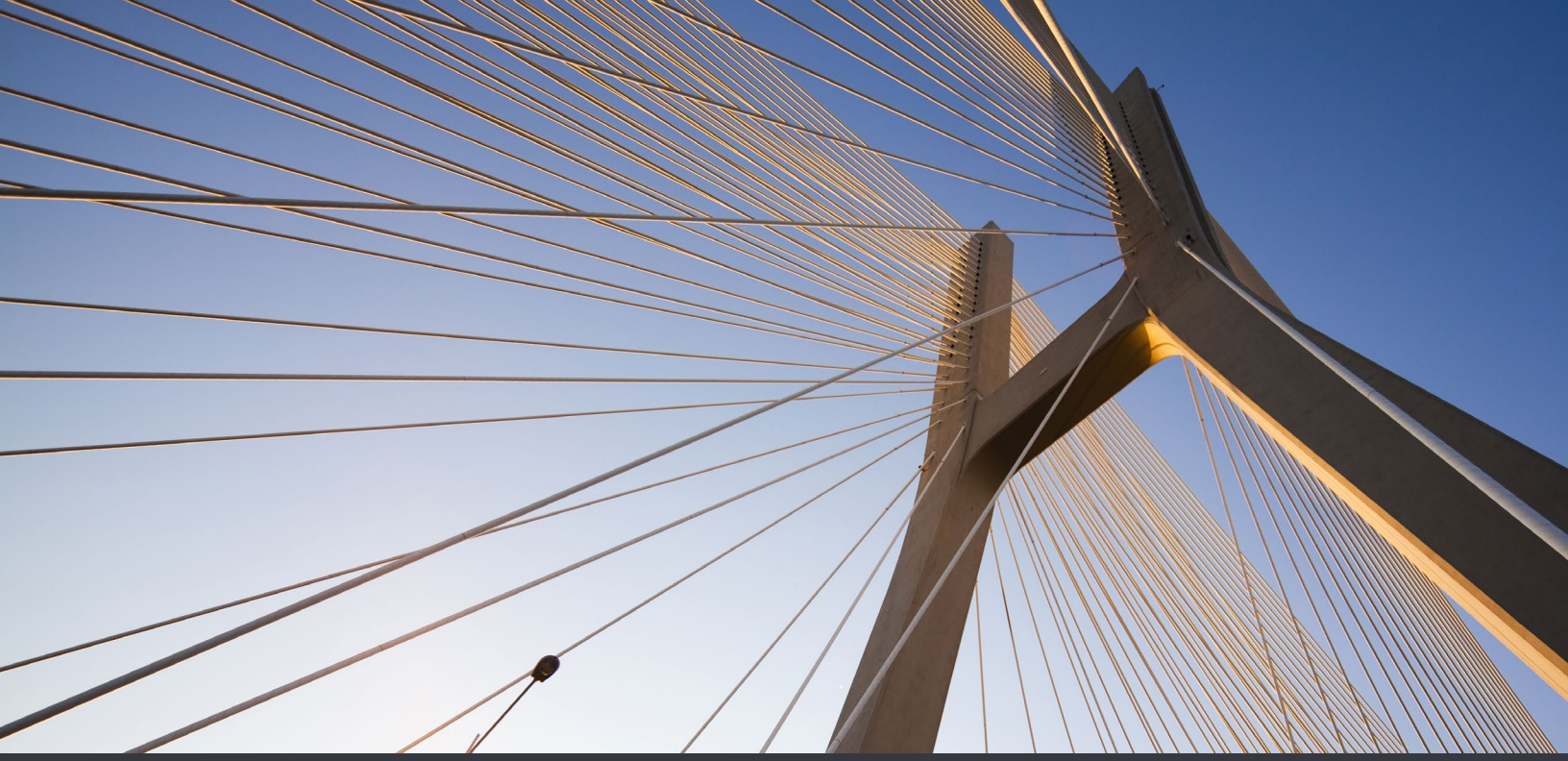

NORTHWEST INSURANCE LAW

QUARTERLY NEWSLETTER SPRING 2017

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WASHINGTON SUPREME COURT LIMITS THE SCOPE OF THE INSURANCE FAIR CONDUCT ACT

by Meredith Dishaw

Recently, the Washington Supreme Court narrowly interpreted the Insurance Fair Conduct Act ("IFCA"), limiting the scope of conduct that constitutes a violation under the act. In *Isidoro Perez-Crisantos v. State Farm Fire & Casualty Company*, the Court determined whether a violation of the insurance regulations under the Washington Administrative Code ("WAC") constituted a violation of IFCA. 187 Wn.2d 669 (Feb. 2, 2017). Since the enactment of IFCA, claimants have asserted that a violation the WAC provisions, even a merely technical or procedural violation, was a violation of IFCA and subjected insurers to the increased penalties under the Act, including treble damages and the claimant's reasonable attorneys' fees. The Court disagreed and held that a cause of action under IFCA could not be predicated solely on a violation of the WAC regulations. Instead, a cause of action under IFCA will only exist if an insurer "unreasonably denied a claim for coverage or payment of benefits."

IFCA was enacted in 2007 to provide a first party claimant with a cause of action "to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs," if an insurer "unreasonably denied a claim for coverage or payment of benefits." RCW 48.30.015 (1). IFCA also provides increased penalties for an insurer's alleged unreasonable behavior, including an award of treble damages and reasonable attorneys' fees. *Id.* at (2)-(3). Creating some confusion, which the *Perez-Crisantos* Court addressed, IFCA provided that such increased penalties could be awarded where an insurer unreasonably denied coverage or a benefit or where an insurer "violated a rule in subsection (5) of this section...." *Id.* Subsection 5 identifies certain specific WAC provisions and states "[a] violation of any of the following is a violation for the purposes of subsections (2) and (3) of this section." *Id.* at (5).

In *Perez-Cristantos*, the insured was injured in a car accident and sought coverage under his personal injury protection ("PIP") and uninsured motorist coverage ("UIM") with State Farm. State Farm paid the limits of the PIP coverage, but did not issue any payments under the UIM policy. The insured asserted that State Farm denied coverage under the UIM policy, but State Farm asserted that it merely disagreed with the insured's valuation of his claim. The insured's claim was arbitrated and an award was issued in favor of the insured. The insured had also brought a separate lawsuit against State Farm, alleging violations of IFCA, the WAC regulations, and

WASHINGTON SUPREME COURT LIMITS THE SCOPE OF THE INSURANCE FAIR CONDUCT ACT (Continued)

Washington's Consumer Protection Act ("CPA"), which was primarily stayed during arbitration. After the arbitration award, the insured amended his IFCA claim to allege "that State Farm forced him to litigate in order to get payments that were due to him," allegedly in violation of WAC 284-30-330 (7). State Farm moved for summary judgment, which the trial court granted.

This is the first time the Court had been asked to interpret the provisions of IFCA since it was enacted. The Supreme Court noted that the federal courts sitting in Washington had reached opposing conclusions on whether an IFCA claim may be predicated solely on a WAC violation. In interpreting the statute, the Court concluded that IFCA did not state that it "creates a cause of action for first party insureds…whose claims were processed in violation of the insurance regulations listed in (5)," which "strongly suggests that IFCA was not meant to create a cause of action for regulatory violations." The Court did find, however, that the statute was ambiguous and looked to extrinsic evidence, which offered conflicting evidence on the legislative intent. However, the Court found that the legislative history ultimately support its conclusion that IFCA did not create a separate cause of action for WAC violations. The Court also noted that the Washington Pattern Jury Instructions had provided that a violation of the WAC regulations was a violation of IFCA, but, the Court stated that jury instructions were not the law and stated that implying an IFCA cause of action for violations of the WAC regulations is not "consistent with the legislature's intent as expressed in the actual statutory language." Further, in analyzing the specific WAC regulations identified, the Court concluded that it was unlikely that the legislature intended to create a cause of action for at least some of the regulations. The Court noted that providing an independent cause of action for a WAC violation would allow a first-party claimant to bring an IFCA claim for merely procedural or technical violations such as where the insurer paid a claim that was "not accompanied by a statement setting forth the coverage under which the payment is made," or where the insurer did not respond to a "pertinent communication[] from a claimant reasonably suggesting that a response was required" until the 11th working day, instead of the 10th day.

Thus, the Court held that IFCA did not intend to create a cause of action solely for WAC violations. The Court did state that a WAC violation is "relevant to the apportioned attorneys' fees and damages associated with [] derivative violation[s]." But, before reaching a derivative violation, the insurer must have first denied a claimant's demand for coverage or benefits. However, the Supreme Court did note that a violation of the WAC regulation would establish an unfair act which occurred in trade or commerce, two of the five elements required to establish a CPA claim. Nevertheless, the *Perez-Crisantos* decision would seem to provide insurers with some flexibility in investigating and resolving a claimant's demand for coverage or benefits under the WAC regulations without a looming threat of an IFCA violation for mere technical or procedural violations. Insurers must still timely and fully investigate and strive to comply with their duties under Washington's statutory and common law, but this opinion does clarify that any alleged technical violations of the WAC regulations do not amount to an IFCA violation.

ALASKA SUPREME COURT FINDS DUTY OWED BY LIABILITY INSURER TO THIRD-PARTY CLAIMANT

by Eliot M. Harris

Over the years, policyholders and their attorneys have sought to assert tort claims directly against liability insurers for alleged mishandling of liability claims. While the general rule in many jurisdictions is that third party claimants have no independent cause of action against the policyholder's liability insurer absent an assignment of rights from the policyholder, courts have recently been willing find the existence of such a duty under certain circumstances.

The latest court to find the existence of such a duty was the Alaska Supreme Court in *Burnett v. Gov't. Employees. Ins. Co.*, 2017 Alas. LEXIS 9. In *Burnett*, the insured was a driver that lost control of his truck and crashed into cabin causing property damage including a heating fuel spill and personal injuries to the cabin owner. The insurer hired a contractor to perform an environmental site assessment and to coordinate the necessary clean-up of the spill. After the Alaska Department of Environmental Conservation initially declined approval for the contractor's clean-up plan, the claimant asked the insurer to provide money to allow him to arrange the clean-up. The insurer refused under the purported reason that the insurer did not want to risk increasing the potential liability to the State of Alaska and to the insured if the claimants clean-up was inadequate. As a result, there was a delay in the clean-up, which allegedly caused the cabin to become uninhabitable and complicated the claimant's respiratory health issues. The claimant filed suit against the insured and insurer for his alleged damages.

The insurer moved for summary judgment citing to *O.K. Lumber*, 759 P.2d 523 (Alaska 1988), which held that a third party claimant could not directly sue a liability insurer for failing to promptly settle claims against the policyholder; an alleged breach of a fiduciary duty between the insurer and the policyholder. Based on *O.K. Lumber*, the trial court in *Burnett* granted the insurer's motion for summary judgment.

However, the Alaska Supreme Court reversed and held that a liability insurer can owe a tort duty to a third party claimant when the insurer's claims handling actions affirmatively create a "new and independent duty to the claimant." In doing so, the court distinguished *O.K. Lumber* as not supporting a proposition that a liability insurer would never owe a duty to a third party claimant for any action taken in the insurer's claims settlement role. Instead, the *Burnett* Court found that a tort claim, independent of the contractual relationship between the insurer and the policyholder, would be supported by Alaska law if the insurer engaged in claim handling practices that could give rise to a separate and independent duty.

The court indicated that the insurer had the option of "sitting back and letting" the policyholder and the Alaska Department of Environmental Conservation handle the clean-up and defend the property damage and environmental claims brought against the policyholder by the claimant and the State of Alaska. However, by deciding to affirmatively take control of all or parts of the clean-up to ensure that it was performed in the most economical manner protecting its insured from liability in excess of the policy limit, the insurer "exposed [itself] to all of the liability risk associated with managing an environmental clean-up project." While the *Burnett* Court indicated that it did not fault the insurer before taking this option, its decision to allow a tort claim to proceed against the insurer by a third party claimant suggests that the old saying of "no good deed goes unpunished" may ring true in this situation.

This decision is significant for a number of reasons. First, a well-intentioned insurer that affirmatively takes control of a claim to protect the insured from the potential of increased future liability may subject itself to an independent duty to the claimant to resolve the claim in a good faith manner. Conversely, if the insurer sat back and did nothing and allowed the potential liability of its insured to increase in an amount that may exceed its policy limits, the insurer could be subject to a bad faith claim by the insured for not acting sooner and taking steps to limit the insured's potential exposure. This situation presents a classic Hobson's choice for insurers when a claim is tendered while the alleged damages continue to escalate. Given the nuances that can develop in these circumstances, it is likely that the *Burnett* decision will be refined and further developed by future lawsuits regarding an insurer's independent duty to third party claimants.

WASHINGTON COURT FINDS THAT RES JUDICATA DOES NOT PRECLUDE BAD FAITH LAWSUIT FOLLOWING RESOLUTION OF SEPARATE UIM LAWSUIT

by Naazaneen Hodjat

For years, insurers in Washington have persuaded courts to bifurcate trial, and often discovery, when insureds brought uninsured motorist ("UIM") claims at the same time as bad faith claims. However, the Washington Court of Appeals recently turned this argument around against insurers by finding that they may be subject to multiple lawsuits for essentially the same claim in this context.

In *Fortson-Kemmerer v. Allstate Insurance Co.*, No. 34640-4-III (Wash. Ct. App. 2017), the Court held that an insured could bring a second lawsuit against her insurer for bad faith and violations of Washington's Insurance Fair Conduct Act ("IFCA") after resolution of her original UIM lawsuit against the insurer. In this case, the insured was involved in a hit-and-run collision by a presumed uninsured motorist. She sent a demand letter to her insurer requesting $75,000 in UIM benefits. She also informed the insurer that if it did not pay the amount requested, she would bring a lawsuit for the policy benefits, as well as bad faith claims. In response, the insurer offered $9,978, which the insured rejected. The insured subsequently sued her insurer, but only for $75,000 in UIM benefits. The UIM claim was resolved in mandatory arbitration. Thereafter, she brought another, separate lawsuit against her insurer for bad faith and IFCA violations for allegedly failing to conduct a reasonable investigation into her UIM claim. The insurer argued that this second lawsuit was barred by res judicata. The trial court dismissed the second lawsuit on summary judgment. The insured appealed.

The Washington Court of Appeals reversed the trial court and found that the second bad faith lawsuit was not barred by res judicata. The Court noted that the issue of whether final judgment resolving a UIM claim precludes a later claim for insurer bad faith is an issue of first impression. The insured argued that UIM and bad faith claims are routinely bifurcated by insurers in Washington, and cited to a series of cases (some of which included the same insurer) where insurers have persuaded the Court to bifurcate such claims. In its decision, this Court quoted the following arguments previously made by insurers when seeking to bifurcate:

A claim for breach of contract against an insurance company is significantly different than a claim that in breaching the insurance contract the insurance company somehow acted in bad faith;

It is judicially recognized that…the evidence necessary to support a bad faith claim is very different from that necessary to support a claim for UIM benefits, since [*t*]*he focus of discovery and trial of the UIM claims relates solely to the* plaintiff's *bodily injuries and medical treatment, while* [*c*]*onversely, the focus of discovery and trial on the bad faith claims is on Allstate's conduct;*

Until the fact finder has determined the dollar value of the UIM claim, there is no way to know whether a bad faith claim based upon an alleged failure to properly evaluate, negotiate and settle a UIM claim is even colorable;

None of the eyewitnesses, investigating officers, medical providers, and experts who will testify to the accident related claims has a remote scintilla of evidence relevant to the insurance claims, and evidence about Allstate's evaluation and handling of the claim is not at all relevant to the accident-related claims; and

Without bifurcation and a stay of discovery as to the bad faith claim, an insurer's defense will be prejudiced, since it will be required to produce its UIM file and internal privileged documents to plaintiff before the UIM claim is resolved.

The Court rejected the insurer's argument that because the insured's demand letter threatened to sue for bad faith and IFCA violations, it was clear that these claims "could have" been brought in the earlier action. The Court held that res judicata did not preclude her second claim because bad faith claims are "a different quality that accounts for [the insurer's] and other insurers' efforts—and their success—in persuading courts to treat UIM and bad faith claims joined in a single lawsuit as if the claims had been brought separately." The Court noted that UIM claims are unique because the insurer stands in the shoes of the uninsured motorist; therefore, the insurer's relationship with its insured in a UIM case is "adversarial and at arm's length." However, in a bad faith claim, insurers have a quasi-fiduciary duty to act in good faith toward their insureds. The Court concluded that where a party's different posture as to two claims makes it prejudicial to proceed in the same lawsuit, a different "quality" prevents the claims from being identical under res judicata.

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INSURANCE TEAM

For over eighty years Williams Kastner attorneys have represented clients in the insurance industry, including primary and excess insurers, reinsurers, self-insurers, agents, brokers, and insurance pools. Our attorneys have advised clients on regulatory and claim handling issues, and have assisted insurers in countless claims from the claim investigation through trial on cases involving coverage and bad faith claims. Please feel free to contact us if you have any questions regarding insurance law in Washington, Oregon or Alaska.

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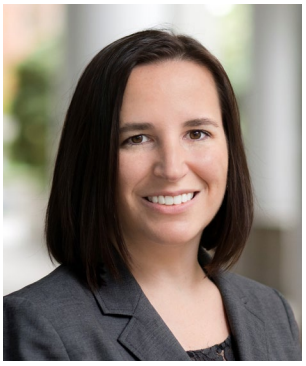

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