GRABBING THE TIGER BY THE TAIL

STRATEGIES AND TACTICS FOR FIGHTING ALLSTATE INSURANCE COMPANY'S CCPR CLAIMS PRACTICES

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I. INTRODUCTION

Jones v. Allstate Insurance Co. et. al, King County, Washington Superior Court No.99-2-02212-2 SEA, apparently is the first of approximately 56 similar cases in 22 states to hold that Allstate's national policy of "representing" claimants on auto accident claims against its insureds involves the unauthorized practice of law and a breach of fiduciary duties to the claimants.

On January 14, 2000, the Hon. Philip G. Hubbard, a Washington state court judge, ruled on summary judgment that Allstate's Claims Core Process Redesign (CCPR) claims policy toward unrepresented claimants involved the unauthorized, negligent practice of law and breached fiduciary duties to plaintiffs Janet and Terry Jones. (Exhibit 1) Janet Jones was an unrepresented claimant who was seriously injured in an auto accident caused by Allstate's insured, Jeremy France.

Judge Hubbard also dismissed Jeremy France's affirmative defenses of accord and satisfaction and release. One of the grounds for doing so was that Allstate breached fiduciary duties to the Joneses in representing both them and France in settling their injury claim, without disclosing or obtaining their written consent to its conflict of interest. Allstate's unauthorized practice of law and breach of fiduciary duties tainted the settlement and rendered it unenforceable as the "fruit of the poisonous tree."

The Washington Court of Appeals has granted interlocutory review of these decisions and has granted the Joneses' motion to certify the case to the Washington Supreme Court for a final ruling on the legality of Allstate's CCPR claims practices. The Court of Appeals' Order of Certification provides:

"[T]he undersigned panel has determined that the case involves an issue of broad public import which requires prompt and ultimate determination, to wit:

> Whether the manner in which Allstate Insurance Company settled a third party's claim against its insured amounted to the unauthorized practice of law and/or violated the Consumer Protection Act?"

The seminar presentation will focus on strategies and tactics for dealing with Allstate and its insureds in "unrepresented claimant" litigation, including legal causes of action, Allstate's internal documents, written discovery, depositions, expert witnesses, discovery motions, Rule 12(b)(6) dismissal motions, protective orders, and summary judgment motions to establish Allstate's liability and eliminate its factual and legal defenses.

This paper provides the legal architecture for what thus far has been a successful strategy to establish Allstate's liability for the unauthorized, negligent practice of law and breach of fiduciary duties to third-party claimants on summary judgment. It also contains legal strategies and themes to refute Allstate's factual, legal and policy defenses. It is offered as a legal template to assist others who are suing or who will sue Allstate to stop it from deceiving the public by practicing law without a license under CCPR.

II. FACTUAL BACKGROUND

A. The Accident and Janet Jones' Injuries.

In November, 1997 Jeremy France, then 17 years old, drove a Honda Prelude through a stop sign at an intersection in Des Moines, Washington and broadsided Janet Jones' 1992 Chrysler Voyager minivan. The force of the collision dislodged Janet Jones' seatbelt buckle insert from the buckle, causing her head to strike the interior of the minivan and hit the ground after the van tipped over on its driver's side.

Janet was hospitalized for 24 days of surgery and treatment for scalp degloving injuries, brain injury, coma, facial fractures, and the loss of her right eye. Her medical bills exceed $100,000.

A month after the accident in December 1997, Chrysler recalled its seat belt buckle because of safety defects that caused the buckle insert to disengage from the buckle in collisions.

B. Allstate's "Representation" of the Joneses.

Jeremy France was insured by Allstate under a $25,000 liability policy. Three days after the accident, Allstate's "unrepresented segment" claims adjuster Christy Klein contacted Terry Jones in Janet's room at Harborview Hospital and mailed the Joneses its unrepresented claimant form letter and Quality Service Pledge.[1] Allstate's form letter said its adjuster would be Janet Jones' "claim representative" and that Allstate would "ensure that you receive this quality service, outlined in the enclosed Quality Service Pledge." The Quality Service Pledge promised that Allstate would provide "quality service", conduct "a quick, fair investigation of the facts of [the accident]", "fully explain the process", and make "an appropriate offer of compensation" for any injuries Janet may have suffered.

Over the next two months, Allstate followed through on its pledge by helping the Joneses apply to other insurers for payment of medical bills and waivers of UIM and PIP subrogation. Allstate investigated the accident and determined that Jeremy France was 100% at fault and

[1]Allstate divides its claims functions into "represented " and "unrepresented" segments. "Unrepresented segment" adjusters deal exclusively with unrepresented claimants and act as their "claim representatives" pursuant to Allstate's CCPR policies. If an unrepresented claimant hires a lawyer, Allstate immediately transfers the claim from the "unrepresented segment" adjuster to its represented claim unit and terminates its assistance and services to the claimant.

Janet's medical expenses exceeded $75,000. It also discovered that Chrysler's seatbelt had malfunctioned in the accident.

In January 1998, Allstate told Terry Jones that its $25,000 policy limit was "all the money that is going to be available." Then it sent Janet a transmittal letter with a $25,000 settlement check and a release form. Allstate asked the Joneses in writing to sign the check and release their claims. Janet Jones signed and deposited the check.

Janet Jones never had any personal contact with Allstate. She testified she assumed that Allstate was representing France and was adverse to her. Terry Jones testified he did not know if Klein was practicing law or giving legal advice, but he believed she was representing his interests. He relied on Klein's experience and trusted her to guide him in his decisions:

> A: I believed Christy [Klein] was representing my interests. She told me she was going to. I believe she was representing me, I thought in good faith, all my interests associated with this accident, and Allstate....
>
> Q: Was it your understanding and belief at the time that you were not relying on her, Christy Klein, to give you legal advice?
>
> A: In that the advice she was giving me had legal ramifications, it's a very difficult question for me to answer. I relied on her experience and trust. She asked me to trust her, and I did, and in her experience and trust as an insurance agent, and her years of experience, to believe in her abilities to do the right thing for me.

Allstate's adjuster had no legal training, was not qualified to practice law or give legal advice, did not understand how a release could affect the joint and several liability of Jeremy France and Chrysler or the vicarious liability of Jeremy France's parents. She was not qualified to advise the Joneses on whether or not to sign a release. She did not recommend that they have independent counsel review the settlement instruments.

Allstate's unrepresented claimant letter and Quality Service Pledge said its adjuster would be the Joneses' "claim representative". The adjuster told Terry she would represent his interests. The adjuster later testified, however, she really was not representing the Joneses at all: "I was handling the claim for the accident against the Allstate policy for the Frances.... I am handling it for Allstate. ... I am not representing the Joneses." Allstate did not disclose or obtain the Joneses' written consent to the conflicts of interest arising out of its multiple representations.

The Joneses later discovered that the $25,000 settlement and release, if enforceable, would destroy vicarious and joint and several liability on their claims against Jeremy France's parents and Chrysler and preclude full compensation. They returned the $25,000 to Allstate. Allstate refused the repayment and insisted that the Joneses had released their claims by signing the settlement check. A lawsuit ensued.

C. Allstate's CCPR Policy. (*See* Exhibit 2)

Allstate heralds its CCPR policy as a "fundamental" and "radical" departure from conventional claims practices:

> "It's time to make fundamental changes." "Our change goal is to **redefine the game**...to question, improve and **radically alter** our whole approach to the business of claims."

Under CCPR, Allstate teaches its "unrepresented segment" adjusters to make "extremely rapid initial contact" with injured persons and initiate a "personalized discussion" of their injuries by asking them, "How are you feeling today?" Allstate's goal is to establish "empathetic, trust-based relationships" and "maintain rapport" by promising to be the "claim representative" and "act as advocate" for the unrepresented claimant. Allstate tells unrepresented claimants, "*I will help you determine if you are eligible to receive compensation for any injuries you have suffered*."

The "central theme" of CCPR is to "reduce claimants' need for attorney representation" by encouraging them to rely on "the service we provide" to get a "fair settlement":

What Can I Tell Claimants About Attorneys?

> ... Our communications with claimants should reinforce our central theme that *claimants do not need attorneys to receive fair treatment or a fair settlement.... Our emphasis should be on reducing the need for an attorney through the service we provide....*

Reducing the "attorney representation rate" is a "primary performance measure" for Allstate's Unrepresented Segment Claim Units.

Allstate uses CCPR to persuade unrepresented claimants to settle for one-third to one-half of what it would pay to settle represented claims. It believes CCPR will give it a competitive edge over other insurers that goes beyond expense control in reducing claims costs:

> "We begin with casualty because that is where we spend the most claim dollars." The "goals of claim redesign" are based on "recognition that expense control alone will not allow us to effectively compete..." "*[T]he way we approach claimants and develop relationships will significantly alter representation rates and contribute to lower severities....*" "*Represented claims settle for 2-3 times more than unrepresented claims."*

Under CCPR, Allstate instructs its unrepresented segment adjusters like Ms. Klein to offer unrepresented claimants advice and services typically performed by lawyers in personal injury claims. CCPR involves surrogate lawyering because the activities and services it prescribes–*i.e.* developing trust-based relationships, representing, advocating for, and advising injury claimants if they are entitled to compensation–involve legal rights and obligations and ordinarily are performed by lawyers.

Allstate's CCPR manual does not inform its adjusters about the legal and ethical prohibitions against undisclosed, dual representation of claimants and insureds. It also contains

the following incorrect definition of the unauthorized practice of law, which is much more limited than the true legal definition discussed *infra*:

> **Unauthorized Practice of Law**
>
> Allstate and its claims representatives are prohibited from practicing law without a license. *Advising a claimant not to seek an attorney, particularly if coupled with advice which a claimant might normally receive from an attorney (such as whether the claimant has a cause of action, the legal consequences of a release, etc.) might be construed as practicing law*.

Under Allstate's definition of the unauthorized practice of law, unrepresented segment adjusters are free to represent, advocate for, and develop empathetic trust-based relationships with unrepresented claimants without telling the claimants that they are actually representing the interests of Allstate and its insureds in devaluing their causes of action. These legally untrained adjusters are allowed to "fully explain" (or fail to explain) the legal consequences of a release, or whether a claimant has "a legal cause of action", or is "eligible to receive compensation", so long as they do not "couple" this legal advice with explicit advice not to hire a lawyer. No legal authority supports Allstate's definition. Allstate has merely redefined the unauthorized practice of law to exclude its CCPR practices, just as it has "redefined the game" of claims to include the unauthorized practice of law. This allows Allstate to engage in the unauthorized practice of law, while at the same time pretending to prohibit it with a wink and a nod.

CCPR is Allstate's unique, highly sophisticated formula for realizing superior profits through practicing law without a license on a nationwide scale. By substituting its claim services for traditional legal services, Allstate expects to save one-half to two-thirds on claim payouts and obtain a competitive advantage over other insurers that goes beyond "expense control alone." CCPR profit goals are tied to the way Allstate "approaches claimants and develops relationships"

so it can lower legal representation rates. Allstate's CCPR claims literature and "unrepresented segment" adjusters reinforce its "central theme" that claimants do not need attorneys, but should instead substitute Allstate's advice and services for the advice and services a lawyer typically would provide. As the superior court noted in granting the Joneses' motion for summary judment, Allstate has "radically altered its approach to the business of claims" by "mimicking an attorney-client relationship" with unrepresented claimants.

State Attorneys General, bar associations and private individuals have filed at least 56 lawsuits against Allstate in 22 states based on its CCPR practices toward unrepresented claimants. (*See* Exhibit 3)

D. Allstate's "Representation" Harms Unrepresented Claimants by Devaluing Their Personal Injury Claims.

The following illustration shows how unrepresented claimants can be harmed by Allstate's CCPR policy of having its legally untrained adjusters "represent" and "act as advocate" for unrepresented claimants. Assume, for example, that Allstate had not advised the Joneses to settle for its $25,000 policy limit, and the jury ultimately found Jeremy France to be 90% at fault, Chrysler 10% at fault, and awarded the Joneses $1 million. In this situation, the Frances and Chrysler would be jointly and severally liable for the $1 million judgment.[2] Under joint and several liability, the Joneses could recover the Frances' $25,000 liability limit and $975,000 from Chrysler. They also could execute on Jeremy's parents' assets, if they proved family car liability.

On the other hand, if the Joneses followed Allstate's advice and settled for $25,000, then joint and several liability would be destroyed because no judgment would be entered against the

[2]Rev.Code Wash. 4.22.070(1)(b) provides that where a plaintiff is free of fault, joint and several the liability applies as to "all defendants against whom judgment is entered."

Frances. RCW 4.22.070(1)(b). This would leave Chrysler only *severally liable* for $100,000 (its 10% fault share), instead of the $975,000 it would owe under joint and several liability. A release also would destroy vicarious liability and prevent any recovery from Roy and Amy France. If the release was enforceable, the Joneses' recovery would be only $125,000 ($100,000 from Chrysler plus $25,000 from France) instead of $1 million. By following Allstate's advice to settle, the Joneses under this illustration would lose $875,000.

III. ESTABLISHING ALLSTATE'S LIABILITY

A. Allstate's Practice of Law under CCPR Harms the Public Interest.

In *Washington State Bar Assn. v. Great Western Union Federal Sav. and Loan Ass'n.,* 91 Wn.2d 48, 54-55, 586 P.2d 870 (1978), the Washington Supreme Court said:

> It is the nature and character of the service performed which governs whether given activities constitute the practice of law.... However, it is generally acknowledged to include not only the doing or performing of services in the courts of justice, throughout the various stages thereof, but in a larger sense includes legal advice and counsel and the preparation of legal instruments by which legal rights and obligations are established. [Citations omitted] Further, selection and completion of preprinted form legal documents has been found to the be "practice of law."

In its most recent pronouncement on the unauthorized practice of law, *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 97-98, 969 P.2d 93 (1999), the Washington Supreme Court said:

> The practice of law includes the selection and completion of legal instruments by which legal rights and obligations are established.... Thus, CTX engaged in the practice of law by selecting and preparing the various legal documents involved in this case. The question then becomes whether such activities are authorized.

The key factor in determining if the practice of law is unauthorized is whether public harm may result from the lay exercise of legal discretion:

> Our underlying goal in unauthorized practice of law cases has always been the promotion of the public interest. Consequently, we have prohibited only those activities that involved the lay exercise of legal discretion because of the potential for public harm....
>
> [T]he court's guiding principle [is] to protect against 'the probability of injurious consequences from the acts of the unskilled.'

Id. at 102-03.

One of the main concerns in determining the potential for public harm is whether "the role of lay persons in selecting and completing form legal documents... [is likely or] unlikely to result in *uncertain legal rights*...." *Id.* at 106 (emphasis supplied). In *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 447, 635 P.2d 730 (1981), the Washington Supreme Court noted that legal rights are rendered uncertain when lay practitioners "fail to identify and address obscure issues." The other main concern is that "[t]he public still needs protection against incompetence, divided loyalties and other evils." *Cultum v. Heritage House Realtors, Inc.,* 103 Wn.2d 623, 631, 694 P.2d 630 (1985).

1. Allstate Engages in the Unauthorized Practice of Law in Selecting, Completing and Advising Claimants to Sign Personal Injury Releases.

In *State v. Hunt,* 75 Wn. App. 795, 880 P.2d 96 (1994), the Washington Court of Appeals examined whether the unauthorized practice of law occurs when lay persons prepare releases of tortfeasors and insurance companies and advise personal injury claimants to sign them. The court held that the evaluation and negotiation of personal injury settlements necessarily involve the lay exercise of legal discretion, *citing Dauphin County Bar Ass'n. v. Mazzacaro,* 461 Pa. 545, 554, 351 A.2d 229 (1996).[3] It also stated that "when one determines for the parties the kinds of

[3]In *Dauphin County Bar Ass'n.*, the Pennsylvania Supreme Court held that a public adjuster's evaluation and negotiation of a personal injury settlement on behalf of a third-party claimant necessarily involved the exercise of legal discretion and exceeded the abilities of a lay

legal documents they should execute to effect their purpose [of settling personal injury claims], such is the practice of law." *Id* at 802. The Court of Appeals ruled that a paralegal had engaged in the unauthorized practice of law by selecting, preparing and advising personal injury claimants to sign releases of their claims against tortfeasors and insurance companies: "Washington law clearly prohibits an unlicensed person from selecting and completing legal forms for another...." *State v. Hunt, supra* at 804.[4]

Allowing legally untrained, unlicensed lay persons to evaluate, recommend, and draft personal injury settlement agreements creates a major risk of uncertain legal rights and inadequate compensation because "the acquisition of such knowledge is not within the ability of lay persons...." *Dauphin County Bar Ass'n.*, *supra*. Allstate is engaging in the unauthorized practice of law under CCPR because its use of legally untrained claims adjusters to recommend settlements and draft releases is a sure recipe for public harm.

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person:

> Such an assessment, however, involves an understanding of the applicable tort principles (including the elements of negligence and contributory negligence), a grasp of the rules of evidence, and an ability to evaluate the strengths and weaknesses of the client's case vis-a-vis that of the adversary. The acquisition of such knowledge is not within the ability of lay persons, but rather involves the application of abstract legal principles to the concrete facts of the given claim. As a consequence, *it is inescapable that lay adjusters who undertake to negotiate settlements of the claims of third-party claimants must exercise legal judgment in so doing....*

[4]In *WSBA v. Great Western Union Federal Sav. and Loan Ass'n,* the Supreme Court held that a lay person who selects and completes a legal instrument for another party to sign is engaging in the practice of law, unless "the lay person is acting *solely on his own behalf."* 91 Wn.2d at 57. This "*pro se"* exception does not apply if the preparer, in this case Allstate, also is a party to the legal instrument. *Id.* at 58.

2. Allstate Engages in the Unauthorized Practice of Law by Performing Activities and Services Typically Performed by Lawyers.

In *WSBA v. Great Western Union Federal Sav. and Loan Ass'n,* 91 Wn.2d at 54-55, the Supreme Court said:

> The services at issue here [*i.e.* "legal advice and counsel and the preparation of legal instruments by which legal rights and obligations are established"] are ordinarily performed by licensed attorneys, involve legal rights and obligations, and by their very nature involve the practice of law....

Allstate's use of "unrepresented segment" adjusters to "represent" and "act as advocate" for claimants is certain to cause public harm because they are not competent and they lack motivation to give proper advice about the legal consequences of the settlements, especially in multi-tortfeasor cases involving vicarious or joint and several liability.[5] By advising the claimant to settle with its insured, Allstate is likely to devalue the claimant's cause of action because a partial settlement may provide other vicariously or jointly and severally liable tortfeasors with release and apportionment of fault defenses that otherwise would not have been available.

If enforceable, these defenses can harm claimants by precluding global settlements or joint and several judgments on their claims against other tortfeasors. *See e.g. R.A. Hanson Co v. Aetna Cas. Co*., 15 Wn. App 608, 611, 550 P.2d 701(1976) ("Prejudice [*i.e.* harm] may be shown through loss of a favorable settlement of the case....") Even if unenforceable, these defenses still create uncertain rights and a risk of inadequate compensation, which may necessitate filing an

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[5]When the insured's liability is clear and the claimant's damages exceed the policy limit, the insurer's financial motivation is to pay its liability limit and avoid the cost of defending the insured in protracted litigation against other tortfeasors. Thus, Allstate's motivation to cap its insured's liability exposure at the policy limit and avoid future defense costs by obtaining a release is likely to be in conflict with the claimant's interest in preserving vicarious or joint and several liability, which may depend on keeping Allstate's insured as a party in the multi-defendant litigation.

action against Allstate and its insured to restore the claimant's legal rights. Allstate's unauthorized practice of law under CCPR thus makes claimants' legal rights uncertain and devalues their claims against other tortfeasors. Its activities and services are a perfect example why "the public still needs protection against incompetence...." *Cultum,* 103 Wn.2d at 631.

3. CCPR is the Practice of Law for Profit Without a License.

CCPR is Allstate's master plan for making money by practicing law without a licence. By substituting its claim services for traditional legal services, Allstate expects to save one-half to two-thirds on claim payouts. CCPR's profit goals are tied to the way it "approaches claimants and develops relationships." Allstate approaches claimants through "extremely rapid initial contacts", form letters and "quality service" pledges to reinforce its "central theme" that claimants do not need attorneys. It develops "empathetic, trust-based relationships" through services, representation and advocacy in advising claimants if they are eligible to receive compensation for their injuries.

CCPR involves surrogate lawyering because the activities and services it prescribes–representing, advocating for, and advising injury claimants if they are entitled to compensation–involve legal rights and obligations and ordinarily are performed by lawyers. Allstate creates fiduciary relationships by presenting its CCPR adjusters as loyal, caring, trustworthy advocates who rapidly appear to advise and assist accident victims. The intent and the effect of CCPR are to inculcate trust, dependency and relaxed vigilance in unrepresented claimants in times of uncertainty or crisis when they are most vulnerable and most in need of proper assistance and advice in determining their legal rights.

A party who engages in surrogate lawyering and cultivates trust-based relationships subjects itself to the rules of legal ethics, as well as the rules of legal competence. *See Batten v. Abrams,* 28 Wn. App. 737, 739 n.1, 626 P.2d 984 (1981) (a non-lawyer who undertakes the role of a lawyer "assumes the duties and responsibilities [of a lawyer] and is accountable to the same standards of *ethics* and legal knowledge" as a lawyer.) The law of ethics does not allow a lay person to use "divided loyalties and other evils" to create trust, dependency and relaxed vigilance in injury claimants, and then determine their legal rights without incurring any legal obligation to them. *Cultum,* 103 Wn.2d at 631. It does not allow an insurer who engages in the practice of law to use the pretense of loyal representation to disguise its goal of devaluing unrepresented claims. Allstate's practice of law under CCPR is unauthorized because it causes public harm by undermining legal ethics.

B. Allstate's Practice of Law under CCPR is Below the Legal Standard of Care.

In *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 106, 969 P.2d 93 (1999), the Supreme Court held that a lay person who practices law must comply with the standard of care of a practicing attorney, regardless of whether his practice of law is authorized or unauthorized:

> Moreover, even though the Perkinses have not alleged any harm, in order to fully safeguard the public interest we further hold that lenders must comply with the standard of care of a practicing attorney when preparing such documents.

See also Mattleigh v. Poe, 57 Wn.2d 203, 356 P.2d 328 (1960) (non-lawyers who engage in the practice of law are held to the standard of care applicable to lawyers); *Bowers v. Transamerica Title Ins.,* 100 Wn.2d 581, 586-87, 590, 675 P.2d 193 (1983) ("a layman who attempts to practice law is liable for negligence"); and *Hecomovich v. Nielsen,* 10 Wn. App. 563,

572, 518 P.2d 1081(1974) (summary judgment proper when "the standard of care was so obviously breached" by a lay person practicing law).

A claimant meets the initial burden of showing that Allstate practiced law below the standard of care by establishing that its "unrepresented segment" adjuster was not qualified to practice law and failed to advise or gave improper advice about the claimant's causes of action, vicarious or joint and several liability, the legal consequences of a release, the value of the claim, etc. *Young v. Key Pharmaceuticals, Inc*., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).[6] The burden then shifts to Allstate as the nonmoving party to produce affidavits setting forth specific facts showing a genuine issue for trial. CR 56(e) Allstate, however, may not present any evidence that its adjuster had complied with the legal standard of care.[7]

Based on this uncontradicted evidence, the trial court ruled that Allstate had been negligent in preparing and asking the Joneses to sign its release without informing them of its legal consequences and in failing to disclose its conflict of interest. This was proper under

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[6]The Joneses' legal malpractice expert, distinguished Olympia, Washington trial lawyer Kim Rolofson Putnam, testified that a lawyer practicing personal injury law within the standard of care should have known that releasing the Frances would have destroyed the joint and several liability of the Frances and Chrysler. He testified that Allstate failed to comply with the standard of care (1) in recommending that the Joneses release their claims against the Frances without advising them of the legal effect a release would have on joint and several liability and their ability to obtain full compensation; (2) in failing to disclose its conflict of interest arising out of its multiple representations in the settlement negotiations; and (3) in failing to advise the Joneses to retain independent counsel to review its release.

[7]In the Jones case, Allstate's ethics and practices expert, University of Pennsylvania law professor Geoffrey C. Hazard, only testified that Allstate's adjuster was not practicing law; he did not testify that she complied with the legal standard of care. Professor Hazard's opinion as to the practice of law was properly disregarded as being contrary to Washington law, which he evidently had not even read. *See Eriks v. Denver,* 118 Wn.2d 451, 458, 824 P.2d 1207 (1992) ("When a trial court is presented with a question of law, the trial court may properly disregard expert affidavits that contain conclusions of law.")

Burien Motors, Inc. v. Balch, 9 Wn. App. 573, 582, 513 P.2d 582 (1973) ("a court may take judicial notice of rules of law concerning standards of care applicable to attorneys and rules of law concerning what constitutes the practice of law"). Once it was established that Allstate had engaged in the practice of law, it was uncontradicted that it had violated the standard of care.

The trial court also could have ruled that Allstate was negligent in failing to recommend that the Joneses ask a lawyer to review the release. *See Bowers v. Transamerica Title Ins., supra* at 590 (a lay person practicing law "has a duty to inform the parties to a [transaction involving legal instruments] of the advisability of obtaining independent counsel"). Thus, Allstate is likely to be found negligent, regardless of whether its practice of law is deemed to be authorized or unauthorized, based on uncontradicted testimony that its "unrepresented segment" adjusters failed to "comply with the standard of care of a practicing attorney in preparing [settlement] documents." *Perkins,* 137 Wn.2d at 106.

C. Allstate Breaches Fiduciary Duties in Representing Claimants under CCPR.

A fiduciary relationship is "one in which one party 'occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for....'" *Liebergessell v. Evans,* 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980), *quoting from* Restatement of Contracts §472(1)(c) (1932). It arises when "any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former." *Id.* at 890-91. A fiduciary relationship "allows an individual to relax his guard and repose his trust in another...." *Id.* at 889.

Fiduciary relationships in law include those the law historically has regarded as fiduciary, such as the attorney-client relationship:

> *A fiduciary relationship arises as a matter of law between an attorney and his client* or a doctor and his patient, for example. But a fiduciary relationship can also arise *in fact* regardless of the relationship *in law* between the parties....

Id. at 890. (Emphasis supplied) Allstate's fiduciary relationship with unrepresented claimants *in law* arises out of its unauthorized practice of law in representing them on accident claims and preparing, completing and advising them to sign release instruments which affect their legal rights and obligations. *Liebergessell, supra*; *State v. Hunt, supra.*

In *Eriks v. Denver,* 118 Wn.2d 451, 461, 824 P.2d 1207 (1992), the Washington Supreme Court set forth the following rules for representing clients with potentially conflicting interests:

> An attorney may represent multiple clients with potentially conflicting interests where (1) it is obvious the attorney can adequately represent each client; and (2) each client consents to the multiple representation after full disclosure of the potential conflict. CPR DR 5-105(C)....An attorney must discuss all potential conflicts of interest of which he or she is aware prior to undertaking the multiple representation.

The court noted that "the question of whether an attorney breached his fiduciary duty to a client..." and "the question of whether an attorney's conduct violates the relevant Rules of Professional Conduct [*i.e.* pertaining to conflicts of interest are] question[s] of law." It held that a lawyer breaches his fiduciary duty as a matter of law if he "violate[s] his duty to explain any circumstances that might cause a client to doubt [his] loyalty... or fails "to discuss the dangers inherent in multiple representation and allow the clients the opportunity to decide whether their interests are best served by independent representation." *Id.* at 460-61.

Allstate breaches its fiduciary duty to unrepresented claimants as a matter of law by "representing" them and its insureds in settling accident claims without disclosing its conflict of interest. In most or all cases, Allstate will not have any objective reason to believe it could represent its own and its insured's interests in settling and avoiding defense costs without

adversely affecting the claimants' interests. It certainly is not "obvious" that Allstate "can "adequately represent each client" on a contested auto accident claim.

RPC 1.7(b)(1) and (2) and RPC 1.4(b) require Allstate, as a lay practitioner of law, to tell unrepresented claimants about the objectives of CCPR so they can decide if its representation is in their best interest. It also has to obtain their written consent to its dual representation.[8] RPC 1.8 further requires Allstate to give unrepresented claimants "a reasonable opportunity to seek the advice of independent counsel in the [settlement] transaction." Under *Liebergessell* and *Eriks, supra,* breach of fiduciary duty claims against Allstate are properly decided on summary judgment because Allstate's unauthorized, negligent practice of law and violations of RPC 1.7 and 1.8 involve a breach of fiduciary duties as a matter of law.

Allstate also creates fiduciary relationships with unrepresented claimants *in fact* by saying it will be their "claim representative" and will "fully explain the process" to them. Allstate's "unrepresented segment" adjusters then follow up by encouraging claimants to rely on "the service we provide" to get a "fair settlement", instead of hiring lawyers. Their advice usually encourages claimants to "relax [their] guard and repose [their] trust" and culminates in a settlement and release of their claims. By actively instilling trust and dependency, Allstate

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[8]Under RPC 1.7(a), a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client, unless (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents in writing after consultation and a full disclosure of the material facts...." The same prohibition applies "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person *or by the lawyer's own interests*, unless: The lawyer reasonably believes the representation will not be adversely affected; and the client consents in writing after consultation and a full disclosure of the material facts. RPC 1.7(b). Under RPC 1.4(b), a lawyer is required to explain a conflict of interest or another legal matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

persuades the unrepresented claimant to "justifiably expect his welfare to be cared for by" Allstate. *Liebergessell, supra* at 899.

Even if Allstate's activities and services did not involve the practice of law, they clearly would breach a fiduciary duty *in fact* by creating a relationship of trust and dependency which justifies a claimant in expecting that Allstate will care for her interests. *Liebergessell, supra,* at 889-90. At a minimum, evidence that Allstate breached a fiduciary duty *in fact* should defeat its motion to dismiss the plaintiff's lawsuit.

D. None of Allstate's Factual or Legal Defenses Has Merit.

Allstate offers several reasons why its CCPR practices should not be deemed the unauthorized practice of law: (1) the insurance regulations require insurers to offer policy limits, if liability is reasonably clear and the claims exceed the policy limits; (2) third-party claimants do not have standing to sue liability insurers; (3) the unauthorized practice of law does not occur unless the claimant believes the practitioner was giving legal advice; (4) CCPR is not relevant if Allstate's "unrepresented segment" adjusters testify they don't recall reading the CCPR manual; (5) an insurer cannot engage in the unauthorized practice of law if the claimant consults with an attorney; and (6) claims practices will suffer if insurers have to maintain an adversarial relationship with third-party claimants. These arguments are legally incorrect or merely sympathetic. None provides a legal defense to Allstate's unauthorized practice of law.

1. The Insurance Regulations Do Not Force Insurers to Engage in the Unauthorized Practice of Law.

WAC 284-30-330(6) requires insurers to "attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." This duty runs from the insurer to its insured; it does not run directly to third-party claimants. *Neigel v.*

Harrell, 82 Wn. App. 782, 919 P.2d 630 (1996) *citing Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 393, 715 P.2d 1133 (1986).

WAC 284-30-330(6) reflects the conventional insurer-insured/claimant relationship in which the insurer represents the insured in opposition to the claimant. It imposes a duty of good faith on the insurer to offer its policy limit to avoid exposing its *insured* to personal liability in excess of the policy limit. *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 203 n.6, 743 P.2d 1244 (1987).

WAC 284-30-330(6) authorizes, and in some situations may require, insurers to prepare and send checks and releases to claimants to settle claims against its insureds. It does not, however, authorize or require insurers to represent and provide legal services to adverse claimants. It does not authorize insurers to use the guise of "trust-based" relationships to discourage legal representation and lure claimants into disadvantageous settlements. WAC 284-30-330(6) does not mandate the unauthorized practice of law or excuse the conflicts of interest inherent in an insurer's dual representation of adverse claimants and its own insureds.

2. The Third-Party Claimant Rule Does Not Preclude Actions Against Insurers Based on the Unauthorized Practice of Law.

The third-party claimant rule provides that "third-party claimants may not sue an insurance company directly for alleged breach of duty of good faith *under a liability policy",* or "for breach of their *statutory* duty of good faith" [under RCW 48.30.010], or for violating the insurance regulations under WAC 284-30 *et. seq. Tank v. State Farm, supra* at 393-95 (emphasis supplied). The Joneses' claims are not barred by the third-party claimant rule because they are not based on Jeremy France's liability policy, or RCW 48.30.010, or WAC 284-30-330. Instead, they are based on Allstate's unauthorized, negligent practice of law and breach of

fiduciary duties, which also constitute civil fraud/bad faith and unfair and deceptive acts or practices under the Consumer Protection Act. *See* RCW 19.86.020 and *Escalante v. Sentry Insurance,* 49 Wn. App. 375, 387, 743 P.2d 832 (1987).

In *Physicians Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 312, 858 P.2d 1054 (1993), the Supreme Court, *citing Escalante,* noted that "a passenger in an auto accident had standing to bring a CPA claim against an insurance company based upon the insurer's bad faith handling of a claim even though the injured party was not a party to the insurance contract, did not pay any premiums, and had no consumer relationship with the company." In *Heigis v. Cepeda,* 71 Wn. App. 626, 632, 862 P.2d 129 (1993), the Court of Appeals said that an insurer who "led [a third-party claimant] to believe [it] was watching out for her interests" in recommending a disadvantageous release may be liable for breaching a fiduciary duty to the claimant. The third-party claimant rule is not a legal defense because under *Fisons, Escalante*, and *Heigis*, a third-party claimant's standing to sue Allstate for the unauthorized, negligent practice of law and breach of fiduciary duties also extends to bad faith/civil fraud and CPA claims.

3. Lay Beliefs and Opinions Do Not Determine What Is the Practice of Law.

Whether a party's activities and services involve the practice of law is determined by objective legal standards, not by the subjective beliefs of lay persons. In *State v. Hunt,* 75 Wn. App. 795, 880 P.2d 96 (1994), the Court of Appeals affirmed a paralegal's conviction for the unauthorized practice of law based on his representation of personal injury claimants in

settlement negotiations. Neither the paralegal's disclaimers, nor his clients' understanding that he was not a lawyer and was not practicing law, could be used as a legal defense. *Id.* at 800.[9]

Allstate cannot take legal refuge in a claimant's personal belief that it was not practicing law or giving legal advice because lay beliefs are not a legal defense to the unauthorized practice of law. *State v. Hunt, supra*. It also is not a legal defense that the claimant may have understood her relationship with Allstate's insured to be adversarial and that Allstate was on the side of the its insured in that adversarial relationship. This understanding merely reflects economic reality and the conventional relationship that every insurer *other than Allstate* maintains with third-party claimants.

Unrepresented claimants generally are unaware that Allstate uses psychological research and testing in interviews, focus groups and closed file surveys to validate the psychological premise of CCPR–*i.e.* that an insurer can take economic advantage of unrepresented claimants by winning and manipulating their trust with professions of empathy and representation. By scientifically testing claimants' receptivity to its themes and factoring their gullibility into the CCPR equation, Allstate, in effect, targets them even before they are injured. Claimants are caught off-guard because Allstate is the only insurance company who uses CCPR techniques, and its highest priority is to keep CCPR strictly confidential.

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[9]Similarly, in the cases where escrow agents engaged in the unauthorized practice of law, there is no indication that they or their customers believed they were lawyers or were practicing law. *See e.g. Bowers v. Transamerica Title Ins.,* 100 Wn.2d 581, 586-87, 590, 675 P.2d 193 (1983), *Washington State Bar Ass'n v. Great Western Union Federal Sav. and Loan Ass'n,* 91 Wn.2d 48, 55, 589 P.2d 870 (1978), and *Hecomovich v. Nielsen,* 10 Wn. App. 563, 571, 518 P.2d 1081, *review denied,* 83 Wn.2d 1012 (1974).

In *Boonstra v. Stevens-Norton, Inc.,* 64 Wn.2d 621, 626, 393 P.2d 287 (1964), the Supreme Court said that "wrongdoers cannot shield themselves from liability by asking the law to condemn the credulity of their victims." Under *Boonstra,* the law does not penalize credulous claimants for believing Allstate's promise to treat them fairly and honestly, even if it isn't true.

4. Allstate Cannot Avoid Liability by Trying to Dissociate Its Claims Adjusters from CCPR.

Allstate also argues that CCPR cannot be relevant if its "unrepresented segment" adjusters testify that they cannot recall reading her CCPR training manual. Such implausible testimony is not a legal defense to Allstate's unauthorized practice of law under CCPR.[10] As a corporation, Allstate cannot dissociate itself from its employees, either in general or in regard to the unauthorized practice of law. *See* WPI 50.18 ("Any act or omission of an employee is the act or omission of the corporation") and *Hecomovich v. Nielsen,* 10 Wn. App. 563, 572, 518 P.2d 1081, *review denied,* 83 Wn.2d 1012 (1974) ("We discern no difference when an escrow company or its employees practice law, particularly when there are no instructions given.") Since Allstate's CCPR policy and its adjusters' services were one and the same, and since Allstate admits they acted within the course and scope of their employment, Allstate is liable for their implementation of CCPR practices.

[10]The Allstate adjuster's personal opinion that she was not practicing law is legally irrelevant under *State v. Hunt, supra*, and is not a defense for Allstate.

5. A Claimant's Consultation with an Attorney Is Not a Defense to an Insurer's Unauthorized Practice of Law.

If a claimant has a lawyer or contacts a lawyer about any aspect of the accident, Allstate will assert the attorney-client relationship as a defense to its unauthorized practice of law. In the Jones case, Terry Jones met with two attorneys after the accident to discuss a possible product liability claim against the seatbelt manufacturer. He did not retain either lawyer. The lawyers did not have any dealings with Allstate, or know about its settlement offer or release, or have any contact with Janet before she deposited Allstate's settlement check.

Terry Jones told Allstate's adjuster that he had met with lawyers to discuss a possible product liability claim, but had not retained them. The adjuster knew the Joneses were not represented, and if they had been, she could not have communicated with them because of the model uniform insurance regulations, which prohibit claims adjusters from "negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent." *See e.g.* WAC 284-30-330(19).

A claimant's consultation with an attorney is not a legal defense to another party's unauthorized practice of law, if the other party, rather than the attorney, represented the claimant and selected, drafted and explained the settlement agreement. Allstate's liability does not depend on whether the attorney was practicing law, but on whether its own activities and services were unauthorized and negligent. *Perkins v. CTX Mortgage; State v. Hunt, supra.*

It also is not a legal defense to say or imply that a claimant assumes the risk of Allstate's negligent legal advice and drafting by not consulting with a lawyer. In *Boonstra v. Stevens-Norton, Inc.,* 64 Wn.2d 621, 626, 393 P.2d 287 (1964), the Supreme Court said that "[w]here misrepresentations actually deceive and mislead a party.... it is immaterial that proper

investigation would reveal the truth." Under *Boonstra,* third-party claimants do not owe Allstate a legal duty to review its settlement offer or release language with counsel to determine its scope or legal consequences, and their failure to is not a proximate cause of Allstate's unauthorized, negligent practice of law.

6. CCPR Does Not Promote "Courtesy and Respect" toward Unrepresented Claimants.

Allstate and the National Association of Independent Insurers have suggested that Allstate and other insurers are being "penalized for acts of simple courtesy and respect" in their dealings with unrepresented claimants. This is just an attempt to twist civil fraud into civic virtue. CCPR cannot promote courtesy and respect because it uses the pretense of loyal, caring representation and advocacy to dupe unrepresented claimants into accepting disadvantageous settlements.

There is no danger that insurers who follow conventional claims practices will become liable for "mailing a claimant a proposed settlement check and a release form for endorsement and return." Issuing a settlement check and release form does not involve the *unauthorized* practice of law, unless the insurer acts as the claimant's representative or adviser in settling the claim. *Perkins v. CTX Mortgage Co.; State v. Hunt, supra.* Allstate is the only insurer who purports to represent claimants, insureds and itself on the same accident claims. All other insurers represent themselves and their insureds. Other insurers are protected from liability under the third-party claimant rule because they do not purport to represent or advise third-party claimants or perform other activities involving the practice of law, such as selecting, preparing and recommending that they sign releases. *See Tank v. State Farm, supra.*

The third-party claimant rule should not protect Allstate because under CCPR, it has created the illusion of a loyal, caring first-party relationship between itself and the unrepresented claimant. Allstate uses CCPR to take economic advantage of unrepresented claimants by exploiting their trust and credulity, then asserts the third-party claimant rule to insulate itself from any legal responsibility. The third-party claimant rule is not a legal defense, however, because the law does not permit Allstate to cultivate fiduciary relationships, while at the same time disclaiming any fiduciary responsibility.

CCPR embodies the "incompetence, divided loyalties and other evils" that define the unauthorized practice of law. *Cultum v. Heritage House Realtors, Inc., supra.* The NAII's endorsement of CCPR harms the public interest because it encourages other insurers to confuse and exploit the difference between first-party and third-party relationships. Inevitably, this will impel honest insurers who avoid dual representation to emulate Allstate's CCPR practices in order to eliminate Allstate's present competitive advantage.

The "Unauthorized Practice of Law" section in the CCPR manual shows that Allstate's management, in devising and secretly implementing CCPR, consciously weighed the risk of illegality against the reward of settling thousands of unrepresented claims for one-half to one-third of their represented value. So far, its financial gamble has paid off, as Allstate has reaped enormous profits from CCPR. The April 1997 edition of Allstate's Seattle Market Claims Office publication "PACE" reports that its average bodily injury settlement at year end 1996 was $8580, which it described as a "significant improvement" over year end 1995. It also reported that average settlements of Minor Impact Soft Tissue ("MIST") cases had dropped 50% from $6801 to $3419. The attorney representation rate fell from 49% to 35.2% overall between June 1995

and year end 1996, and the 90 day representation rate dropped to 21.26% on third party claims. (Exhibit 4)

IV. CONCLUSION

The fate of CCPR in Washington is now in the capable hands of the Washington Supreme Court. Allstate's CCPR strategy is vulnerable because its illegality can be established on summary judgment, if the Supreme Court holds that it involves the unauthorized practice of law. Once liability for the unauthorized practice of law is established, liability for breach of the fiduciary duty of undivided loyalty and competent representation automatically follows. It also is likely that liability for civil fraud automatically flows from the breach of the fiduciary duty of loyalty. Allstate's pretense of loyal representation and undisclosed conflicts of interest allow the claimant to invalidate its release and restore the ability to sue Allstate and its insured. The unauthorized practice of law, fiduciary malfeasance and civil fraud also trigger liability for bad faith, Consumer Protection Act recoveries, and potentially punitive damages. Thus, establishing that CCPR is the unauthorized practice of law will be the key to grabbing and holding the tiger by its tail.