

FILED
SUPREME COURT
STATE OF WASHINGTON
2/12/2019 4:11 PM
BY SUSAN L. CARLSON
CLERK

No. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

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

Petitioners.

RESPONDENTS' COMBINED ANSWER TO BRIEFS OF AMICI
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I. INTRODUCTION

Moun Keodalah submits this combined answer to the *amici curiae* briefs that Washington State Association for Justice Foundation (WSAJF), GEICO General Insurance Company (GEICO), Washington Defense Trial Lawyers' (WDTL), American Insurance Association (AIA),¹ and Coalition Against Insurance Fraud (CAIF) filed. The Court should affirm Division I.

Keodalah agrees with and adopts WSJF's argument that the Court should recognize a common law good-faith duty adjusters owe to insureds. He also agrees a breach should be actionable under a common law bad-faith and Consumer Protection Act (CPA) action. As WSJF correctly states, the Legislature enacted in Title 48 a statutory framework governing all persons involved in the business of insurance. A key element of that framework is a declaration that all persons—including insurers and their representatives—act in good faith and without deception. As WSJF demonstrates, the Court has incorporated those statutory provisions into its bad-faith precedent, and public policy and that precedent warrant this Court recognizing a duty.

Moreover, CAIF, GEICO, AIA, and WDTL fail to demonstrate that this Court should reverse Division I. They instead make largely irrelevant, incorrect, or speculative arguments the Court should reject. Contrary to their

¹ AIA filed a joint brief with the National Association of Mutual Insurance Companies and Property Casualty Insurers Association. Keodalah refers to all three jointly as AIA.

claims, the adjuster-liability duty is limited, these actions benefit insureds, and no evidence suggests any of the negative impacts those entities predict will plague the insurance industry—such as increased insurance fraud—will occur. Moreover, the Court needs not engage in an implied cause of action analysis, and such analysis counsels for an implied action in any event.

II. ARGUMENT

A. **This Court should hold that adjusters engaged in the business of insurance owe a common law good-faith duty to insureds that is actionable in a common law bad-faith action.**²

Keodalah agrees with WSAJF that this Court should conclude that adjusters owe insureds a common law good-faith duty that is actionable in common law bad-faith actions. WSAJF Br. at 5-11; Appellants' Br. at 21 (“RCW 48.01.030 unambiguously imposes on . . . adjusters an independent good-faith duty. If they violate that duty, they are subject to a common-law tort action.”). Indeed, when “justice requires, this court does not hesitate to expand the common law and recognize a cause of action.” *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 136, 691 P.2d 190 (1984).

Duty is a legal question of law for the Court and “may be predicated on violation of a statute or common law principles of negligence.” *Bernethy v. Walt Failor*, 97 Wn.2d 929, 932-33, 653 P.2d 280 (1982). Duty questions

² Keodalah responds to many of AIA’s, GEICO’s, and CAIF’s arguments in this section because his responses to their arguments apply equally to Keodalah agreeing with WSAJF that the Court should recognize a common law duty and to otherwise affirming Division I.

raise three issues: “its existence, its measure, and its scope.” *Affiliated FM Ins. v. LTK Consulting Servs.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010).

[Thus, t]he duty question breaks down into three inquiries: Does an obligation exist? What is the measure of care required? To whom and with respect to what risks is the obligation owed?

Id. In deciding duty questions, the Court evaluates public policy, *Bernethy*, 97 Wn.2d at 933, and considers “logic, common sense, justice, policy, and precedent.” *Affiliated*, 170 Wn.2d at 449 (internal quotation marks omitted) (quoting *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001)). Duty reflects “all those considerations of public policy which lead the law to conclude that a plaintiff’s interests are entitled to legal protection against” a defendant’s acts. *Id.* (internal quotation marks omitted) (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988)).

1. RCW 48.01.030, public policy, and this Court’s precedent warrant this Court recognizing a common law good-faith duty actionable in common law bad-faith actions.³

WSAJF is correct that both public policy and this Court’s precedent warrant the Court recognizing an adjuster’s common law good-faith duty owed to insureds. As Keodalah details in his briefs, the Legislature has been

³ GEICO relies on *Garoutte v. Am. Fam. Mut. Ins.*, No. C12-1787, 2013 U.S. Dist. LEXIS 8559 (W.D. Wash. Jan. 22, 2013), to argue employee adjusters cannot be liable for bad-faith or CPA violations when acting in the scope of employment. GEICO Br. at 4-5. This is incorrect. Employees acting in the scope of employment are liable for breaching their own independently owed duties. *E.g.*, *Annechino v. Worthy*, 175 Wn.2d 630, 290 P.3d 126 (2012). Adjusters owe their own good-faith duty.

clear that the insurance industry is a matter that affects the public interest, and that it intended Title 48 to govern “all persons having to do therewith”. RCW 48.01.020; Appellant Br. at 9-11. To advance the public interest, the Legislature imposed a good-faith duty on insurers and their representatives:

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.

RCW 48.01.030. As both Division I below and Division III in *Merriman v. York Risk Servs.*, 198 Wn. App. 594, 396 P.3d 351 (2017), have concluded, the Legislature intended to include adjusters in the scope of that good-faith-duty as representatives. This Court has long incorporated the statutory duty into its bad-faith precedent. *E.g., Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990); *Ellwein v. Hartford Accident & Indem.*, 142 Wn.2d 766, 775, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco*, 150 Wn.2d 478, 78 P.3d 1274 (2003) (“RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty may give rise to a tort action for bad faith.”); *see also* WSAJF Br. at 7-8.⁴

⁴ In its bad-faith law overview, WSAJF discusses the fact that this Court has looked to the quasi-fiduciary nature of an insurer-insured relationship in the past, but also correctly states that the nature has never limited a common law duty and is not an element of common law bad-faith actions. WSAJF Br. at 8-10. Keodalah agrees. Respondents’ Supp. Br. at 8-14.

As part of advancing public policy and defining bad-faith conduct, the Legislature also made clear that those involved in the insurance business may not engage in unfair, false, or deceptive conduct. *E.g.*, RCW 48.01.030, 48.30.010(1), 48.30.040 (“No person shall knowingly make . . . any false, deceptive or misleading representation or advertising in the conduct of the business of insurance . . .”). This Court has cited these statutes as evidence that “[a] primary purpose of the intensive regulation of the [industry] is to create public confidence in the honesty and reliability of those who engage in the business of insurance . . .” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 43, 204 P.3d 885 (2009). This includes confidence in adjusters.

As WSAJF notes, this Court has previously recognized a common law duty when a statute, like RCW 48.01.030, demonstrates a strong public policy interest. In *Bernethy v. Walt Failor*, 97 Wn.2d at 933, this Court held, weighing the policy considerations, that persons owe a duty to third parties to not furnish firearms to intoxicated persons. While no statute existed that explicitly outlawed selling firearms to intoxicated persons, the Court looked to a general statute prohibiting the sale of firearms to certain incompetent persons. It recognized the “statute, at a minimum, reflects a strong public policy in our state that certain people should not be provided with dangerous weapons.” *Id.* at 933. Based on the public policy, the Court held that a duty existed. The same holds true here. Because adjusters fall in the scope of the

persons on whom the Legislature imposed a good-faith duty, and this Court has incorporated the Legislative policy, including RCW 48.01.030, into its common law bad-faith precedent, public policy and this Court's precedent warrant its recognizing a duty. WSAJF Br. at 6-8, 10-11, 12-14 (detailing public policy issues and their incorporation into precedent).

A balancing of the interests involved further demonstrates that this Court should recognize a duty. *Affiliated*, 170 Wn.2d at 449. AIA, CAIF, and GEICO all argue Division I's decision and adjuster liability in general will provide no benefit to insureds. AIA Br. at 4; CAIF Br. at 5-6; GEICO Br. at 9-10. This is incorrect. For example, as Keodalah details in his briefs, *e.g.*, Respondent Supp. Br. at 7-8, adjuster liability serves a vital preventive role that deters harmful conduct. *Davis v. Baugh Indus. Contrs.*, 159 Wn.2d 413, 419, 150 P.3d 545 (2007) (abandoning "completion-and-acceptance doctrine" in part because it "undermines the deterrent effect of tort law.").

Insureds are entitled to be treated fairly and honestly, and they want their claims to be properly paid. While bad-faith suits provide a remedy if that does not occur, foreclosing such conduct before suit is necessary is key. Adjuster liability provides a valuable deterrent that aims to avoid bad-faith suits, protect insureds, and promote proper claim handling. This is certainly true if insurers—via incentive programs or otherwise—encourage bad-faith conduct, *see Niver v. Travelers Indem.*, 433 F. Supp. 2d 968, 980-82 (N.D.

Iowa 2006), removing “institutional incentives”, *i.e.*, adverse employment consequences, that deter bad-faith conduct.⁵

Moreover, while adjuster liability will benefit insureds and promote public policy, it will impose no unusual burdens on the public, the courts, or the insurance industry. For example, while AIA, CAIF, and GEICO argue Division I’s decision and adjuster liability in general will negatively impact adjusters—*e.g.*, will subject them to judgments they cannot pay and impact their credit ratings, *see* AIA Br. at 5, 6-7; CAIF Br. at 12; GEICO Br. at 11-12—these are potential ramifications for any tortfeasor. These arguments provide no reason to reject adjuster liability. *E.g.*, *Cramer v. Van Parys*, 7 Wn. App. 584, 594, 500 P.2d 1255 (1972) (“Financial hardship cannot be an excuse for failing to perform a duty undertaken for economic benefit.”). It also is likely that employers will cover costs and judgments in any event. Indeed, Allstate’s counsel has represented Allstate and its adjuster, Tracey Smith, throughout this action. *E.g.*, CP 27-28.

Liability will not negatively impact the industry or public in general either. While AIA, CAIF, and GEICO claim adjuster liability will increase

⁵ Moreover, though GEICO argues that insurers will remain liable under agency principles, that is incorrect. An insurer may assert that its adjuster acted so far outside the bounds of authority and policy that they were no longer within the scope of employment. *Niece v. Elmview Group Home*, 79 Wn. App. 660, 664, 904 P.2d 784 (1995) (“When an employee’s intentionally tortious or criminal acts are not in furtherance of the employer’s business, the employer is not liable as a matter of law, even if the employment situation provided the opportunity or means for the employee’s wrongful acts.”). Adjuster liability allows a claim against an adjuster where a court may be persuaded to dismiss the employer.

insurance premiums,⁶ litigation costs, and complexity; slow claim handling; drive individuals away from adjuster jobs; and cause “a proliferation of bad-faith suits that will unduly burden the courts”, AIA Br. at 6-7, they offer no evidence to suggest that these issues will occur. In fact, as Keodalah notes in his other briefs, Montana and West Virginia have imposed liability on employee adjusters for 25 and 15 years respectively, *O’Fallon v. Farmers Ins.*, 260 Mont. 233, 859 P.2d 1008 (Mont. 1993); *Taylor v. Nationwide Mut. Ins.*, 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003), and no evidence suggests any of the negative impacts predicted have occurred there. Indeed, neither the legislatures nor courts of those states have reversed their rules. This is strong evidence those states’ industries did not suffer.⁷

Title 48 establishes a clear public policy in ensuring that all persons engaged in the business of insurance act in good faith. Appellant Br. at 9-10; WSAJF Br. at 12-14. This includes adjusters. And, as WSAJF correctly establishes, this Court’s precedent has long recognized those public policy considerations, including its benefits for insureds. WSAJF Br. at 10-11, 13-14. The Legislature’s detailed embodiment of long-standing public policy,

⁶ “[Increase premiums] is a standard argument raised against expanding any area of tort liability. When considering the recognition of a new cause of action, the specter of increased insurance rates is one of our least concerns.” *Ueland*, 103 Wn. 2d at 140.

⁷ GEICO also argues adjuster liability allows plaintiffs’ counsel to engage in conduct like harassing adjusters or unethical bargaining tactics. GEICO Br. at 12-14. Safeguards exist to curtail such improper conduct. This includes the ethics and civil rules. *E.g.*, CR 11. Further, there is no indication such behavior became a problem in the states that permit such claims. *See O’Fallon*, 260 Mont. 233; *Taylor*, 214 W. Va. 324.

which RCW 48.01.030 keystones, this Court’s precedent, a weighing of the interests, and logic and common sense all warrant this Court recognizing an adjusters’ common law good-faith duty.

2. An adjuster’s good-faith duty requires that she act in a state of mind indicating honesty and lawfulness of purpose and refrain from deceit or dishonesty.

WSAJF correctly argues that this Court should recognize a common law good-faith duty. Therefore, “an obligation exist[s].” *See Affiliated*, 170 Wn.2d at 449. The Court’s precedent and the Legislature also set forth the “measure of care required.” *Id.* This Court has recognized that a good-faith duty generally requires that the entity owing the duty act “in a state of mind indicating honesty and lawfulness of purpose.” *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.3d 1133 (1986). As WSAJF correctly notes, public policy considerations define this, at the least, to include a duty to refrain from deceit and dishonesty or acts Title 48 prohibits. *E.g.*, WSAJF Br. at 6-7; 48.30.010(1) (“No person engaged in the business of insurance shall engage in . . . unfair or deceptive acts or practices in the conduct of such business”); RCW 48.30.040.

Here, Allstate’s adjuster, Smith, deliberately lied—including while she was under oath—asserted facts that contradicted both her and Allstate’s investigations, and failed to deal with Keodalah honestly or with lawfulness of purpose. Respondent Supp. Br. at 1; Appellant Br. at 3-6. For example,

in responding to discovery requests, Smith stated Keodalah failed to stop at a stop sign, despite the fact she had the Seattle Police Department accident report, which found the motorcyclist at fault, and Allstate’s expert’s report, which found Keodalah had stopped and the motorcyclist was at fault. CP 7-8. She later then testified, as a CR 30(b)(6) representative, Keodalah ran the stop sign, but then admitted he had not. CP 8. She thereafter testified at trial that when Allstate first stated Keodalah did not stop, she knew the statement was untrue. CP 9-10. And, she testified at trial that Keodalah was 70 percent at fault, despite the fact she testified that Allstate relied on the eyewitness statements and both the Seattle Police Department report and Allstate expert report, neither of which found fault, to reach that conclusion. CP 9-11.

These are only examples. No entity has condoned her conduct. CAIF Br. at 3 (“Amicus cannot support the way in which the underlying claim in this case was handled.”); AIA Br. at 2 (“Amici do not condone the handling of any claim in the manner described in [Division I’s] opinion.”). Requiring that adjusters abide by standards this Court has recognized as exercising good faith generally—*i.e.*, acting in a state of mind indicating honesty and lawfulness of purpose, refraining from both deceit and dishonesty, and complying with Title 48—capture all the egregious acts and set the proper bounds of an adjuster’s good-faith duty. Appellant Br. at 26 (“Smith’s . . .

good-faith duty requires that she must deal with Keodalah ‘in a state of mind indicating honesty and lawfulness of purpose.’”).

3. An adjuster’s good-faith duty would run to insureds, as is consistent with this Court’s precedent.

This Court’s precedent also sets forth the class of persons to whom an adjuster’s good-faith duty is owed. *See Affiliated*, 170 Wn.2d at 449. It would run to insureds. *See Tank*, 105 Wn.2d at 392-95; *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960); *see also* Respondent Supp. Br. at 8-14 (explaining, in part, why the Court limited actions to insureds).

B. The Court should conclude that an adjuster’s breach of their common law good-faith duty is actionable under the CPA.

WSAJF argues that this Court should recognize CPA claims against adjusters that violate their common law good-faith duty. WSAJF Br. at 16-20. Keodalah agrees. *See* Appellant Br. at 29-35. He also adopts WSAJF’s argument. AIA, however, argues that the CPA does not apply to adjusters because they lack entrepreneurial or commercial stakes in adjusting claims. AIA Br. at 13-15. AIA’s argument fails.

The CPA provides that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” RCW 19.86.020. Its definition section defines “person” to “include, where applicable, natural persons”. *Id.* 19.86.010(1). Together, RCW 19.86.010 and .020 establish a clear intent to prohibit any

person from engaging in unfair or deceptive conduct. *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984) (“The CPA . . . shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce. (RCW 19.86.010; .020)). It also grants a private action, RCW 19.86.090, and is to be liberally construed. *Panag*, 166 Wn.2d at 37.

To prevail in a CPA action, “the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) that affects the public interest, (4) injury to a person’s business or property, and (5) causation.” *Id.* at 37. This Court has held that a CPA claim requires only these five elements. *Panag*, 166 Wn.2d at 41-44, 45 (refusing to require a contractual relationship as a sixth element).

AIA cites no authority that states a person like an adjuster must have entrepreneurial or commercial stakes in a transaction to be engaged “in the conduct of any trade or commerce”. While the Court has held professionals are not engaged in trade or commerce unless participating in entrepreneurial or commercial aspects of their work, the decisions have concerned learned professions such as medicine, *e.g.*, *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009), and law, *e.g.*, *Short*, 103 Wn.2d 52. Professionals are not involved in trade or commerce when practicing their professions.

Adjusters adjusting claims are involved in the conduct of trade and commerce. RCW 19.86.170 (stating “*actions* and transactions prohibited or regulated under the laws administered by the insurance commissioner,” *i.e.*, Title 48, are subject to the provisions of RCW 19.86.020, as well as all the sections of RCW 19.86 that “provide for the implementation or enforcement of RCW 19.86.020” (emphasis added); *see also Salois v. Mut. of Omaha*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978) (“Taking the broad scope of RCW 19.86.010 and coupling it with RCW 19.86.020’s reference to the *conduct* of any trade or commerce, we cannot conclude that the legislature intended the act to be restricted to acts or practices designed to induce a sale.”). Neither this Court nor RCW 19.86 require that persons engaged in acts or transactions prohibited or regulated by Title 48 have entrepreneurial or economic stakes. This includes RCW 19.86.070, to which AIA cites for its statement that “[t]he labor of a human being is not a commodity or article of commerce,” as it addresses labor unions. *See Rhodes v. Rains*, 195 Wn. App. 235, 244, 381 P.3d 58 (2016); *Ernst Home Ctr. v. United Food Comm. Wkrs. Int’l*, 77 Wn. App. 33, 45-47, 888 P.2d 1196 (1995).

WSAJF is correct. Breach of an adjuster’s common law good-faith duty should be actionable under the CPA. Because AIA’s argument against CPA liability fails and Keodalah has otherwise demonstrated a CPA claim lies here, *see* Appellants’ Br. at 35-39, a CPA claim is proper.

C. **The entities that owe a good-faith duty are limited and do not encompass the “slippery slope” of potential defendants AIA, WDTL, CAIF, or GEICO claim.**

AIA, CAIF, WDTL, and GEICO all argue Division I’s decision will create a “slippery slope” that will impose actionable good-faith duties on multiple entities—as RCW 48.01.010 “representatives” and “providers”—including doctors, lawyers, building inspectors, and others. AIA Br. at 7-9; CAIF Br. at 11-12; WDTL Br.; GEICO Br. at 3-5.⁸ This is incorrect.

First, if the Court concludes that adjusters owe a common-law good-faith duty actionable in common law bad-faith and CPA actions, the Court can limit its current holding to adjusters. Indeed, adjuster liability is the only issue that was before Division I and is before this Court.

Moreover, RCW 48.01.030 and Division I’s decision do not lead to the results AIA CAIF, WDTL, or GEICO argue. For example, as Division III stated as to “providers” in *Merriman*, the Legislature added “providers” to RCW 48.01.030 “to capture the activities of ‘cappers’”, *i.e.*, “persons who, ‘acting under an agreement or understanding that they will receive a pecuniary benefit refer claimants with real or imagined claims, injuries, or

⁸ GEICO relies on *Garoutte*, 2013 U.S. Dist. LEXIS 8559, to argue that because no cause of action exists against an insured—who also bears a good-faith duty under the statute—no cause of action should exist against an adjuster. GEICO Br. at 3-5. Its argument fails. Keodalaha has addressed this argument in other briefs. *E.g.*, Appellant Br. at 25. Insureds do owe a good-faith duty. The mechanism for enforcing that duty is not at issue here. *Cf. Pilgrim v. State Farm Fire & Cas. Ins.*, 89 Wn. App. 712, 950 P.2d 479 (1997) (insurer sued insured to recover funds paid due to fraud).

property damage to service providers.” 198 Wn. App. at 613 n.6 Therefore, “providers” has a clear intent and does not sweep in the entities over which the insurer *amici curiae* express concern.

Nor does the term “representatives” create bad-faith or CPA claims against insureds’ attorneys—as AIA argues—or other counsel—as WDTL claims. They are engaged in a practice of law, not the business of insurance. *E.g.*, RCW 48.01.030 (discussing “business of insurance”, not practice of law); *Short*, 103 Wn.2d 52. As WSAJF correctly explains, RCW 48.01.030 imposes its duties on those engaged in the “business of insurance”. WSAJF Br. at 14-15.⁹ The “business of insurance” requirement also limits the term “providers”, further discrediting insurer *amici curiae*’s fears.

D. Adjuster bad-faith and CPA liability will not increase insurance fraud.

CAIF argues Division I’s decision and adjuster liability in general will lead to increased insurance fraud. *See generally* CAIF Br. However, its brief relies on speculative, unsupported, policy-based arguments that all fail to demonstrate increased fraud will occur.¹⁰ CAIF’s argument presents no basis on which to reverse Division I.

⁹ The result may be different in cases where attorneys transition from practicing law to adjusting claims. *See Gould v. Mut. Life Ins.*, 37 Wn. App. 756, 683 P.2d 207 (1984).

¹⁰ WDTL also argues that the decision will increase insurance fraud. But it advances no arguments that are different from the Coalitions. *See* WDTL Br. at 8-9.

Insurance fraud is clearly unacceptable and illegal. As CAIF details in its brief, the Legislature has implemented statutory measures to combat such fraud. CAIF Br. at 8-9; RCW 48.30A. These are important provisions. However, while CAIF argues adjuster liability will frustrate these measures by chilling adjuster fraud investigations, detection, and/or prevention, it can provide no evidence to suggest that these speculative fears will occur, that criminal investigations will be impacted, or that adjuster liability will erode any other statutory fraud prevention measures. Moreover, criminal liability will still exist for those insureds that provide false or misleading statements in insurance applications, RCW 48.30.210, destroy property with intent to defraud, RCW 48.30.220, or make fraudulent claims. RCW 48.30.230.

As Keodalah notes above, two states, Montana and West Virginia, have both imposed personal liability on adjusters for over 25 years and 15 years respectively, *O'Fallon*, 260 Mont. 233; *Taylor*, 214 W. Va. 324, and no evidence indicates any of the fraudulent impacts CAIF argues will occur have occurred in those states. Indeed, while CAIF discusses the cases in its brief, CAIF Br. at 14-16, it provides no evidence of increased fraud—or any other negative insurance impacts—in those states.

Moreover, while CAIF argues that, as a result of their investigations being chilled, adjusters will be unable to create a factual record to defend their decisions, it is more likely that adjusters will conduct more thorough

investigations so they can create a record to defend themselves. Indeed, our courts are aware of insurers' duties to "root out fraud", can differentiate between legitimate investigation and bad-faith conduct, and can account for the fact an adjuster must investigate fraud. *See Pilgrim v. State Farm Fire & Cas. Co.*, 89 Wn. App. 712, 950 P.2d 479 (1997) (affirming summary judgment for insurer when insured failed to provide information, which, in part, prejudiced insurer's fraud investigation). Adjusters are more likely to properly investigate a claim to fulfill their duty to investigate and to support and evidence their belief that an insured engaged in fraudulent conduct.

E. **A *Bennett v. Hardy* analysis is not required but would, in any event, counsel for an implied cause of action.**

AIA argues Division I should have undertaken a *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), analysis to determine whether RCW 48.01.030 implies an action. AIA Br. at 10-12. AIA is incorrect. Moreover, even had a *Bennett* analysis been needed, it shows an implied action exists.

First, because this Court should hold adjusters owe a common law good-faith duty actionable under common law bad-faith and CPA actions, *see* discussion *supra* Parts II.A-B, it need not determine if an implied action exists under RCW 48.01.030. Thus, it need not engage in a *Bennett* analysis. Moreover, this Court has previously stated that bad-faith actions exist for RCW 48.01.030 good-faith duty breaches, which also eliminates a need for

a *Bennett* analysis. *Ellwein*, 142 Wn.2d at 775 (“RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty may give rise to a tort action for bad faith.”). Respondent Supp. Br. at 16. Finally, a *Bennett* analysis is irrelevant to Keodalah’s CPA claim. The CPA provides a private right of action. RCW 19.86.090. Respondent Supp. Br. at 16.

But even had a *Bennett* analysis been required as to RCW 48.01.030, this Court has “‘long . . . recognized that a legislative enactment may be the foundation of a right of action.’” *Bennett*, 113 Wn.2d 919 (quoting *McNeal v. Allen*, 95 Wn.2d 265, 274, 621 P.2d 1285 (1980)). Whether an implied cause of action exists under a statute depends on whether (1) “the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted”, (2) the “legislative intent, explicitly or implicitly, supports creating or denying a remedy”, and (3) “implying a remedy is consistent with the underlying purpose of the legislation.” *Id.* at 920-21. All elements are satisfied here.

First, Keodalah—an insured—is in the class of persons the statute was to benefit. Indeed, the Court of Appeals, deciding whether an insured had established a *per se* CPA violation against an insurer, previously held that insureds are in the class RCW 48.01.030 was designed to protect. *St. Paul Ins. Co. v. Updegrave*, 33 Wn. App. 653, 659, 656 P.2d 1130 (1983) (“As an insured under a policy issued by insurance company doing business

in this state, Lad is within this class. RCW 48.01.030; *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978).”).

Second, the legislative intent supports a remedy. The Legislature is presumed to know the existing state of case law when it legislates. *E.g.*, *Price v. Kitsap Transit*, 125 Wn.2d 456, 463-64, 886 P.2d 556 (1994). In 1986, this Court in *Tank*, 105 Wn.2d at 386, explained that “[t]he imposition of an insurer’s duty of good faith by both the courts and the Legislature . . . has resulted in lawsuits alleging breach” Despite this discussion, the Legislature did not amend RCW 48.01.030 to indicate that it was not meant to create actionable good-faith duties. Instead, in 1995, it amended RCW 48.01.030 to expand it to “providers”, not to restrict it. 1995 Wash. Sess. Laws 1157-58.

Six years later, in 2001, this Court noted “RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty may give rise to a tort action for bad faith.” *Ellwein*, 142 Wn.2d at 775. Despite that statement, the Legislature has still not amended RCW 48.01.030 to indicate it was not intended to create an actionable duty. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (“This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.”).

Finally, implying a remedy under RCW 48.01.030 is consistent with the legislation's purpose. AIA does not address this factor in any detail.¹¹ However, RCW 48.01.030's purpose is to impose a good-faith duty in the insurance industry. This includes imposing such a duty on adjusters, as both Division I below and Division III in *Merriman*, 198 Wn. App. 594, held. As Keodalah details above, adjuster liability will benefit insureds by providing force to that good-faith duty through both the deterrence that such liability provides and through recovery to an insured when the deterrent goal fails.

III. CONCLUSION

Smith engaged in egregious conduct during Keodalah's claim. She lied, misrepresented facts, and asserted facts that contradicted Allstate's and her own investigations. Indeed, even the insurer *amici curiae* condemn her conduct. Both bad-faith and CPA claims are proper mechanisms to address and deter such conduct in the future. This Court should affirm Division I.

Respectfully submitted this 12th day of February, 2019.

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¹¹ Smith addresses this factor by arguing adjuster liability will undermine the purpose of RCW 48.01.030 because it will not advance insureds' interests and will have detrimental impacts on the insurance industry and adjusters. Petitioners' Br. at 15-17. These arguments are the same AIA, GEICO, and CAIF make to adjuster liability in general and fail for the same reasons Keodalah set forth above. *See* discussion *supra* Part II.A.1-.3.

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 below a true and correct copy of the foregoing *Respondents' Combined Answer to Briefs of Amici Curiae* on the facilities and to the parties mentioned below as indicated:

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SIGNED at Seattle, Washington this 12th day of February, 2019.



Tonya Arico

No. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

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

Petitioners.

APPENDIX TO RESPONDENTS' COMBINED ANSWER TO BRIEFS
OF AMICI CURIAE

RCW 19.86.010	001
RCW 19.86.020	002
RCW 19.86.090	003
RCW 19.86.170	004
RCW 48.01.020	005
RCW 48.01.030	006
RCW 48.30.010	007
RCW 48.30.040	008
RCW 48.30.210	009

RCW 48.30.220	010
RCW 48.30.230	011

Revised Code of Washington

Section 19.86.010 Definitions

Wash. Rev. Code § 19.86.010

As used in this chapter:

(1) "Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.

(2) "Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.

(3) "Assets" shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

Revised Code of Washington

Section 19.86.020 Unfair competition, practices, declared unlawful

Wash. Rev. Code § 19.86.020

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Revised Code of Washington

Section 19.86.090 Civil action for damages-Treble damages authorized-Action by governmental entities

Wash. Rev. Code § 19.86.090

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect,

and to recover the costs of the suit including a reasonable attorney's fee.

Revised Code of Washington

Section 19.86.170 Exempted actions or transactions- Stipulated penalties and remedies are exclusive

Wash. Rev. Code § 19.86.170

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020: PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW: PROVIDED, FURTHER, That this chapter shall apply to actions and transactions in connection with the disposition of human remains.

RCW 9A.20.010(2) shall not be applicable to the terms of this chapter and no penalty or remedy shall result from a violation of this chapter except as expressly provided herein.

Revised Code of Washington

Section 48.01.020 Scope of code

Wash. Rev. Code § 48.01.020

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.

Revised Code of Washington

Section 48.01.030 Public interest

Wash. Rev. Code § 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. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Revised Code of Washington

Section 48.30.010 Unfair practices in general-Remedies and penalties

Wash. Rev. Code § 48.30.010

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

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

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

(b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW 34.05.325(6).

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

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

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

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

(7) An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant. "First party claimant" has the same meaning as in RCW 48.30.015.

Revised Code of Washington

Section 48.30.040 False information and advertising

Wash. Rev. Code § 48.30.040

No person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation or advertising in the conduct of the business of insurance, or relative to the business of insurance or relative to any person engaged therein.

Revised Code of Washington

Section 48.30.210 Misrepresentation in application for insurance

Wash. Rev. Code § 48.30.210

A person who knowingly makes a false or misleading statement or impersonation, or who willfully fails to reveal a material fact, in or relative to an application for insurance to an insurer, is guilty of a gross misdemeanor, and the license of any such person may be revoked.

Revised Code of Washington

Section 48.30.220 Destruction, injury, secretion, etc., of property

Wash. Rev. Code § 48.30.220

Any person, who, with intent to defraud or prejudice the insurer thereof, burns or in any manner injures, destroys, secretes, abandons, or disposes of any property which is insured at the time against loss or damage by fire, theft, embezzlement, or any other casualty, whether the same be the property of or in the possession of such person or any other person, under circumstances not making the offense arson in the first degree, is guilty of a class C felony.

Revised Code of Washington

Section 48.30.230 False claims or proof-Penalty

Wash. Rev. Code § 48.30.230

(1) It is unlawful for any person, knowing it to be such, to:

(a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or

(b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

(2)(a) Except as provided in (b) of this subsection, a violation of this section is a gross misdemeanor.

(b) If the claim is in excess of one thousand five hundred dollars, the violation is a class C felony punishable according to chapter 9A.20 RCW.

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