

NO. 66815-3

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

OBERTO SAUSAGE COMPANY, a Washington corporation,

Respondent,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, identifiable
under Contract No. 071083 and subscribing to Certificate No. MPT-
0027300,

Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

This case involves claims of coverage by Oberto Sausage Company (“Oberto”) under a policy of insurance issued by Certain Underwriters at Lloyd’s (“Underwriters”). The Policy in question provided coverage for Product Tampering (Section 1) and/or Accidental Product Contamination (Section 2). Oberto sought coverage under both sections of the Policy for a product recall which occurred on February 17, 2008. Underwriters denied coverage under both Section 1 and Section 2 of the Policy. Oberto brought the instant action seeking coverage under the Policy and a determination that Underwriters acted in bad faith in denying its claim. The trial court resolved this case on cross motions for summary judgment.

Underwriters seek review by the Court of the following orders issued by the trial court: (1) the Order Denying Defendants’ Motion for Summary Judgment and Granting Summary Judgment in Favor of Plaintiff Except as to the Bad Faith Claims under Section 2 of the Policy; (2) the Amended order Denying Defendants’ Motion for Summary Judgment and Granting Summary Judgment in Favor of Plaintiff Except as to the Bad Faith Claims Under Section 2 of the Policy; and (3) the Order Granting in Part and Denying in Part Plaintiff Oberto Sausage Company’s (“Oberto”) Motion for Summary Judgment with Respect to Damages and Judgment. Underwriters respectfully requests that this Court reverse the

trial court's original and amended orders denying Underwriters' motion for summary judgment, and reverse the trial court's orders granting summary judgment in favor of Oberto.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Underwriters' Motion for Summary Judgment.

2. The trial court erred in granting summary judgment in favor of Oberto with respect to the issue of liability on its claim for coverage and breach of contract under Section 1 of the Policy.

3. The trial court erred in granting summary judgment in favor of Oberto with respect to the issue of liability on its claim for coverage and breach of contract under Section 2 of the Policy.

4. The trial court erred in granting summary judgment in favor of Oberto with respect to its common law claim for bad faith and its statutory claims under the Insurance Fair Conduct Act (IFCA) and the Consumer Protection Act (CPA).

5. The trial court erred in granting in part Oberto's Motion for Summary Judgment with Respect to Damages and by applying an unwarranted 1.75 multiplier to increase Oberto's damages.

III. ISSUES ON APPEAL

1. Coverage under Section 1 of the Policy ("Product Tampering") is provided for actual or threatened, intentional, malicious **and** illegal alteration of Oberto product unfit or dangerous for

consumption. Oberto presented no evidence that its product was intentionally or maliciously altered or contaminated or that it was dangerous or unfit for consumption. Did Underwriters properly deny Oberto's claim?

2. Coverage under Section 2 of the Policy ("Accidental Product Contamination") is provided only if the consumption or use of Oberto's product has resulted in, or was likely to result in, bodily injury, sickness or disease or death of any person and/or physical damage to or destruction of tangible property within 120 days of consumption or use. There is no evidence that any person ever became sick or injured or that any tangible property was damaged or destroyed as a result of consumption or use of Oberto's product. Additionally, the evidence established that rather than being likely, there was only a very remote possibility that sickness would result. Did Underwriters properly deny Oberto's claim?

3. Under Washington law, an insurer does not have a duty to indemnify its insured unless coverage actually exists under the insurance policy. Coverage does not exist under the Policy because there is no evidence of actual or malicious contamination under Section 1 of the Policy or any likelihood of sickness or injury to persons or damage to personal property as a result of consumption of an accidentally contaminated product under Section 2 of the Policy. Did Underwriters breach the insurance contract by refusing to acknowledge coverage?

4. Under Washington law, an insured may bring a cause of action for bad faith or violation of the Insurance Fair Conduct Act (IFCA) or Consumer Protection Act (CPA) if the insurer unreasonably denies a claim or violates a claims handling regulation and the insured is harmed as a result. Underwriters properly denied coverage and Oberto was not harmed by any alleged regulatory violation. Did Underwriters breach the IFCA and/or the CPA? If so, is Oberto entitled to any artificial increase in damages?

IV. STATEMENT OF THE CASE

A. Procedural History

Oberto brought suit on July 20, 2009. Underwriters filed a Motion for Summary Judgment on July 15, 2010, seeking dismissal of all of

Oberto's claims. Oberto filed a Cross-Motion for Summary Judgment, and the motions were heard together on Friday, September 3, 2010. At oral argument, the trial court acknowledged that the decision would almost certainly be appealed.

On September 9, 2010, the trial court entered an Order Denying Defendants' Motion for Summary Judgment and Granting Summary Judgment in Favor of Plaintiff Except as to Bad Faith Claims Under § 2 of the Policy.¹ CP 444-46. Without explanation, the trial court concluded that as a matter of law: (1) Oberto was entitled to coverage under both the Product Tampering (Section 1) and Accidental Product Contamination (Section 2) provisions of the Policy, and (2) Underwriters

denied coverage [under Section 1 of the Policy] unreasonably and in bad faith, and otherwise violated RCW 48.30.015(1)-(6) and applicable regulations promulgated by the Office of the Insurance Commissioner, and that Plaintiff is entitled to judgment as a matter of law with respect to its common law claim for bad faith and its statutory claims under the Insurance Fair Conduct Act, RCW 48.30.010-.015, and the Consumer Protection Act, RCW ch. 19.86.

CP 449. Importantly, the trial court did not hold that Underwriters acted in bad faith (and thus violated the CPA and IFCA) when they denied coverage under Section 2 of the Policy. Additionally, although the trial court stated generally that Underwriters violated RCW 48.03.015

¹ The trial court subsequently entered a substantively identical amended order on September 15, 2010, which listed the materials it reviewed in ruling on the motion and incorporated its handwritten edits into the original order. *See* CP 447-50.

(Unreasonable denial of a claim for coverage or payment of benefits) and related regulations in denying coverage under Section 1, the trial court did not state why the denial of coverage was unreasonable or which regulations Underwriters violated.

Underwriters filed a Notice of Discretionary Review on October 6, 2010. On October 14, Underwriters filed a Motion for Certification in the trial court, asking the court to certify that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The trial court ultimately denied Underwriters' request.

On November 19, 2010, Underwriters filed a Motion for Discretionary Review pursuant to RAP 2.3(b)(1) and (2). On November 19, 2010, Underwriters' motion was denied by the Court Commissioner. On February 11, 2011, the trial court issued an order granting in part and denying in part Oberto's motion for summary judgment with respect to damages and judgment. CP 813-31. The trial court held that Oberto was entitled to an award of additional damages pursuant to the IFCA, in an amount equal to 1.75 times Oberto's actual damages. CP 829. This appeal followed.

B. General Facts.

Oberto was the named insured under a “Malicious Product Tampering & Accidental Product Contamination” Policy, No. MPT-00270300, purchased from Underwriters, with a policy term commencing on March 1, 2007, and ending on May 1, 2008. CP 172. Under the Policy, Underwriters agreed to indemnify Oberto for losses—defined as recall expenses, lost gross profit, rehabilitation expenses, and crisis response/consultant expenses—that resulted directly from a product tampering or accidental product contamination first discovered during the policy term. The Policy is not a “product recall” policy which would cover recall expenses and related losses regardless of the cause of the recall.

The Policy defined the circumstances under which coverage would be provided as follows:

PRODUCT TAMPERING: Any actual or threatened, intentional, malicious and illegal alteration or contamination of the Named Insured’s PRODUCT(S) so as to render such PRODUCT(S) unfit or dangerous for the use intended by the Named Insured, or create such an impression with the public.

* * *

**ACCIDENTAL PRODUCT
CONTAMINATION** shall mean:

(1) any accidental or unintentional contamination, impairment or mislabeling

(including mislabeling of instructions for use) during the manufacture, blending, mixing, compounding, packaging, labeling, preparation, production or processing of the Named Insured's PRODUCTS (including their ingredients or components), or PUBLICITY implying such, or

(2) fault in design specification or performance by the Named Insured's PRODUCT(S)

provided always that the consumption or use of the Named Insured's CONTAMINATED PRODUCT(S) has, within 120 days of such consumption or use, either resulted, or may likely result, in: (1) physical symptoms of bodily injury, sickness or disease or death of any person(s) and/or (2) physical damage to (or destruction of) tangible property, including animals and/or livestock.

CP 174, 177. In both cases, PRODUCT(S) are defined as

All goods or products (finished or in process), including all ingredients or components thereof, manufactured, distributed, handled by the Named Insured (or manufactured by a contract manufacturer for the Named Insured) and which are (or will be) available for sale by the Named Insured.

CP 174, 177. CONTAMINATED PRODUCT(S), on the other hand, are PRODUCT(S) that have been the subject of a PRODUCT TAMPERING or ACCIDENTAL PRODUCT CONTAMINATION, respectfully. CP 174, 177.

During the Policy period, Oberto purchased beef from the Hallmark/Westland Meat Packing Company (“Hallmark/Westland”) that it used as an ingredient in some of its products. CP 3. On February 17, 2008, Hallmark/Westland voluntarily recalled approximately 143 million pounds of raw and frozen beef products.² This voluntary recall was necessitated by a United States Department of Agriculture Food Safety and Inspection Service (FSIS) determination that, on some occasions during the course of the previous two years, cattle did not receive complete and proper inspection prior to slaughter. CP 189. Specifically, there were some circumstances in which cattle became non-ambulatory after passing ante-mortem inspection and Hallmark/Westland employees failed to contact the FSIS public health veterinarian for an additional inspection, as required by the regulations. *Id.*

FSIS designated the recall as a Class II recall, meaning that there was only a “remote probability that the beef being recalled would cause adverse health effects if consumed.” *Id.* Subsequent releases from FSIS elaborated on just how remote that possibility was. For example, a Question and Answer release issued the same day stated that the health risk to children who had consumed Hallmark/Westland products through

² CP 188-92 (Recall Release, USDA Food Safety and Inspection Service, California Firm Recalls Beef Products Derived From Non-Ambulatory Cattle Without the Benefit of Proper Inspection (Feb. 17, 2008)).

school lunch programs was “negligible.”³ Additionally, Dr. Kenneth Petersen, Assistant Administrator, Office of Field Operations for FSIS, stated that the Hallmark/Westland meat presented only a very, very remote probability of any adverse health effects, particularly in light of the fact that the regulatory violations had been occurring for more than two years and there had been no reported illness.⁴ In fact, according to Mr. Petersen, the recall was “really not a health-related issue.” CP 209.

At the time of the Recall, Oberto fully endorsed FSIS’s position that the Recall was not health related. In response to a straightforward inquiry from Costco, one of Oberto’s customers, regarding where Oberto sourced its beef from, Bruce Barry, Director of Food Safety/Standards for Oberto, instructed the responding Oberto employee to preface her answer by emphasizing that the Recall was not health related. Specifically, he instructed her to quote Dr. Petersen as saying, “This is an animal humane issue with this plant. . . . This is different than a Class I recall, which [includes] significant food safety hazards,” and American Meat Institute Senior Vice President of Regulatory Affairs and General Counsel Mark

³ CP 193-205 (USDA, Questions and Answers: Hallmark/Westland Meat Packing Co. (Feb. 17, 2008)).

⁴ CP 206-09 (USDA, Technical Briefing—Hallmark/Westland Meat Packing Company (Feb. 21, 2008)).

Dopp as saying, “It is important to note that the government has found no evidence that the meat was unsafe. . . .”⁵

Subsequently, in an internal email regarding what FSIS required Oberto to do, Mr. Barry said

This is turning into a tragedy. The final tally could easily reach one billion pounds and it appears that several companies will be forced into bankruptcy over this. The Secretary of Agriculture today said they were aware of the growing implications and that discussions were underway with regard to some form of disaster relief for impacted companies. In the end, while many of us in the industry are hard hit victims of this event, the ultimate victim may well be the consumer this action was intended to protect as *countless pounds of high quality protein are plowed into the ground* and misguided fears raised by a political reaction take food prices to a new high and destroy confidence in what is probably the worlds [sic] safest and most cost effective supply of food.⁶

⁵ CP 210-11 (Email from Bruce Barry, Director of Food Safety/Standards, Oberto Sausage Company, to David Yonce, Former Vice President of Finance, Oberto Sausage Company (Feb. 19, 2008) (alterations in original)).

⁶ CP 212-13 (Email from Bruce Barry to Bob Gray, Former Director of Finance, Oberto Sausage Company (Feb. 22, 2008) (emphasis added)).

In fact, Oberto was so certain that the Hallmark/Westland meat did not present any health risk that it participated in and supported lobbying efforts to have the Recall essentially revoked.⁷

On February 28, 2008, Oberto sent Underwriters a notice of potential loss under the Policy.⁸ Underwriters denied this claim because there was no evidence of actual or threatened, intentional, malicious and illegal alteration or contamination of Oberto's product, as required to trigger coverage under Section 1 of the Policy, or that there was any likelihood of sickness or bodily injury resulting from consumption of Oberto's product, as required for coverage under Section 2.⁹

From May 2008 to May 2009, the parties exchanged letters disputing whether coverage existed under the Policy. CP 5-7. Subsequently, on June 23, 2009, Oberto sent Underwriters notice of its intent to file suit to establish coverage under the Policy. CP 7. This action followed on July 20, 2009. *Id.*

⁷ See CP 214-21 (Email from Tom Campanile, Former President, Oberto Sausage Company, to David Yonce, et al. (Feb. 24, 2008); Talking Points for Stay of Notification Until Thursday, Feb. 28; Letter from National Meat Association and Southwest Meat Association to Secretary of Agriculture Ed Schafer (Feb. 27, 2008)).

⁸ CP 222-23 (Letter from David Yonce to Corporate Risk International (Feb. 28, 2008)).

⁹ CP 224-29 (Letter from Robert F. Roarke, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, to David Yonce (May 22, 2008)).

C. Facts Relating to the Trial Court’s Grant of Increased Damages.

With respect to coverage under Section 2 (“Accidental Product Contamination”), Oberto initially agreed with Underwriters that there was no coverage because there was no “evidence of physical harm to any of Oberto’s customers.”¹⁰ Although Oberto reserved the right to challenge Underwriters’ position “should additional facts come to light to indicate that coverage under Section 2 is proper,”¹¹ no such facts were ever discovered or communicated to Underwriters. Rather, Oberto’s subsequent decision to pursue coverage was based on a novel legal theory that coverage was available as a result of the mixture of the Hallmark ingredient with other ingredients in the Oberto product, which Oberto claimed resulted in immediate damage to Oberto’s final food product, thus triggering coverage.¹² Underwriters rejected this unreasonable interpretation of the Policy, explaining that the damage to Oberto’s product resulted not from the consumption or use of the Hallmark beef or Oberto’s product, but rather from Hallmark’s regulatory noncompliance, i.e. Hallmark’s failure to comply with FSIS regulations.¹³ Oberto never

¹⁰ CP 230-37 (Letter from Joseph E. Bringman, Perkins Coie, to Robert F. Roarke (July 1, 2008)).

¹¹ *Id.*

¹² *Id.*

¹³ CP 564-67 (Letter from Robert Roarke to Joseph Bringman (Oct. 6, 2008)).

provided any further explanation of why it believed it was entitled to coverage under Section 2.

With respect to coverage under Section 1 (“Malicious Product Tampering”), Underwriters’ position was also straightforward and consistent. Underwriters explained that there was no coverage based on actual contamination for two reasons. First, although Underwriters acknowledged that there is evidence that ‘downer’ cattle are at a greater risk of contamination by E.coli, salmonella or mad cow disease as they have weaker immune systems and greater contact with feces, there had not been any evidence whatsoever of actual contamination of the Hallmark meat.¹⁴ In this regard, it bears noting that the recalled beef had been in the stream of commerce more than two years, yet no ‘actual’ contamination had been linked to the recalled Hallmark beef products.¹⁵ Second, Underwriters explained that there was no coverage because there was no evidence that the Hallmark employees acted with malice toward anyone. As Underwriters explained, “[w]hile the actions of the Hallmark employees may have been wrongful, there is no evidence of any actual malice in permitting the downer cattle to enter the food chain. A

¹⁴ In fact, to this day, no such evidence has been discovered.

¹⁵ CP 568-72 (Letter from Robert Roarke to Joseph Bringman (Aug. 14, 2008)).

requirement of malice goes beyond the mere commission of a wrongful act.”¹⁶

Underwriters’ denial of coverage under Section 1 of the Policy was not limited to the lack of evidence of actual contamination. As Underwriters explained, “there was no verbal or express threatened contamination of the Hallmark beef” and the “public would have no way of knowing that Oberto’s products contained any of the recalled Hallmark beef.”¹⁷ Importantly, Oberto never pursued the “threatened contamination” argument in pre-litigation communications between the parties or it’s briefing in the trial court. In fact, that issue was raised by Oberto for the first time during the September 3, 2010 oral argument on the parties’ cross-motions for summary judgment, thus denying Underwriters notice and an opportunity to respond.

Underwriters decision to deny coverage was based not only on what it contends is the only reasonable interpretation of the Policy, but also on all publicly available statements of FSIS regarding the circumstances surrounding the Recall. Although Oberto alleged in its Complaint that Underwriters failed to conduct a reasonable investigation, in violation of WAC 284-30-330(4), Oberto has never pointed to any evidence that Underwriters would have discovered if they had done more

¹⁶ *Id.*

¹⁷ *Id.*

investigation, much less any evidence that would have compelled Underwriters to conclude that coverage existed.

In light of the lack of any evidence, much less a finding, that Underwriters' investigation was unreasonable, the trial court's holding that Underwriters violated the insurance regulations listed in IFCA would appear to be based on the following. First, as a result of their belief that there was no coverage, Underwriters failed to attempt to effectuate a prompt, fair and equitable settlement of Oberto's claim. Second, Oberto was compelled to initiate litigation to establish coverage. Third, Underwriters did not always meet the ten-day requirement in WAC 284-30-360(3) and (4) for responding to communications of a claimant and providing necessary claim forms.

With respect to this last violation, however, Oberto has never presented any evidence that it was harmed as a result of the violation. Instead, Oberto's harm argument focused exclusively on the overall harm that it suffered as a result of Underwriters' denial of coverage. This harm included "massive legal fees in writing multiple, detailed letters to Underwriters and pursuing this litigation." CP 275. Yet, the only letter sent *because of* Underwriters' failure to respond within 10 days was less than one page long. All of Oberto's other letters were written as a result of Underwriters' substantive decision, not the minor, procedural failure to respond to Oberto's letters within 10 days. These other letters, and this

litigation, are therefore irrelevant to determining whether Oberto was harmed as a result of this procedural failure.

In summary, the following is the evidence before the Court in deciding whether Oberto is entitled as a matter of law to increased damages: Underwriters denied coverage based on an interpretation of the Policy that it consistently maintained (and continues to maintain) is the only reasonable interpretation. During the sixteen months in which the parties exchanged letters regarding coverage, Underwriters failed on a single occasion to respond to one of Oberto's letters within ten days as required under WAC 284-30-360(3). CP 275 n.11. The trial court did not find that this single failure also amounted to a failure to act reasonably promptly in response to communications with respect to claims, as required by WAC 284-30-330(2). Moreover, there is no evidence that that this delay caused any harm to Oberto independent of the harm it claims as a result of the denial of coverage.

There is no evidence showing that Underwriters acted with malice or evil intent in denying coverage to Oberto. The undisputed facts show that Underwriters made a reasoned interpretation of the Policy, and acted consistently and straightforwardly in accordance with that interpretation. The trial court found that Underwriters' interpretation was unreasonable, but unreasonableness is not, in itself, evidence of malice or evil intent.

V. STANDARD OF REVIEW

A. Appellate Review of Summary Judgment.

In reviewing summary judgment, the appellate court engages in the same inquiry as the trial court. The appellate court determines whether genuine issues of fact exist and whether the moving party is entitled to judgment as a matter of law. Facts are considered in the light most favorable to the nonmoving party. *Bowles v. Dept. of Retirement Systems*, 121 Wn.2d 52, 62, 847 P.2d 440 (1993).

B. Summary Judgment Standard and Burden of Proof.

A motion for summary judgment must be granted if “there is no genuine issue of material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). Where the moving party is the defendant and the plaintiff bears the burden of proof on the issue, this standard will be met “if the plaintiff fails to establish a prima facie case for an essential element of his or her claim.” *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 542 (2008) (citation omitted). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)).

In an insurance coverage dispute, the insured bears the burden of proving that a policy covers his loss. *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 803 (2002). But ultimately, it is “the court [that] determines coverage by characterizing the perils contributing to the loss, and determining which perils the policy covers and which it excludes.” *Id.* (citation omitted); *see also Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 170 (1994). In answering the latter question, “[t]he court examines the terms of an insurance contract to determine whether under the plain meaning of the contract there is coverage.” *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576 (1998) (citing *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876 (1990)). “If terms are defined in a policy, then the term should be interpreted in accordance with that policy definition. Undefined terms, however, must be given their ‘plain, ordinary, and popular’ meaning.” *Id.* “To determine the ordinary meaning of undefined terms, courts look to standard English dictionaries. If words have both a legal, technical meaning and a plain, ordinary meaning, the ordinary meaning will prevail unless it is clear that both parties intended the legal, technical meaning to apply.” *Id.*

As explained below, Oberto cannot meet its burden here because there is no evidence to support the essential elements of either Product Tampering under Section 1 of the Policy or Accidental Product Contamination under Section 2. Accordingly, Oberto’s loss is not covered

by the Policy, and because it is not covered, Underwriters did not breach the contract and their denial of coverage was not unreasonable or in bad faith. Moreover, Underwriters conducted a reasonable investigation of Oberto's claim, and there is no evidence that Oberto was injured or harmed as a result of any alleged violation of the claims handling regulations by Underwriters. Therefore, all of Oberto's Causes of Action fail and summary judgment must be granted in Underwriters' favor.

VI. ARGUMENT

Underwriters' primary position is that summary judgment should be entered in their favor pursuant to their Motion for Summary Judgment, and that the superior court erred in failing to do so. In the event that the Court determines that Underwriters are not entitled to summary judgment on any of Oberto's claims, Underwriters submit that Oberto has failed to meet its burden of proving that there is no genuine issue of material fact and thus requests that the trial court's issuance of summary judgment in favor of Oberto be reversed and remanded, and the case proceed to trial.

A. **Oberto's Loss Is Not Covered by Section 1 of the Policy Because There is No Evidence of Product Tampering.**

In order to establish coverage under Section 1 of the Policy, Oberto must present evidence of (1) actual or threatened, (2) intentional, malicious **and** illegal (3) alteration or contamination (4) of Oberto's product (including its ingredients) (5) so as to (a) render such products

unfit or dangerous for their intended use, or (b) create such an impression with the public. Oberto's theory is that one of its ingredients—the Hallmark/Westland beef—was the subject of actual, intentional, malicious, and illegal contamination that rendered it unsafe for its intended use (human consumption). This unreasonable theory fails because it completely disregards the “plain, ordinary and popular” meaning of the undefined term “contamination,” which requires the mixture or introduction of one substance into another. Moreover, even if contamination had occurred, there is no evidence that it was the result of malice on the part of the Hallmark/Westland employees. Accordingly, there is no coverage under Section 1 of the Policy and the trial court erred in recognizing the existence of such coverage as a matter of law.

1. The Hallmark/Westland meat was not contaminated.

The trial court erroneously assumed that it was reasonable to conclude that all meat that is “adulterated” as that term is defined by the Federal Meat Inspection Act (“FMIA”), 21 U.S.C. § 601 et seq., satisfies the plain, ordinary and popular meaning of “contamination,” an undefined term in the Policy. This was error because the definition of contamination requires the mixture of two or more substances, but the FMIA's definition of “adulterate” does not.

Webster's Third New International Dictionary defines contamination as the act or process of “mak[ing] inferior or impure by

mixture,” or “render[ing] unfit for use by the introduction of unwholesome or undesirable elements.” *Webster’s Third New International Dictionary of the English Language* 491 (2002) [hereinafter *Webster’s*]. Similarly, American Heritage defines it as the act or process of making something impure or corrupt by contact or mixture. *American Heritage Dictionary of the English Language* 287 (1979) [hereinafter *American Heritage*]. Accordingly, coverage exists under Section 1 of the Policy only if two or more substances are mixed together, and the resulting substance is impure. *Cf. The Limited, Inc. v. Cigna Ins. Co.*, 228 F. Supp. 2d 574, 580 (E.D. Penn. 2001) (granting summary judgment in favor of insurer under a similarly worded policy where there was no evidence that any poor, foreign, improper, or inferior substance had been added to the insured’s product or that the insured’s product had been debased or made impure, inferior or not genuine by another substance).

There is no evidence that the Hallmark/Westland meat was contaminated. The fact that cattle might be non-ambulatory does not mean that their meat is unwholesome or undesirable. The primary concern with non-ambulatory cattle arises from the fact that the non-ambulatory state *might* be a symptom of Bovine Spongiform Encephalopathy (“BSE”), i.e., mad cow disease. *See generally* CP 193-205. But not all—or even most—non-ambulatory cattle have BSE. There are numerous reasons why cattle might become non-ambulatory, including acute injuries

such as broken legs. That is why the regulations do not require condemnation of meat from non-ambulatory cattle and instead provide that such meat can enter the food system upon further inspection.

Because it cannot be inferred from the fact that the cattle were non-ambulatory that they were unwholesome, Oberto must present direct evidence that the Hallmark/Westland meat was unwholesome. Despite the fact that Hallmark/Westland employees allegedly had been violating the regulations for two years and most of the meat that was subject to the Recall had already been consumed at the time of the Recall, there was not a single, reported incident of someone becoming ill as a result of consumption of the Hallmark/Westland meat or any product containing this meat. Moreover, according to FSIS, the probability of that happening was very, very remote because of all of the other precautions that FSIS takes to ensure the safety of the U.S. food supply, including “the feed ban that prohibits feeding ruminant protein to other ruminants, an ongoing BSE surveillance program and the required removal of specified risk materials,” i.e., the brain, spinal cord, and distal ileum (small intestine), which are the organs that might contain the infectious agent that causes BSE. *Id.* According to FSIS, as a result of these precautions, the Hallmark/Westland “meat products are not be [sic] expected to be infected or have an adverse public health impact.” *Id.* It is thus incumbent on Oberto to show that infection and/or adverse public health impacts

actually occurred, a burden that it cannot meet in light of the complete lack of evidence of illness or injury from consumption of the Hallmark/Westland meat.

This conclusion is not altered by FSIS's determination that due to the technical, regulatory violation, the Hallmark/Westland meat was considered "adulterated." "Adulterated" is a statutorily defined term that applies to meat that "consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food." 21 U.S.C. § 601(m)(3) (2006). While some "adulterated" meat might be contaminated—specifically that that consists in whole or in part of any filthy, putrid, or decomposed substance—not all adulterated meat will be because the statutory definition of "adulterated" does not require the mixture of two or more substances. Moreover, in this case FSIS did not order the Recall because there had been a mixture of substances, but rather because of regulatory violations that it believed rendered the food "unfit for human food," notwithstanding the lack of potential adverse health effects. Accordingly, the mere fact that FSIS concluded that the Hallmark/Westland meat was adulterated does not mean that it was contaminated as required for coverage under the Policy. Thus, Oberto is required to present independent evidence that the requisite mixture of substances occurred, something that it cannot do. Therefore, there was no

actual contamination of the Hallmark/Westland meat, and Underwriters properly denied Oberto's claim.

2. Even had the Hallmark/Westland meat been contaminated, the contamination was not malicious.

The trial court further erred by concluding that the alleged contamination was malicious as a matter of law. Assuming *arguendo* that there was evidence that the Hallmark/Westland meat was actually contaminated, Underwriters still would be entitled to summary judgment because there is no evidence that such contamination was malicious. The Policy does not define "malicious," and as a result, the Court must ascertain the "plain, ordinary, and popular" meaning of the word in order to determine whether the acts that allegedly caused the contamination were, in fact, malicious.

Webster's Third New International Dictionary of the English Language defines "malicious" as "given to, marked by, or arising from malice." *Webster's, supra*, at 1367. Malice is defined as the "*intention or desire to harm another* usu[ally] seriously through doing something unlawful or otherwise unjustified." *Id.* (emphasis added); *see also American Heritage, supra*, at 790 (defining malice as "the desire to harm others, or to see others suffer; ill-will; spite"). In other words, actions must be taken with the "conscious objective" to harm another. *See In re Juarez*, 143 Wn.2d 840, 876 (2001); *see also Gen. Mills, Inc. v. Gold*

Medal Ins. Co., 622 N.W.2d 147, 154–55 (Minn. Ct. App. 2001)

(affirming trial court conclusion that coverage did not exist under a Malicious Product Tampering policy because although the actor “knew it was wrong to substitute [an unapproved pesticide for an approved one], he assumed that the substitution would never be discovered and that no one would be harmed by his action”).

There is no evidence that the Hallmark/Westland employees’ failure to follow the regulations was motivated by an intention or desire to harm another. The only evidence even remotely related to motive is images of and statements related to Hallmark/Westland employees’ alleged inhumane treatment of cattle. To the extent this treatment is evidence of an intent to harm, it is at most evidence of an intent to harm the cattle. But intent to harm cattle—even if proven—is insufficient to establish coverage under the Policy, the purpose of which is to respond to contamination that causes harm to humans, and not alleged mistreatment of animals. Accordingly, Oberto cannot establish the essential element of malice and therefore is not entitled to coverage under Section 1 of the Policy.

Oberto encourages adoption of a limited definition of “malice” to mean only “reckless disregard for the rights of another.” Oberto’s definition is unreasonable because it ignores the context in which that term arises—a definition of product tampering that requires that the act be

“intentional, malicious, and illegal.” While “malicious,” must mean something more than “intentional” or “illegal,” it cannot mean something less. By interpreting malice not to require any intent whatsoever, Oberto essentially reads the latter term right out of the Policy, and therefore the interpretation is unreasonable.

But even if Oberto’s definition was reasonable, it was still error for the trial court to conclude that the Hallmark employees acted with malice as a matter of law. To act with reckless disregard, the employees must have at least had some awareness of a potential harm to others. But there is absolutely no evidence in the record regarding the Hallmark employees’ mental state or their knowledge. And while there may be some situations in which malice can be inferred—as when someone knowingly puts poison in a product—this is not one of those cases. There is no evidence regarding what the Hallmark employees knew about the regulatory requirements or the consequences of their actions. Bereft of this necessary information, the trial court lacked sufficient basis to conclude that the Hallmark employees acted with malice as a matter of law.

B. Oberto’s Loss Is Not Covered by Section 2 of the Policy Because There Is No Evidence of Accidental Product Contamination.

In order to establish coverage under Section 2 of the Policy, Oberto must present evidence of (1) an accidental or unintentional (2) contamination, impairment or mislabeling (3) during the manufacture,

blending, mixing, compounding, packaging, labeling, preparation, production or processing of its products (including their ingredients), and (4) “provided always” that the consumption or use of the contaminated products has, within 120 days of such consumption or use, either resulted, or may likely result, in: (a) physical symptoms of bodily injury, sickness or disease or death of any person and/or (b) physical damage to (or destruction of) tangible property, including animals and/or livestock.¹⁸

For purposes of determining whether the fourth element is met, “contaminated products” refers to Oberto’s products (including ingredients) that “have been the subject of an accidental product contamination.” CP 171-87.

Oberto’s theory under Section 2 is that it accidentally contaminated its product when it mixed Hallmark/Westland meat—which it did not know may have come from non-ambulatory cattle—with other meat that was not subject to the Recall, and that as a result, it was required to destroy the product containing the Hallmark/Westland meat. CP 11-13. In the alternative, Oberto claims that it is entitled to coverage because physical symptoms of bodily injury, sickness or death of any person(s)

¹⁸ Alternatively, publicity specifically naming Oberto’s product as having been accidentally contaminated could suffice, but only if the contamination was likely to result in physical symptoms of bodily injury, sickness or death, or physical damage to tangible property. In this case, it is undisputed that Oberto was never named in connection with the Hallmark/Westland recall, and therefore, Oberto is not entitled to coverage under the publicity provision.

may likely have resulted from consumption or use of Oberto's product. In both cases, Oberto's claim is based on a strained interpretation of the Policy and contrary to the facts.

There are several problems with Oberto's argument. First, as explained in the preceding section, the Hallmark/Westland meat was not actually contaminated and there is no evidence that it was unwholesome. Although FSIS declared that the meat was unfit for human food, that decision was based on a regulatory violation that did not affect the wholesomeness of the product. Moreover, there is no evidence that any of the cattle processed by Hallmark/Westland contracted BSE or any other disease or infection. This lack of evidence is fatal to Oberto's cause because without actual contamination, there can be no coverage.

But even if Oberto were able to present evidence of contamination or that the Hallmark/Westland meat was unwholesome, there still would not be coverage because Oberto cannot establish that consumption or use of the accidentally contaminated product "may likely" result in sickness, injury, or death to any person or damage or destruction to any tangible property. First, the evidence conclusively establishes that consumption of Oberto's product did not result in such harm, and that, moreover, it was not likely to do so. As has been previously noted, the Hallmark/Westland Recall was designated a Class II Recall, meaning that "there is a remote probability of adverse health consequences from the use of the product."

CP 192. This is in contrast to a Class I Recall, “where there is a reasonable probability that the use of the product will cause serious, adverse health consequences or death.” *Id.* While “remote probability” does not mean that there is no likelihood of adverse health consequences, it does not mean that adverse health consequences “may likely result” from consumption of the recalled product either.

Once again, Washington law requires that we turn to the dictionary to determine what “may likely result in” means. Essentially, may and likely are synonyms—if something “may result,” it is “in some degree likely to result.” *Webster’s, supra*, at 1396. Additionally, something is “likely” if it has “a better chance of existing or occurring than not.” *Id.* at 1310. It follows, then, that something “may likely result” if it has “a better chance of . . . occurring than not.” In other words, coverage exists if physical injury, sickness or disease or death will more likely than not result from consumption or use of the accidentally contaminated products.

With this understanding, there can be no question that there is no coverage in this case based on potential harm to humans. It was not more likely than not that physical injury, sickness or disease or death would result from consumption of Oberto’s products. In fact, there was only a “remote probability” that that would happen. Put another way, there was a “slight” probability of adverse health consequences, meaning that they could arise, but it was unlikely. *Id.* at 1921. Thus, to the extent that “may

likely” is difficult to quantify, that difficulty is irrelevant because “may likely” cannot mean “unlikely.” The two are antonyms and must be treated as such. This point is repeatedly reinforced by Oberto in the documents discussed above. By reading “remote”, “slight” and “negligible” as synonyms for “likely” the trial court, in essence, converted the Policy into an unqualified product recall policy, which it is not.

Finally, there is no evidence that any tangible property was damaged or destroyed or was likely to be destroyed as a result of consumption or use of the accidentally contaminated product. As Oberto rightly acknowledges, the only tangible property that was damaged or destroyed (or was likely to be) as a result of the Recall was Oberto’s own product. CP 4. But destruction of Oberto’s product cannot serve as the basis for coverage under the Policy. If it could, coverage would be available under an Accidental Product Contamination Policy any time that FSIS issued a Recall of a Named Insured’s product (including ingredients). But that was not the intention of the parties in entering into this insurance contract. *See The Limited, Inc.*, 228 F. Supp. 2d at 580 (“The plain language of the Policy and its title indicate that the parties intended to have coverage for only those specific instances of product tampering and accidental contamination, not product recalls in general. . . .”). If it was, there would have been no reason to incorporate such a detailed definition of “accidental product contamination” into the Policy.

It would be sufficient to say that an “accidental product contamination” (or some other covered event) occurs any time that a Named Insured incorporates an ingredient into one of its products that is later subject to a FSIS Recall. But that is not how the Policy defines “accidental product contamination.” To interpret it in such a manner would be to rewrite the Policy. Accordingly, Oberto cannot establish that there was an accidental product contamination that was likely to result in harm to humans or property, and therefore it is not entitled to coverage under Section 2 of the Policy.

C. Underwriters Did Not Breach the Insurance Contract Because Oberto’s Loss Was Not Covered.

In order to recover for breach of contract, a plaintiff must show “(1) a contract that imposed a duty, (2) breach of that duty, and (3) an economic loss as a result of the breach.” *Myers v. State*, 152 Wn. App. 823, 827–28 (2009) (citation omitted). An insurance contract imposes on the insured the duty to indemnify the insured if coverage for the insured’s loss is provided for under the contract. *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 52 (2007).

Oberto claims that Underwriters breached the insurance contract between them by failing to acknowledge the existence of coverage under the Policy. For the reasons explained in the preceding section, the Policy did *not* provide coverage for Oberto’s loss. Accordingly, Underwriters did

not breach the contract, and Oberto's Third Cause of Action (Breach of Contract) must be dismissed.

D. Oberto's Causes of Action for Bad Faith and Violation of the Insurance Fair Conduct Act and Consumer Protection Act Must Be Dismissed.

The trial court erred when it concluded that Underwriters acted in bad faith with respect to the denial of coverage under Section 1 of the Policy and thus violated the Consumer Protection Act and the Insurance Fair Conduct Act. Washington law imposes a duty of good faith on insurers and requires that they not engage in unfair or deceptive acts or practices in the conduct of their business. RCW 48.01.030 (2008) ("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."); RCW 48.30.010 (2008) ("No person engaged in the business of insurance shall engage in . . . unfair or deceptive acts or practices in the conduct of such business. . . ."). An insurer violates this duty when it unreasonably denies coverage or payment of benefits, *see Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764–65 (2002), or violates regulations promulgated by the Washington Insurance Commissioner defining unfair and deceptive insurance claims practices, *see Am. Mfr. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 697 (2001) (holding that regulatory violations establish breach of duty of good faith and violation of CPA). For purposes of this case,

those regulations can be divided into three categories: those that turn on whether coverage exists under the policy, WAC 284-30-330(6), (7), those related to the investigation of the claim, WAC 284-30-330(4), and those governing the insurer's timely response to communications from the insured, WAC 284-30-330(2), 284-30-360(3), (4).

It has long been the case that violation of the duty of good faith could give rise to two related causes of action under Washington law: (1) the tort of bad faith and (2) violation of the Washington Consumer Protection Act. *See Osborn*, 104 Wn. App. at 697. The specific elements of the causes of action differ, but the circumstances under which a cause of action might arise are basically the same. *Compare Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 470–71 (1988) (bad faith requires that the insurers' actions be "unreasonable, frivolous, or untenable"), *with Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986) (elements of private CPA actions are (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation). In either case, the insured is required to show an unreasonable denial or a violation of the regulations that resulted in harm to the insured. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 276 (1998); *Osborn*, 104 Wn. App. at 697.

In 2007, the Washington Insurance Fair Conduct Act (“IFCA”) created a third related cause of action. That statute creates a cause of action for any first-party claimant who is “unreasonably denied a claim for coverage or payment of benefits by an insurer.” RCW 48.30.015(1) (2008). The statute further provides that if the court finds that the insurer unreasonably denied the claim or violated an unfair claims settlement practice rule codified in chapter 284-30 of the Washington Administrative Code, the court shall award reasonable attorneys’ fees and costs and may award treble damages. RCW 48.30.015(2), (3) (2008).

The primary difference between the IFCA and the CPA is that the \$10,000 cap on punitive damages under the CPA does not apply to claims brought under the IFCA. Under both statutes, an unreasonable denial of claim or a violation of the regulations can serve as the basis for the cause of action. RCW 48.30.015 (2008) (IFCA); *Rizzuti v. Basin Travel Serv. of Othello, Inc.*, 125 Wn. App. 602, 615–16 (2005) (CPA). Moreover, in both cases, the plaintiff must demonstrate some injury or harm as a result of the regulatory violation. *Cf. Lane v. City of Seattle*, 164 Wn.2d 875, 885 (2008) (noting that a party does not have standing to bring suit if it has not been harmed).

All three causes of action—bad faith, violation of CPA, and violation of IFCA—can be analyzed simultaneously because under all of them, Underwriters will be liable only if (1) they unreasonably denied

Oberto's claim or violated one of the unfair claims settlement practices regulations and (2) Oberto was harmed as a result of the denial or regulatory violation. For the reasons explained below, all three of Oberto's causes of action must be dismissed because Underwriters' decision to deny Oberto's claim was reasonable, they conducted a reasonable investigation, and even if Oberto presented evidence of a technical violation of the regulations by Underwriters, Oberto was not harmed thereby.

1. Underwriters' denial of coverage was reasonable.

Oberto first claims that Underwriters' denial of coverage was unreasonable, as evidenced by the reasons given in support of the denial, and that as a result, Underwriters violated the regulations requiring them to "attempt in good faith to effectuate a prompt, fair and equitable settlement of claims on which liability is reasonably clear," WAC 284-30-330(6), and prohibiting them from "compelling the insured to initiate litigation to establish coverage," WAC 284-30-330(7).

An insurer's decision to deny coverage is not in bad faith—and accordingly does not violate the IFCA or CPA—if it was correct. *Roberts v. Allied Group Ins. Co.*, 79 Wn. App. 323, 327 (1995) (affirming trial court order dismissing bad faith claim because the insurer's "interpretation of the extent of recovery under its policy was not only reasonable, it was correct"). But even if the decision was not correct, the insured's cause of

action will not succeed unless he can establish that the insurer's decision was not based on a reasonable interpretation of the policy. *See Transcon. Ins. Co.*, 111 Wn.2d at 470.

As explained in the preceding sections, Underwriters' decision to deny coverage was correct because the Policy does not cover Oberto's loss. But even if the decision was not correct, it was not in bad faith because it was based on the dictionary definitions of undefined policy terms, as well as public statements by the FSIC regarding the product in question, and thus necessarily was reasonable. As such, Oberto did not violate WAC 284-30-330(6) and (7), both of which are premised on the insurer's unreasonable denial of coverage, *Rizzuti*, 125 Wn. App. at 616 (citing *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486 (2003)), and the decision to deny Oberto's claim does not give rise to a cause of action for bad faith, violation of the CPA, or violation of the IFCA.

2. Underwriters conducted a reasonable investigation prior to denying coverage.

Oberto's second claim is that Underwriters denied coverage without first conducting a reasonable investigation of Oberto's claim.

Even where an insurer has properly denied coverage, an insured may still have a cause of action for bad faith or violation of the IFCA or CPA if the insurer failed to make a reasonable investigation of the insured's claim. *Rizzuti*, 125 Wn. App. at 618. The burden is on the

insured to present sufficient evidence to permit a trier of fact to conclude that the insurer would have reached a different result if it had conducted additional investigation. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 334 (2000) (holding that district court properly dismissed CPA and bad faith claims based on failure to conduct a reasonable investigation where plaintiff failed to present evidence in support of claim).

Underwriters' denial of coverage was based on their interpretation of the Policy as applied to the facts as they were reported by FSIS, the federal agency that ordered the Recall. FSIS's message was clear—the Hallmark/Westland meat did not pose a risk to human health, and it was being recalled only because of a regulatory violation. Based on the public information provided by FSIS, Underwriters concluded that the Hallmark/Westland meat was not actually, intentionally, and maliciously contaminated, and that even if there had been accidental contamination, there was no coverage because there was no likelihood that anyone would get sick as a result of consumption of the meat. This conclusion is supported by Oberto's internal communications regarding this recall. CP 211-15. Simply put, there was nothing more for Underwriters to investigate given the largely legal nature of their decision.

Moreover, the burden is on Oberto to present evidence that Underwriters would have reached a different result if they had done more investigation. But Oberto cannot meet that burden because it has no

evidence that its product was actually contaminated or that anyone became sick as a result of consuming its product. Accordingly, Oberto's claims for bad faith and violation of the CPA and IFCA based on the failure to conduct a reasonable investigation must be dismissed.

3. Oberto was not harmed by any violation of the claims handling regulations by Underwriters.

Finally, even assuming that Underwriters acted in bad faith or violated one of the claims handling regulations, Oberto does not have a cause of action because it did not suffer any injury as a result of the violation. *Cf. Coventry Assocs.*, 136 Wn.2d at 284 (holding that where there is no coverage but the investigation was unreasonable, insured's damages were limited to the costs it incurred as a result of the bad faith investigation). As Underwriters have shown, Oberto's loss was not covered by the Policy. Accordingly, in order to meet the injury requirement, Oberto must show that it incurred expenses as a direct result of Underwriters' alleged violation of the regulations. *See id.* at 283 (explaining that an insured who is forced to hire an expert as a result of the insurer's failure to investigate meets the injury requirement). But Oberto has not incurred any expenses as a result of Underwriters' actions.¹⁹ Accordingly, Oberto cannot demonstrate any injury or harm, and as a result, its causes of action for bad faith and violation of the IFCA and CPA

¹⁹ *See* CP 244-47 (detailing damages that Oberto "claim[s] to have suffered as a result of Defendants' denial of [Oberto's] claim").

based on Underwriters' alleged violation of the claims handling regulations must be dismissed.

E. Oberto Is Not Entitled to Increased Damages.

Assuming *arguendo* that Oberto is entitled to damages at all, there is no evidence that Underwriters engaged in the type of malicious conduct that would justify an increase in damages for Oberto. As shown below, the trial court's application of a 1.75 multiplier to increase Oberto's damages award was unwarranted. CP 829.

Washington's Insurance Fair Conduct Act gives the trial court discretion to increase an award "to an amount not to exceed three times the actual damages." RCW 48.30.015(2). An increased award does not "flow naturally" from a finding that Underwriters is liable under IFCA or the Consumer Protection Act ("CPA"). Something more is required.

As Oberto has acknowledged, an increased award under IFCA and the CPA is designed to "deter and punish" insurers – that is, it is a form of punitive damages. CP 458. "Washington's only expressed policy regarding punitive damages is that they are not favored. Our courts view them as 'a penalty generally reserved for criminal sanctions', inappropriate in civil cases because they give the plaintiff a windfall beyond full compensation." *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 102 Wn. App. 237, 248 (2000), citing *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574 (1996). Washington allows an award of punitive or

increased damages when specifically authorized by statute, but such an award requires something more than a mere finding of liability in order to avoid an unmerited windfall for the plaintiff.

The IFCA does not specify what this “something more” might be, and because the statute is only a couple of years old, Washington case law does not yet provide guidance on this issue. In these circumstances, a review of the requirements for an increased award in those states that allow an award of punitive damages for denial of coverage is helpful.

Punitive damages are generally not available for mere breach of an insurance policy. Indeed, even proof of the elements necessary to establish bad faith will not be sufficient, by itself, to support an award of punitive damages. It is, however, the majority rule that punitive damages can be recovered where the insurer’s conduct amounts to something more egregious than simply breach of contract or bad faith, with most jurisdictions requiring “malice,” “willful disregard” of the insured’s rights or “evil” intent or motive.

2 Law and Prac. of Ins. Coverage Litig. § 27:12.

Thus, in Arizona, “[m]erely acting in bad faith toward the insured, without something more, does not warrant the imposition of punitive damages.” *The Medical Protective Company v. Pang*, 606 F.Supp.2d 1049, 1064 (D. Ariz. 2008) (internal citations omitted). Punitive damages are only appropriate when “the facts establish that the insurer’s conduct was aggravated, outrageous, malicious or fraudulent. The insurer must be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, or intolerable that it creates a

substantial risk of tremendous harm to others.” *Id.* (citations and alterations omitted) (granting summary judgment in favor of the insurer on the issue of punitive damages where there was no evidence from which a reasonable juror could conclude that the insurer “knew of the evil of its actions [in contacting the insured’s attorney], or that it acted from spite, or that [the insurer’s] conduct was so outrageous and intolerable that it presented an unacceptable risk of tremendous harm” to the insured).

Similarly, in Wisconsin proof of bad faith denial of coverage “does not necessarily make an award of punitive damages appropriate. The intent necessary to maintain an action for bad faith is distinct from what must be shown to recover punitive damages. The factors necessary for an award of punitive damages require a showing of: (1) evil intent deserving of punishment or of something in the nature of special ill-will; or (2) wanton disregard of duty; or (3) gross or outrageous conduct.” *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 261 Wis.2d 333, 352 (2002) (upholding an award of punitive damages when the insurer was a “recidivist” or repeat offender, and acted egregiously in failing to reform an insurance policy after discovery of a mutual mistake, despite an earlier Wisconsin Supreme Court decision involving the same insurer that explicitly required it to reform a policy in such circumstances, and despite being reminded of this decision).

And, in Ohio, “[p]unitive damages are available to prevailing plaintiffs in bad faith actions where the defendant has acted with actual malice. Actual malice is ‘that state of mind under which a person’s conduct is characterized by hatred or ill will, a spirit of revenge, retaliation, or a determination to vent his feelings upon other persons.’” *Schreiber v. State Farm Ins. Co.*, 494 F.Supp.2d 758, 769 (2007) (denying insurer’s motion for summary judgment on the issue of punitive damages where insurer mischaracterized the insured’s claim and failed to present evidence showing a lack of actual malice).

Oberto’s Motion for Summary Judgment, as presented to the trial court, fails to present any evidence that Underwriters acted with evil intent or malice in denying coverage. Instead, Oberto points to Underwriters’ “persistent refusal” of coverage and alleges a “pattern of bad faith conduct.” CP 465-66. Even if a pattern of conduct were sufficient, in itself, to justify an increased award, which it is not, there is no pattern of repeated bad faith conduct by Underwriters. *All* of Underwriters’ acts relied upon by Oberto were part and parcel of Underwriters’ straightforward and consistent position, based upon a reasoned interpretation of the Policy, that coverage was not available for Oberto’s claim. Underwriters simply put forth a policy interpretation that differed from that of Oberto. Oberto points to no support, in Washington or any other jurisdiction, for its position that a disagreement about policy

interpretation (even an unreasonable interpretation), standing alone, justifies an increased award. Those jurisdictions that allow for increased awards consistently require something more – that is, malice or evil intent. And that something more is absent in this case.

Oberto makes yet another unjustified leap in claiming that an increased award is justified in this case due to the “modest size” of Oberto’s \$400,000 claim, alleging that a “secondary purpose” of the IFCA’s increased damages provision is to encourage insureds to “avail themselves of available legal remedies.” CP 461. Oberto bases this argument on the rationale for allowing increased awards under the CPA to reimburse individual plaintiffs for “enforcing the Act on behalf of the general citizenry,” and asserts that “[t]here is no reason to think that identical considerations do not apply to the IFCA’s trebling provision.” CP 461 n.7. Unless Oberto is somehow able to read the legislature’s mind, this is a specious argument. As Oberto acknowledges, the CPA limits an increased award to \$25,000. CP 459. An increased award under the CPA is intended to encourage consumers to pursue truly small claims, provided that such claims affect the general public, by allowing for a modest increase in an award of damages. These same considerations do not apply to Oberto’s \$400,000 IFCA claim, especially given that IFCA requires an award of attorneys’ fees and costs to a prevailing plaintiff.

There is no basis for an increased award, because there is no evidence that Underwriters acted with malice or evil intent or otherwise showing that “something extra” that would justify such an award. Therefore, the Court should overrule the trial court’s erroneous application of a 1.75 multiplier to increase Oberto’s damages award.

VII. CONCLUSION

The Malicious Product Tampering and Accidental Product Contamination Policy that Oberto purchased from Underwriters is not intended by the parties to be an unqualified product recall policy. It only covers losses suffered as a result of product recalls that resulted from either (1) the actual and malicious contamination of the insured’s products if the contamination rendered the product unfit or dangerous for its intended use or (2) accidental product contamination if the consumption or use of the accidentally contaminated product is likely to result in sickness, injury, or death to a person or damage or destruction to tangible property. The evidence conclusively establishes that Oberto’s product was not actually and maliciously contaminated and that it was not likely that any sickness, disease, death, or destruction would result from the consumption or use of Oberto’s product. Moreover, there is no evidence that Oberto was harmed by any alleged violation of the Insurance Commissioner’s claim handling regulations as required to sustain an action for bad faith or violation of the IFCA or the CPA. Accordingly, Oberto cannot carry its

burden of presenting a genuine issue of material fact on any issue as required to defeat Underwriters' motion for summary judgment.

Therefore, it is respectfully submitted that the rulings of the trial court denying Underwriter's Motion for Summary Judgment, granting Oberto's Motion for Summary Judgment on Liability, granting Oberto's Motion for Summary Judgment on the issues of bad faith and statutory violations, and the granting Oberto's Motion for Summary Judgment with Respect to Damages and applying a 1.75 multiplier to Oberto's claimed damages, be reversed.

DATED this 8th day of July, 2011.

GARVEY SCHUBERT BARER

By



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CERTAIN UNDERWRITERS
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CERTIFICATE OF SERVICE

I, Marilyn Rowley, certify under penalty of perjury under the laws of the State of Washington that, on July 8, 2011, I caused to be served on the persons listed below in the manner shown:

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