

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/3/2019 10:35 AM  
BY SUSAN L. CARLSON  
CLERK

Supreme Court No. 96931-1  
(United States District Court, Western District of Washington, Case No.  
C18-1173RSL (Consolidated with Case No. C18-1254RSL))

SUPREME COURT  
OF THE STATE OF WASHINGTON

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

KRISTA PEOPLES,  
*Appellee/Plaintiff,*

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL.  
*Appellant/Defendants*

AND

JOEL STEDMAN, ET AL.  
*Appellees/Plaintiffs,*

v.

PROGRESSIVE DIRECT INSURANCE COMPANY,  
*Appellant/Defendant.*

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**APPELLANT PROGRESSIVE DIRECT INSURANCE  
COMPANY'S OPENING BRIEF**

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## CERTIFIED QUESTIONS

The United States District Court for the Western District of Washington certified two questions to this Court concerning the injury to “business or property” element of a Washington Consumer Protection Act (“CPA”) claim (emphasis added):

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?*

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 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?*

As explained below, the Court should answer the first certified question “No” because well-established Washington law holds that medical expenses resulting from personal injuries are not CPA injuries to business or property. The Court should decline to answer the second certified question because its three alternative injury theories are insufficiently developed on this record for the Court to issue anything other than

hypothetical and advisory answers. If the Court chooses to reach the second question, it should answer it “No” as presented.

### **STATEMENT OF THE CASE**

The certified questions come to this Court on a motion to dismiss and a motion for judgment on the pleadings posture. The federal court therefore assumed Plaintiffs/Appellees Stedman and Joyce’s (“Insureds”) well-pled factual allegations were true. Progressive does the same here due to that standard but does not admit the truth of any factual allegations and does not assume the truth of any arguments or legal conclusions.<sup>1</sup>

The Insureds were beneficiaries of Personal Injury Protection coverage (“PIP”) under Progressive automobile insurance policies when they were involved in automobile accidents. Dkt. 11 ¶¶ 2.3, 5.7, 5.16.<sup>2</sup> The Insureds suffered personal injuries in their accidents. *Id.* ¶¶ 5.8, 5.17. The Insureds then opened PIP claims with Progressive seeking payment for medical treatment they claim was related to their automobile accident personal injuries. *Id.* ¶¶ 5.8, 5.17. After paying PIP benefits for certain of the Insureds’ medical treatment, Progressive requested them to undergo independent medical examinations (“IME”) and then denied them further

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<sup>1</sup> For brevity purposes only, Progressive recites the Insureds’ allegations as if they were true without stating “The Insureds allege...” in each instance.

<sup>2</sup> Unless otherwise indicated, Dkt. citations are to the underlying Progressive federal case record. Citations to USAA’s consolidated case record are indicated “USAA Dkt.”

PIP benefits allegedly by contending they had reached maximum medical improvement (“MMI”). *Id.* ¶¶ 5.11-12, 5.20-21.

The Insureds claim that Progressive’s denial of additional PIP benefits after their IMEs, allegedly on the basis of MMI, was unlawful because Washington insurance regulations allow PIP benefits to be denied only if the treatment is not reasonable, necessary, related to the accident, or incurred within three years of the accident. *See id.* ¶¶ 5.2-5.4. On this theory, they asserted five causes of action for declaratory relief, violation of the Insurance Fair Conduct Act, violation of the CPA, common law bad faith, and breach of the implied covenant of good faith and fair dealing. *Id.* at 9-12. Only the CPA claim is at issue here.

The Insureds allege they were injured by denial of PIP benefits partway through their treatment and seek to recover damages measured by “the amount of any and all medical expenses incurred by claimants following [Progressive’s] denial of PIP benefits using MMI as a criterion for the termination, limitation, or denial of future benefits . . . .” *Id.* Prayer for Relief ¶ 10. The Insureds allege no facts and seek no damages for “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” as described in the second certified question. *See* Dkt. 11.

In the federal court, Progressive moved for partial judgment on the pleadings. Dkt. 19. Progressive argued that the Insureds' CPA claims fail as a matter of law because the only damages they seek to recover—payment of medical expenses resulting from personal injuries—are not cognizable CPA injuries to “business or property”. Dkt. 19 at 6-8; 21 at 6-10; *see* RCW 19.86.090. Because the Insureds did not allege any injury theories or damages other than unpaid medical expenses resulting from their personal injuries, Progressive's motion did not address the alternative injury theories of investigation expenses, lost time, and excess premiums listed in the second certified question. Dkt. 19.

In opposition to Progressive's motion, the Insureds argued for the first time—despite not having alleged it—that they “suffered an injury to their property (time) when Progressive scheduled their medical examinations with a physician of Progressive's choice” in which the examiner “address[ed] whether the individual plaintiffs had reached maximum medical improvement.” Dkt. 20 at 19. In the same opposition brief, the Insureds also asked for leave to amend “to show the damage claimed also relates to the premiums they were charged for PIP coverage.” *Id.* at 21, 18 n.10. The Insureds have never alleged or argued that they incurred “costs of investigating the unfair acts” as described in the second certified question. *See* Dkts. 11 and 20.

The federal court declined to rule on Progressive's CPA injury arguments and certified the present questions by separate order. Dkts. 27-28. In its order on Progressive's motion, the federal court denied the Insureds' request to amend their complaint. Dkt. 27 at 7 n.4. The Insureds' First Amended Complaint, which seeks damages only for "the amount of any and all medical expenses incurred by claimants following Defendant's denial of PIP benefits" remains the operative pleading. Dkt. 11.

### **SUMMARY OF THE ARGUMENT**

The answer to the first certified question of whether medical expenses resulting from personal injuries are CPA injuries to "business or property" is "No." Washington and federal court cases interpreting requirements for injury to "business or property" have correctly excluded from its ambit all personal injuries and expenses resulting from them. This holds true regardless of whether the defendant is the tortfeasor who caused the personal injuries or an insurer, and regardless of how the plaintiff attempts to characterize the "wrong" in the asserted legal theory. The proper focus, as this Court's decisions demonstrate, is solely on whether the underlying injury for which the plaintiff seeks compensation is a personal injury, not on the defendant's identity or the legal theory asserted.

The Court should decline to answer the second question in this case asking whether "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" are CPA injuries to "business or property." None of these three alternative injury theories were adequately pled, developed, or argued in the federal court, rendering any decision on them impermissibly hypothetical and advisory.

But if the Court reaches the second question, it should find that: (1) mere loss of time is not a viable CPA injury to "business or property;" (2) there is no need to address investigation expenses because this Court's existing precedent already addresses that injury theory on better-developed factual records; and (3) the filed-rated doctrine bars any injury theory seeking to recover "excess premiums." The Court should therefore decline to answer the second certified question or answer it "No" as presented.

### **ARGUMENT**

**I. The Court should answer the first certified question "No" because medical expenses resulting from personal injuries are not CPA injuries to "business or property."**

A. Under this Court's precedent, medical expenses resulting from personal injuries are not CPA injuries to business or property, regardless of who the plaintiff sues or the plaintiff's theory of the alleged wrong.

This Court's decision in *Ambach v. French* precludes recovery under the CPA for any damages resulting from personal injuries, including expenses for medical treatment related to personal injuries. 167 Wn.2d 167, 169, 216 P.3d 405 (2009). The *Ambach* plaintiff sued her surgeon for

malpractice and CPA violations after she developed infections from a surgery. *Id.* at 170. The trial court dismissed the CPA claim, finding that her damages were not an injury to “business or property” because they were the same damages recoverable on a tort personal injury claim. *Id.* at 171.

The Court of Appeals reversed, concluding that economic losses allegedly resulting from the surgeon inducing the plaintiff to elect a higher-cost surgery over more conservative treatment could be recoverable under the CPA even if damages for personal injury were not. *Id.*; see *Ambach v. French*, 141 Wn. App. 782, 790, 173 P.3d 941 (2007) (“[A]llegations of economic loss due to the increased cost of surgery over the cost of more conservative treatment are sufficient to satisfy the damages requirement.”). In other words, the Court of Appeals characterized the wrong as deceptive inducement to elect surgery and found that the higher cost of the surgery resulting from that deception was recoverable. *See id.*

This Court reversed the Court of Appeals. 167 Wn.2d at 179. Rejecting the Court of Appeals’ focus on the nature of the alleged wrong, this Court turned the focus solely to the nature of the plaintiff’s injury and concluded that “what she really seeks is redress for her personal injuries, not injury to her business or property.” *Id.* at 178-79. The Court then held that the plaintiff failed to state a CPA claim, reasoning that “payment for medical treatment, like Ambach’s payment for surgery, does not transform

medical expenses into business or property harm.” *Id.* at 175; *see also Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014) (“The financial consequences of such personal injuries are also excluded” as cognizable CPA injuries to business or property.).

The *Ambach* Court anchored its holding on the underlying concern that “the CPA was not designed to give personal injury claimants such backdoor access to compensation they were denied in their personal injury suits.” *Ambach*, 167 Wn.2d at 179 n.6. Implicit in this concern was the Court’s acknowledgment that reframing the alleged wrong is necessarily irrelevant. *See id.* Any CPA plaintiff necessarily has to allege and prove a theory of wrongful conduct different from a tort personal injury claim. If pleading a CPA wrong—*e.g.*, deceptive conduct—made personal injury medical expenses recoverable, the Court would have stopped there and allowed recovery. Instead, the Court looked only to the nature of the injury being medical expenses resulting from personal injury and denied recovery.

*Ambach* relied in part on this Court’s earlier decision in *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, which consistently focused only on the nature of the injury. 122 Wn.2d 299, 858 P.2d 1054 (1993). In *Fisons*, a doctor who had been sued for malpractice by a patient who suffered an adverse reaction to a medication the doctor prescribed sued the drug company that made the medication under the CPA and other

theories. *Id.* at 306-07. On appeal from a judgment awarding the doctor damages, in part for pain and suffering, this Court addressed for the first time “whether personal injuries are recoverable under a CPA claim.” *Id.* at 317. Citing federal precedent interpreting the same injury to “business or property” requirement in the federal Sherman and Clayton Act contexts, this Court concluded that personal injuries are not recoverable because they are not injuries to “business or property” and held that the doctor could not recover pain and suffering damages under the CPA. *Id.* at 318.

Given that both *Ambach* and *Fisons* disregarded the nature of the alleged CPA wrong and focused solely on the nature of the alleged injures, the only arguable difference between those cases and this case is the defendant’s identity. In certifying the questions here, the federal court noted this difference in observing that the Insureds were seeking CPA recovery from their insurance company rather than the tortfeasors who injured them. Dkt. 28 at 4-5. But the defendant’s identity does not change the nature of the injury any more than characterization of the wrong does.

Under both *Ambach* and *Fisons*, the defendant’s identity and role in causing the personal injuries are irrelevant. *Ambach*’s central concern that “the CPA was not designed to give personal injury claimants such backdoor access to compensation they were denied in their personal injury suits” presupposes a plaintiff seeking redress for personal injuries from a

defendant other than the tortfeasor who caused the personal injuries. *See* 167 Wn.2d at 178-79, 179 n.6; *see also Williams v. Lifestyle Lift Holdings, Inc.*, 175 Wn. App. 62, 72, 302 P.3d 523 (2013) (citing same passage as *Ambach*'s "overriding concern").

And *Fisons*' earlier reasoning reflects the same concern for backdoor compensation regardless of the defendant's identity. *Fisons* noted that the doctor's pain and suffering personal injuries were caused by both the CPA-defendant drug company and by the injured patient's malpractice suit. 122 Wn.2d at 319 n.19. Yet *Fisons* held that personal injuries are not compensable under the CPA despite this dual causation because the facts raised the same concern over "backdoor access" to personal injury compensation. *See id.* at 317-18. The doctor in *Fisons* was presumably unable to collect damages for pain and suffering caused by being sued for malpractice from the patient suing him for malpractice, so he sought backdoor access to the same damages from the drug company instead. *See id.* at 307. Changing the defendant did not change the outcome.

In sum, *Ambach* and *Fisons* dictate that medical expenses resulting from personal injuries are not CPA injuries to business or property—regardless of how a plaintiff characterizes the wrong or who the plaintiff sues. The Court should follow its precedent and hold that claims to recover

personal injury medical expenses from insurers under a CPA theory of wrongful conduct fail as a matter of law.

- B. An unbroken line of Washington federal cases interpreting *Ambach* supports applying it to bar CPA claims against insurers seeking damages for medical expenses resulting from personal injuries.

Consistent with *Ambach* and *Fisons*' focus solely on the nature of the injury rather than characterization of the wrong or the defendant's identity, an unbroken line of Washington federal cases has followed *Ambach* to hold that insureds may not recover personal injury medical expenses from their insurers under the CPA. *See Coppinger v. Allstate Ins. Co.*, 2018 WL 1121327, at \*1-2 (W.D. Wash. Mar. 1, 2018); *Heide v. State Farm Mut. Auto. Ins. Co.*, 261 F. Supp. 3d 1104, 1110 (W.D. Wash. 2017); *Kovarik v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4555465, at \*3 (W.D. Wash. Aug. 31, 2016); *Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310-12 (W.D. Wash. 2013); *Haley v. Allstate Ins. Co.*, 2010 WL 4052935, at \*8 (W.D. Wash. Oct. 13, 2010), *on reconsideration in part*, 2010 WL 5224132 (W.D. Wash. Dec. 14, 2010); *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203, at \*4 (W.D. Wash. Sept. 17, 2010); *Sadler v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 4371661, at \*8-9 (W.D. Wash. Sept. 22, 2008) *aff'd*, 351 F. App'x 234, 236 (9th Cir. 2009).

Relying on *Ambach*, none of these courts found it relevant that the plaintiff was seeking to recover personal injury medical expenses from their insurer rather than the tortfeasor. And none of them found it relevant that the conduct allegedly wrongful under the CPA was different from a personal injury theory of wrongful conduct. *See, e.g., Kovarik*, 2016 WL 4555465, at \*3 (rejecting plaintiff’s argument that the CPA injury was “a wrongful deprivation of [the] policy’s benefits.”). Consistent with *Ambach* and *Fisons*, these cases focused solely on the nature of the claimed personal injuries in rejecting the CPA claims. The Court should do the same here.

- C. Washington state courts have not indicated that *Ambach* allows CPA recovery of medical expenses resulting from personal injuries from insurers or anyone else.

In its certification order, the federal court wrote that notwithstanding the consistent body of federal authorities, there was “some indication that the state courts interpret *Ambach* more narrowly and have not yet embraced a categorical bar against CPA claims brought by an injured insured.” Dkt. 28 at 5-6 (citing *Williams*, 175 Wn. App. at 73 and *Hayes v. USAA Cas. Ins. Co.*, 185 Wn. App. 1055, 2015 WL 677143 at \*5-6 (2015)). That statement is true—as far as it goes. But it does not answer the question presented in this case. There may be no categorical bar against CPA claims brought by an injured insured, but neither of the cases the federal court cited for that “indication” stand for the proposition that an insured may bring a CPA

claim against an insurer *to recover medical expenses resulting from personal injuries*.

In *Williams*, the Court of Appeals did not permit the plaintiff to recover any medical expenses resulting from personal injuries on her CPA claim. 175 Wn. App. at 73-74. After her “Lifestyle Lift” cosmetic procedure injured her, the plaintiff sued the medical practice that performed the procedure and the licensor of the procedure’s trademark under the CPA and other theories. *Id.* at 65, 68-69. She sought pain and suffering damages and other economic damages, including the \$4,600 she paid for the surgery, which she claimed was deceptively marketed to her. *Id.* at 69, 72.

The *Williams* court did allow part of the CPA claim to survive, but it limited the claim to seeking a refund of the \$4,600 cost of the deceptively marketed surgery. *Id.* at 74. The court distinguished *Ambach* on grounds that the *Williams* plaintiff’s CPA claim “does not depend on proof that she sustained a personal injury as a result of the surgery” and would be viable even if the surgery had not injured her. *Id.* at 73-74. Or stated differently, the cost of the surgery was not a cost *resulting from* her personal injuries, such as her post-surgical medical expenses to treat her injuries. *See id.* at 69; 73-74. Notably, the *Williams* plaintiff also sought damages for those medical expenses to treat her personal injuries, but the court did not allow their recovery under the CPA. *See id.*

*Williams*' reasoning is consistent with *Ambach* and does not support the conclusion that the Insureds here should be permitted to recover PIP benefits for their personal injury medical expenses under the CPA. Unlike the cost of surgery that was recoverable in *Williams* absent proof of personal injury, the claim to recover PIP benefits for medical expenses resulting from personal injuries here depends directly on proof of those underlying personal injuries because PIP only covers personal injuries. *Williams*' reasoning would, at most, only allow the Insureds to recover something *other than* their personal injury medical expenses—*i.e.*, something akin to the cost of the deceptively marketed surgery. The Insureds did not allege any similar injury theory here and this Court cannot opine on any such theory because the federal court's certified questions do not encompass one. *See* Dkts. 11 and 28; *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (“[T]he court lacks jurisdiction to go beyond the question certified.”).

The other case cited in the federal court's certification order, *Hayes v. USAA Cas. Ins. Co.*, is an unpublished, non-binding opinion. 185 Wn. App. 1055, 2015 WL 677143 (Feb. 17, 2015); *see* GR. 14.1(a) (“Unpublished opinions of the Court of Appeals have no precedential value and are not binding upon any court.”). And critically, the discussion of out-of-pocket medical costs as potential CPA injuries in *Hayes* is merely

background, recounting the early history of the case in the trial court. 2015 WL 677143 at \*6-10. On appeal, the Court of Appeals did not decide, and had no occasion to decide, whether out-of-pocket costs or anything else would be cognizable CPA injuries to business or property. *Id.* at \*9-10. It merely affirmed on the narrow basis that the plaintiffs were limited by judicial estoppel to one injury theory and failed to produce any evidence of damages fitting within that theory. *Id.* at \*9-10.

In sum, neither of the Washington appellate cases the federal court cited indicate any departure in the insurance context from *Ambach*'s bar on recovering medical expenses resulting from personal injuries on a CPA claim. As addressed in the next section, the remainder of the cases the federal court cited in certifying these questions are inapposite because they do not even address arguments under *Ambach*.

- D. The Washington state court cases cited in the certification order in which insureds' CPA claims against insurers have been allowed to proceed considered injury theories other than recovery of medical expenses resulting from personal injuries and did not consider arguments based on *Ambach*.

The federal court's certification order also noted that Washington state courts have allowed insureds' CPA claims against insurers to proceed despite seeking reimbursement for personal injury medical expenses. Dkt. 28 at 3-4 (citing five cases). But none of the cases cite or address *Ambach*

and none support the proposition that *Ambach* permits insureds to recover personal injury medical expenses from their insurers on a CPA claim.

Three of the cases the federal court cited pre-date *Ambach* and do not address any argument that personal injury medical expenses are not qualifying CPA injuries because the argument was not raised. *See Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 333, 2 P.3d 1029 (2000), *review denied*, 142 Wn.2d 1017 (2001); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 496-97, 983 P.2d 1129 (1999), *aff'd*, 142 Wn.2d 784 (2001); *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 386-88, 743 P.2d 832 (1987), *review denied*, 109 Wn.2d 1025 (1988).<sup>3</sup> The other two cases are post-*Ambach*, but also do not cite *Ambach* or address an argument that the CPA does not permit damages for personal injury medical expenses because, again, the argument was not raised. *Keodalah v. Allstate Ins. Co.*, 3 Wn. App. 2d 31, 41-43, 413 P.3d 1059 (2018), *review granted*, 191 Wn.2d 1004 (2018); *Nelson v. Geico Gen. Ins. Co.*, 192 Wn. App. 1007, 2016 WL 112475, at \*8-9 (2016) (unpublished).

Moreover, four of the five cases addressed UIM coverage, which is different from PIP coverage for CPA injury purposes because that coverage

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<sup>3</sup> Disapproved of by *Ellwein v. Hartford Acc. & Indem. Co.*, 142 Wn.2d 766, 781 n. 10, 15 P.3d 640 (2001), and disapproved of by *In re of Azula*, 104 Wn. App. 1038, 2001 WL 111968, at \*1 n.1 (2001) (unpublished).

can apply to physical property damage while PIP coverage cannot. *See Keodalah*, 3 Wn. App. 2d at 33; *Nelson*, 2016 WL 112475, at \*1, 8 (PIP and UIM, but PIP coverage not at issue because policy limits exhausted); *Anderson*, 101 Wn. App. at 326; *Escalante*, 49 Wn. App. at 378. Although those cases did not explicitly address claims to recover physical property damage, it was at least possible there for the plaintiffs to claim physical property damage as a CPA property injury. That is not possible here because PIP only covers personal injuries.

Finally, to the extent the cases discuss CPA injury theories other than payment for personal injury medical expenses, the courts did not consider their viability under *Ambach* or hold that they are viable post-*Ambach*. *Nelson*, 2016 WL 112475, at \*8-9 (delay in receiving payment, costs of hiring an attorney, cost of investigation); *Anderson*, 101 Wn. App. at 332-33 (loss of interest on money, financial penalties attributable to delayed payment, emotional distress); *Van Noy*, 98 Wn. App. at 497 (expenses of incurring medical treatment that plaintiffs would not have incurred absent delay in determination that expenses were not covered).<sup>4</sup>

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<sup>4</sup> This Court has since held that neither attorneys' fees incurred in initiating a CPA claim nor emotional distress damages are viable CPA injuries, undercutting any notion that these cases' discussions of alternative injury theories means they were or remain viable. *See Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 57, 62, 204 P.3d 885 (2009) ("damages for mental distress, embarrassment, and inconvenience" and costs incurred in "consulting an attorney to institute a CPA claim" not viable CPA injuries).

Regardless, none of these alternative injury theories are issues certified to this Court or alleged in the consolidated cases, with the sole exception of investigation costs, which is part of the second certified question and discussed below. Because they are not issues certified to this Court, they cannot be decided here. *See Broad*, 141 Wn.2d at 676 (“[T]he court lacks jurisdiction to go beyond the question certified.”).

In sum, none of these Washington cases considered *Ambach* or held that medical expenses resulting from personal injuries are cognizable CPA injuries post-*Ambach* when sought from an insurer. As addressed in the next section, there is no persuasive reasoning for departing from *Ambach* and *Fisons* when the defendant is an insurer.

- E. Federal precedent interpreting injuries to “business or property” in other contexts shows that neither re-characterization of the alleged wrong nor the defendant’s identity can make damages for personal injuries recoverable because the focus is solely on the nature of the injury.

The federal court’s certification order did not indicate why the court thought a departure from *Ambach* was conceivable here, except that the defendants are insurance companies. *See* Dkt. 28. Progressive can only assume the federal court saw some potential significance in the defendant not being the personal injury tortfeasor or the fact that the Insureds are alleging a secondary CPA “wrong” in Progressive denying their claims, distinct from the underlying personal injury wrong. But such theories

cannot displace *Ambach*'s holding that expenses resulting from personal injury are not CPA injuries to business or property.

First, as addressed in the discussion of *Ambach* and *Fisons* above, any CPA plaintiff, including the plaintiff in *Ambach*, necessarily has to allege a “wrong” apart from the tort causing their personal injuries because a CPA claim requires proving different elements from a tort personal injury claim. If that secondary layer of alleged “wrong” allowed a CPA claim to survive despite the plaintiff seeking to recover for personal injury medical expenses, it would vitiate *Ambach*'s holding. The same is true of the Clayton and Sherman Acts this Court looked to in *Ambach* because a plaintiff suing under either statute necessarily has to allege and prove a wrong apart from the tort causing their personal injuries.

Consistent with this reality, federal courts interpreting injuries to “business or property” in other contexts have rejected exactly these types of theories that alleging a secondary wrong or suing someone other than the tortfeasor can transform personal injuries into recoverable “business or property” injuries. Just as this Court looked to analogous federal guidance under RCW 19.86.920 when it decided *Fisons* and *Ambach*, it should look to similar federal guidance here. Like the Clayton and Sherman Acts this Court looked to before, the federal RICO statute also requires an injury to “business or property.” 18 U.S.C. § 1964(c). Interpreting that injury

requirement, federal courts have held that how the plaintiff characterizes the wrong and the defendant's identity are both irrelevant to whether a claim impermissibly seeks personal injury expenses. These well-reasoned cases say explicitly what *Ambach* and *Fisons* say implicitly.

For example, in *Brown v. Cassens Transp. Co.* (“*Brown I*”) the plaintiffs sued their self-insured employer and its claims administrator alleging a scheme to deny workers’ compensation insurance benefits by deliberately selecting unqualified doctors to give erroneous medical opinions on their workplace injuries. 743 F. Supp. 2d 651, 654 (E.D. Mich. 2010), *rev’d*, 675 F.3d 946 (6th Cir. 2012).<sup>5</sup> The *Brown I* plaintiffs claimed “they were deprived of workers’ compensation benefits, and incurred attorneys’ fees, medical care expenses and mileage to and from medical care and claim damages measured by the amount of benefits improperly withheld from [them] . . .” *Id.* at 674 (internal quotations omitted; substitution in original). Addressing RICO’s injury to “business or property” requirement, the court held that the plaintiffs’ claimed damages did not qualify because they “unquestionably were incurred as a direct result

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<sup>5</sup> The opinion reversing this decision was later overruled on the same issue by the Sixth Circuit, *en banc*, as discussed below.

of Plaintiffs’ on-the-job injuries” and “[b]ut for their workplace injuries, Plaintiffs would have no claim at all.” *Id.*<sup>6</sup>

In reaching this result, the *Brown I* court reasoned that it was irrelevant that the workers’ compensation scheme allowed the plaintiffs to recover medical expenses without proving the elements normally required for a personal injury claim because that did “not change the nature of their claims—they seek to recover for injuries they allege that they suffered while working for [their employer] and they seek medical benefits and related expenses.” *Id.* The court found this true “[r]egardless of how Plaintiffs characterize the wrong.” *Id.*<sup>7</sup>

The Sixth Circuit reversed in *Brown v. Cassens Transp. Co.* (“*Brown II*”), finding that personal injuries could be transformed into

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<sup>6</sup> This is the opposite of the Washington Court of Appeals’ reasoning in *Williams v. Lifestyle Lift Holdings*, where the court found the CPA claim viable because it did *not* depend on the existence of personal injury damages. See Part I.C. above.

<sup>7</sup> As to attempts to recharacterize the wrong, see also *Fisher v. Halliburton*, 2009 WL 5170280, at \*5 (S.D. Tex. Dec. 17, 2009) (rejecting RICO claim on injury element because “Plaintiffs confuse the issue by arguing that their ‘injury to property’ was not caused by personal injuries, but rather by Halliburton’s alleged predicate acts: mail fraud and wire fraud. Ultimately, plaintiffs’ alleged ‘continued compensation’ loss occurred as a direct result of plaintiffs’ personal injuries.”); *Vavro v. Albers*, 2006 WL 2547350, at \*21 (W.D. Pa. Aug. 31, 2006) (“With regard to the ‘injury’ prong of the standing test, Plaintiff alleges that his ‘property interest in his PMI was damaged [as a result of] defendants’ violations of 42 U.S.C. § 1320d-6(b) . . . .’ However, all of the injuries Plaintiff claims to have suffered constitute either personal injuries . . . or financial injuries that derive from the alleged personal injuries (i.e., incurred medical bills for treatment and care, loss of income, diminished earning capacity, and other substantial economic losses), none of which are deemed compensable under RICO.”), *aff’d sub nom.*, *Vavro v. A.K. Steel Co.*, 254 F. App’x 134 (3d Cir. 2007).

property injuries by an “intervening legal entitlement” and that personal injury can be converted into a property right when “filtered through” workers’ compensation. 675 F.3d 946, 959-65 (6th Cir. 2012). This reasoning is similar to the notion the federal court raised here in suggesting the possibility that personal injury damages could potentially be recoverable under the CPA when sought from an insurer. *See* Dkt. 28 at 4-5.

But the Sixth Circuit sitting *en banc* overruled *Brown II* in *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.* by rejecting that intervening legal entitlement theory. 731 F.3d 556 (6th Cir. 2013). In *Jackson*, the Sixth Circuit pointedly addressed whether personal injuries somehow become property injuries when filtered through insurance. *Id.* at 566. The Court found that *Brown II* “ignored the underlying reality that an award of benefits under a workers’ compensation system and any dispute over those benefits are inextricably intertwined with a personal injury giving rise to the benefits.” *Id.* The court therefore held that “racketeering activity leading to a loss or diminution of benefits the plaintiff expects to receive under a workers’ compensation scheme does not constitute an injury to ‘business or property’ under RICO.” *Id.*

The next year in *Brown v. Ajax Paving Indus., Inc.*, the Sixth Circuit addressed a plaintiff’s argument that *Jackson*’s result was limited to disputes between employees and employers and did not apply to claims

against insurers, claims administrators, and doctors. 752 F.3d 656, 657-58 (6th Cir. 2014). The Sixth Circuit again held that personal injury damages were not recoverable injuries to business or property, reasoning that RICO’s “applicability turns on the nature of the *injury*—that the plaintiff was ‘injured in his business or property’” and “does not turn on the nature of *the defendant*.” *Id.* at 658 (emphasis in original). The court also observed that it could not “see how the same harm, loss of expected workers’ compensation benefits, could count as an injury to business or property against some defendants but not against other defendants.” *Id.*; *see also Gucwa v. Lawley*, 731 F. App’x 408, 412 (6th Cir. 2018) (applying *Jackson* to bar RICO claims for medical expenses against independent medical examiners over argument that *Jackson* did not extend to doctors).<sup>8</sup>

The Court should adopt the reasoning of these cases here to hold that the Insureds’ personal injury medical expenses do not transform into CPA

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<sup>8</sup> In contrast, it can matter for injury purposes who *the plaintiff* is. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Warren Chiropractic & Rehab Clinic P.C.*, 2015 WL 4724829, at \*12 (E.D. Mich. Aug. 10, 2015) (distinguishing *Jackson* and allowing insurance company’s RICO claim against medical providers alleging that providers submitted false claims for costs of medically unnecessary procedures because the plaintiff was a commercial enterprise whose business and property were injured) citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339–340, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979), which this Court cited in *Ambach* and *Fisons*. This is the same reason why the Washington Court of Appeals found a sufficiently pled CPA injury in *Folweiler Chiropractic, PS v. Am. Family Ins. Co.*, which concerned a chiropractic practice’s CPA claim against an insurance company. 5 Wn. App. 2d 829, 839-40, 429 P.3d 813 (2018). But when the plaintiff is the person who suffered personal injuries and seeks to recover expenses for them, as here, the distinction drawn in these types of cases cannot apply.

injuries to business or property merely because they seek them from their insurer under a different theory of wrongful conduct than a personal injury tort claim. Consistent with *Ambach*, *Fisons*, and well-settled Washington law, these cases all started from the same premise the Court must start with here: personal injuries, including their resulting expenses, are not injuries to “business or property.” From that premise, these cases properly held that neither alleging a secondary wrong nor suing a defendant other than the tortfeasor changes the analysis because the focus is solely on the nature of the injury. The Court should reach the same holding here and answer the first certified question “No.”

**II. The Court should decline to answer the second certified question because the three alternative CPA injury theories it presents are abstract, hypothetical, and lack sufficient record facts for the Court to render anything other than an advisory opinion.**

RCW 2.60.020 allows this Court to answer certified questions “[w]hen in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state *in order to dispose of such proceeding* and the local law has not been clearly determined . . .” (emphasis added). This Court answers certified questions that do not require advisory opinions because the decision to answer a question entails the Court determining that the ruling would not be advisory so that it can “dispose of such [federal] proceeding.” RCW 2.60.020; *see*

*Certification from the United States Court of Appeals for the Ninth Circuit in Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 186 Wn.2d 58, 65, 375 P.3d 651 (2016) (once the Court decides to answer a certified question, it is not advisory); *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 337, 334 P.3d 14 (2014) (same).<sup>9</sup> Because the certified question statute is permissive, “a certified question which does not meet the criteria of the certification act can be summarily rejected.” *In re Elliott*, 74 Wn.2d at 617.

For a decision not to be advisory, it must be limited to the established facts of the case presented rather than hypotheticals or speculation. *See Hutchinson v. Port of Benton*, 62 Wn.2d 451, 455-56, 383 P.2d 500 (1963); *Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 335, 771 P.2d 340 (1989) (“To decide this case upon neither the facts presented nor the applicable law would constitute an advisory opinion.”);

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<sup>9</sup> Although this Court in rare cases will render advisory opinions, it does so “with great reluctance and only when there are urgent and convincing reasons for doing so[.]” *In re Elliott*, 74 Wn.2d 600, 616, 446 P.2d 347 (1968). The Court will render advisory opinions only where “the question is one of great public interest and has been brought to the court’s attention in the action where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government[.]” *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972) (constitutional interpretation); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001) (finding no justiciable controversy and stating that advisory opinions are rendered “only ‘on those rare occasions where the interest of the public in the resolution of an issue is overwhelming’ and where the issue has been ‘adequately briefed and argued.’”) (internal citation omitted). Even then, an advisory “opinion is not binding on the court in the future and does not determine the rights of any parties before the court[.]” *In re Elliott*, 74 Wn.2d at 616. There is no overwhelming public or governmental interest in the questions certified here and they were not adequately briefed or argued in the federal court. *See* Part II(a)-(c), below.

*Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 207, 676 P.2d 477 (1984) (“[W]e are hesitant to decide a conflicts case on a record in which the facts before us may develop in a number of ways at trial, reducing our opinion to nothing more than an advisory opinion.”); *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 332, 684 P.2d 1297 (1984) (“[W]ithout a factual controversy before us we believe that an advisory opinion would not be beneficial to the public or to other branches of government.”); *Port of Seattle v. Washington Utils. & Transp. Comm’n*, 92 Wn.2d 789, 806, 597 P.2d 383 (1979) (no justiciable controversy where “issue appears to be founded on a hypothetical factual situation”).

On certified questions, the Court does “not consider a certified question in the abstract but instead consider[s] it in light of the certified record from the federal court.” *Adamson v. Port of Bellingham*, 438 P.3d 522, 2019 WL 1567437, at \*3 (Wash. Apr. 11, 2019). Because of this, the Court declines to answer certified questions that are too hypothetical, abstract, or speculative on the federal record because any answer would be impermissibly advisory. *See id.* at \*5 (declining to address certified question of “[W]hether priority use can be considered to give exclusive control, and if so in what circumstances?” as “too abstract”); *United States v. Hoffman*, 154 Wn.2d 730, 748, 116 P.3d 999 (2005), as amended (Aug. 25, 2005) (declining to answer question that was “hypothetical and

speculative” because the “record before us was insufficient and any attempt to answer would be improvident.”); *cf. Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 524 n.6, 91 P.3d 864 (2004), as amended (July 30, 2004) (“[W]e find it unwise to speculate about possible assumptions the Ninth Circuit might have made but chose not to articulate in the certified question.”).

Here, although the federal court’s second certified question asks if “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” qualify as CPA injuries to business or property, none of those injuries were adequately pled or briefed in the consolidated federal cases and the factual record consists only of scant allegations and bare arguments. As such, the second question’s vague, hypothetical, and speculative injury theories allow this Court to give nothing but advisory answers that will not dispose of any live controversy in the federal cases. The Court should exercise its discretion and decline to answer each of the three components of the second question, as discussed further below.

- A. The injury theory on excess premiums is insufficiently developed to allow this Court to render an opinion on it.

“Excess premiums paid for the PIP coverage” are not damages alleged either in the Insured’s case or the consolidated USAA case. *See* Dkt. 11; USAA Dkt. 7-1. Neither complaint mentions a premium-based

damages theory, much less alleges any supporting facts or requests such damages. *See* Dkt. 11; USAA Dkt. 7-1. Premium-based damages were never mentioned in the briefing on USAA’s motion to dismiss. *See* USAA Dkts. 12, 31, and 34.

Premiums came up only in the Insureds’ opposition to Progressive’s motion for judgment on the pleadings. And even then, only in two vague and conclusory asides, one of which was in a footnote: “the premiums [the Insureds] paid for PIP coverage tainted by MMI would be sufficient to deny Progressive’s motion” (Dkt. 20, 18 n.10) and asking leave “to show the damage claimed also relates to the premiums they were charged for PIP coverage.” Dkt 20 at 21.<sup>10</sup> Given the vague and tangential nature of these references, Progressive’s reply did little more than point out that they were vague, unpled statements that merited little response. Dkt. 21 at 8.

As postured, any premium-based damages theory was not sufficiently pled, developed, or argued in the federal court for this Court to render an opinion. And any attempt to render one would be impermissibly advisory. Even apart from premiums not being a live issue alleged in either operative complaint, the throwaway reference to damages also “relat[ing] to” premiums and the conclusory statement that “premiums . . . would be

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<sup>10</sup> The federal court denied leave to amend, so the premium damages theory remains unpled. Dkt. 27 at 7 n.4.

sufficient to deny Progressive’s motion” give this Court nothing but an indeterminate hypothetical to work with.

How do damages relate to premiums? What facts do the Insureds have to support a premium-based damages theory? What exactly are they seeking to recover based on premiums? None of these questions have answers because premium-based damages are not a live or developed controversy in either consolidated case. The Court should decline to render an advisory opinion speculating about the answer to a premium-based damages question when it is entirely unclear what premium-based damages question the Court is even called upon to answer.

- B. The injury theory on costs of investigating unfair acts is insufficiently developed to allow this Court to render an opinion on it.

The Insureds here did not allege any facts suggesting that they even investigated, let alone incurred any costs investigating, any allegedly unfair acts. *See* Dkt. 11. Nor did they allege any damages relating to investigative costs. Dkt. 11 at 12-14. The USAA case plaintiff’s complaint contains only four vague and factually devoid references to “investigative costs” and “investigative expenses.” USAA Dkt. 7-1 at ECF p. 24, 28-30. Investigative costs were not argued, even tangentially or impliedly, in either USAA’s motion to dismiss or Progressive’s motion for judgment on the pleadings. *See* Dkts. 19-21; USAA Dkts. 12; 31; 34.

Like the premium-based damages theory, investigative costs are not sufficiently alleged or argued to allow this Court to give anything other than an advisory opinion on an abstract question devoid of factual development. What investigation did the USAA plaintiff perform? Did she investigate herself? Or did someone investigate for her? If someone investigated for her, who? And regardless of who investigated, when did they do so, was it in conjunction with bringing this lawsuit, and what costs are we talking about (*e.g.*, did her attorneys incur investigative expenses in connection with bringing this lawsuit or did she independently incur them)?

Again, none of these questions have answers because the record is insufficiently developed on the theory in USAA's case and devoid of the theory in Progressive's case. The Court should therefore decline any attempt to give an advisory opinion on this ill-defined and insufficiently developed investigative cost theory.

- C. The injury theory on time lost complying with the insurer's allegedly unauthorized demands is insufficiently developed to allow this Court to render an opinion on it.

Finally, neither the Insureds here nor the USAA plaintiff allege that they lost time complying with any unauthorized demands or request any time-based damages in their operative complaints. *See* Dkt. 11; USAA Dkt. 7-1. Time-based damages were not mentioned or argued in any of the briefing on USAA's motion to dismiss. USAA Dkts. 12, 31, 34.

Time based-damages came up only in the Insureds' opposition to Progressive's motion for judgment on the pleadings—unsupported by any citation to their complaint or authority—where they argued that “both Plaintiffs suffered an injury to their property (time) when Progressive scheduled their medical examinations with a physician of Progressive's choice . . . . By injecting an element unrelated to WAC 284-30-395 into the examination, Progressive was wasting their time.” Dkt. 20 at 19.

The Insureds did not explain how much time they claim was wasted or offer any factual basis for the argument that their examinations took longer than they otherwise would have. *See id.* And they conceded the lack of factual support for their theory by framing it on two hypothetical sets of facts: “Whether they had to take time off of work (paid time) *or* time out of their day, their ability to control their own activities and time was diminished by Progressive's conduct.” *Id.* (emphasis added). Given the vague hypothetical of this argument, Progressive's reply merely pointed out that it was a speculative and unpled theory that also lacked legal support for its viability even if factually developed. Dkt. 21 at 8.

On this state of the record, the time-based damages theory is not sufficiently developed to allow the Court to opine on its viability without speculating about the facts. Are the Insureds claiming the wasted time is the entire duration of their IMEs? Or are they claiming the wasted time is

only the portion considering “an element unrelated to WAC 284-30-395”? Dkt. 20 at 19. Did their examinations actually take longer because of the claimed “unrelated element”? If so, how much longer? What would the Insureds otherwise have done with the time? Did they actually “take time off of work”? If so, did they lose any income or business profits as a result?

Once again, none of these questions have answers because the issue arises only in two sentences of argument unmoored from any factual development, or even well-pled facts. The court should decline to engage in a speculative and academic exercise of “if this, then that” to render an impermissible advisory opinion on this undeveloped theory.

**III. If the Court reaches the second certified question, it should rule that none of the alternative injury theories as articulated in the certified question are viable CPA injuries to business or property on the record here.**

- A. Lost time related to recovery of personal injury damages, without more, is not a CPA injury to business or property.

Loss of time can be a CPA injury when it causes the plaintiff to take time away from business *and* results in lost business profits, at least for a self-employed business owner. *See Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 57, 62, 204 P.3d 885 (2009); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992) (self-employed, sole owner of business had business injury in having to take time off from business to address deceptive business practices),

*review denied*, 120 Wn.2d 1002 (1992). But “[t]aking time off work is compensable only when it results in lost business or lost profits.” *Malloy v. Quality Loan Serv. of Washington*, 1 Wn. App. 2d 1038, 2017 WL 6335994, at \*6 n.30 (2017) (unpublished) (addressing claimed “distractions and loss of time to pursue business and personal activities”), citing *Panag*, 166 Wn.2d at 62 and *Sign-O-Lite*, 64 Wn. App. at 563-64.

It follows from this need to link lost work time to lost business profits for a CPA injury that lost personal time—unconnected to work or lost business profits—is not a CPA injury to business or property. *See Bigelow v. Nw. Tr. Servs.*, 2016 WL 4363199, at \*4 (W.D. Wash. Aug. 16, 2016) (“Bigelow’s damages of loss of time with family, loss of time to pursue personal activities, and other emotional damages do not meet the injury element of a CPA claim.”); *In re Gen. Motors LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262, 320 n. 56 (S.D.N.Y. 2018) (“[I]t is plain that the Washington CPA does not allow a plaintiff to recover for lost personal time because it requires proof of injury ‘to business or property’”).<sup>11</sup>

Washington cases considering lost-time damages even in less restrictive contexts where viable injuries are not limited to “business or property” confirm that lost time is not a compensable injury, except when

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<sup>11</sup> If lost time were an injury to business or property by itself, *Panag* and *Sign-O-Lite* would not have addressed whether the lost time resulted in lost business profits.

connected to lost income or profit. *See Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 761, 709 P.2d 1200 (1985) (characterizing lost time understood as lost profits as consequential damages); *Carr v. Martin*, 35 Wn.2d 753, 756, 215 P.2d 411 (1950) (affirming jury instructions that a plaintiff may recover “the reasonable value of the time lost, if any, by reason of inability to pursue his occupation as a result of [his or her] injuries[.]”); *Kubista v. Romaine*, 14 Wn. App. 58, 62, 538 P.2d 812 (1975) (stating that, when a plaintiff “is unable to continue earning his prior wages,” he or she may recover “lost time,” meaning that the plaintiff is entitled to “compensation for regular wages lost because of the disability”), *aff’d*, 87 Wn.2d 62 (1976); *State v. Anderson*, 72 Wn. App. 253, 261-62, 261 n.17, 863 P.2d 1370 (1993) (holding that plaintiffs could recover for “loss of time” understood as loss of earnings, but not for loss of “the opportunity to be free to enjoy life”), *review denied*, 124 Wn.2d 1010 (1994).

Finally, federal cases interpreting the same injury to business or property requirement in the RICO context are consistent that mere lost time does not qualify. *See, e.g., Jackson v. Klein, Thorpe & Jenkins, Ltd.*, 2017 WL 3263476, at \*5 (N.D. Ill. Aug. 1, 2017) (“loss of time” not injury to business or property under RICO); *Adamo v. Jones*, 2016 WL 356031, at \*10 (D.N.J. Jan. 29, 2016) (“[L]oss of time, money, legal fees and other expenses . . . . are personal in nature, and therefore not cognizable under

RICO.”); *287 Franklin Ave. v. Meisels*, 2015 WL 5457959, at \*9 (E.D.N.Y. July 20, 2015)<sup>12</sup> (“[L]ost time and effort does not constitute an injury to business or property” under RICO); *Angermeir v. Cohen*, 14 F. Supp. 3d 134, 152 (S.D.N.Y. 2014) (allegations of having to “waste considerable time and effort” not RICO injuries to business or property); *Rylewicz v. Beaton Servs., Ltd.*, 698 F. Supp. 1391, 1396 (N.D. Ill. 1988) (“Lost effort and time are properly characterized as non-compensable personal injuries” under RICO), *aff’d*, 888 F.2d 1175 (7th Cir. 1989).

Here, the record contains none of the facts about the claimed lost time that would be necessary to decide if it could be compensable under the CPA—e.g., how much lost time, whether any was missed work time, what type of work, whether it resulted in lost income or business profits, whether the parties are business owners, etc.—because the record contains only a hypothetical argument: “[w]hether they had to take time off of work (paid time) or time out of their day, their ability to control their own activities and time was diminished by Progressive’s conduct.” Dkt. 20 at 19.

On that record, the only answer this Court could give to the certified question asking if “time lost complying with the insurer’s unauthorized

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<sup>12</sup> Report and recommendation adopted sub nom. *287 Franklin Ave. Residents’ Ass’n v. Meisels*, 2015 WL 5457967 (E.D.N.Y. Sept. 17, 2015), *aff’d* sub nom. *Sasmor v. Meisels*, 708 F. App’x 728 (2d Cir. 2017).

demands” qualifies as a CPA injury is “No.” Because the record lacks the necessary facts to address this issue with any more specificity, the Court should either decline to address it or answer that portion of the second certified question “No” as presented.

- B. Because this Court has already held that investigation expenses may qualify as CPA injuries in certain factual circumstances, but that their recoverability is highly fact-dependent, the Court should not revisit that issue on the factually devoid record here.

This Court has already addressed whether investigation expenses can be CPA injuries to business or property. In *Panag*, this Court stated that “[i]nvestigation expenses and other costs resulting from a deceptive business practice sufficiently establish injury.” 166 Wn.2d at 62. But *Panag* qualified that statement in at least two ways. First “[i]f the investigative expense would have been incurred regardless of whether a [CPA] violation existed, causation cannot be established.” *Id.* at 64. Second, the Court suggested that investigation expenses incurred in instituting a CPA lawsuit, as distinct from independently investigating the allegedly unlawful practice, would not qualify. *Id.* at 62-63 (expense of consulting an attorney to institute a CPA claim not a CPA injury to business or property). The Court held only that “other expenses incurred as a result of the deceptive practice *may satisfy* the injury element” and affirmed denial of the defendant’s summary judgment motion because “whether Panag actually suffered any

investigation expenses beyond the expenses of litigating her personal injury claim raises a question of fact.” *Id.* at 65 (emphasis added). *Panag* therefore highlights that CPA recoverability of investigation expenses is highly fact-dependent.

This Court has reiterated the potential viability of investigative expenses twice since *Panag*, but again their recoverability is highly fact-dependent. *See Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 432, 334 P.3d 529 (2014) (“[E]xpenses incurred in investigating their legality *may be* compensable” under the CPA) (emphasis added); *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 837, 355 P.3d 1100 (2015) (reversing dismissal of CPA claim in part because “Trujillo’s investigation expenses and other costs associated with dispelling the uncertainty about who owns the note that NWTs’s allegedly deceptive conduct created are therefore sufficient to constitute an injury under the CPA.”).

Given this Court’s existing decisions demonstrating that investigation expenses may or may not be viable CPA injuries depending on their timing, nature, and causal relationship to the alleged CPA violation, the Court cannot answer whether investigation expenses are recoverable here because it lacks any of the necessary facts. The only answer the Court could give on the abstract concept of “investigative expenses” and “investigative costs” in the USAA complaint is that they may or may not be

CPA-recoverable depending on the facts. *See* USAA Dkt. Dkt. 7-1 at 24, 28-30 (alleging no factual detail about nature of investigation expenses).

Such an answer would only reiterate existing law that investigative expenses may qualify as CPA injuries depending on the facts, so there is no reason for the Court to give that answer. *See Thiry v. Atl. Monthly Co.*, 74 Wn.2d 679, 682, 445 P.2d 1012 (1968) (“We believe that our holding in *Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corp.*, *supra*, is crystal clear—so clear in fact that we conclude that the certified question should not have been referred.”). The Court should either decline to answer the second certified question about investigation expenses or answer it “No” as abstractly presented here because it depends on facts not in the record.<sup>13</sup>

C. The filed-rate doctrine bars recovery of excess premiums under the CPA.

Based on the Insureds’ vague argument that their injury “also relates to the premiums they were charged for PIP coverage” (Dkt. 20 at 21), the federal court certified a question of whether seeking “to recover excess

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<sup>13</sup> How federal courts evaluate the adequacy of allegations concerning investigative expenses for purposes of a Fed. R. Civ. P. 12(b)(6) motion to dismiss or a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings will have to depend on their own analysis of the federal plausibility standard under *Iqbal* and *Twombly*, which is different from the standard in Washington State. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010) (declining to adopt *Iqbal/Twombly*). The Court should not opine on what allegations might suffice to survive dismissal under the federal standard. *Broad*, 141 Wn.2d at 676 (“The federal court retains jurisdiction over all matters except the local question certified.”).

premiums paid for the PIP coverage” is a viable CPA injury. Dkt. 28 at 8. It is unclear from the record what type of recovery these general statements are contemplating, so Progressive can only assume the theory seeks a partial refund of hypothetically “excess” premiums. Damages for “excess” premiums would be barred by the filed-rate doctrine, making it unnecessary to consider hypothetically whether the payment of these premiums could otherwise be a viable CPA injury.

This Court recently applied the filed-rate doctrine to bar a CPA claim in *McCarthy Fin., Inc. v. Premera*, 182 Wn.2d 936, 943, 347 P.3d 872 (2015). In *Premera*, the CPA claimants sought damages based on health insurance premiums for “(1) a refund[ ] of the gross and excessive overcharges in premium payments and (2) a refund of the amount of the excess surplus” the defendant allegedly amassed by charging excessive premiums. *Id.* at 943 (internal quotation marks omitted).

This Court reasoned that damages claims requiring “courts to reevaluate agency-approved rates” fail under the filed-rate doctrine because they usurp the Office of the Insurance Commissioner’s (“OIC”) role as the agency charged with regulating rates. *Id.* at 942-44. Because the premium refund damage theories in *Premera* would have done exactly that, the Court affirmed dismissal of the CPA claims based on the doctrine. *Id.* at 944

(contrasting premium refund damages claims with seeking “general damages” that “do not directly attack agency-approved rates”).<sup>14</sup>

Here, as with the premium rates in *Premera*, the OIC approves Progressive’s auto insurance premium rates and enforces the requirement that “[p]remium rates for insurance shall not be excessive . . . .” RCW 48.19.020; RCW 48.19.040; RCW 48.19.043. And as with the OIC’s role in *Premera*, the OIC can disapprove an auto insurance contract form “[i]f it contains or incorporates by reference any inconsistent, ambiguous or misleading clauses, or exceptions and conditions which unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the contract” or “if the benefits provided therein are unreasonable in relation to the premium charged.” RCW 48.18.110(1)(c) and (2).

While it is not clear from the record what premium-based damages the Insureds would seek, any CPA claim seeking “to recover excess premiums paid for the PIP coverage” as framed in the second certified question (Dkt. 28 at 8) would necessarily attack agency-approved premium rates as excessive. Policing excessive premiums is the OIC’s realm. As a result, any such damages theory would run afoul of the filed-rate doctrine

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<sup>14</sup> See also § 79:7. Generally—When risk has attached, 5 Couch on Ins. § 79:7 (citing cases) (“As a general rule, in the absence of a statutory provision or an express or implied agreement to the contrary, an insured may not have any part of his or her premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned.”).

and could not survive under *Premera*. Thus, if the Court reaches the excessive premium theory in the second certified question, it should hold that any damages theory seeking a CPA recovery of “excess premiums” is not viable and answer that portion of the second certified question “No.”

### **CONCLUSION**

Because medical expenses resulting from personal injuries are not CPA injuries to “business or property” regardless of who the plaintiff sues or how the plaintiff characterizes the alleged wrong, the Court should answer the first certified question “No.” And because the three alternative injury theories presented in the second certified question are insufficiently developed for this Court to give anything other than an advisory opinion, the Court should either decline to answer the second certified question or answer each of its three components “No” as framed.

Respectfully submitted this 3<sup>rd</sup> day of May, 2019.

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