Case Study

Washington's Insurance Fair Conduct Act

A Primer for OCAA Adjusters Handling Washington Claims

— *by* Jeffrey D. Eberhard

Many members of OCAA also handle Washington claims. At the Spring Symposium in April, my colleague Kyle Riley and I gave a presentation on Washington's new Insurance Fair Conduct Act (IFCA). The following article highlights important elements of IFCA.

WHAT THE INSURANCE FAIR CONDUCT ACT DOES

The Insurance Fair Conduct Act, found at RCW 48.30.015, creates a new statutory cause of action to recover actual damages for first party claimants who are unreasonably denied a claim for coverage or payment of benefits. The Act allows the court, in its discretion, to increase the insured's actual damages up to three times the amount upon a finding that an insurer acted unreasonable in denying a claim for coverage or payment of benefits or has violated one of five specifically mentioned insurance regulations. Additionally, the Act also requires an award of reasonable attorney fees and actual and statutory litigation costs, including expert witness fees, to a first party claimant who prevails on their IFCA claim.

Although Washington insureds already could obtain attorney fees and costs for first party suits in coverage lawsuits against their insurers, the new legislation makes the award of attorney fees mandatory any time the court finds a violation of the specified regulations or unreasonable denial of a claim or payment.

Perhaps most importantly, although Washington insureds are currently able to obtain treble damage awards (i.e. damages three times the amount of actual damages) up to a statutory limit of $10,000 for actions brought under the Consumer Protection Act (CPA), treble damage awards under IFCA are limitless.

Procedurally, the law requires a claimant to provide 20 days written notice to both the insurer and the state's Office of the Insurance Commissioner before filing suit under the law. Notice may be provided by regular mail, registered mail, or certified mail. Notice under the statute is deemed received three business days after mailing. The notice must provide for the basis of the cause of action, however, if the insurer does not resolve the claim during the 20-day period, the claimant may bring suit without further notice.

WHAT DOES THE ACT CHANGE?

- Creates a new cause of action for first party claimants who are unreasonably denied a claim for coverage or payment of benefits.
- Provides for a court's discretionary award of uncapped treble damages after a finding a violation of the act.
- Makes an award of attorney fees and actual and statutory litigation costs mandatory after a finding a violation of the Act.
- Expressly includes expert witness fees as part of the mandatory litigation cost award.
- Requires a first party claimant to provide a 20-

(Continued on next page)

PERSPECTIVES ON THE LAW

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A Tale of Two Bicycles

In Search of the Law

— by Rudy Lachenmeier

It was a beautiful day along the Columbia River in late January, about a year ago. Blue skies, cool temperatures, and even the stiff breeze coming out of the gorge couldn't change the fact that it was a good day for a bike ride. Two friends from northeast Portland decided to take their first ride of the season, going north on 33rd Avenue towards Marine Drive, then east on the paved path that starts under 33rd, heads east, crosses Marine Drive, and then me-

(Continued on next page)

Case Study… *(Continued from previous page)*

day written notice of the basis of any cause of action brought under the act to both the insurer and the Washington Office of the Insurance Commissioner prior to filing.

- May lower the standard courts use to determine bad faith denial, compared to standards previously used for common law or CPA claims. Under IFCA, an insurer violates the Act if they "unreasonably den[y] a claim for coverage or payment of benefits." Although it is unclear how Washington courts will interpret this language, some observers have opined that the "new" standard may result in a lesser showing of culpability on the part of the insurer than the current standard applied by courts than the above described first party common law and CPA bad faith claims.

CONCLUSION

The Insurance Fair Conduct Act is expected to increase litigation and claims costs for insurers operating in Washington as more first party claimants, newly emboldened by the Act's promise of mandatory attorney fees and the chance for treble damages upon a showing of unreasonable denial or a violation of the specified WACs, file suit. Although it is impossible to accurately quantify the total number of additional lawsuits that will be filed in Washington as a result of the new legislation, we do know that the Insurance Commissioner underestimated the number of notices. They predicted 25 a month, but over 100 notices a month have been filed so far.

We expect that plaintiff's attorneys will aggressively use this statute in PIP and UIM claims. With the increase in the number of lawsuits expected to be brought as a result of the new Act, insurers may be compelled to pay higher settlements on questionable claims (especially relatively low dollar claims) in order to forego the costs associated with litigation. While it remains unclear just how significant of a change IFCA will have on claims costs in Washington, the total costs is expected to be substantial. ❖

— If you would like to be notified of updates, please send an email to caseupdate@smithfreed.com.

This article is intended to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.

Perspectives… *(Continued from previous page)*

anders along the Columbia River towards the I-205 bridge.

Meanwhile, a bike club from Washington was headed in the other direction, having crossed the I-205 bridge, planning to go west to the I-5 bridge, completing a loop back to Vancouver. All cyclists were having a fun, invigorating ride. "It was the best of times," (with apologies to Dickens).

Suddenly, disaster struck. One of the Washington riders was passing a fellow club member with the tailwind at his back, and collided head-on with one of the Portland riders headed east in a horrendous crash. Both bikers went down with significant injuries, and both headed to the hospital in an ambulance. So suddenly, "it was the worst of times."

Flash forward to April of this year, and this bike accident case goes to trial before the Honorable Judge Bearden, with each cyclist claiming to have given the other more than enough room to pass. Believe it or not, then the major issue at trial that the court and counsel struggled with was "What law applies on this beautiful paved path?" On behalf of the defense, I thought the issue was clear.

ORS 814.400 states:

> (1) Every person riding a bicycle upon a **public way** is subject to the provisions applicable to and has the same rights and duties as the driver of any other vehicle concerning operating on highways, vehicle equipment and abandoned vehicles, except:
>
> (a) Those provisions which by their very nature can have no application.
>
> (b) When otherwise specifically provided under the vehicle code.
>
> (2) Subject to the provisions of subsection (1) of this section:

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Perspectives… *(Continued from previous page)*

> (a) A bicycle is a vehicle for purposes of the vehicle code: and
>
> (b) When the term "vehicle" is used it shall be deemed applicable to bicycles.
>
> (3) The provisions of the vehicle code relating to the operation of bicycles do not relieve bicyclists or motorists from the duty to exercise due care.

The question then became "what exactly is a **public way**?" There does not appear to be a separate definition of "public way" in the Oregon Revised Statutes, but the phrase is used in several statutes including ORS 801.160. That statute says '"Bike Path' means a **public way**, not part of a highway, that is designated by official signs or marking for use by persons riding bicycles except as otherwise specifically provided for by law." Given that there were lots of official bike signs and nothing providing otherwise, I argued the path was, by definition, a "Bike Path".

It would also appear that the bike pathway would not be considered a sidewalk which is basically defined in ORS 801.485 as an area adjacent to a Highway, and this path clearly is not.

Since a bike path is a "public way," ORS. 814.400 makes the vehicular code applicable. Thus, ORS 811.300 (failure to drive to the right of an approaching vehicle), ORS 811.100 (the basic speed rule), and most of the rest of the vehicular code were applicable as well, I argued. This would then provide the basis for favorable instructions about not passing when there is not room to do so, the clear requirement to keep to the right, etc.

Plaintiff's counsel took the position that this is essentially a sidewalk, and while everyone has common law duties, the rules of the road don't apply. He pointed out there are pedestrians, skateboarders, roller skaters, fishermen, and all kinds of others which use this multi-use path. He also quoted from the well known bicycle advocate, and very good Oregon trial lawyer, Ray Thomas, who appeared to be the only person who had written on this issue. His writing suggested that this area was a multi-use path and that the rules that apply to a bicycle path are the same rules that apply to a sidewalk. See Ray Thomas's article "Multi-Use Paths and the Rights of Bicycle Riders."

There is a certain amount of irony here because both sides attempted to hire Ray Thomas as an expert, and neither side was successful.

After protracted arguments on both sides, the judge indicated that he was troubled that the law had not stayed current with development of multi-use paths. In fact, he noted that there is no definition in the statutes of a multi-use path. The judge himself had experienced the multi-use nature of this path, having bicycled on the path and seen the walkers, fisherman, etc. I tried to point out to the court that, as confusing as the law might be for a multi-use path, if a pedestrian, or a skateboarder, or a roller skater was somehow involved in the accident, it should not prevent the rules of the road from applying in this case, because no pedestrians were involved; it was a straight bicyclist on bicyclist accident, both of whom, I argued, were subject to the rules of the road.

Ultimately, relying on Ray Thomas, instead of the more normal modes of statutory construction analysis, the court decided that the rules of the road did not apply and only gave common law instructions on lookout and control, and allowed each side to argue pretty much anything they wanted in terms of where people were supposed to be.

In the end, the jury decided in my client's favor, but the legal issue of what law applies on a multi-use path needs to be resolved. Not only for bicyclists, for whom I continue to believe the law is clear, but for the myriad of other users for which the law is muddy at best. Must a fisherman crossing the path yield to the skateboarder or a bike? At this point no one knows for sure.

By way of footnote, Ray Thomas did call me after this case. When I walked him through my statutory analysis, he indicated I may well be right and he would be taking a closer look at that and decide whether or not to correct his prior writings. More importantly, we both agreed that the legislature needs to do something specific about what rules apply on multi-use paths. ❖

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Key Elements of Business Income Loss Calculations Part 6

Last month's column focused on expense projections and the types of documents and information that can be used to project expenses. Part VI, my final article in the series, focuses on continuing expenses.

Continuing normal operating expenses are added to projected net income (or loss) to compute the Business Income Loss. Although continuing expenses appear to be relatively straightforward, in reality they can include a variety of complex matters including cash/accrual accounting issues, as well as identifying and extracting expenses that have been submitted as property damage claims or other claims.

Before you get too far along in your analysis of continuing expenses it can be very helpful to spend some time with the insured discussing the nature of business expenses and how they might be impacted by the loss. A good tool to use in your discussion is the insured's last income statement (or similar document) that was prepared prior to the loss incident. Spend a little time going through each expense listed on the income statement. Pertinent questions include:

a) What would you normally expect this expense to be (a monthly average for fixed expenses or a percentage of sales for variable expenses)?

Claims for continuing expenses that exceed normal pre-loss levels should be investigated. Oftentimes, these occur due to cash/accrual accounting issues or inclusion of property damage expenses in the normal cost of operation. In such cases, it's best to seek the advice of a forensic accountant as these matters can be quite complex for someone not familiar with accounting practices.

b) How do you think this expense will be impacted by the loss?

Simple common sense can be useful in evaluating the insured's response to this question. If the insured says that certain expenses will continue in full, even though the building was completed destroyed, find out why they believe this will occur. This is also a good time to instruct the insured to track property damage and extra expense separate from normal operating expenses. Be prepared to explain why it is important to track these expenses separately.

What type of documents can you provide to support continuing normal operating expenses?

Make sure you understand what specific documents are available to verify the insured's actual continuing expenses and update the calculation as necessary This question will also alert you to possible limitations of the insured's accounting system and get you thinking about possible solutions early in your evaluation of the loss. ❖

Claims Professionals

— *by* Roger Howson
Claims Dispute Resolutions

Editor's Note: Roger Howson is the Education Coordinator for both Seattle and Tacoma Claims Adjusters Associations, and recently did a presentation at the OCAA Spring Symposium. The following article is reprinted from the May TCAA newsletter.

As some of you know, in addition to being a licensed Independent Adjuster I am also a licensed Public Adjuster.

For those of you who may not be familiar with the difference: an Independent Adjuster is licensed to represent insurance companies, and Public Adjusters are licensed to represent policy holders. In Oregon there is only one kind of adjusting license, so they don't differentiate between Independent and Public Adjusters. You are an adjuster, period. You are empowered to represent either an insurance company or an insured, and the only restriction is that you can't represent both parties in the same claim.

I have been adjusting claims since 1977, and for most of the past decade the majority of my adjust-

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Claims… *(Continued from previous page)*

ing work has been in the resolution of first party insurance claims disputes.

Much of my claims work involves the Appraisal process, wherein the insured retains an Appraiser, the insurance company retains an Appraiser, and the two Appraisers agree on a third party Umpire. More often than not, I'm the Umpire. Within the Appraisal process, the Appraisers aren't advocates so much as independent third party claims professionals determining loss, damage, and valuation based on the claim information and documentation available. In other words, the Appraiser doesn't "represent" their client so much as they appraise the claim that's put before them.

Think of it like the real estate appraisers who are called upon to determine a fair market value for buyers, sellers, and mortgagors. There's been quite a scandal over those appraisers who miscalculated market valuations based on the influence of aggressive lenders and/or real estate agents. Unethical appraisers kept busy by giving their client lenders and realtors what they wanted — ever higher real estate valuations to ensure that borrowers could refinance and buyers could qualify. Unfortunately for just about every one of us, the entire mortgage system collapsed when these supposedly independent professionals began acting as an advocate for their clients instead of appraising real estate according to its true market value.

Why does any of this matter? Because the question of my Public Adjusting license sometimes comes up when we're discussing the work I do with the Tacoma Claims Adjusters Association (TCAA), Seattle Claims Adjusters Association (SCAA), and Oregon Casualty Adjusters Association (OCAA). Occasionally, someone asks me if I feel a conflict working on TCAA, SCAA, or OCAA business with the same adjusters I might have to take a claim against. Not at all; and here's why:

- We don't take an adversarial approach to the claims process; instead we look for cooperation and collaboration in establishing a fair, reasonable valuation of the claim. If a claim is intentionally misrepresented by the insured, that's called fraud and the claim can be denied in its entirety. And if the insurance company intentionally underpays a claim, that's called Bad Faith and there are all kinds of penalties for that kind of misbehavior. Therefore, true Claims Professionals (no matter WHO they represent) are invested in an equitable, expeditious claim resolution.

- Much of my Appraisal work comes from insurance companies BECAUSE I am licensed as a Public Adjuster. If a disputed claim goes to litigation, the insurance company likes to prove that they are so fair and reasonable that they will actually hire a Public Adjuster as their designated Appraiser to ensure that the claim is evaluated without any insurance company bias. This is especially useful when an Appraisal Award comes in closer to the insurance company's initial settlement offer than the insured's demand. (I recently settled an Appraisal for EXACTLY what the adjuster offered, now THAT adjuster is a shining example of a true Claims Professional!)

- I am often named by the courts as the Umpire on Appraisals because of the fact that I favor neither insurers nor insureds. My income is not entirely dependent on insurance companies so I am not perceived as beholden to them, and insurers are confident that my thirty years of adjusting experience enables me to evaluate a claim on its merit rather than the emotional pleas of a dissatisfied claimant.

- I get many of my Public Adjusting and/or Appraisal referrals from fellow adjusters. I can't tell you how many times an adjuster has referred a family member, friend, neighbor, acquaintance, or claimant to me for help. If you're a staff adjuster or an Independent who gets all your work from insurance companies, you can't afford to get involved in a claim against another carrier where someone is asking for help. So, what else are you going to do?

- The Appraisal community is very small. I've gotten insurance company Appraisals because the insurance company's Appraiser I was working opposite on one claim was representing the policyholder on another claim, and I've been referred to other Appraisals when the

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Claims… *(Continued from previous page)*

policyholder asks the insurance company's Appraiser for a recommendation as to who THEY should hire. (And, of course, I've done my share of referring Appraisers one way or the other.)

When it comes to representing policyholders and insurance companies, I'm damned if I do and damned if I don't. I was recently hired as an Appraiser by the Claims Manager for a large insurance company, and he called back to make sure that I don't ONLY represent insurance companies because his legal team told him to make sure that the Appraiser he hired couldn't be accused of bias. The reason this was so funny was that I was presently representing policyholders in two other claims with his claims staff.

I was once testifying in a Bad Faith trial, and the attorney who knew me well was trying to establish for the judge and jury that I wasn't ALWAYS his Expert Witness. He asked me to tell of other occasions where I had testified against him, and I answered, "You mean, besides this case?" This was especially humorous to us both because this same defense attorney had once subpoenaed me as a witness when the opposing plaintiff attorney named me as a witness but decided not to have me testify because he thought my assessment of his client's claim was far too conservative.

As a Claims Professional I practice empathy, not sympathy. If you're looking for a fair, reasonable, and competent assessment of your claim, hire a Claims Professional. If you're looking for someone to agree with you regardless of the facts, you're better off hiring someone whose ethics and integrity are for sale. As I like to say, "We don't drink the Kool Aid." Most Claims Professionals call it the way they see it; you may not always like it, but you should be able to trust it.

In closing, I'll quote Darrell Lee, who in 1965 was the first adjuster to be licensed in the state of Washington as a Public Adjuster AND has been a fifty year member of the Seattle Claims Adjusters Association. When challenged about his membership in SCAA as it related to his status as both an Independent Adjuster and a Public Adjuster, Darrell shot back, "Would you rather have me inside the tent peeing out, or outside the tent peeing in?" ❖