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No. 96931-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON IN

KRISTA PEOPLES,
Appellee/Plaintiff,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL.,
Appellants/Defendants, and

JOEL STEDMAN, ET AL.
Appellees/Plaintiffs

v.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Appellant/Defendant.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in an insured's right to bring an action under Washington's Consumer Protection Act, chapter 19.86 RCW (CPA or the Act), against an insurer that wrongfully denies payment of medical expenses in personal injury protection (PIP) insurance.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case concerns an insured's right to bring a CPA claim against a PIP insurer. The facts are drawn from the federal district court's order and the parties' briefs. *See Peoples v. USAA* and *Stedman v. Progressive*, Order Certifying Questions to the Washington Supreme Court, U.S. D.Ct. W.D. WA., filed 03/04/2019; *Progressive Op. Br.* at 2-5; *USAA Op. Br.* at 4-11; *Stedman Resp. Br.* at 5-11; *Peoples Ans. Br.* at 9-20.

Peoples filed suit against USAA, alleging it withheld PIP medical expenses whenever a computerized review process determined a particular medical bill exceeded a predetermined limit. Peoples claimed that USAA's failure to investigate or otherwise make an individualized determination of the reasonableness and necessity of the medical providers' charges violated

Washington insurance regulations and the CPA. Stedman filed suit against Progressive, alleging it denied his PIP benefits when it determined that Stedman had reached “maximum medical improvement.” Stedman claimed that Progressive’s basis for denying payment of medical expenses was not allowed under Washington’s insurance regulations and violated the CPA. USAA and Progressive (the Insurers) moved for dismissal of the CPA claims, arguing that medical expenses and other related claims arise from personal injuries and are not recoverable under the CPA, which only allows a cause of action for a person “injured in his or her business or property.”

The federal district court consolidated the cases solely for the purpose of certifying questions to this Court as to whether Peoples’ and Stedman’s (the Insureds) claims for damages for the Insurers’ alleged WAC violations pertaining to PIP coverage give rise to a cause of action for “injuries” to “business or property” under Washington’s CPA.

III. ISSUES PRESENTED

1. With regards to the injury to “business or property” element of a CPA claim, can insureds in Ms. Peoples’ and/or Mr. Stedman’s circumstances, who were physically injured in a motor vehicle collision and whose Personal Injury Protection (“PIP”) benefits were terminated or limited in violation of WAC 284-30-330, bring a CPA claim against the insurer to recover out-of-pocket medical expenses and/or to compel payments to medical providers?

2. With regards to the “injury to business or property” element of a CPA claim, can insureds in Ms. Peoples’ or Mr. Stedman’s circumstances, who were physically injured in a motor vehicle collision and whose Personal Injury Protection (“PIP”) benefits were terminated or limited in violation of WAC 284-30-330, bring a CPA claim against the insurer to recover excess premiums paid for the PIP coverage, the costs of investigating the unfair acts, and/or the time lost complying with the insurer’s unauthorized demands?

IV. SUMMARY OF ARGUMENT

Whether an insured who is wrongfully denied PIP benefits is injured in his or her “business or property” depends upon the statutory interpretation of RCW 19.86.090, which requires consideration of all that the Legislature has said in related statutes and regulations concerning the application of the CPA to insurers’ wrongful conduct. Review of the intertwined provisions of Ch. 19.86 RCW, Title 48 RCW and Ch. 284-30 WAC demonstrates the Legislature’s intent that *all* insurance contracts, including PIP coverages, are subject to the CPA enforcement provisions. The wrongful denial of an insured’s request for payment of PIP medical expenses results in an injury to the insured’s “business or property” because it diminishes the insured’s money and property interest in the bargained-for prompt payment of insurance proceeds in the event of an accident.

V. ARGUMENT

The answers to the certified questions turn on the interpretation of “injured in his or her business or property” under RCW 19.86.090. This Court interprets both statutes and regulations using rules of statutory construction. *See Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 90, 392 P.3d 1025 (2017). The fundamental objective in interpreting a statute is determining legislative intent, and the “surest indication of legislative intent is the language enacted by the legislature.” *See State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Washington has adopted a broad, contextual “plain language” rule, which considers “all

that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Only if the language is reasonably susceptible to more than one meaning will the Court turn to rules of construction. *See Dep’t of Ecology*, 146 Wn.2d at 10.

Conspicuously absent from the Insurers’ briefing is any examination of the statutory language that must guide this Court in answering the questions presented. Chapters 19.86, 48.01, 48.22 and 48.30 RCW, and the regulations in Ch. 284-30 WAC must be considered together to interpret the Legislature’s meaning of “injured in his or her business or property” in RCW 19.86.090.¹ A careful examination of these statutory schemes demonstrates legislative intent that *all* insurance transactions involve the “business of insurance” and are imbued with public interest, and are subject to the provisions of the CPA. There is no evidence that the Legislature intended to relieve PIP Insurers from the enforcement provisions of the CPA. The Court should answer “yes” to both certified questions.²

A. Overview Of The Relationship Among Washington Laws Regarding The CPA (Ch. 19.86 RCW), The Insurance Code (Title 48 RCW) And The Regulations Governing Unfair Or Deceptive Acts Or Practices In Insurance (Ch. 284-30 WAC).

¹ This amicus brief discusses a number of statutes and regulations contained in Ch. 19.86 RCW, Title 48 RCW and Ch. 284-30 WAC. The most pertinent cited provisions are RCW 19.86.020, .090, .170 & .920; RCW 48.01.020, .030 & .040; RCW 48.22.005, .085 & .105; RCW 48.30.010 & .015; WAC 284-30-300, -310, -330 & -395. The current versions of these provisions are reproduced in the Appendix to this brief.

² The second certified question asks whether the insureds may bring a CPA claim for several types of damages that are ancillary to the damages for unpaid medical expenses. The insureds’ claims for these ancillary damages should be permitted for the same reasons set forth in this brief to allow the insureds to bring a CPA claim to recover wrongfully withheld PIP benefits.

Re: CPA

The Washington Legislature enacted the CPA to protect consumers against unfair or deceptive acts or practices and to foster fair and honest competition. *See* Ch. 19.86 RCW; *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 40, 204 P.3d 885 (2009). The Act provides for few exemptions, and requires liberal construction to further its purposes. *See* RCW 19.86.170 (listing exemptions) and RCW 19.86.920 (describing purposes and mandating liberal construction). RCW 19.86.090 states: “Any person who is injured in his or her business or property by a violation of RCW 19.86.020 ... may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both ...” RCW 19.86.020 declares that “unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” The Legislature has provided broadly that violations of insurance regulations are actionable under the CPA. *See* RCW 19.86.170.

A plaintiff bringing a private CPA action must generally establish five elements: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to the plaintiff in business or property; and (5) the injury is causally linked to the unfair or deceptive act. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). The Court has recognized that “[t]he CPA, on its face, 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.” *Hangman Ridge*, 105 Wn.2d at 785 (emphasis in original; brackets added; citation omitted).³

Re: Insurance Code

Title 48 RCW governs all insurance transactions in Washington. *See* RCW 48.01.020. RCW 48.01.030 provides that every insurance transaction in the State of Washington is imbued with 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.” This is a “broad legislative mandate that the business of insurance is vital to the public interest.” *Panag*, 166 Wn.2d at 55. A violation of the duty of good faith announced in RCW 48.01.030 is a per se violation of the CPA. *See* RCW 19.86.090, 19.86.170; *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997).

PIP coverage is first-party insurance described as “essentially no-fault coverage for medical expenses arising from bodily injuries sustained in an automobile accident.” *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 787, 16 P.3d 574 (2001). RCW 48.22.085 requires automobile insurers to offer PIP coverage, including payment for all reasonable and necessary medical expenses for injuries sustained as the result of an automobile accident. *See Durant v. State Farm Auto. Ins. Co.*, 191 Wn.2d 1, 14, 419 P.3d 400 (2018) (citing RCW 48.22.085, 48.22.005(7)). The

³ Washington is “very clearly in the minority” of jurisdictions that have retained the restrictive “public interest” requirement. *See Hangman Ridge*, 105 Wn.2d at 787-89.

statutory requirement to offer PIP coverage implicates public policy. *See Durant*, 191 Wn.2d at 14. Through RCW 48.22.105, the Legislature has provided the Insurance Commissioner with express authority to adopt “such rules as are necessary” to implement the statutes that concern PIP coverage.

Re: Insurance Regulations Governing Unfair or Deceptive Acts or Practices in the Conduct of the Business of Insurance

RCW 48.30.010(1) provides that “[n]o person engaged in the business of insurance shall engage ... in unfair or deceptive acts or practices in the conduct of such business,” as those acts or practices are defined in subsection (2) of that statute. (Brackets added.) Subsection (2) states that “unfair methods and unfair or deceptive acts or practices” include those acts “expressly defined and prohibited by the [insurance] code,” and that “the [insurance] commissioner” may define “other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive.” (Brackets added.) By enacting RCW 48.30.010(2), the Legislature granted the Commissioner general authority to define unfair practices in the business of insurance. *See Leingang*, 131 Wn.2d at 151.

Pursuant to RCW 48.30.010, the Insurance Commissioner enacted the unfair claims settlement practices in WAC 284-30-300 through -400 to govern insurance business practice. *See* WAC 284-30-300. These unfair claims settlement practices apply to “all insurers and to all insurance policies and ... contracts.” WAC 284-30-310. WAC 284-30-330 defines unfair or deceptive acts or practices in the business of insurance.

In RCW 48.22.105, the Legislature afforded to the Commissioner rule-making authority to implement the PIP statutes. In WAC 284-30-395, the Commissioner defined “unfair or deceptive acts or practices in the business of insurance specifically applicable to [PIP] insurance” (brackets added), and provided the only grounds for denial of PIP benefits are if the medical services are not reasonable, not necessary, not related to an automobile accident or not incurred within three years of the accident. “[A]n insurer may deny PIP benefits ‘only’ for the reasons listed; no other reasons are permitted.” *Durant*, 191 Wn.2d at 9 (brackets added).

“The general rule is that violations of the insurance regulations are subject to the [CPA].” *Leingang*, 131 Wn.2d at 152. A violation of a WAC 284-30 regulation constitutes a violation of RCW 48.30.010(1), which constitutes a per se unfair trade practice under RCW 19.86.170. *See Hayden v Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 62, 1 P.3d 1167 (2000).

B. An Insured Who Is Wrongfully Denied PIP Benefits Is “Injured In His Or Her Business Or Property” Within The Meaning Of RCW 19.86.090.

A violation of any regulation enumerated in Ch. 284-30 WAC will automatically establish the first two elements of a CPA claim. *See St. Paul Fire and Marine Ins. Co. v. Onvia*, 165 Wn.2d 122, 133, 196 P.3d 664 (2008). The third element of a CPA claim, the “public interest” requirement, is per se satisfied by the Legislature’s specific declaration of the public interest in the business of insurance. *See RCW 48.01.030; Hangman Ridge*, 105 Wn.2d at 791-92. This Court stated in *Panag*:

[T]he insurance industry... [is a] highly regulated field[]. A primary purpose of the intensive regulation of [this industry] is to create public confidence in the honesty and reliability of those who engage in the business of insurance... Our legislature has declared that violations of regulations applicable to [the] industry implicate the public interest and constitute a per se violation of the CPA.

166 Wn.2d at 43 (brackets added). The first three factors are satisfied here.

The issue presented in this case is whether the Insurers' unfair practices caused an "injury" to the Insureds' "business or property." The Insurers maintain "injury" to "business or property" must be examined in isolation from the unfair conduct, such that *any* claim "derived from" a personal injury, regardless of the nature of the claim or the identity of the defendant, is barred under the CPA. *See* Progressive Op. Br. at 6-11; USAA Op. Br. at 13-16. They rely on this Court's decisions in *Ambach v French*, 167 Wn.2d 167, 216 P.3d 405 (2009) and *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), which involved repackaged personal injury claims against tortfeasors. On the other hand, the Insureds argue "injury" to "business or property" requires the Court to consider the nexus between the unfair conduct and the resultant harm. *See* Stedman Resp. Br. at 13-15; Peoples Resp. Br. at 27-31. Under the Insureds' analysis, the relevant conduct is not the underlying tort, but rather the Insurers' unfair practices, which caused "injury" to the Insureds' "property" interests.

1. The plain language of Ch. 19.86 RCW, Title 48 RCW and Ch. 284-30 WAC evidence legislative intent that *all* insurance transactions create a legally protected interest in an insureds' property and are subject to the enforcement provisions of the CPA.

- a. The statutory language suggests legislative intent that the elements of a CPA claim should be considered in relation to each other, such that the nature of a plaintiff's harm is defined in relation to the defendant's unfair conduct.

This Court has recognized the nexus among the five elements of a CPA claim, and cautioned that “[t]he individual *Hangman Ridge* factors should not be read in isolation so as to render absurd conclusions.” *Ambach*, 167 Wn.2d at 178 (brackets added). The language of the CPA supports the conclusion that the nature of an aggrieved plaintiff's injury must be considered in relation to the unfair or deceptive practice of the specific defendant. RCW 19.86.090 permits a cause of action to a plaintiff who is injured “by a violation” of an unfair practice, which means that “[a] causal link is required between the unfair or deceptive acts and the injury suffered by the plaintiff.” *Hangman Ridge*, 105 Wn.2d at 793 (brackets added).

The Legislature's use of the term “injury” reinforces this reading of the CPA. In *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 910 P.2d 462 (1996), the Court considered the meaning of the undefined term “injury” as used in a statute governing an award of attorney fees:

When a term is well known to the common law, the Legislature is presumed to have intended the term to mean what it was understood to mean at common law... The common law definition of “injury” is “[t]he invasion of any legally protected interest of another.”

128 Wn.2d at 518 (brackets added; citations omitted).

“Injured” is also undefined in the CPA, and the Court should presume the Legislature intended the common law definition – “invasion of a legally protected interest” – to apply. *See also Ambach*, 167 Wn.2d at 174

n.3 (similarly defining “injury” as “the violation of another’s legal right”). The right to such legal protection can arise from tort law, *see, e.g., McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 762-63, 334 P.3d 661 (2015), from statute, *see, e.g., Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 285, 635 P.2d 426 (1981), or out of contract, *see, e.g., Auto. United Trades Org. v. State*, 175 Wn.2d 214, 224, 285 P.3d 52 (2012).

To determine the relevant “injury,” then, it is necessary to ascertain the “legally protected interest” the plaintiff asserts that the defendant “invaded.” This requires the Court to examine the causal link between the unfair practice and the resultant harm. *See Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 571-72, 731 P.2d 497 (1987) (recognizing that distinct “injuries” arise if the injuries are “of a different nature,” arise “at different times,” and “require different causal factors”); *see also Goodman v. Boeing*, 127 Wn.2d 401, 405, 899 P.2d 1265 (1995) (same).

Here, the source of the insureds’ “legally protected interest” with the Insurers is a *contract*. The “interest” they claim was invaded was their legal entitlement under that contract to money, along with the ancillary legal duties under related bodies of law that follow an insurers’ unfair and/or bad faith breach of the insurance contract. Whereas personal injury plaintiffs assert the invasion of a legally protected interest to their *person*, the source of the Insureds’ “legally protected interest” here is their legally protected indemnification interest created by the insurance contract.

- b. A contract of insurance creates a “property” interest in financial compensation upon the occurrence of a triggering event.

In general, “insurance involves a contractual relationship between the insurer and the insured.” *LaPoint v. Richards*, 66 Wn.2d 585, 588, 403 P.2d 889 (1965). “The essence of insurance... is ‘a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.’ RCW 48.01.040.” *Witherspoon v. St. Paul Fire & Marine Ins. Co.*, 86 Wn.2d 641, 645, 548 P.2d 302 (1976) (citation omitted). Insurance provides bargained-for “protection against calamity” through “the assurance that the insured will receive prompt payment of money in times of need.” *Nat’l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 878, 297 P.3d 688 (2013) (citation omitted). This feature of insurance distinguishes it from other forms of indemnity:

Generally speaking, insurance contracts have a different purpose than most other contracts for indemnity. *The insured pays a premium, not to prevent any event, but to provide immediate liquid resources to weather the effects of an emergency... It is thus the special and unique feature of insurance that money be made promptly available to prevent bad situations from getting worse.*

Colo. Structures v. Ins. Co. of the W., 161 Wn.2d 577, 603-04, 167 P.3d 1125 (2007).

PIP insurers’ wrongful denial of benefits is an injury to “property” within the meaning of RCW 19.86.090. This analysis of the right to payment of medical expenses in a PIP policy as constituting “property” is reflected in the jury instruction definition of “Injury in Consumer Protection Act Claim”: “Injuries to business or property do not include physical injury to a person’s body, or pain and suffering,” but “include financial loss.” 6A

Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 310.06 (7th ed.). Proof of a PIP insurer's wrongful nonpayment of medical expenses meets the injury requirement in a CPA claim because the insured suffers a financial loss.

This reasoning is consistent with this Court's analysis of the CPA. Personal injuries do not satisfy the injury requirement and are not compensable under the CPA. *Panag*, 166 Wn.2d at 57; *Fisons*, 122 Wn.2d at 318. "However, the injury requirement is met upon proof the plaintiff's property interest or money is diminished because of the unlawful conduct..." *Panag*, 166 Wn.2d at 57 (citation omitted).

- c. There is no evidence of legislative intent to treat PIP insurers differently from other insurers under the CPA.

RCW 48.22.085 requires all insurers writing automobile liability policies in Washington to offer PIP coverage to an insured. Notably, the PIP coverage mandated by the Legislature provides benefits *only* related to the occurrence of an automobile accident, including the payment of medical expenses. *See* RCW 48.22.095, RCW 48.22.005(7). The Legislature expressly authorized the Insurance Commissioner to adopt regulations to implement rules particular to PIP coverage, and included no proviso excluding claims arising out of unfair practices by insurers related to payment of PIP benefits from the reach of the CPA. *See* RCW 48.22.105. Pursuant to that authorization, the Commissioner adopted WAC 284-30-395, which defines unfair or deceptive acts or practices in the business of insurance specifically applicable to PIP coverage. As with other regulations, an insurer's violation of WAC 284-30-395 constitutes a violation of RCW

48.30.010(1), which in turn constitutes a per se unfair trade practice pursuant to RCW 19.86.170. *Cf. Hayden*, 141 Wn.2d at 62.

This Court recently examined the interplay between the CPA and a related statutory scheme in *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 406 P.3d 1149 (2017). There, the Court considered the scope of the application of the CPA to certain transmissions under the Consumer Electronic Mail Act (CEMA), Ch. 19.190 RCW. In CEMA, the Legislature made sending spam email a per se violation of the CPA, but “puzzlingly no ‘per se violation’ phrase was included in the text message provision.” 189 Wn.2d at 730. The Court looked to the statutory language of CEMA to determine the Legislature’s intended application of the CPA: “Functionally ... there is no indication [in CEMA] that the legislature intended to regulate text messages and emails differently.” *Id.* (brackets added). Based on this observation, along with the presence of a liquidated damages provision in CEMA, the Court concluded that the Legislature intended the sending of unsolicited commercial text messages to be actionable under the CPA, and that the traditional CPA elements of injury and causation need not be proven.

Here, the Insurers’ argument requires the Court to conclude that the Legislature intended to exempt PIP carriers from the reach of the CPA if the claim “derived from” a personal injury (and PIP benefits *always* derive from a personal injury), despite an express provision authorizing the Insurance Commissioner to define unfair practices in PIP, and a complete absence of statutory language recognizing any difference between PIP and

other carriers. In reviewing Ch. 19.86 RCW, Title 48 RCW and Ch. 284-30 WAC, there is no indication the Legislature intended to regulate the unfair acts and practices of PIP insurers any differently than other insurers.

2. If the Court concludes the statutory schemes are reasonably susceptible to two different interpretations and are therefore ambiguous, the Court should hold that all insurance transactions, including those involving PIP coverage, are subject to the enforcement provisions of the CPA, because this construction better effectuates the purposes of the CPA and the Insurance Code.

If statutory schemes are susceptible to more than one meaning, they are ambiguous and may be construed in accordance with rules of statutory construction. *See Dep't of Ecology*, 146 Wn.2d at 10-12. Where statutory language is ambiguous, the Court will adopt the construction that best effectuates the statutory purposes. *See Wright*, 189 Wn.2d at 729.

Title 48 imposes on “all persons” engaged in the business of insurance the duty to act in good faith, and “to practice honesty and equity in all insurance matters” for the purpose of “preserving inviolate the integrity of insurance.” RCW 48.01.030. Unfair practices are prohibited and are actionable under the CPA. *See* Ch. 48.30 RCW; RCW 19.86.170.

The aim of the CPA is “to protect the public and foster fair and honest competition.” RCW 19.86.920. While other theories of recovery may sometimes be available in the area of insurance, the purpose and form of a CPA action make it unique in its ability to further the Legislative intent of eliminating unfair practices by insurers for the benefit of the public.⁴ A

⁴ Other theories of recovery may include the Insurance Fair Conduct Act (IFCA), RCW 48.30.015, common law bad faith and breach of contract. However, none of these theories captures the protective public interest function embodied by the CPA. An IFCA claim is

CPA cause of action expressly provides the deterrent effect of treble damages, injunctive relief, and an award of fees and costs for the insured. Actions by private citizens are “an integral part of CPA enforcement.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007). By bringing private actions, “[p]rivate citizens act as private attorneys general in protecting the public’s interest against unfair and deceptive act and practices in trade and commerce.” *Id.*, 160 Wn.2d at 843 (brackets added).

If this Court reads into the statute an exemption from CPA actions for PIP insurers, unfair practices that do not include a denial of coverage or payment of benefits are more likely to proceed undeterred. This would undermine the purpose of the CPA, which is to protect the public. It is to be liberally construed to serve this purpose. There is no indication the Legislature intended PIP carriers to be relieved from the duty to refrain from unfair practices, and it would frustrate the purposes of the CPA to grant an exception to an entire category of insurers from the CPA’s reach.

C. *Ambach* Does Not Warrant A Contrary Conclusion.

Interpreting the wrongful denial of PIP benefits as an “injury” to “property” within the meaning of RCW 19.86.090 is not contradicted by *Ambach v French, supra*. Plaintiff Ambach alleged claims for medical

not available unless the insurer’s unfair practice includes an unreasonable denial of a claim for coverage or payment of benefits. *See* 48.30.015(1). Common law bad faith and breach of contract may be actionable, but do not include the deterrent effect of treble damages, and do not necessarily offer fees and costs to encourage private citizens’ actions. *See Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d 269, 284-85, 961 P.2d 933 (1998) (examining remedies for common law bad faith); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998) (discussing contract damages). Insureds may be entitled to an equitable award of fees, but only if they prevail against an insurer in a coverage dispute. *See Olympic S.S. Co. Inc. v. Centennial Ins. Co.*, 117 Wn.2d 137, 811 P.2d 673 (1991).

malpractice arising from a failed shoulder surgery and violation of the CPA, seeking damages for the increased cost of the prescribed surgery over the cost of more conservative treatment. This Court upheld the dismissal of the CPA claim, holding that personal injury damages do not constitute “injury” to “business or property” and “are not compensable [damages] under the CPA.” *Ambach*, 167 Wn.2d at 173 (citation omitted). This Court held that “[w]here plaintiffs are both physically and economically injured by one act, courts generally refuse to find injury to ‘business or property’ as used in the consumer protection laws.” *Id.* at 174. The underlying concern expressed in *Ambach* appeared to be plaintiffs’ attempts to repackage personal injury claims against a tortfeasor to shoehorn them into the reach of the CPA:

Had our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her business or property. . . . This limitation clearly excludes *stand alone personal injury claims like those for pain and suffering*...

Id. In *Williams v. Lifestyle Lift Holdings, Inc.*, 175 Wn. App. 62, 302 P.3d 523 (2013), the court of appeals held that where the marketing of a surgical procedure is deceptive and entrepreneurial, the cost of the surgery *could* be an injury under the CPA, even if the plaintiff has alleged that the same procedure caused personal injury. *See Williams*, 175 Wn. App. at 64. The court distinguished *Ambach*, stating the Supreme Court’s overriding concern was that the CPA not be used to give plaintiffs “backdoor access to compensation they were denied in the personal injury suits.” *Williams*, 175 Wn. App. at 72 (citing *Ambach*, 167 Wn.2d at 179 n.6).

[U]nlike in *Ambach*, Williams was not claiming to be physically and economically injured by one act... The act that caused the alleged personal injury to Williams was the surgery; the acts that caused her alleged consumer injury were the advertising and sales techniques. Williams' [CPA] claim does not depend on proof that she sustained a personal injury. It depends upon proof that the surgery was deceptively marketed... That distinguishes *Ambach*.

175 Wn. App. at 73 (citations omitted; brackets added).

Similar to the plaintiff in *Williams*, Peoples and Stedman are not claiming to be physically and economically injured by one act. The acts that caused personal injury to Peoples and Stedman were automobile collisions; the acts that caused their alleged consumer injuries were the unfair acts and practices in wrongfully denying payment of medical expenses under PIP coverages and related costs. The Insureds are not seeking recompense for personal injuries, but rather are alleging injuries related to their PIP insurers' wrongful denial of medical expenses as required in their insurance contracts and under Washington insurance statutes and regulations. Insurers' nonpayment of medical expenses constitutes injury to their property in the form of diminishment of their money.⁵

⁵ The Insurers cite a line of federal decisions, most unpublished, that have barred CPA claims against PIP carriers in reliance on *Ambach*. See Progressive Op. Br. at 11-12; USAA Op. Br. at 18-20. Federal decisions construing state law are not binding on this Court. See *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 806, 824, 881 P.2d 986 (1994). Furthermore, the cases cited do not examine the relevant provisions in Title 48 and the CPA. See, e.g., *Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1311 (W.D. Wash. 2013); *Coppinger v. Allstate Ins. Co.*, 2018 WL 1121327 (W.D. Wash. Mar. 1, 2018) ; *Heide v. State Farm Auto. Ins. Co.*, 261 F. Supp. 3d 1104 (W.D. Wash. 2017). Under Washington law, the plain meaning rule requires that statutory provisions be interpreted in accordance with statutory language. See *Dep't of Ecology*, 146 Wn.2d at 10-12. A federal court exercising diversity jurisdiction and construing a state statute is required to apply the state's rules of statutory construction. See *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 746 (9th Cir. 2013). To the extent these federal decisions fail to examine or interpret the CPA and its interplay with the Insurance Code in accordance with state rules of statutory construction, their analysis is unhelpful here.

D. Federal Case Law Construing RICO To Bar Claims By Employees Arising Out Of Workplace Injuries Is Inapposite And Does Not Provide A Basis For Adopting The Restrictive Construction Of The CPA Urged By The Insurers.

Courts interpreting the CPA are to "be guided by final decisions of the federal courts ... interpreting the various federal statutes dealing with the same or similar matters." RCW 19.86.920. However, this Court declines to follow federal case law "where the language and structure of the CPA departs from otherwise analogous federal provisions." *State v. LG Electronics, Inc.*, 186 Wn.2d 1, 10, 375 P.3d 636 (2016). The Insurers urge the Court to follow cases from the Sixth Circuit interpreting the injury to "business or property" clause in the federal RICO statute, 18 U.S.C. § 1964(c). *See* USAA Op. Br. at 23; Progressive Op. Br. at 19-24.⁶

The Insurers' invitation to construe the CPA's "injury to business or property" clause in relation to the federal RICO statute should be rejected because the court's decisions there were grounded in concerns of federalism that are not present here. In *Jackson v. Sedgwick Claims Mgmt. Servs, Inc.*, 731 F.3d 556 (6th Cir. 2013), the court of appeals declined to interpret RICO to invade state worker's compensation law, explaining:

Our interpretation of the statute is confirmed by the principle that Congress typically does not upset the established distribution of power between federal and state governments without a clear

⁶ The closest corollary to RICO is not the CPA, but the Criminal Profiteering Act, RCW 9A.82. *See Winchester v. Stein*, 135 Wn.2d 835, 848, 959 P.2d 1077 (1998). RCW 19.86.920 directs courts to "be guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters." Contrary to the consumer protection purposes underlying the CPA, which are to "promote free competition in the marketplace for the ultimate benefit of the consumer," *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984), the purpose of RICO is to "combat organized crime." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L. Ed. 2d 931 (1979).

statement of its intent to do so. Concerns about federalism are particularly acute in this case, where the plaintiffs are using RICO to collaterally attack an administrative scheme created by state law to supplant personal injury tort claims. If Congress intended to recalibrate state and federal power in an area that has traditionally been the province of state government by placing federal courts in the position of reviewing a state agency's handling of charges of impropriety by parties appearing in front of it, we would expect a clear statement of Congress's intent to achieve such a result.

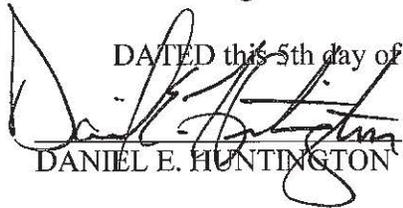
731 F.3d at 566-67; *see also Brown v. Ajax Paving Indus., Inc.*, 752 F.3d 656, 657 (6th Cir. 2014) (similar, noting “*Jackson* resolves this appeal” because it is a “carbon copy” of *Jackson*).

Here, the same legislative body – the Washington State Legislature – enacted the CPA and the Insurance Code. It expressly provided that violations of the Code are actionable under the CPA, and included no exceptions. *See* RCW 19.86.170. Nothing in the statutory text states or implies any legislative intent to treat PIP claims differently from any other claims. Rather, the statutory scheme, read as a whole, evidences the intent that *all* insurance transactions are imbued with public interest, and all unfair practices by insurers are subject to the enforcement provisions of the CPA.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving the issues on review.

DATED this 5th day of August, 2019.


DANIEL E. HUNTINGTON


for VALERIE D. MCOME

On behalf of WSAJ Foundation

Appendix

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| RCW 19.86.020 | A-1 |
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| RCW 19.86.170 | A-3 |
| RCW 19.86.920 | A-4 |
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| WAC 284-30-300 | A-15 |
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RCW 19.86.020

Unfair competition, practices, declared unlawful.

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

[1961 c 216 § 2.]

NOTES:

Hearing instrument dispensing, advertising, etc.—Application: RCW 18.35.180.

RCW 19.86.090

Civil action for damages—Treble damages authorized—Action by governmental entities.

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.

[2009 c 371 § 1; 2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

NOTES:

Application—2009 c 371: "This act applies to all causes of action that accrue on or after July 26, 2009." [2009 c 371 § 3.]

Effective date—2007 c 66: See note following RCW 19.86.080.

Intent—1987 c 202: See note following RCW 2.04.190.

Short title—Purposes—1983 c 288: "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter 19.86 RCW, and to repeal the unfair practices act, chapter 19.90 RCW, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter 19.86 RCW. In repealing chapter 19.90 RCW, it is the intent of the legislature that chapter 19.86 RCW should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law." [1983 c 288 § 1.]

RCW 19.86.170

Exempted actions or transactions—Stipulated penalties and remedies are exclusive.

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.

[1977 c 49 § 1; 1974 ex.s. c 158 § 1; 1967 c 147 § 1; 1961 c 216 § 17.]

NOTES:

Radio communications: RCW 80.04.530.

Telecommunications: RCW 80.36.360.

RCW 19.86.920

Purpose—Interpretation—Liberal construction—Saving—1985 c 401; 1983 c 288; 1983 c 3; 1961 c 216.

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

[1985 c 401 § 1; 1983 c 288 § 4; 1983 c 3 § 25; 1961 c 216 § 20.]

NOTES:

Reviser's note: "This act" originally appears in 1961 c 216.

Short title—Purposes—1983 c 288: See note following RCW 19.86.090.

RCW 48.01.020

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.

[1947 c 79 § .01.02; Rem. Supp. 1947 § 45.01.02.]

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**.

RCW 48.01.040

"Insurance" defined.

Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.

[1947 c 79 § .01.04; Rem. Supp. 1947 § 45.01.04.]

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Automobile" means a passenger car as defined in RCW **46.04.382** registered or principally garaged in this state other than:

(a) A farm-type tractor or other self-propelled equipment designed for use principally off public roads;

(b) A vehicle operated on rails or crawler-treads;

(c) A vehicle located for use as a residence;

(d) A motor home as defined in RCW **46.04.305**; or

(e) A moped as defined in RCW **46.04.304**.

(2) "Bodily injury" means bodily injury, sickness, or disease, including death at any time resulting from the injury, sickness, or disease.

(3) "Income continuation benefits" means payments for the insured's loss of income from work, because of bodily injury sustained by the insured in an automobile accident, less income earned during the benefit payment period. The combined weekly payment an insured may receive under personal injury protection coverage, worker's compensation, disability insurance, or other income continuation benefits may not exceed eighty-five percent of the insured's weekly income from work. The benefit payment period begins fourteen days after the date of the automobile accident and ends at the earliest of the following:

(a) The date on which the insured is reasonably able to perform the duties of his or her usual occupation;

(b) Fifty-four weeks from the date of the automobile accident; or

(c) The date of the insured's death.

(4) "Insured automobile" means an automobile described on the declarations page of the policy.

(5) "Insured" means:

(a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or

(b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

(6) "Loss of services benefits" means reimbursement for payment to others, not members of the insured's household, for expenses reasonably incurred for services in lieu of those the insured would usually have performed for his or her household without compensation, provided the services are actually rendered. The maximum benefit is forty dollars per day. Reimbursement for loss of services ends the earliest of the following:

(a) The date on which the insured person is reasonably able to perform those services;

(b) Fifty-two weeks from the date of the automobile accident; or

(c) The date of the insured's death.

(7) "Medical and hospital benefits" means payments for all reasonable and necessary expenses incurred by or on behalf of the insured for injuries sustained as a result of an automobile accident for health care services provided by persons licensed under Title **18** RCW, including pharmaceuticals, prosthetic devices and eyeglasses, and necessary ambulance, hospital, and

professional nursing service. Medical and hospital benefits are payable for expenses incurred within three years from the date of the automobile accident.

(8) "Automobile liability insurance policy" means a policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage suffered by any person and arising out of the ownership, maintenance, or use of an insured automobile. An automobile liability policy does not include:

(a) Vendors single interest or collateral protection coverage;

(b) General liability insurance; or

(c) Excess liability insurance, commonly known as an umbrella policy, where coverage applies only as excess to an underlying automobile policy.

(9) "Named insured" means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

(10) "Occupying" means in or upon or entering into or alighting from.

(11) "Pedestrian" means a natural person not occupying a motor vehicle as defined in RCW **46.04.320**.

(12) "Personal injury protection" means the benefits described in this section and RCW **48.22.085** through **48.22.100**. Payments made under personal injury protection coverage are limited to the actual amount of loss or expense incurred.

[**2003 c 115 § 1; 1993 c 242 § 1.**]

NOTES:

Severability—1993 c 242: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 242 § 7.**]

Effective date—1993 c 242: "Sections 1 through 5 of this act shall take effect July 1, 1994." [**1993 c 242 § 8.**]

RCW 48.22.085

Automobile liability insurance policy—Optional coverage for personal injury protection—Rejection by insured.

(1) No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage is offered as an optional coverage.

(2) A named insured may reject, in writing, personal injury protection coverage and the requirements of subsection (1) of this section shall not apply. If a named insured rejects personal injury protection coverage:

(a) That rejection is valid and binding as to all levels of coverage and on all persons who might have otherwise been insured under such coverage; and

(b) The insurer is not required to include personal injury protection coverage in any supplemental, renewal, or replacement policy unless a named insured subsequently requests such coverage in writing.

(3) The coverage under this section may be excluded as provided for under RCW 48.177.010(6).

[2015 c 236 § 8; 2003 c 115 § 2; 1993 c 242 § 2.]

NOTES:

Severability—Effective date—1993 c 242: See notes following RCW 48.22.005.

RCW 48.22.105

Rule making.

The commissioner may adopt such rules as are necessary to implement RCW **48.22.005** and **48.22.085** through **48.22.100**.

[**1993 c 242 § 9.**]

NOTES:

Severability—1993 c 242: See note following RCW **48.22.005**.

Unfair practices in general—Remedies and penalties.

(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**.

[2007 c 498 § 2 (Referendum Measure No. 67, approved November 6, 2007); **1997 c 409 § 107**; **1985 c 264 § 13**; **1973 1st ex.s. c 152 § 6**; **1965 ex.s. c 70 § 24**; 1947 c 79 § .30.01; Rem. Supp. 1947 § 45.30.01.]

NOTES:

Unreasonable denial of a claim for coverage or payment of benefits.

(1) Any 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, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

(4) "First party claimant" means an individual, corporation, association, partnership, or other legal entity asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract.

(5) A violation of any of the following is a violation for the purposes of subsections (2) and (3) of this section:

(a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined";

(b) WAC 284-30-350, captioned "misrepresentation of policy provisions";

(c) WAC 284-30-360, captioned "failure to acknowledge pertinent communications";

(d) WAC 284-30-370, captioned "standards for prompt investigation of claims";

(e) WAC 284-30-380, captioned "standards for prompt, fair and equitable settlements applicable to all insurers"; or

(f) An unfair claims settlement practice rule adopted under RCW **48.30.010** by the insurance commissioner intending to implement this section. The rule must be codified in chapter 284-30 of the Washington Administrative Code.

(6) This section does not limit a court's existing ability to make any other determination regarding an action for an unfair or deceptive practice of an insurer or provide for any other remedy that is available at law.

(7) This section does not apply to a health plan offered by a health carrier. "Health plan" has the same meaning as in RCW **48.43.005**. "Health carrier" has the same meaning as in RCW **48.43.005**.

(8)(a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. Proof of notice by mail may be made in the same manner as prescribed by court rule or statute for proof of service by mail. The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed.

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

(c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

(d) If a written notice of claim is served under (a) of this subsection within the time

prescribed for the filing of an action under this section, the statute of limitations for the action is tolled during the twenty-day period of time in (a) of this subsection.

[2007 c 498 § 3 (Referendum Measure No. 67, approved November 6, 2007).]

NOTES:

Short title—2007 c 498: "This act may be known and cited as the insurance fair conduct act." [**2007 c 498 § 1.**]

WAC 284-30-300

Authority and purpose.

RCW **48.30.010** authorizes the commissioner to define methods of competition and acts and practices in the conduct of the business of insurance which are unfair or deceptive. The purpose of this regulation, WAC 284-30-300 through **284-30-400**, is to define certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settlement practices. This regulation may be cited and referred to as the unfair claims settlement practices regulation.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-300, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-300, filed 7/27/78, effective 9/1/78.]

WAC 284-30-310

Scope of this regulation.

This regulation applies to all insurers and to all insurance policies and insurance contracts. This regulation is not exclusive, and acts performed, whether or not specified herein, may also be deemed to be violations of specific provisions of the insurance code or other regulations.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-310, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-310, filed 7/27/78, effective 9/1/78.]

Specific unfair claims settlement practices defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

(1) Misrepresenting pertinent facts or insurance policy provisions.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

(4) Refusing to pay claims without conducting a reasonable investigation.

(5) Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documentation has been submitted.

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.

(7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

(8) Attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.

(9) Making a claim payment to a first party claimant or beneficiary not accompanied by a statement setting forth the coverage under which the payment is made.

(10) Asserting to a first party claimant a policy of appealing arbitration awards in favor of insureds or first party claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring a first party claimant or his or her physician to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.

(12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(14) Unfairly discriminating against claimants because they are represented by a public adjuster.

(15) Failing to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days after notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of a draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.

(16) Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established. Except as to those instances where the

time for payment is governed by statute or rule or is set forth in an applicable contract, procedures which are not designed to deliver payment, whether by check, draft, electronic funds transfer, prepaid card, or other method of electronic payment to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to a claimant, it must do so within twenty working days after a settlement has been reached.

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.

(18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to a first party claimant to identify the claimant or to obtain details concerning the claim.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 16-20-050 (Matter No. R 2016-12), § 284-30-330, filed 9/29/16, effective 10/30/16; WSR 09-11-129 (Matter No. R 2007-08), § 284-30-330, filed 5/20/09, effective 8/21/09. Statutory Authority: RCW **48.02.060**, **48.44.050** and **48.46.200**. WSR 87-09-071 (Order R 87-5), § 284-30-330, filed 4/21/87. Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 78-08-082 (Order R 78-3), § 284-30-330, filed 7/27/78, effective 9/1/78.]

Standards for prompt, fair and equitable settlements applicable to automobile personal injury protection insurance.

The commissioner finds that some insurers limit, terminate, or deny coverage for personal injury protection insurance without adequate disclosure to insureds of their bases for such actions. To eliminate unfair acts or practices in accord with RCW **48.30.010**, the following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance specifically applicable to automobile personal injury protection insurance. The following standards apply to an insurer's consultation with health care professionals when reviewing the reasonableness or necessity of treatment of the insured claiming benefits under his or her automobile personal injury protection benefits in an automobile insurance policy, as those terms are defined in RCW **48.22.005** (1), (7), and (8), and as prescribed at RCW **48.22.085** through **48.22.100**. This section applies only where the insurer relies on the medical opinion of health care professionals to deny, limit, or terminate medical and hospital benefit claims. When used in this section, the term "medical or health care professional" does not include an insurer's claim representatives, adjusters, or managers or any health care professional in the direct employ of the insurer.

(1) Within a reasonable time after receipt of actual notice of an insured's intent to file a personal injury protection medical and hospital benefits claim, and in every case prior to denying, limiting, or terminating an insured's medical and hospital benefits, an insurer shall provide an insured with a written explanation of the coverage provided by the policy, including a notice that the insurer may deny, limit, or terminate benefits if the insurer determines that the medical and hospital services:

- (a) Are not reasonable;
- (b) Are not necessary;
- (c) Are not related to the accident; or
- (d) Are not incurred within three years of the automobile accident.

These are the only grounds for denial, limitation, or termination of medical and hospital services permitted pursuant to RCW **48.22.005**(7), **48.22.095**, or **48.22.100**.

The written explanation responsive to an insured's intent to file a personal injury protection medical and hospital benefits claim must also include contact information for the office of the Washington state insurance commissioner's consumer protection services, including the consumer protection division's hotline phone number and the agency's web site address, and a statement that the consumer may contact the office of the insurance commissioner for assistance with questions or complaints.

(2) Within a reasonable time after an insurer concludes that it intends to deny, limit, or terminate an insured's medical and hospital benefits, the insurer shall provide an insured with a written explanation that describes the reasons for its action and copies of pertinent documents, if any, upon request of the insured. The insurer shall include the true and actual reason for its action as provided to the insurer by the medical or health care professional with whom the insurer consulted in clear and simple language, so that the insured will not need to resort to additional research to understand the reason for the action. A simple statement, for example, that the services are "not reasonable or necessary" is insufficient.

(3)(a) Health care professionals with whom the insurer will consult regarding its decision to deny, limit, or terminate an insured's medical and hospital benefits shall be currently licensed, certified, or registered to practice in the same health field or specialty as the health care

professional that treated the insured.

(b) If the insured is being treated by more than one health care professional, the review shall be completed by a professional licensed, certified, or registered to practice in the same health field or specialty as the principal prescribing or diagnosing provider, unless otherwise agreed to by the insured and the insurer. This does not prohibit the insurer from providing additional reviews of other categories of professionals.

(4) To assist in any examination by the commissioner or the commissioner's delegatee, the insurer shall maintain in the insured's claim file sufficient information to verify the credentials of the health care professional with whom it consulted.

(5) An insurer shall not refuse to pay expenses related to a covered property damage loss arising out of an automobile accident solely because an insured failed to attend, or chose not to participate in, an independent medical examination requested under the insured's personal injury protection coverage.

(6) If an automobile liability insurance policy includes an arbitration provision, it shall conform to the following standards:

(a) The arbitration shall commence within a reasonable period of time after it is requested by an insured.

(b) The arbitration shall take place in the county in which the insured resides or the county where the insured resided at the time of the accident, unless the parties agree to another location.

(c) Relaxed rules of evidence shall apply, unless other rules of evidence are agreed to by the parties.

(d) The arbitration shall be conducted pursuant to arbitration rules similar to those of the American Arbitration Association, the Center for Public Resources, the Judicial Arbitration and Mediation Service, Washington Arbitration and Mediation Service, chapter **7.04** RCW, or any other rules of arbitration agreed to by the parties.

[Statutory Authority: RCW **48.02.060** and **48.22.105**. WSR 12-19-081 (Matter No. R 2012-13), § 284-30-395, filed 9/18/12, effective 4/1/13. Statutory Authority: RCW **48.02.060**, **48.22.105** and **48.30.010**. WSR 97-13-005 (Matter No. R 96-6), § 284-30-395, filed 6/5/97, effective 7/6/97.]

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 5th day of August, 2019, I served the foregoing document by email to the following persons:

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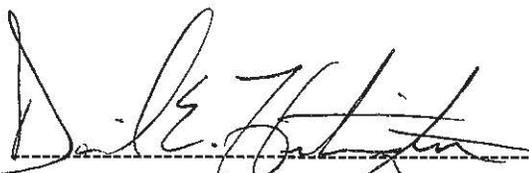
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