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No. 95867-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

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MOUN KEODALAH and AUNG KEODALAH, husband  
and wife,

*Plaintiffs-Respondents,*

v.

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

*Defendants-Petitioners.*

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**PETITIONERS' SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

Insurance companies in Washington are subject to liability to their insureds for bad-faith conduct carried out through their employees, including liability in tort under the common law and by statute for “per se” violations of the Consumer Protection Act (CPA), chapter 19.86 RCW. This case will decide whether the individual insurance company employees who adjust claims are subject to *personal* liability to insureds for such conduct, such that insureds may obtain judgments against adjusters personally and execute against their personal assets.

The Court of Appeals’ decision in this case<sup>1</sup> made Washington the only state to hold employee adjusters personally liable for breach of the duty of good faith.<sup>2</sup> The court premised its decision on RCW 48.01.030, a declaration of public interest that broadly imposes a duty of good faith on “all persons” involved in insurance matters. The Court of Appeals concluded that this general duty is actionable in tort against adjusters, without applying the test adopted by this Court for determining whether the Legislature intended to create an implied tort remedy for violation of a statute.<sup>3</sup> Once that test is applied, it becomes clear that the Legislature did not so intend, and that recognizing such a remedy would be contrary to this Court’s precedents restricting insurance-bad-faith liability to the quasi-

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<sup>1</sup> *Keodalah v. Allstate Ins. Co.*, 3 Wn. App. 2d 31, 413 P.3d 1059, review granted, 424 P.3d 1214 (Div. I, 2018).

<sup>2</sup> See *Petition for Review* at 11 n.6; *Petitioners’ Answer to Amicus Curiae Memorandum of American Insurance Association, et al.*, at 7 n.3.

<sup>3</sup> *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990).

fiduciary relationship between insurer and insured, as well as against the public interest.

As for per se liability under the CPA, this Court has similarly restricted such claims to the insurer-insured relationship, and the administrative regulations Allstate adjuster Tracey Smith allegedly violated apply only to an “insurer.”

This Court should reverse the Court of Appeals and reinstate the dismissal of Keodalah’s claims against Smith.

## **II. STATEMENT OF THE CASE**

This appeal arises from the dismissal of certain claims under CR 12(b)(6). CP 148-50. The following facts, which Smith and Allstate have not admitted and reserve the right to dispute, are taken from the Complaint.

The operator of a speeding motorcycle collided with Plaintiff Moun Keodalah’s vehicle after Keodalah pulled forward from a stop sign into an intersection. CP 2. Keodalah was injured in the accident. CP 2. Keodalah was insured under an Allstate policy, while the motorcyclist, who died in the accident, was uninsured. CP 2-3.

Allstate paid Keodalah’s medical bills under the policy’s personal-injury protection (PIP) coverage. CP 3. Keodalah also made a claim under the underinsured motorist (UIM) coverage of his insurance policy and demanded the \$25,000 policy limit. CP 3, 6. Allstate initially offered \$1,600 to settle the claim based on an assessment that Keodalah was 70% at fault. CP 6. Allstate subsequently increased its offer to \$5,000. CP 6-7.

Keodalah sued Allstate under his UIM coverage. CP 7. Allstate designated one of its employees, adjuster Tracey Smith, as its CR 30(b)(6) representative. CP 8. Smith initially believed that Keodalah had run the stop sign and had been on his cell phone, but later acknowledged that Keodalah in fact had not run the stop sign and had not been on his cell phone. CP 8. Before trial, Allstate offered Keodalah \$15,000 to settle. CP 8. Keodalah refused and again demanded the \$25,000 policy limit. CP 9. The case proceeded to a jury trial. CP 9, 11. The jury determined that the motorcyclist was 100% at fault and that Keodalah sustained \$108,868 in damages. CP 11.

Keodalah<sup>4</sup> sued Allstate a second time and now included claims against Smith. CP 12-16. Against both Smith and Allstate, Keodalah alleged insurance bad faith and “per se” violations of the CPA. CP 12-13. Against Allstate alone, Keodalah also alleged violation of the Insurance Fair Conduct Act (IFCA) and breach of fiduciary duty. CP 12-16. Smith and Allstate moved to dismiss under CR 12(b)(6). CP 46-67.

The King County Superior Court, Honorable John P. Erlick, dismissed Keodalah’s claims against Smith but certified multiple issues for discretionary review under RAP 2.3(b)(4), including whether an employee adjuster is subject to liability for bad faith or per se violation of the CPA.

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<sup>4</sup> The plaintiffs are Moun Keodalah and his wife, Aung Keodalah. For convenience, they are referenced in this brief collectively as “Keodalah.”

CP 149. The Court of Appeals, Division One, accepted review.<sup>5</sup> *Slip Op.* at 4.

The Court of Appeals reversed the superior court and reinstated Keodalah's claims against Smith. The court held that RCW 48.01.030 imposes a duty of good faith upon adjusters individually and that the duty is actionable in tort and under the CPA. *Slip Op.* at 4-13.

### III. ARGUMENT

#### A. Statutory interpretation is a question of law, reviewed de novo.

A dismissal for failure to state a claim is reviewed de novo. *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). So is interpretation of a statute, including whether it creates an implied tort remedy. *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 542, 374 P.3d 121 (2016). The court's objective when interpreting a statute is to ascertain and carry out the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, the court must "give effect to that plain meaning as an expression of legislative intent." *Id.* The plain meaning is discerned from all the Legislature has said in the statute and in related statutes that disclose legislative intent about the provision in question. *Id.* at 11.

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<sup>5</sup> The Court of Appeals also accepted review of whether IFCA creates a private cause of action for violation of specified insurance regulations. Before the court decided the case, this Court decided *Perez-Cristantos v. State Farm Fire & Casualty Co.*, 187 Wn.2d 669, 389 P.3d 476 (2017), which foreclosed Keodalah's IFCA claim. See *Slip Op.* at 4 (citing *Perez-Cristantos*, 187 Wn.2d at 672).

**B. RCW 48.01.030 is a statement of public interest that does not expressly create any private right of action.**

The insurance code was recodified as title 48 RCW in 1947. It governs “[a]ll insurance and insurance transactions in this state...and all persons having to do therewith[.]” RCW 48.01.020; RCW 48.02.010, .060. The first chapter of the code, chapter 48.01 RCW, contains provisions of general application, defining the scope and applicability of the code. The statute primarily at issue in this case, RCW 48.01.030, is a statement of public interest that was part of the 1947 enactment.<sup>6</sup> It states a broad duty of good faith, but does not expressly provide any private remedies for breach of the duty. The present version of the statute, a copy of which is attached as Appendix A, provides:

*Public interest.* The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.<sup>[7]</sup>

**C. This Court should hold that RCW 48.01.030 does not create an implied tort remedy for insureds against employee adjusters.**

There is no question that RCW 48.01.030 imposes a duty of good faith on “all persons” participating in insurance matters, including “the insurer, the insured, their providers, and their representatives.” Nor is there any question that an employee adjuster is a “representative” of the insurer.

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<sup>6</sup> A copy of RCW 48.01.030 as enacted in 1947 is attached as Appendix B.

<sup>7</sup> The Legislature amended RCW 48.01.030 in 1995 to add the words “their providers.” 1995 WASH. LAWS, ch. 285, § 16. That is the sole amendment the Legislature has made to the statute since its adoption in 1947.

The issue is whether the statutory duty is actionable in tort and, if so, by and against whom.

Not every duty imposed by a statute is actionable in tort. This Court considers three factors in determining whether to find an implied cause of action in a statute:

*first*, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; *second*, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and *third*; whether implying a remedy is consistent with the underlying purpose of the legislation.

*Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990) (emphasis added). None of these factors supports finding an implied cause of action in RCW 48.01.030.

**1. RCW 48.01.030 was enacted to benefit the public at large, and not insureds specifically.**

Where a statute indicates that it was enacted to benefit a particular class of persons, that tends to support recognizing an implied remedy for persons within the class. *Compare Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 423, 334 P.3d 529 (2014) (concluding that a mortgage borrower who was subjected to nonjudicial foreclosure was within the class for whose benefit the legislature enacted a statute that preserved for such borrowers the right to bring certain damages claims), *with Adams v. King Cty.*, 164 Wn.2d 640, 654, 192 P.3d 891 (2008) (concluding that a statute authorizing anatomical gifts was not enacted specifically to benefit family members of organ donors). To determine whether the plaintiff is “within

the class for whose ‘especial’ benefit the statute was enacted,” this Court looks to the language of the statute. *Adams*, 164 Wn.2d at 654.

It is not enough that a statute benefits the general public. “When a statute protects the general public instead of an identifiable class of persons, a plaintiff is not a member of the class for whose especial benefit the statute was enacted.” *Protect the Peninsula’s Future v. City of Port Angeles*, 175 Wn. App. 201, 210, 304 P.3d 914 (2013) (holding that a statute enacted to protect the general public from risks posed by legend drugs did not create an implied remedy) (citing *Fisk v. City of Kirkland*, 164 Wn.2d 891, 895-97, 194 P.3d 984 (2008) (holding the same, as to statute requiring water companies to furnish safe and adequate water); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-93, 690 n.13, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) (“[T]he Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large.”).

The language of RCW 48.01.030 indicates that it was enacted to benefit the general public, rather than any particular class. It begins by stating that the business of insurance is “affected by the public interest.” RCW 48.01.030. This indicates the Legislature’s recognition that insurance-related activities affect all citizens.<sup>8</sup> Indeed, this Court has cited RCW 48.01.030 as indicating that it is “clear” that the insurance code “was

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<sup>8</sup> *See also Kueckelhan v. Fed. Old Line Ins. Co. (Mut.)*, 69 Wn.2d 392, 405, 418 P.2d 443 (1966) (citing RCW 48.01.030). In *Kueckelhan*, the case in which this Court cited RCW 48.01.030 for the first time ever, this Court observed, “There can be little doubt that the insurance industry bears such a relation to the public welfare as to render persons and businesses engaged in it subject to regulation under the state’s police power.” *Id.*

enacted in *the interest of the public generally.*” *Herrman v. Cissna*, 82 Wn.2d 1, 5-6, 507 P.2d 144 (1973) (emphasis added).

Nothing in RCW 48.01.030 indicates that the Legislature intended the statute to benefit only a specific, narrower class. The statute imposes a duty on “all persons,” including “the insurer, the insured, their providers, and their representatives,” and the benefits of that duty’s having been imposed flow to the public at large, to advance the public interest.

**2. There is no indication of legislative intent to create or modify a tort remedy.**

The statutory duty of good faith and the common-law tort of insurance bad faith originated independent of one another in Washington. A statutory duty of good faith existed at least 30 years before this Court recognized common-law liability for insurance bad faith. Not until 50 years after that would this Court cite the statutory duty in connection with that liability. Moreover, this Court has always restricted bad-faith liability to the insurer-insured relationship, and the Legislature has done nothing to change that. There is no indication of legislative intent to expand the scope of common-law liability for insurance bad faith.

**(a) Common-law liability for insurance bad faith developed independent of any statute.**

This Court recognized common-law insurance bad faith in 1941. *Burnham v. Commercial Cas. Ins. Co. of Newark, N.J.*, 10 Wn.2d 624, 632-38, 117 P.2d 644 (1941). If that tort were premised on a statute, this Court presumably would have cited one. Provisions containing language similar

to RCW 48.01.030 have existed in Washington since at least 1911.<sup>9</sup> Yet this Court cited no statutory basis for the cause of action it recognized.

Six years after *Burnham*, in 1947, the Legislature enacted the present insurance code, including RCW 48.01.030. 1947 WASH. LAWS, ch. 79, § .01.03 (copy attached as Appendix B). The purpose of the code was to create a regulatory scheme for insurance matters and a comprehensive enforcement scheme, including civil fines and criminal penalties. *Kueckelhan v. Fed. Old Line Ins. Co. (Mut.)*, 69 Wn.2d 392, 402, 418 P.2d 443, 451 (1966). There is no indication that the Legislature, in enacting RCW 48.01.030, intended to supplant or modify the remedies provided by the common law.<sup>10</sup> The Legislature is presumed to be familiar with prior judicial decisions on the subject of an enactment. *Daly v. Chapman*, 85 Wn.2d 780, 782, 539 P.2d 831 (1975). “[L]egislative intent does not support creating a remedy where one already exists.” *Wright v. Lyft, Inc.*,

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<sup>9</sup> The Legislature enacted a provision containing the following language in 1911:

Within the intent of this act the business of [insurance] is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from misleading practices, and shall keep, observe, and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured, and their representatives shall rest the burden of maintaining proper practices in said business.

1911 WASH. LAWS, ch. 49, art. 1, § 1 (copy attached as Appendix C); *see also* REM. 1915 CODE § 6059-1 (copy attached as Appendix D); REM. REV. STAT. § 7032 (1932) (copy attached as Appendix E).

<sup>10</sup> As the Court of Appeals observed when it refused to recognize a negligence cause of action based on RCW 48.01.030, the purpose of the insurance code generally is “only...to create a mechanism for regulating the insurance industry” and “not...to provide protection or remedies for individual interests.” *Pain Diagnostics & Rehab. Assocs., P.S. v. Brockman*, 97 Wn. App. 691, 697, 988 P.2d 972 (1999). The subsequent adoption of IFCA created limited remedies for first-party claimants against insurers for specific unfair conduct. *See* RCW 48.30.015; *Perez-Cristantos*, 187 Wn.2d at 676-84.

189 Wn.2d 718, 727, 406 P.3d 1149 (2017). Before 1947, a common-law cause of action against the insurer already existed.

Between 1947 and 1990, this Court cited RCW 48.01.030 in connection with insurer liability, but only in relation to liability under the CPA—not the common law. This Court first cited RCW 48.01.030 in connection with insurer liability in 1976, in *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 324-25, 553 P.2d 423 (1976). That was strictly a CPA case. This Court cited the statute in two more CPA cases in 1978: *Salois v. Mutual of Omaha Insurance Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978), and *Levy v. North American Co. for Life & Health Insurance*, 90 Wn.2d 846, 850, 586 P.2d 845 (1978).

Meanwhile, this Court repeatedly found common-law tort liability for insurance bad faith, without citing RCW 48.01.030 at all. *See, e.g., Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 794, 523 P.2d 193 (1974) (citing *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 179, 473 P.2d 193 (1970)); *Murray v. Mossman*, 56 Wn.2d 909, 911-12, 355 P.2d 985 (1960); *Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 628, 245 P.2d 470 (1952).

In 1986, this Court observed that “[t]he imposition of an insurer’s duty of good faith by both the courts and the Legislature of this state has resulted in lawsuits alleging breach of that duty[.]” *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986). But in support of that proposition, this Court cited CPA cases (including *Salois* and *Levy*) as well as tort cases, and did not presume to hold that the statute was a basis for tort liability. *Id.* at 386-87. Not until 1990, in *Industrial Indemnity Co.*

*of the Northwest, Inc. v. Kallevig*, did this Court cite RCW 48.01.030 in connection with tort liability, separate from liability under the CPA. 114 Wn.2d 907, 916-17, 792 P.2d 520 (1990).

Despite occasionally citing RCW 48.01.030 in insurance bad-faith-tort cases since *Kallevig*, this Court has never analyzed whether RCW 48.01.030 creates an implied remedy or applied the *Bennett* test to that statute.<sup>11</sup> Meanwhile, in other cases, this Court has continued to address bad-faith tort liability without citing RCW 48.01.030. *See, e.g., Smith*, 150 Wn.2d at 484-85; *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). In the context of this Court's precedents, it appears that when this Court has cited RCW 48.01.030, it has done so simply because the statute is consistent with the common-law duty that this Court has long held is actionable in tort, and not based on a determination that the statute somehow modified or supplanted that duty.

**(b) This Court has steadfastly restricted bad-faith liability to the quasi-fiduciary relationship between insurer and insured, and the Legislature has not seen fit to expand liability.**

Regardless of whether the statutory duty of good faith is itself a basis for tort liability, this Court has made clear that the insurance-bad-faith actions are restricted to the insurer-insured relationship.

This Court has repeatedly held that both the statute and common law create a *quasi-fiduciary* duty on the part of the insurer. *Mahler v. Szucs*,

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<sup>11</sup> *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129-30, 196 P.3d 664 (2008) (observing that both the courts and Legislature have imposed a good-faith duty, citing *Kallevig* and *Tank*); *Ellwein*, 142 Wn.2d at 775 (citing *Kallevig*).

135 Wn.2d 398, 414, 957 P.2d 632 (1998) (“We have said that the statute [RCW 48.01.030] creates a fiduciary duty for insurers running to their insureds.”) (citing *Kallevig*, 114 Wn.2d at 916-17); *Kallevig*, 114 Wn.2d at 916-17 (stating that RCW 48.01.30 codifies a “fiduciary duty to act in good faith”); *Tank*, 105 Wn.2d at 385-86. This Court explained in *Tank* that “[s]uch a relationship exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds’ dependence on their insurers.” *Tank*, 105 Wn.2d at 385.

Only within the context of the quasi-fiduciary relationship has this Court held breach of the duty of good faith to be actionable in tort. For instance, in *Murray*, this Court held that an insurer owes no common-law duty to third-party claimants because “the duty of the insurance company to use good faith in the handling of a claim against the insured *springs from a fiduciary relationship that is entirely lacking* between the person injured and the insurance company.” 56 Wn.2d at 912 (emphasis added). *See also Tank*, 105 Wn.2d at 395 (holding that “a third party claimant has no right of action against an insurance company for bad faith”).

This Court’s holdings in the context of first-party claims confirm that the existence of an insurer-insured relationship is key to the existence of an actionable duty. The relationship between a UIM insurer and its insured is “by nature adversarial and at arm’s length.” *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 779, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274

(2003) (quoting *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 249, 961 P.2d 350 (1998)). Yet because a UIM claim nonetheless arises in the context of the insurer-insured relationship, the insured “still has the reasonable expectation that he will be dealt with fairly and in good faith by his insurer.” *Id.* at 780-81 (citations and internal quotation marks omitted).<sup>12</sup>

As stated above, the Legislature is presumed to be familiar with prior judicial decisions on the subject of an enactment. *Daly*, 85 Wn.2d at 782. And further, this Court takes the Legislature’s omission to amend a statute following a judicial decision interpreting that statute to indicate “legislative acquiescence” in that decision. *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). The Legislature has not seen fit to supersede or modify this Court’s precedents tying bad-faith liability to the existence of an insurer-insured relationship. This Court should thus not read into RCW 48.01.030 any legislative intent to extend liability beyond the context of such a relationship.

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<sup>12</sup> Indeed, this Court has held that the “dependence and heightened trust” that gives rise to a quasi-fiduciary relationship exists “perhaps even more so...in the first party context, where the insurer’s interests might be opposed to the insured’s and the insured is particularly vulnerable and dependent on the insurer’s honesty and good faith.” *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 793 n.2, 16 P.3d 574 (2001). The duty of a UIM insurer is, however, less demanding than that of a third-party liability insurer: a UIM insurer need not give equal consideration to the insured’s interests, but still must “deal in good faith and fairly as to the terms of the policy and not overreach the insured.” *Ellwein*, 142 Wn.2d at 781 (quoting *Hendren v. Allstate Ins. Co.*, 100 N.M. 506, 672 P.2d 1137, 1140-41 (Ct. App. 1983)).

- (c) **Because no quasi-fiduciary or other special relationship exists between an insured and an insurer-employee adjuster, there should be no liability.**

An employee adjuster has no legal relationship with those insured by his employer. The adjuster is not a party to the insurance contract. She receives no premiums and bears none of the financial risk of loss on the claim—the potentially “high stakes” involved for the insurer and insured. *Tank*, 105 Wn.2d at 385. She is not a quasi-fiduciary of the insured.

An employee adjuster’s only pertinent legal relationship is an agency relationship with her employer-principal—the insurer—to which she owes absolute loyalty. *See Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 663, 648 P.2d 875 (1982). Although an adjuster may have actual or apparent authority to act on the insurer’s behalf, *see Buchanan v. Switzerland Gen. Ins. Co.*, 76 Wn.2d 100, 108-09, 455 P.2d 344 (1969), the insurer retains the ultimate authority under the insurance policy to accept or deny coverage and the obligation to pay claims, *i.e.*, fulfill its good-faith obligation to its insured.

Because employee adjusters are not part of the quasi-fiduciary relationship, this Court should hold, consistent with *Murray*, *Tank*, and other similar precedents, that an employee adjuster is not subject to personal liability in tort to an insured for breach of the duty of good faith.

**3. The consequences of personal liability of adjusters would be inconsistent with the express purpose of RCW 48.01.030, which is to advance the public interest in the business of insurance.**

Providing a tort remedy outside the insurer-insured relationship would be inconsistent with the express purpose of RCW 48.01.030, which is to advance the public interest in the business of insurance. Holding employee adjusters personally liable would have significant negative consequences for the public, while filling no gap in the remedies otherwise available to insureds who have been subjected to bad-faith conduct. This would undermine, rather than advance, the public interest.

The existing remedies available to insureds subjected to bad-faith conduct are broad and comprehensive. Under existing law, an insured may recover from the insurer all damages caused by an employee's bad-faith conduct. An insurer's duty of good faith is nondelegable. And under the doctrine of respondeat superior, an insurer is vicariously liable for the bad-faith acts and omissions of its agents and employees. *Chicago Title Ins. Co. v. Wash. State Office of Ins. Comm'r*, 178 Wn.2d 120, 135-36, 309 P.3d 372 (2013); see also *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 45 P.3d 1068 (2002). Keodalah has offered no compelling reason to recognize a new cause of action, against adjusters.

In addition, ample mechanisms exist to deter adjusters from acting in bad faith in the first place. Insurers are already incentivized to discourage and prevent misconduct by their employees, not only to avoid regulatory consequences, but to avoid possible extra-contractual liability on claims.

Insurers face potential liability to insureds in tort, under the CPA, and under the Insurance Fair Conduct Act (IFCA). *See Perez-Cristantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 676, 389 P.3d 476 (2017).

Meanwhile, holding employee adjusters personally liable will have at least two significant, negative consequences. First, it will increase costs, including by (1) increasing the complexity of bad-faith litigation and delay resolution, (2) complicating settlement negotiations by creating conflicts of interests between insurers and their adjusters, and (3) discouraging qualified people from becoming or remaining employed as adjusters in Washington. The increased costs from personal liability would ultimately result in higher insurance premiums for consumers. Second, being subjected to personal liability would harm adjusters, personally and professionally. Indeed, simply being sued could damage an adjuster's credit rating, reputation, and employability, and cause emotional distress. These are well-recognized consequence of being sued. *Cf. Miller v. Kenny*, 180 Wn. App. 772, 802, 325 P.3d 278 (2014) (discussing damages potentially sustained by an insured from being exposed to liability) (citing *Butler*, 118 Wn.2d at 399).

All of these consequences would be contrary to the public interest because personal liability would provide no public benefit, would fill no need given existing remedies against insurers, and would increase costs to the detriment of the premium-paying public. In addition, by extension, personal liability would not apply to adjusters alone, but to all "representatives" of the insurer. *See RCW 48.01.030*. Thus, any person hired by an insurer in the process of adjusting a claim could face personal

liability for breach of the broad good-faith duty, including appraisers, accountants, and other experts, as well as remediation and building contractors. There is no indication that the Legislature intended to create such broad liability, which ultimately would further increase the costs of insurance, contrary to the public interest.

\* \* \*

In sum, each factor of the *Bennett* test points to a conclusion that RCW 48.01.030 does not create an implied tort remedy for insureds against employee adjusters for bad faith.

**4. *Merriman v. American Guarantee & Liability Insurance* is neither persuasive nor controlling.**

The Court of Appeals relied on *Merriman v. American Guarantee & Liability Insurance Co.*, 198 Wn. App. 594, 611-13, 396 P.3d 351 (2017), review denied, 413 P.3d 565 (2017). In *Merriman*, Division Three of the Court of Appeals held that *corporate* adjusters—outside entities engaged by insurers or insureds under contract to adjust claims—are subject to liability for the tort of insurance bad faith. The Court of Appeals here “agree[d]” with *Merriman* and viewed its decision as an extension of *Merriman*. See *Slip Op.* at 5-7, 10.

*Merriman* is neither persuasive nor controlling on the common-law tort issue presented here. As here, the Court of Appeals did not apply the *Bennett* test or otherwise analyze whether RCW 48.01.030 created an implied cause of action. In addition, employee and corporate adjusters are not similarly situated. Corporate adjusters ordinarily are delegated full

responsibility to adjust claims, without direct insurer involvement or supervision.<sup>13</sup> Employee adjusters, in contrast, are people who happen to be employed by insurance companies, and who are supervised by employers that are subject to vicarious liability for their employees' actions and omissions. Employee adjusters should not be deemed to have put their personal financial security and well-being at stake for having taken jobs as claims adjusters. Applying the *Bennett* test, this Court should reinstate the dismissal of Keodalah's bad-faith claim against Smith.

**D. This Court should hold that an employee adjuster is not personally liable under the Consumer Protection Act for violations of RCW 48.01.030 or WAC 284-30-330.**

Keodalah alleged that adjuster Smith committed “*per se* CPA violations” by engaging in “bad-faith conduct” and committing specific unfair claims settlement practices in violation of WAC 284-30-330. CP 14. A plaintiff generally must prove five elements to establish a CPA claim: (1) an unfair or deceptive act or practice that (2) affects trade or commerce and (3) impacts the public interest, and (4) the plaintiff sustained damage to business or property that was (5) caused by the unfair or deceptive act or practice. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-793, 719 P.2d 531 (1986).

Certain elements of a CPA claim are deemed satisfied “*per se*” based on violation of another statute. The first two elements of a CPA claim are established where a statute declares that a violation is a *per se* unfair trade

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<sup>13</sup> The Legislature has thus required corporate, but not employee, adjusters to be licensed. RCW 48.17.010(1), .410.

practice. *Hangman Ridge*, 105 Wn.2d at 791-92. Alternatively, the second element alone is established where the Legislature has declared a public interest. *Id.* This is called “per se public interest.” *Id.*

RCW 48.01.030 establishes per se public interest. *Hangman Ridge*, 105 Wn.2d at 791-92. Nevertheless, Keodalah’s CPA claim based on RCW 48.01.030 fails, and for a similar reason as his tort claim: just as this Court has limited bad-faith tort claims to the context of the insurer-insured relationship, so has it limited CPA claims based on breach of the statutory duty of good faith. *Tank*, 105 Wn.2d at 394-95 (holding that only an insured may bring a per se CPA action based on breach of the duty of good faith). This approach maintains consistency, as otherwise the same duty that for sound policy reasons is not actionable in tort would nevertheless be actionable under the CPA. *See Murray*, 56 Wn.2d at 912.

To be sure, this Court has held that the CPA may apply although the plaintiff and defendant had no contract and were in an “adversarial relationship.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 41-42, 204 P.3d 885 (2009). But this Court in *Panag* did not overrule *Tank* and eliminate the exception for breach of the statutory duty of good faith. Rather, it recognized the continuing validity of that exception, noting that “[o]nly an insured may bring a CPA claim for an insurer’s breach of its statutory duty of good faith.” *Id.* at 43 n.6 (citing *Tank*). Although Keodalah is the insured here and can sue Allstate, he cannot also sue Smith. Because Keodalah claims a breach of the duty of good faith by someone

outside the quasi-fiduciary relationship, his CPA claim based on RCW 48.01.030 was properly dismissed.

Keodalah also alleged that Smith violated the CPA by committing certain unfair claims settlement practices defined in WAC 284-30-330.<sup>14</sup> A violation of that regulation is a per se unfair trade practice. *Kallevig*, 114 Wn.2d at 922-23. But Smith did not owe Keodalah a duty under WAC 284-30-330 because that regulation defines only unfair acts or practices “of the insurer.” WAC 284-30-330 (emphasis added). As Smith is not “the insurer,” Keodalah cannot seek to enforce the regulation against Smith. *Merriman*, 198 Wn. App. at 627-28. Again, Keodalah’s CPA claim against Smith was properly dismissed.

#### IV. CONCLUSION

This Court should hold that employee adjusters are not subject to personal liability for insurance bad faith or per se claims under the CPA.

Respectfully submitted this 7th day of December, 2018.

**FOX ROTHSCHILD, LLP**

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P.S.**

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*Attorneys for Petitioners*

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<sup>14</sup> Keodalah’s complaint alleged violations of WAC 284-30-330(2), (4), (6), (7), and (8). See CP 12-13.

### CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Email to the following:

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DATED this 7<sup>th</sup> day of December, 2018.

  
\_\_\_\_\_  
Patti Saiden, Legal Assistant

# **APPENDIX**

## **A**

**RCW 48.01.030****Public interest.**

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

[ **1995 c 285 § 16**; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

**NOTES:**

**Effective date—1995 c 285:** See RCW **48.30A.900**.

# **APPENDIX**

## **B**

## CHAPTER 79.

[ S. B. 47. ]

## INSURANCE CODE.

AN ACT to provide an Insurance Code for the State of Washington; to regulate insurance companies and the insurance business; to provide for an Insurance Commissioner; to establish the office of State Fire Marshal; to provide penalties for the violation of the provisions of this act; to repeal certain existing laws and to amend section 73 of chapter 49, Laws of 1911 as last amended by section 1 of chapter 103, Laws of 1939.

*Be it enacted by the Legislature of the State of Washington:*

## ARTICLE ONE

## INITIAL PROVISIONS

SECTION .01.01 *Short Title:* This act constitutes the insurance code. Short title.

SEC. .01.02 *Scope of Code:* All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code. Scope of code.

SEC. .01.03 *Public Interest:* The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, and their representatives rests the duty of preserving inviolate the integrity of insurance. Public interest.

SEC. .01.04 *"Insurance" Defined:* Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies. "Insurance" defined.

SEC. .01.05 *"Insurer" Defined:* "Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal or inter-insurance exchange is an "insurer" as used in this code. "Insurer" defined.

# **APPENDIX**

## **C**

## CHAPTER 49.

[S. S. B. 6.]

## INSURANCE CODE.

AN ACT to provide an Insurance Code for the State of Washington, to regulate the organization and government of insurance companies and insurance business, to provide penalties for the violation of the provisions of this act, to provide for an Insurance Commissioner and define his duties, and to repeal all existing laws in relation thereto. [Repealing all former acts.]

*Be it enacted by the Legislature of the State of Washington:*

## ARTICLE 1.

## GENERAL PROVISIONS.

SECTION 1. *Insurance Defined.*

Within the intent of this act the business of apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service, is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe, and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured, and their representatives shall rest the burden of maintaining proper practices in said business. Defining insurance.

Insurance is a contract whereby one party called the "insurer," for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the "insured," or to his "beneficiary," upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury.

SEC. 2. *Terms Defined.*

The terms "company," "corporation," or "insurance company" or "insurance corporation," in this act, unless the context otherwise requires, includes all corporations, associations, partnerships, or individuals engaged as insurers in the business of insurance.

# **APPENDIX**

## **D**

REMINGTON'S  
CODES AND STATUTES  
OF WASHINGTON

(Cite REM. 1915 CODE)

SHOWING ALL

STATUTES IN FORCE, INCLUDING THE SESSION LAWS OF 1915

BY

HON. ARTHUR REMINGTON,

Reporter of the Supreme Court, Author of "Notes on Washington Reports,"  
"Remington's Washington Digest," "Remington and Ballinger's  
Annotated Codes and Statutes," etc.

CODES OF PROCEDURE  
AND  
GENERAL STATUTES

VOLUME II

"INSANE" to "WEIGHTS AND MEASURES," §§ 5936 to 9533

SAN FRANCISCO  
BANCROFT-WHITNEY COMPANY  
1916

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- 6059-209. Exemptions.
- 6059-210. Benefits.
- 6059-211. Beneficiaries.
- 6059-212. Qualifications for membership.
- 6059-213. Certificate.
- 6059-214. Funds.
- 6059-215. Investments.
- 6059-216. Distribution of funds.
- 6059-217. Organization.
- 6059-218. Powers retained—Reincorporation—Amendments.
- 6059-219. Mergers and transfers.
- 6059-220. Annual license.
- 6059-221. Admission of foreign society.
- 6059-222. Power of attorney and service of process.
- 6059-223. Place of meeting—Location of office.
- 6059-224. No personal liability.
- 6059-225. Waiver of the provisions of the laws.
- 6059-226. Benefits not attachable.
- 6059-227. Constitution and laws—Amendment.
- 6059-228. Annual reports.
- 6059-229. Provisions to insure future security.
- 6059-230. Examination of domestic societies.
- 6059-231. Application for receiver, etc.
- 6059-232. Examination of foreign societies.
- 6059-233. No adverse publications.
- 6059-234. Revocation of license.
- 6059-235. Exemption of certain societies.
- 6059-236. Taxation.
- 6059-237. Penalties.
- 6059-238. Existing insurance laws repealed.

#### ARTICLE I. GENERAL PROVISIONS.

§ 6059-1. Insurance Defined.—Within the intent of this act the business of apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service, is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe, and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured, and their representatives shall rest the burden of maintaining proper practices in said business.

Insurance is a contract whereby one party called the "insurer," for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the "insured," or to his "beneficiary," upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury. [L. '11, p. 161, § 1.]

Cited in 85 Wash. 687; 87 Wash. 423.

§ 6059-2. Terms Defined.—The terms "Company," "Corporation," or "Insurance Company" or "Insurance Corporation," in this act, unless the context otherwise requires, includes all corporations, asso-

# **APPENDIX**

## **E**

7289. War-time and veterans' organizations.  
 7290. Taxation.  
 7291. Penalties.  
 7292. Existing insurance laws repealed.  
 7293.\* Juvenile death benefits authorized.  
 7294.\* Conditions attaching to issuance of certificates.  
 7295.\* Juvenile reserve fund—Exchange for adult certificate—Beneficiary.  
 7296.\* Separate financial statements for two classes.  
 7297. Payments to society's general fund.  
 7298. Continuance of juvenile certificate.

## ARTICLE I

### GENERAL PROVISIONS

§ 7032. **Insurance defined.** Within the intent of this act the business of apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service, is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe, and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured, and their representatives shall rest the burden of maintaining proper practices in said business.

Insurance is a contract whereby one party called the "insurer," for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the "insured," or to his "beneficiary," upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury. [L. '11, p. 161, § 1.]

Cited in 85 Wash. 687, 149 Pac. 7, 7 Ann. Cas. 1917B, 804, L.R.A.1916A, 750; 87 Wash. 423, 151 Pac. 768, Ann. Cas. 1916C, 1017; 93 Wash. 605, 607, 161 Pac. 483; 95 Wash. 127, 163 Pac. 488; 105 Wash. 671, 178 Pac. 811; 126 Wash. 480, 218 Pac. 221; 130 Wash. 214, 226 Pac. 503.

**What law governs:** See Remington's Digest, Insurance, § 43; Griesemer v. Mutual Life Ins. Co., 10 Wash. 202, 38 Pac. 1031; Griesemer v. Mutual Life Ins. Co., 10 Wash. 211, 38 Pac. 1034.

§ 44. **Nature of contract of insurance:** State ex rel. Fishback v. Universal Service Agency, 87 Wash. 413, 151 Pac. 768, Ann. Cas. 1916C, 1017.

For text treatment of "Insurance," see 14 R. C. L. 823.

Fire insurance as a business affected by public interest. 29 L.R.A.(N.S.) 1195; L.R.A.1915C, 1189.

What constitutes insurance. 63 A.L.R. 711.

§ 7033.\* **Terms defined.** The terms "company," "corporation," or "insurance company" or "insurance corporation," in this act, unless the context otherwise requires, includes all corporations, asso-

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