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WASHINGTON STATE LEGISLATURE CONSIDERS BILL ON NEW INSURANCE BAD FAITH CLAIMS AND REMEDIES

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The Washington State Legislature is considering a bill called the "insurance fair conduct act" ("Act"), that appears to be headed for a floor vote in either the House or Senate this month. The Act would amend existing Washington statutes and make a "negligence" standard sufficient for private-action "insurer bad faith" claims in Washington. The Act would also expand the range of claimants' remedies for a proven statutory violation by an insurer.

Washington law presently requires that so-called "insurance bad faith" must be based on "unreasonable, frivolous or unfounded" conduct. The Act prohibits "unreasonable or negligent" denial of a "claim for coverage or payment of benefits," and creates an associated private right of action within the Washington statute RCW 48.30. If the court in a claimant's action finds there was such an "unreasonable or negligent" denial, or finds a Washington Administrative Code violation, the court "shall" award reasonable attorneys' fees, and "actual and statutory litigation costs, including expert witness fees" to the prevailing "insured or first-party claimant of an insurance contract." If such a denial or a "negligent or unreasonable" Washington Administrative Code violation is found, the court "may" increase the damages award up to triple the amount of damages, without any cap.

Washington law already permits private claims under the Washington Consumer Protection Act (CPA) for unreasonable violations of Washington Administrative Code regulations promulgated by the state's Insurance Commissioner. The new Act's provisions are stated to be separate from (and therefore additional to) the CPA remedies that are presently available against insurers. In contrast to the proposed Act, however, the CPA capped the amount of the same courts' treble damages awards at $10,000. In the current legislative session, the same Senate Committee that considered the Act is also considering a CPA amendment that would expand the courts' authority to issue an additional damages award, over and above "actual damages" and "costs of the suit including a reasonable attorney's fee," of up to $50,000.

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Washington's common law already permits awards of attorney fees against an insurer that has denied coverage, if an entitlement to coverage is ultimately proven. These rights do not presently extend to mere differences of opinion over the value of a claim. The new Act could potentially broaden the scope of attorney fee awards and possibly encompass valuation issues, if the claimant can thereby prove an unreasonable or negligent denial of the "payment of benefits."

Eligible claimants under the Act, called "first party claimants," are defined by Substitute House Bill 1491, as first read on February 28, 2007, to include any persons or legal entities "asserting a right to payment" under insurance policies "arising out of the occurrence of" a covered contingency or loss. Substitute Senate Bill 5726 as first read on February 16, 2007, had left the term "first party claimant" undefined, and further provided for claims by any "insured" entity that "has purchased insurance." Substitute House Bill 1491 also differs from the Senate bill because it does not specifically require "negligent or unreasonable" Washington Administrative Code violations to justify an award of treble damages.

The House and Senate bills both received majority votes from their respective Committees, the House's Committee on Insurance and Financial Services & Consumer Protection and the Senate's Committee on Consumer Protection and Housing. The Senate's Rules Committee has already referred the Senate bill for a floor vote, and the House's Rules Committee may similarly refer the House bill for a floor vote in this legislative session by no later than March 14, 2007.

Cozen O'Connor is a recognized industry leader in all areas of insurance litigation, including bad faith claims. For more information regarding this recent development, contact Michael D. Handler at 206-808-7839 or mhandler@cozen.com; or Thomas M. Jones, Vice Chair for the Cozen O'Connor National Insurance Department at 206-224-1242 or tjones@cozen.com.