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**WASHINGTON STATE VOTERS APPROVE  
NEW "BAD FAITH" ACT**

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On November 6, 2007, the voters of Washington State approved a new statutory basis for a wide range of so-called "insurer bad faith" claims. Under the "insurance fair conduct act" ("Act"), "penalties" may be imposed against insurers that are found to have "acted unreasonably" or that are found to have violated any one of at least 37 existing Washington Administrative Code rules adopted by Washington's Office of the Insurance Commissioner. *See* WAC 284-30-330, -350 through -380. The most significant change in existing Washington law is that the Act will permit Washington Superior Court judges to impose uncapped treble damages. Other than stating that insurers "may not unreasonably deny a claim for coverage or payment of benefits," the Act supplies no guidance as to when a court may increase damages awards up to "three times the actual damages." The treble-damages multiplier would be left to the discretion of the individual judge.

**CLAIMANTS UNDER THE ACT**

The Act permits a Washington Superior Court action to be brought by "an individual, corporation, association, partnership, or other legal entity asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract." The Act calls any such claimant a "first party claimant."

Underlying plaintiffs cannot claim under the Act because they would not be asserting rights "as a covered person." Nor could assignees make claims under the Act, based on longstanding Washington authority supporting the principle that causes of action for "recovery of a penalty" are generally not assignable.

Otherwise, it is anticipated that any insured claiming to be a "first party" to an insurance contract will be permitted to make claims under the Act. Litigation may be

needed to determine whether the Act's above-quoted definition of "first party claimant" will encompass insureds under liability insurance policies.

#### INSURERS SUBJECT TO THE ACT

The Act's new statutory section of RCW 48.30 specifically exempts only one category of insurance: "a health plan offered by a health carrier." The terms "health carrier" and "health plan" are defined by existing Washington statutes. "Health carriers" are a very small subset of the insurers "engaged in the business of insurance" in Washington as referenced in the Act's new RCW 48.30.010(7), because the referenced statutory definition of "health carrier" identifies only a disability insurer, a health care service contractor, and a health maintenance organization (all terms further defined by statute). "Health plan" is subject to various statutory exceptions as well, including long-term care insurance, Medicare supplemental insurance, disability insurance, worker's compensation insurance, employer-sponsored self-funded health plans, dental-only coverage, and vision-only coverage.

#### POTENTIAL FOR RETROACTIVITY TO CLAIMS HANDLING BEFORE THE EFFECTIVE DATE

The Act will be effective on December 6, 2007. The Act is silent as to any retroactive application. Generally, Washington statutes are presumed to apply prospectively only, unless they are "remedial" in nature. Furthermore, statutes imposing penalties are not to be applied retroactively. This Act creates a new cause of action and provides for penalties. Therefore, it is not likely to be held to apply retroactively. *See Johnston v. Beneficial Management Corp.*, 85 Wn.2d 637, 538 P.2d 510, 514 (Wash. 1975) (holding Washington's Consumer Protection Act would not be applied retroactively where it created a civil cause of action for damages and provided for exemplary damages).

#### ATTORNEYS FEES AND COST AWARDS ARE MANDATORY; TREBLE-DAMAGE PENALTIES ARE DISCRETIONARY

Washington law previously provided for all of the following to be potentially recoverable by a policyholder who asserted "bad faith": the value of the claim for coverage; the damages caused by the insurer's alleged bad faith; Washington Consumer Protection Act awards including attorney fees, costs and treble damages up to \$10,000 per violation for unreasonably violating Washington Administrative Code insurance regulations; and all of the attorneys fees paid to establish that the insurer should have provided insurance coverage (known as "*Olympic Steamship*" fees).

The Act makes "reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees," a mandatory award in addition to bad faith damages. The Act therefore shifts the costs of "expert witness fees" and attorneys' fees incurred in establishing the bad faith claim to the insurer.

The Act also permits Superior Court judges to add penalties of up to triple the “actual damages.” Such damage multiplier awards against insurance companies would no longer be subject to the existing Consumer Protection Act’s \$10,000 cap. At the same time, the Act states that it leaves unchanged “any other remedy that is available at law,” including Consumer Protection Act claims “for an unfair or deceptive practice of an insurer.”

#### 20-DAY WRITTEN NOTICE REQUIREMENT PRIOR TO FILING SUIT

At least 20 days before filing a lawsuit, the claimant must provide written notice “of the basis for the cause of action” to the insurer and to the Office of the Insurance Commissioner. A lawsuit may be brought under the Act without further notice, “[i]f the insurer fails to resolve the basis for the action within the twenty-day period after the written notice.”

*For further details about the Act, please contact Cozen O'Connor member Michael Handler (206-808-7839; [mhandler@cozen.com](mailto:mhandler@cozen.com)) or Thomas Jones, Vice Chair of the firm's National Insurance Department and Chair of the Electronic Discovery Practice Area (206-224-1242; [tjones@cozen.com](mailto:tjones@cozen.com)), both of the firm's Seattle office. Cozen O'Connor is a nationally recognized leader in representing the insurance industry in all coverage areas.*