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WASHINGTON STATE ASSOCIATION for JUSTICE

Trial News

March 2017 | VOLUME 52 • NUMBER 7

Special Focus: Interpersonal Violence

Ninth Circuit Case Will Determine Statute of Limitations for Section 1983 Child Sex Abuse Cases

by Kevin Sullivan, Leonard Feldman, and Tomás Gahan

Does the statute of limitations for a federal claim against a public entity start: (1) when a child is sexually assaulted, or (2) when he realizes (a) that his adult psychiatric issues came from the abuse and (b) that the government is at fault? A case now before the Ninth Circuit will decide these issues: *Does v. Josephine County*, Case No. 15-35506.

The events occurred in Josephine County, in a small, southern Oregon town named Grants Pass. Ray Luckey served as a juvenile probation officer for Josephine County and he had total control over his probationers. Applying his own discretion, he could arrest them and send them to the state juvenile prison.

The Juvenile Department had rules for its probation officers' out-of-office contacts with the kids under their charge. The officers were not to have the probationers over to their homes, take them out to dinner, buy them presents, or take them on overnight trips. But, with the County's full knowledge, Luckey regularly violated these rules. Luckey had boys over to his house for overnight stays, and County employees saw them outside of his home wearing only Speedos. Luckey took boys on overnight vacations, bought them presents and even took roses to a "favorite boy" at the local high school.

Parents and other local residents complained to the Juvenile Department and to County officials. They were rebuffed because "Ray did so much good for the kids." The Oregon State Police started an investigation after a boy complained of sexual abuse, resulting in a grand jury. Luckey committed suicide the day he was scheduled to testify.

As it turned out, Luckey had been abusing boys under his charge the entire time.

What happened to these kids? Many ended up going to prison as adults. All had serious psychiatric problems – drugs, alcoholism, depression, or PTSD. Their relationships failed. They could not hold jobs.

Suit was filed in federal court in Oregon for 10 victims by Medford attorney Tom Petersen, asserting claims under Section 1983 and under Oregon law. Petersen brought in Seattle attorney Kevin Sullivan to serve as co-counsel. Both represent victims of child sex abuse against institutional defendants. The defense was simple: These boys knew when they were assaulted that Luckey's actions were "wrong," and it was this knowledge that triggered the statute of limitations.

Plaintiffs' counsel, on the other hand, argued the following: Abuse victims frequently bury the trauma and fail to connect their adult problems to the abuse suffered as children. Thus, the statute of limitations starts running only when the victims con-

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IFCA

After *Perez-Crisantos*: What Have We Arguably Lost, What Was Preserved, What Don't We Know, and How Best to Move Forward With IFCA Claims

By Kristine Grelish and Paul Veillon

Introduction

On February 2, 2017 the Washington Supreme Court provided its first decision concerning the Insurance Fair Conduct Act (hereinafter "IFCA"), *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 92267-5, 2017 WL 448991 (Wash. Feb. 2, 2017). The Court held that a first-party claimant may not sue under RCW 48.30.015 on the basis of an insurer's regulatory violation for unfair claims settlement practices without a concurrent unreasonable denial of coverage or payment of benefits: "IFCA does not create an independent cause of action for regulatory violations." *Id* at *1.

According to the Court, relying on RCW 48.30.015(1) (the granting provision), "IFCA does not state it creates a cause of action for first party insureds who were unreasonably denied a claim for coverage or payment of benefits or 'whose claims were processed in violation of the insurance regulations listed in (5).'" *Perez-Crisantos*, 92267-5, 2017 WL 448991, at *4. The Court rejected the theory of an implied cause of action for WAC violations. The Court viewed the statute as ambiguous but determined that the extrinsic evidence of the legislative intent did not, on balance, support a "WAC alone" IFCA claim. The Court determined that the legislature intentionally included references to the insurance regulations in the remedial section of IFCA, but not its granting provision.

Whether the Court's holding was "right" or "wrong" is beyond the scope of this article. Bad faith claims and CPA claims are also outside the scope of this article. Our goal in this article is to assess what we have lost, what the opinion preserved, and how best to move forward successfully handling IFCA claims for our clients in the PIP and UIM arena.

What Have We Arguably Lost?

After *Perez-Crisantos*, a first-party claimant may not maintain a cause of action under IFCA (RCW 48.30.015) for

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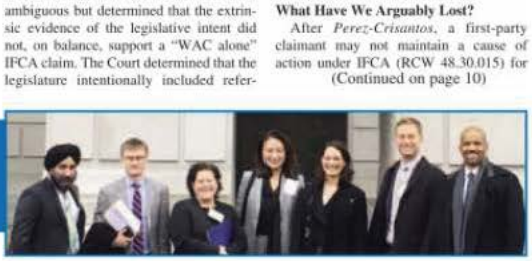
For More LOBBY DAY Photos See pages 8 & 9



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WSAJ 2017 Annual Convention	8/3-6/17

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bare violations of Washington's fair claims practices regulations, WAC 284-30-330, *et. seq*. A cause of action under IFCA must be premised on an unreasonable coverage denial or an unreasonable denial of the payment of benefits.

For example, if an insurer pays fair value for a claim reasonably promptly but fails at some point to respond to pertinent correspondence, WAC 284-30-360(3) does not support an IFCA lawsuit. If an insurer promptly pays fair and reasonable PIP benefits but fails to "se[t] forth the coverage under which the payment is made," then WAC 284-30-330(9) alone does not support an IFCA lawsuit. These are illustrative, but likely trivial examples since these facts would permit only a relatively frail lawsuit.

The opinion's most profound effect is arguably related to WAC 284-30-330(7), which declares "Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings" to be an "unfair metho[d] of competition and unfair or deceptive ac[t] or practic[e]." *Perez-Crisantos* involved State Farm's offering to pay no UIM bodily injury benefits, the insured's suing for breach of contract and IFCA, substantially prevailing in a damages arbitration while the IFCA claim was on hold, and then alleging an IFCA violation based solely on an alleged WAC 284-30-330(7) violation. But if a WAC 284-30-330(7) violation cannot support an IFCA claim, then what can? Don't panic - keep reading.

What Did *Perez-Crisantos* Preserve?

Despite disappointment among policyholder attorneys and strong rhetoric from the defense bar overreacting to the opinion, *Perez-Crisantos* preserved the core of a meaningful IFCA lawsuit. The majority clearly endorsed denial of payment of benefits as adequate for an IFCA claim even if the insurer did not deny coverage: "The insured must show that the insurer unreasonably denied a claim for coverage ***or*** that the insurer unreasonably denied payment of benefits. If either or both acts are established, a claim exists under IFCA." *Perez-Crisantos,* 92267-5, 2017 WL 448991, at *6 (citing *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 79, 322 P.3d 6 (2014)) (emphasis in the original).

The opinion *did not* strip from first-party claimants the right to sue for unreasonable low ball offers or for unreasonably delayed claims handling, particularly where the insured alleges that the insurer failed to conduct a reasonable investigation. The opinion did not address what constitutes a "denial of payment of benefits" or whether unreasonable delays constitute effective denials. The opinion did not address, and therefore did not narrow, the scope of "benefits" to which an insured is entitled; it did not limit an insured's discovery rights in IFCA litigation; and it did not address or limit "actual damages," e.g., for emotional distress. The opinion did not discuss whether a policyholder in a third party case is a first party claimant under IFCA. Most importantly, *Perez-Crisantos* did not hold, or even suggest, that an insurer's violation of the fair claims practices regulations was immaterial to IFCA liability.

What We Still Don't Know?

With respect to regulatory violations the Court specifically stated:

> Instead, IFCA makes regulatory violations relevant to the apportioned attorneys' fees and damages associated with that derivative violation. *See Mut. of Enumclaw Ins. Co. v. Myong Suk Day*, No. 75633-8-I, 2016 WL 7210718, at *8 (Wash. Ct. App. Dec. 12, 2016) (apportioning attorney fees based on the issues prevailed upon at appeal). This interpretation is consistent with our canons of statutory construction prohibiting us from reading language into subsection (1) that the legislature expressly omitted and from rendering any portion of subsections (2) and (3) superfluous.

Perez-Crisantos, 92267-5, 2017 WL 448991, at *6.

The Court told us that its statutory interpretation did not "rende[r] any portion of subsections (2) and (3) superfluous," but RCW 48.30.015(2) and (3) both refer to the Court's authority to award extra-contractual damages for an unreasonable denial of coverage or payment of benefits *or* for a violation of a fair claims handling regulation. If an insured must prove the former to win an IFCA lawsuit in the first place, under what circumstances would a Court ever rely on the latter to support the remedy?

A Strong IFCA Claim Remains Strong

Successfully suing an insurer for extra-contractual claims has always required, and still requires, a clear articulation of what the insurer owed the policyholder but didn't provide, what damage beyond the withheld coverage or benefits the policyholder suffered (even if "actual damages" include the benefits denied), and what made the insurer's claim decision and/or claims handling unreasonable. Even if our Supreme Court had ruled in favor of *Perez-Crisantos*, IFCA lawsuits lacking those elements would fail to produce a compelling claim likely to produce a successful trial outcome.

Fundamentally, we must characterize our IFCA claims as coverage issues, benefits issues, or both. *We must resist an insurer's efforts to control our narrative and allege that our claims are predicated only on regulatory violations or that they are merely good faith value disputes.* An insurer may owe a policyholder coverage, first-party benefits expressed in the policy, or benefits our regulations and Courts have established as inherent in an insurer's duty of good faith. Defense, even in the ultimate absence of liability coverage, is a valuable policy benefit - sometimes more valuable than payment of an insured's liability exposure. An underinsured motorist or PIP valuation dispute is an agreement to the undisputed portion of the claim and a denial of benefits for the remainder. Some benefits are embedded in our regulations: an insurer's duty to conduct a fair, full, reasonable, and prompt investigation is a legal, not contractual, benefit of buying insurance. When we face circumstances that justify an IFCA allegation or lawsuit, we can, and must, describe those facts in relation to coverage owed but not provided or benefits deserved but denied. We can, and must, use the fair claims practices regulations to demonstrate that the insurer's conduct was unreasonable, or that the regulatory violation directly represents a benefit denied, and we must clearly discuss those regulations in the context of our primary assertion: that the carrier's conduct raises an issue of coverage or payment of benefits.

Washington's regulations governing insurer conduct remain essential to IFCA litigation. They establish a standard of care, and an insurer's failure to comply with them is evidence that the coverage or payment of benefits denied was unreasonable. We are in familiar territory: a police officer will not tell a jury that a driver who failed to yield the right of way "broke the law," but he or she may give opinion testimony that the driver engaged in unreasonably unsafe conduct. Likewise, IFCA litigation has involved and will involve both expert testimony and attorney argument, relying on the content of our regulations to explain why we are seeking something more than simply disputed policy benefits. The insurance regulations remain a linchpin to persuading an IFCA jury that our client was not simply "going through the normal (pugilistic) insurance process," but rather suffered damage requiring extra-contractual compensation.

Whether a claims adjuster gathered all the information necessary to formulate a full and fair coverage or damages evaluation - in the context of a fire cause investigation, UIM bodily injury damages, business interruption after a physical loss or data breach, or the reasonable value of medical services owed under PIP - remains

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the most important question we will ask a jury to decide. Obtaining a litigation, arbitration, or appraisal outcome substantially greater than the carrier offered before that proceeding was insufficient, alone, to obtain extra contractual damages before and after *Perez-Crisantos*.

Thus, while this apparent pronouncement that WAC 284-30-330(7) violation cannot support an IFCA claim is alarming, it is hard to imagine any situation where you have solid evidence of a WAC 284-30-330(7) violation and do not also have evidence of an unreasonable denial of a claim for coverage or payment of benefits. WAC 284-30-330(7) still has meaning, but we must show how, but for unreasonable claims handling, our clients would probably have received fair treatment and benefits owed but denied without adversary proceedings.

Rebutting Adjusters' Inaccurate Allegations and Abuse after *Perez-Crisantos*

We must address a new practical daily reality outside the context of a judicial motion or jury trial. We can expect adjusters and coverage counsel to rely on *Perez-Crisantos* to handle first-party claims more aggressively as industry insiders hail the decision as a major blow to policyholder rights. We can expect adjusters to perceive less exposure for violating the regulations than before, even where the violation would demonstrate unreasonableness. Most disruptive will be the likely allegation that making *any* offer of benefits is *per se* adequate under IFCA even if the offer is the unreasonably low product of a mishandled investigation. Counsel responding to 20-day Notices are less likely than before to resolve potential IFCA claims even where the notice clearly characterizes the claim as a coverage or benefits issue.

Our most promising response to this trend will be consistently framing our IFCA allegations within the scope of *Perez-Crisantos* and being prepared to engage insurance professionals in reasoned discussions of the opinion's limited effect. We already face vigorous resistance to IFCA claims based on technical regulatory violations, and for good reason. Our goal must be to eventually restore the competing narratives to the status quo before the decision.

Conclusion

Federal Courts have largely been shaping the breadth, restraints and applicability of IFCA to our cases. Washington court pronouncements on IFCA have been rare. *Perez-Crisantos* is our Supreme Court's first. While it narrowed the basis for a claim under IFCA, in application the opinion will likely not be the dark cloud upon our IFCA cases we feared. To win an IFCA lawsuit - or even credibly allege and resolve a claim before litigation - we must present compelling evidence of an insurance company that has failed to obey the basic rules of insurer-insured fairness, accepting funds through premiums and failing, to pay out benefits when owed, fallaciously claiming a good faith value dispute, when all the evidence points to an unreasonable denial of benefits and/or results driven coverage denial, and leaving the insured consumer to suffer unnecessarily because of careless, or even callous, insurer conduct.

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***Paul Veillon**, JD, CPCU is a WSAJ EAGLE Member and solo practitioner at Galileo Law PLLC in Seattle.*

Ninth Circuit Case Will Determine Statute of Limitations for Section 1983 Child Sex Abuse Cases

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nect their emotional problems to the abuse.

Trial counsel anticipated the issue would come before the Ninth Circuit and therefore worked to develop a strong record. Each Plaintiff was examined by a clinical psychologist who opined that the connection was made only as an adult. Two leading authorities in the field of trauma psychology, Dr. Laura Brown and Dr. Jennifer Freyd, testified that the Plaintiffs' delayed realization was typical and rational for abuse victims. Dr. Freyd testified to a phenomenon called "betrayal trauma," which occurs when an institution fails to protect the victim.

Magistrate Judge Marc Clarke ruled in Plaintiffs' favor and allowed their Section 1983 claims to proceed. He also ruled that their Oregon claims were barred under an Oregon 10-year statute of repose. Chief Judge Ann Aiken reversed and held the statute of limitations had run on the federal claims.

Ninth Circuit appellate specialist Leonard Feldman was retained for the appeal.

In his opening brief, Mr. Feldman first argued that granting summary judgment on the statute of limitations issue was improper because the testimony and declarations by plaintiffs' expert witnesses created significant issues of fact about when the victims came to realize that they were harmed and the extent of that harm. Similarly, there were issues of fact about when the victims came to learn of the County's role in their abuse. Such evidence created substantive factual issues for determining the start of the statute of limitations that could not be decided at summary judgment.

Second, Mr. Feldman argued that the district court likewise erred in dismissing Plaintiffs' state law claims based on Oregon's 10-year statute of repose. Claims against public bodies in Oregon are governed by the two-year statute of limitations in Oregon Revised Statute (ORS) 30.275(9) and the corresponding discovery rule. That statute expressly states that it applies to claims against a public body "notwithstanding any other provision of ORS Chapter 12 or other statute providing a limitation on the commencement of an action." Oregon's 10-year statute of repose is precisely such a statutory provision: Thus, Mr. Feldman argued that Plaintiffs' state law claims, like their Section 1983 claims, should instead be governed by discovery rule principles. Such an interpretation would permit Plaintiffs to proceed on their state claims.

Mr. Feldman was assisted in the appeal by trial counsel and Tomás Gahan, an attorney who works with Mr. Feldman on appellate matters. Plaintiffs filed their Reply on February 3, 2017, and are awaiting oral argument.

***Kevin Sullivan**, EAGLE member, is a Seattle native. He is a UW and Boalt Hall graduate. He has been a Seattle-based trial lawyer for over 35 years with experience in maritime, child sex abuse, medical malpractice and securities litigation.*

***Leonard Feldman**, EAGLE member, grew up in Seattle and is a graduate of UW undergrad and Harvard Law School. He is admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Fifth, Eighth, Ninth, and Tenth Circuits, and Washington appellate courts. He was counsel of record and argued in the United States Supreme Court in City and County of San Francisco v. Sheehan.*

***Tomás Gahan**, EAGLE member, is originally from Madrid, Spain, and graduated from Notre Dame Law School. He is a trial lawyer and spent many years as a Senior Deputy Prosecutor with King County before joining Peterson Wampold where he specializes in personal injury, police brutality, and civil rights cases.*