

# SENATE BILL REPORT

## ESSB 5726

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As Amended by House, April 5, 2007

**Title:** An act relating to creating the insurance fair conduct act.

**Brief Description:** Creating the insurance fair conduct act.

**Sponsors:** Senate Committee on Consumer Protection & Housing (originally sponsored by Senators Weinstein, Kline and Franklin).

**Brief History:**

**Committee Activity:** Consumer Protection & Housing: 2/08/07, 2/15/07 [DPS, DNP].  
Passed Senate: 3/13/07, 30-17.

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### SENATE COMMITTEE ON CONSUMER PROTECTION & HOUSING

**Majority Report:** That Substitute Senate Bill No. 5726 be substituted therefor, and the substitute bill do pass.

Signed by Senators Weinstein, Chair; Kauffman, Vice Chair; Haugen, Kilmer and Tom.

**Minority Report:** Do not pass.

Signed by Senators Honeyford, Ranking Minority Member and Delvin.

**Staff:** Vanessa Firnhaber-Baker (786-7471)

**Background:** Insurance claims are governed by general principles of contract and tort law, statute, and regulations promulgated by the Insurance Commissioner. If an insurer denies a valid claim, the insured may sue to enforce the insurance contract and force the insurer to pay according to the policy.

An insured may also bring an action against an insurer for acting in bad faith. To succeed on a claim of bad faith, the insured must demonstrate that the insurer's denial of the claim was unreasonable, frivolous, or unfounded. Additionally, an insured may bring a claim under the Consumer Protection Act if the insurer's denial of a claim amounts to an unfair or deceptive trade practice.

By statute, the Insurance Commissioner has the authority to promulgate rules prohibiting unfair and deceptive business practices by the insurance industry. Current insurance regulations require an insurer to attempt in good faith to make a fair, prompt, and equitable settlement of a claim when liability is relatively clear and to generally observe standards of reasonableness in all aspects of its claim settlement practices. The Commissioner may fine an insurer for failure to comply with these regulations.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Summary of Engrossed Substitute Bill:** Insurers may not unreasonably deny insurance coverage or payment of benefits. First party claimants to an insurance policy may sue insurers for unreasonable denials of coverage or payments of benefits.

First party claimant is defined as an individual, corporation, association, partnership, or any other legal entity who asserts the right to payment as a covered person under the insurance policy at issue.

Damages are available to plaintiffs upon a finding that the insurer unreasonably denied coverage or payment or upon a finding that the insurer violated certain rules adopted by the Insurance Commissioner and published in the Washington Administrative Code that prohibit certain unfair and deceptive business practices in the insurance industry. Upon such a finding, the court must award: (1) the actual damages sustained; (2) reasonable attorney's fees; and (3) actual and statutory litigation costs, including expert witness fees.

The court has the discretion to also increase the total award of damages to an amount that does not exceed three times the actual damages suffered by the plaintiff.

First party claimants are explicitly permitted to bring actions under both the Consumer Protection Act and this bill.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Original Bill:** PRO: Washington law places a heavy burden on insureds when they make an insurance claim. They must cooperate and any false statement, regardless of intent, voids the policy. This bill brings parity to the law by requiring insurers to be careful and to act in good faith. If an insured cheats in the insurance claim process it is a felony, if the insurer cheats there are currently no consequences. This bill creates an incentive for insurers to treat claimants fairly. There is currently no practical way for insureds to sue insurers who deny valid claims because insureds do not have the resources to hire lawyers and usually attorneys' fees are not recoverable. Insurers have the financial ability to litigate and intimidate consumers who seek fair payment of claims. The Insurance Commissioner receives quite a few complaints from insureds regarding insurers not paying claims. There are insurers out there that are knowingly underpaying insurance claims.

CON: The bill should not apply to third-party claimants. The common law claim of bad faith already exists in Washington and is commonly used by insureds in litigation. Codifying the common law is dangerous because the courts will assume that the Legislature is intending to broaden the common law bad faith claim. Treble damages are disfavored in Washington. The bill is much too broad because a violation of the Washington Administrative Code includes many acts that are not indicative of bad faith. There is already an incentive for insureds to litigate because plaintiffs who prevail under a bad faith claim are routinely awarded attorney's fees and court costs. This bill will encourage frivolous lawsuits. The increase in litigation

will result in higher insurance rates and insurers abandoning Washington. A similar law was enacted in California and was repealed because it was so problematic.

**Persons Testifying:** PRO: Larry Shannon, Washington State Trial Lawyers Association; Rob Dietz, Insurance Consultant, expert witness; Karen Koehler, Attorney; Mary Mulcahy, citizen.

CON: Mel Sorensen, Property and Casualty Insurers; Sam Sorich, Association of California Insurance Companies; Gerrit Ayers, Washington Defense Trial Lawyers.

Signed In, Unable to Testify & Submitted Written Testimony: CON: Cliff Webster, American Insurance Association.

**House Amendment(s):** The reference to the insurance rules that can serve as a basis for treble damages or attorneys' fees is narrowed. The amended bill refers to five existing rules and any additional rules adopted as unfair claims settlement practice rules by the commissioner that are intended to implement the act and codified in chapter 284-30 of the Washington Administrative Code. The five specific rules address the following areas: (1) specific unfair claims practices, (2) misrepresentation of policy provisions, (3) failure to acknowledge pertinent communications, (4) standards for prompt investigation, and (5) standards for prompt, fair, and equitable settlements applicable to all insurers.

The provision that states that the remedies in the bill are separate from any remedies prescribed in RCW 19.86.090 of the Consumer Protection Act is removed. The bill specifically does not limit a court's existing ability to make any other determination regarding unfair or deceptive practices by an insurer or to provide any other remedy available by law.

A claimant must provide 20 days written notice to both the insurer and the Office of the Insurance Commissioner before filing suit under this section. The notice must provide for the basis of the cause of action. If the insurer does not resolve the claim during that 20-day period, the claimant may then bring suit without further notice to the insurer.

Health plans offered by health carriers are exempt from the bill.