PSAA
Puget Sound Adjusters Association

~ Our Mission ~

"A professional organization dedicated to the ongoing education of the claims community. Providing an arena for member interaction and the sharing of resources."

Next Regular Meeting: September 20, 2019
Renaissance Hotel, Seattle
— See page 2 for details

September Meeting Sponsors: FRSTeam Fabric Restoration Service Team · Interstate · Norcross A McLARENS COMPANY · The Contents Specialists

David A. Forte Property & Casualty Policy Analyst, Policy and Legislative Affairs Division, Washington State Office of the Insurance Commissioner

September Presenter

David's primary duties for the Office of the Insurance Commissioner are to lead agency rulemaking efforts, prepare legislative analyses, work with stakeholders and formulate policy briefings. Prior to joining the OIC, David worked closely with insurance companies and their insureds for over 7 years adjusting large loss property claims in eight western US states. His success in adjusting claims was assisted by his 15 years of experience in the construction field and 10 years of litigation support, including as an expert witness in federal and state court on claims handling regulations.

David earned his undergraduate degree from Washington State University. David also has received his Chartered Property Casualty Underwriters (CPCU) and Associate in Claims (AIC) professional designations from the American Institute of Chartered Property Casualty Underwriters.

— Join us for our luncheon meeting at the Renaissance Hotel on September 20 for his presentation titled **"You Need a License for that"**. For more information read Roger's Claims Conversation article reprinted from the August issue. ❖

Claims Conversation

with **Roger Howson,** Claims Dispute Resolution, PSAA Newsletter Editor & Education Chair, TCAA Past President

PSAA, like the United States Congress, is on hiatus this month, but the Claims Conversations never rest.

Sign up now for this year's inaugural 2019-2020 PSAA meeting on Friday, September 20th at the Seattle Renaissance Hotel (or is it the Renaissance Seattle Hotel, I can never remember which) at 515 Madison Street, Seattle, WA 98104. The venue is right in the heart of downtown Seattle on the corner of Sixth and Madison just southeast of the magnificent Seattle Public Library, so you can't miss it. In response to the recreational bitching about the hassles of getting in and out of Seattle, we offer the following concessions: (1) the hotel is right there at the Seneca Street exit off I-5, (2) PSAA provides free parking for adjusters, and discounted parking for our vendor partners, (3) the view from our 28th floor meeting room is spectacular, and (4) there's no limit on the number of homeless you can take home with you.

(Continued on page 3)

ATTENTION CLAIMS PROFESSIONALS!!!
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Please renew your annual dues to avoid any interruption in communications from PSAA.

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PSAA Next Luncheon Mtg

Next Meeting: **September 20, 2019**

Time: 11:30am to 1:30pm

Location: **Renaissance Seattle Hotel**
515 Madison Street
Seattle, WA
206/583-0300 www.marriott.com/Seattle

Cost: Claims Personnel—Active Member Status
No charge for lunch or parking

Vendors & Non-Members
$35 if paid in advance ($50 @ door)
Parking $12

Presentations: **David A. Forte from the Office of WA State Insurance Commissioner to talk about proposed new laws regarding the licensing of adjusters — "You Need a License for that"**

Sponsors: **FRSTeam, Interstate Restoration, The Contents Specialists, Norcross**

To RSVP or to stay in touch with PSAA use our social media tools listed below!

www.pugetsoundadjusters.org/calendar
www.facebook.com/PSAAPugetSoundAdjusters

Additional Meeting Information

Please keep in mind that we'd like to start and end promptly during our monthly meetings. Here is the timeline for each meeting:

11:30 a.m. Registration
11:45 a.m. Buffet
12:00 p.m. Meeting Called to Order
1:30 p.m. End of Meeting

Please arrive on time and have your cash or check (payable to PSAA) ready, or provide your online payment receipt. We appreciate your cooperation and assistance.

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Claims Conversation… *(Continued from front page)*

Our guest speaker this month is David Forte from the Office of the Washington State Insurance Commissioner. David is an OIC unicorn by virtue of his claims experience. Traditionally, the Commissioner's office is staffed by veterans of insurance agencies, brokerages, underwriting, and healthcare. The claims process is an unexplored mystery to many of them, so the challenges of the claims profession is not high on their list of priorities. David Forte is the exception that proves the rule.

David Forte has been tasked by the Insurance Commissioner to explore tightening licensing requirements due to the number of unlicensed individuals "representing" policyholders and/or "analyzing and evaluating" claims on behalf of insurance companies. Washington state's definition of an adjuster includes anyone who investigates or reports on a claim… which covers just about EVERYONE. The OIC's opinion is that if it quacks like an adjuster, waddles like an adjuster, and/or flies like an adjuster… it damn well better be licensed as an adjuster. In other words, if you're touching an insurance claim, company, policyholder, or claimant you need to be licensed as an adjuster… or an attorney (more about that in a later PSAA Claims Conversation). David Forte's presentation addresses a licensing issue which affects every PSAA member, vendor partner, and associate, so sign up early to make sure that you're not locked out on this critical issue. Seating IS limited (not really, Lizzy will just move us to a larger room).

What's even more interesting about this month's speaker is not what he's going to SAY, but what he's going to ASK. The licensing of everyone and anyone engaged in the claims process may be an important issue, but the Office of the Insurance Commissioner has instructed David Forte to find out what the claims profession REALLY thinks, REALLY wants, and REALLY needs.

David is the proverbial canary in the coal mine… he's been sent out to see if this dog bites. So, when he asks what we think (or want or need), please remember to be nice, but be sure to be honest. We don't get very many opportunities to interact directly and candidly with the OIC, and it's extremely rare to talk to an insurance regulator who understands what we do, respects our profession, and actually speaks our language. (Our most recent OIC guest speaker from many years ago was a very low-level bureaucrat who was last minute replacement for a Deputy Commissioner, and this poor woman merely read a bunch of meaningless insurance statistics that she'd Googled minutes before leaving her office. She

Welcome New Vendor Partners

A special THANK YOU goes out to our members who have renewed their dues already! You rock and are ready for anything PSAA!

Save these dates in 2019-20

Sept 20	PSAA Luncheon Meeting, Renaissance
Nov 1	PSAA Luncheon Meeting, Renaissance
Dec 6	PSAA Pajama Jam Holiday Party, Renaissance
Feb 21	PSAA Bowling @ Acme
Mar 20	PSAA Mini Symposium
May 15	PSAA Past Presidents & Vendor Appreciation Luncheon, Renaissance
June 19	PSAA Zombie Golf Tournament, Northshore
Note:	*No meeting or event in the months of October, January, April*

talked fast and bolted the stage even faster, but no one noticed because every audience member was sound asleep.)

I guarantee that David Forte will be an important and impactful guest speaker, but there are three more excellent reasons why you want to attend the Friday, September 20th PSAA Meeting: (1) this is our opportunity to properly thank our outgoing 2018-2019 PSAA President, Jason Runyon, for his selfless service (and to see the return of his family that we've held hostage throughout his four year tenure on the PSAA Board), (2) meet the new Sheriff in town, 2019-2020 PSAA President Deanna Boras (and watch as we take her husband, Alex Boras, back into custody to ensure that she serves out her term as president), and (3) check out the PSAA "back to school" attendees to see who is still in business, switched employers, looking to make a move, and/or just to say hi to all of your friends and cohorts.

We look forward to seeing you there. ❖

Sedgwick Completes Purchase of York Risk Services

Reprinted from www.insurancejournal.com

Insurance and benefits claims firm Sedgwick said it has completed its purchase of York Risk Services Group, which offers claims administration, managed care and loss adjusting services.

The acquisition plan was first announced in July. The purchase marks Sedgwick's third acquisition of a TPA in five years. The Memphis, Tennessee-based company purchased Cunningham Lindsey in 2018 and T&H Global Holdings, owner of VeriClaim, in 2014.

As part of the transaction, entities controlled by Onex Corp., an investment manager that owned York, are rolling their equity into the combined business and joining Sedgwick's shareholder group as a minority investor. Sedgwick's majority shareholder is The Carlyle Group, while Stone Point Capital, Caisse de dépôt et placement du Québec, and management investors are the other minority shareholders.

Sedgwick Group President Michael Arbour told Claims Journal that the purchase of York will en-

hance the company's scope of services and improve its access to talent in the claims industry. He said York is active in some market segments where Sedgwick has little presence, such as with Longshore and Harbor Workers' Compensation and Defense Base Act claims and the administration of group risk pools. He also said York also is in a strong position as a service provider for public agencies and provides managed care services for other claims administrators. Sedgwick also provides managed care services, but only to clients for whom it adjusts claims, he said.

York, based in Jersey City, New Jersey, has about 5,000 employees in about 60 U.S. offices. With the close of the acquisition, the Sedgwick business now comprises nearly 27,000 employees across 65 countries.

"The York acquisition marks another milestone in our storied half-century of growth," said Sedgwick president and CEO Dave North, referencing the company's 50th anniversary in 2019. ❖

5G Mobile Networks Jeopardize Future Storm Forecasts, Claim Weather Agencies

By Thomas Seal and Angelina Rascouet, with assistance from Rodrigo Orihuela and Brian K. Sullivan.

Reprinted from www.insurancejournal.com

Weather agencies are warning that signals from new 5G mobile networks will make it harder to predict and track deadly storms, as the fiercest hurricane in more than 80 years tore across the Bahamas to threaten the U.S. East Coast.

The global mobile industry is pushing back against meteorologists, who say radio waves from the fast cellular networks will interfere with the ability of weather satellites to detect resonance from water particles. Those faint radio signatures offer clues to the future intensity and direction of storms.

5G technology is set to supercharge smartphones and connect factories at data speeds at least ten times faster than current networks. It uses frequencies of 24.25-27.5 gigahertz, while the weather satellites detect frequencies that are just a notch lower, at 23.8 GHz.

"It's a trade-off between the economic benefits of 5G and the costs for human life," said Eric Allaix, national frequency manager at French weather agency Meteo-France. "The satellite won't be able to distinguish if these signals will be appearing because there's a hurricane coming, or if it's a consequence of the out-of-band emissions of this 5G technology."

Hurricane Dorian shows the importance of early storm detection as extreme weather events become more frequent because of climate change. It's one of only eight hurricanes in the Atlantic basin to reach wind speeds of 180 miles per hour (290 kph) since official data began in 1851. It's also the fifth category 5 storm in the Atlantic in four consecutive years.

And it's been particularly hard to predict.

Scientists at U.S. space agency NASA, the National Oceanic and Atmospheric Administration (NOAA), Meteo-France and the European Centre for Medium-Range Weather Forecasts say 5G signals will exacerbate the problem by interfering with satellite readings.

'Territorial Dispute'

The dispute will come to a head at a conference next month in the Egyptian resort of Sharm el-Sheikh, where almost 200 national regulators will try to forge an agreement in the face of fierce lobbying by the telecommunications industry, space agencies and forecasters.

Mobile industry trade body the GSMA and the U.S. government's Federal Communications Commission say the high-bandwidth spectrum can be used for 5G with no disturbance to weather forecasting.

The GSMA has dismissed the concerns of forecasters as a "territorial dispute triggered by the space industry." It warned that $565 billion in economic value is in jeopardy if wireless operators are blocked from those airwaves, known as "millimeter-wave", as they're best for carrying the fastest data that allows the most advanced applications promised by 5G, such as automated factories, virtual reality and connected vehicles.

The London-based industry group has resisted a compromise proposal for a frequency "buffer zone" to ensure neither side interferes with the other's signals. One alternative could be to carve out regions in which either 5G or weather satellites can operate without interference. ❖

Adjusters Beware the Potential Risks of Illicit Drug Residue

Reprinted from www.claimspages.com

As we continue to face a national opioid crisis, insurance adjusters need to keep their safety top of mind during the inspection of a drug-related claim.

It is essential to be aware of the potential health risks you could be facing, especially if the property

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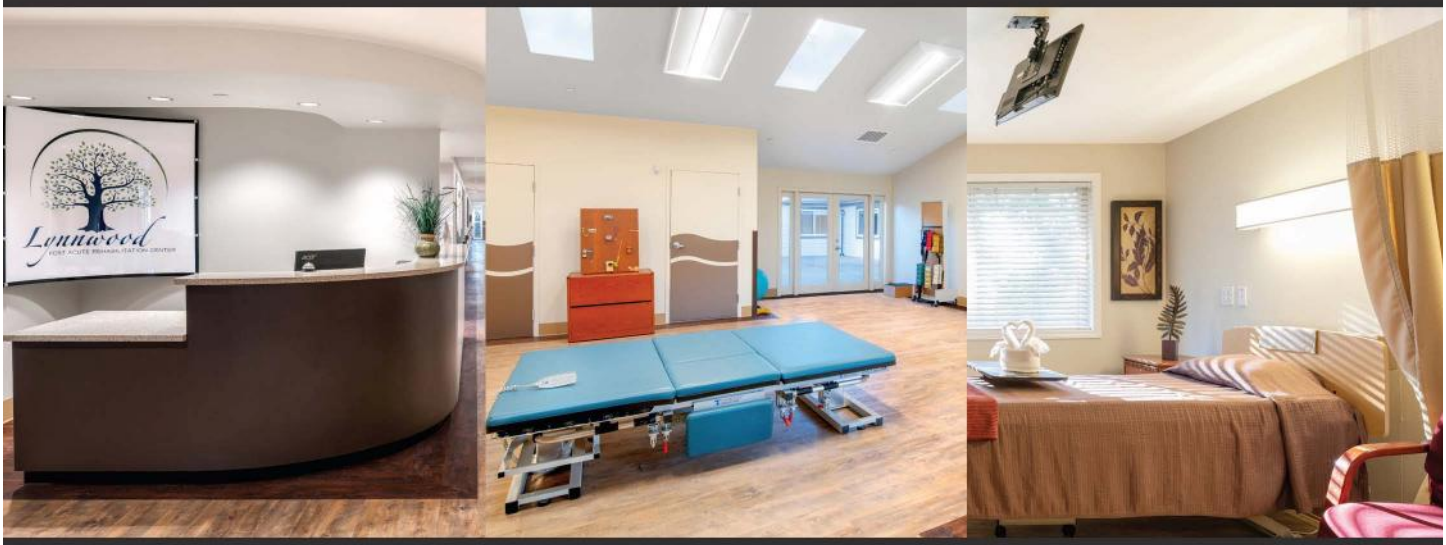

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or vehicle you are dealing with may be contaminated with an illicit drug.

When you first step on the scene, remember to think whether the property could have been contaminated by the insured, a third party involved in the claim or an unknown party.

Take a situation where an adjuster is inspecting a property damaged by the renter, and a mysterious white powder is discovered.

This powder could be a number of substances — flour, drywall compound, cocaine or even fentanyl. It is important to treat it with caution while identifying the substance, as this will affect the claim and your safety. ❖

— To read the fulll article go to: http://insurancethoughtleadership.com/potential-risks-from-illicit-drug-residue/

You Can't Teach Claims Adjusters this Skill

By Greg Meckbach, Associate Editor
Reprinted from www.canadianunderwriter.ca.

As the chief claims officer for Wawanesa Mutual Insurance Company, Erin Fischer hears one question all the time.

"The Number 1 question I get is: Do you need to hire claims people who are technical experts?'" Fischer said Wednesday.

Although technical expertise is very important in claims, empathy is an essential ingredient, Fischer suggested during a presentation at Connected Insurance Canada, which wrapped up Wednesday.

"What you can't teach people is how to connect with people," Fischer said during the presentation, Why Talking To Your Customer is the Next Innovation in Claims.

"We actually try to find people who deliver empathy," Fischer said of Wawanesa's claims hiring practices. "Hire people who can deliver on customer experience skills." Claims organizations do need other people in the organization with good technical skills at claims, but they need to balance that with people skills, according to Fischer.

Sometimes she is asked how applicants for claims positions should be interviewed. "It is not about how many files, what kind of precedent cases, what is your average talk time," she said about possible interview questions to ask. "It's not about those things. It's about, "Tell me about a time that you helped a customer get through one of life's biggest tragedies.'"

Connected Insurance Canada was produced by Insurance Nexus and held at the Marriott Eaton Centre in downtown Toronto.

Fischer delivered her presentation on the 18th anniversary of the hijacking Sept. 11, 2001 of four American airliners, which grounded most civilian air travel for days. To give an example of empathy, Fischer noted that thousands of Newfoundlanders let strangers stranded at Gander airport stay at their homes after the Sept. 11, 2001 attacks.

"Sympathy would have been 'Hey, yes, sorry to hear about that, I guess sleeping on a plane is going to suck,'" Fischer said Wednesday. "Empathy is different. Empathy is about feeling with you. Sympathy is about feeling for you. There is a huge difference. In our our industry, we have to get empathy right."

To illustrate how to treat customers and how not to treat customers, Fischer recounted two travelling experiences she had, each with a different airline.

Fischer revealed that she has a tendency to forget personal items on airplanes. One time she forgot to take her carry-on bag off from the overhead compartment and didn't realize this until she exited the security zone.

"At that moment, I entered the abyss – the black hole – 'You shall never find your suitcase ever again, Erin,'" she recounted. She went to speak to a human and was told to go online and go through a process. "Eight weeks later, after I replaced everything in my suitcase, I got an electronic note from [the airline] saying 'Guess what, they found your suitcase and it's only $100 to ship it back to you from Montreal.'"

She contrasted that with another incident in which she left her business card holder in an airplane cabin and did not even notice it was missing until the airline contacted her by phone, offering to ship it to her by courier. The following day, a customer service agent from the airline called her and reported the courier did not show up but would deliver the business card holder the next day, said Fischer.

"When our customer is in a first-party claim, the most important thing that I want somebody to do is connect with that customer in that moment." ❖

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Problems with proving damages related to the destruction of cannabis crops

By S. Karen Bamberger
Reprinted from www.clmmag.theclm.org

Cannabis is now legal for medicinal or recreational use (or both) in 33 states and the District of Columbia. As of Oct. 17, 2018, it also became legal throughout Canada. More states are expected to legalize cannabis in some form this year. That means litigation concerning cannabis can be expected to grow, well, like a weed.

There are obvious product liability claims related to the sale of cannabis products—for example, products that are tainted or mislabeled. Criminal cases are expected to define and refine issues surrounding impairment and the levels at which use of cannabis-related products can be prosecuted. No doubt, there are cases that will involve trademark issues. But what about cases in which cannabis growers bring claims against others for damaging or killing their crops?

There recently was such a case in Washington State. The client was an industrial painting company that applied spray paint to an outdoor water tank. Several indoor grow operations were located approximately 800 feet away, and one company alleged that volatile organic compounds (VOCs) emitted when the spray paint was applied caused "mass plant death" to its crop of marijuana plants. But how to prove such claims?

Even though so many states have now legalized or will be legalizing cannabis, the federal government still has not. This hazy hybrid status for cannabis leads to proof problems. In a typical case involving death of a crop due to environmental factors (think of spray drift cases, in which a pesticide is applied on one field and wind causes the chemicals to drift to another field where the product has deleterious effects on a different crop), there is scientific literature that can support not only the weather and its effects on particular chemicals, but also, and more importantly, the effect of a certain chemical upon a particular crop. Not so for marijuana.

For example, there are no federally funded studies that have been published regarding the effects of any particular chemical on a cannabis plant. If there is no laboratory in the plaintiff's state that can process cannabis (and many laboratories are only certified to perform certain limited tests on the

plants), a plaintiff will be unable to send samples across state lines because to do so would be to commit a federal offense.

Similarly, where many other crops have been studied by federal agencies to establish certain acceptable levels of exposure to specific products, there are no published levels regarding acceptable levels of any particular chemical in a cannabis plant. In the previously mentioned case, the plaintiff's own experts admitted that there was no published data establishing what level of VOCs would be toxic to a cannabis plant and no peer-reviewed publications that established this causal connection, either.

So, when a plaintiff claims that VOCs were the source of the loss, what type of proof can that plaintiff rely upon to prove causation? If your jurisdiction applies the Frye standard, take advantage of these voids in the scientific knowledge base. Under Frye, evidence derived from a scientific theory or principle is admissible only if the theory or principle has achieved general acceptance in the scientific community, and there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. In our case, given the plaintiff's experts' admissions—and the reality of the dearth of scientific research studying the effects of VOCs on cannabis plants—we were successful in obtaining summary judgment due to plaintiff's inability to establish causation.

If your jurisdiction follows Daubert, you know that your judge will consider the following factors:

• Is the underlying theory testable?

• Was the theory peer reviewed?

• Does application of the theory lead to a high known or potential rate of error?

• Are there standards controlling the technique's operation, and were they followed?

• Is the theory or technique generally accepted within the relevant scientific community?

Under the Daubert analysis, the plaintiff in the case example would have had similar insurmountable proof problems. The underlying theory, according to plaintiff's own experts, was not really testable. They conceded that there was no way to practically test for the presence of VOCs in the air or in the plants, and they could cite no peer review of their theory. As will be explained, they failed to follow even rudimentary scientific principles in collecting data.

Of course, do not forget Rule of Evidence 703, whether you are in federal or state court. This rule

requires that facts or data that experts base their opinions on be of the type reasonably relied upon by experts in the particular field. In the case example we discussed, the defense experts provided testimony that no forensic agronomist would rely on the facts or data used by the plaintiff's experts, because those experts really had no such evidence.

In a typical case involving the destruction of a crop, a forensic agronomist would collect samples and perform thorough testing of each potential source of contamination. For example, water would be tested and records would be maintained regarding when, where, and how the water was collected; there would be a protocol for how the water was tested and what it was tested for, and the test results would be recorded and a sample of the water would be retained so that additional testing could be performed again if necessary. In the case example provided, the defense hit the jackpot, because plaintiff's experts failed to maintain any records of any of the testing they performed. There were zero test results, and no samples were retained of the planting material, the containers, the water, or the plants themselves. The plaintiff's experts also admitted that they had not performed any testing of the air inside the grow rooms to try to determine VOC content.

Cannabis may be legal in many states, but that does not mean there is the necessary science to establish causation for a crop failure. A plaintiff seeking to recover damages for a crop loss can be caught "high" and dry if it cannot meet the rigors of scientific proof. ❖

WA Supreme Court Throws Automobile Subrogation Into Chaos — By Gary L. Wickert

Reprinted from www.mwl-law.com

The Spanish philosopher George Santayana once said that, "Chaos is the name we give order which produces confusion in our minds." With that definition in mind, the July 3, 2019 Washington Supreme Court decision of *Daniels v. State Farm Mut. Auto. Ins. Co.,* 2019 WL 2909308 (Wash. July 3, 2019), is responsible for about as much chaos as you can possibly throw into one state's body of subrogation law. It would stand to reason, however, that if we can eliminate the confusion, we also eliminate the chaos.

Subrogation professionals know well the disaster which befalls an anti-subrogation state like Montana when it sides with its trial lawyers and turns its back on small businesses. By extending an equitable Made Whole Doctrine on steroids to all lines of insurance subrogation, and declaring that an insured must be made whole and totally reimbursed for any and all losses, including attorneys' fees, such states take the absurd position that an insured must be totally reimbursed for all losses, as well as costs, including attorney's fees involved in recovering those losses, before the insurer can exercise any

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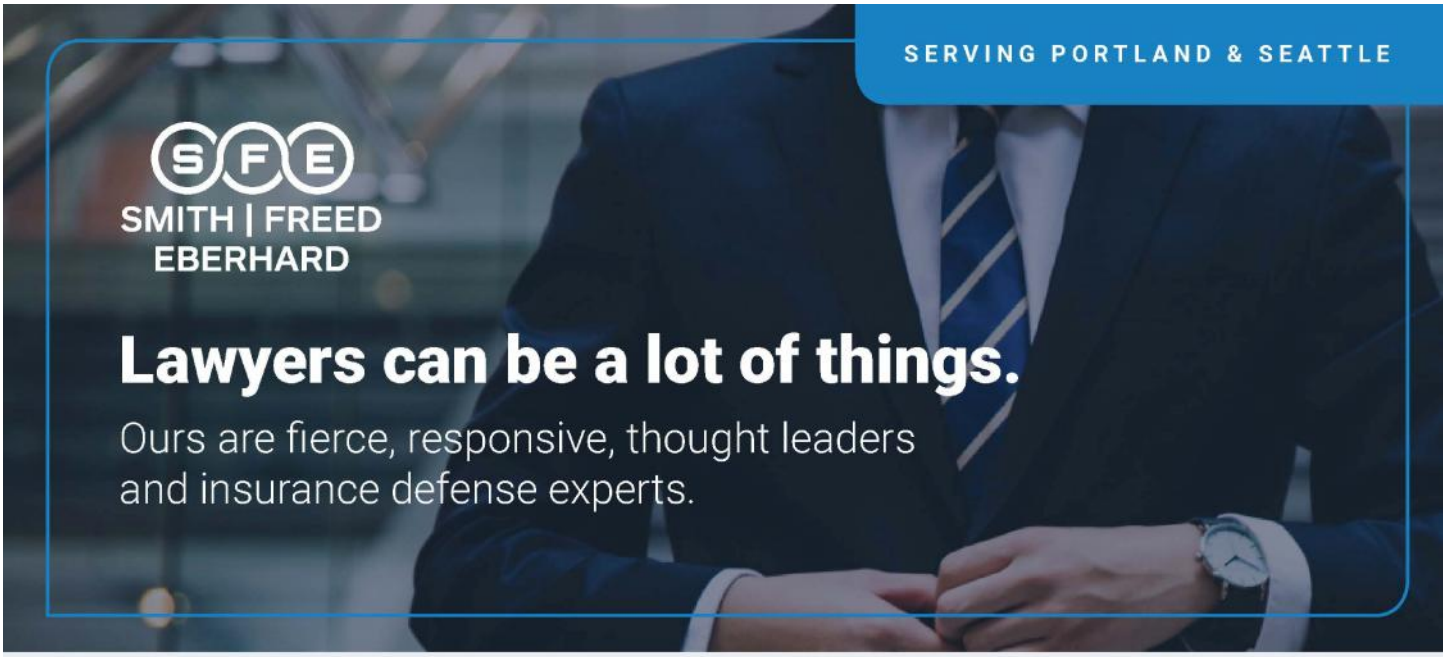

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OREGON CASE UPDATES

"Oregon Supreme Court Determines that the Noneconomic Damages Cap Does Not Apply in Any Case Involving Workers' Compensation" - PUBLISHED ON: 4/25/19

"Disturbing Court of Appeals Decision Reversed – Oregon Supreme Court Reaffirms That Restaurants and Taverns Do Have Immunity For "First Party" Claims of Over-Service of Alcohol" - PUBLISHED ON: 4/4/19

WASHINGTON CASE UPDATES

"Washington Statute Change: Washington Duck Boat Crash Leads to Wrongful Death Statute Change"
PUBLISHED ON: 5/2/19

"Unusual Injury Suffered While Riding a Roller Coaster Allows a Plaintiff to Utilize the Doctrine of Res Ipsa Loquitur"
PUBLISHED ON: 4/18/19

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right of subrogation, regardless of contract language to the contrary.

Washington is no Montana; but it just took a giant leap in that direction. On July 3, 2019, the high court issued a decision out of left field. In Daniels, the court addressed whether the Made Whole Doctrine applies to property subrogation. Specifically, it addressed whether a first-party auto insurer, upon obtaining a partial recovery in a subrogation action, must reimburse its fault-free insureds for their full deductibles before any portion of the subrogation proceeds can be allocated to the insurer. Lazuri Daniels was involved in a three-vehicle accident near Federal Way, Washington. At the time of the wreck, Daniels was insured by State Farm with a policy that included a $500 deductible. Daniels's vehicle was at the center of the wreck; the driver of the car that hit her from behind was insured by GEICO, and the driver in front of her was insured by Liberty Mutual. State Farm paid the portion of the repair costs that exceeded Daniels's deductible. State Farm then did the prudent thing and sought recovery of its payment from GEICO, which agreed that its insured was 70% at fault, and reimbursed State Farm for that portion of the total cost of the repairs. From these proceeds, State Farm reimbursed Daniels for 70% of her deductible. What could go wrong with such a responsible course of subrogation action by State Farm?

Enter the trial lawyers. Lazuri Daniels sued State Farm and sought class action status, arguing that by failing to fully reimburse its insureds for their deductibles after recovering in a subrogation action, State Farm violated both Washington law and its own insurance policy. The trial court dismissed the claims under CR 12(b)(6), and the Court of Appeals affirmed the dismissal. The Supreme Court reversed, and in the process turned auto subrogation in Washington into chaos. Daniels' lawsuit alleged bad faith and argued that, under both its own policy and Washington law, State Farm could seek reimbursement of its property damage payments only after Daniels was fully compensated for her losses, including her full deductible, and that by allocating subrogation recoveries to itself before it reimbursed its insured's full deductible, State Farm was liable for breach of contract, bad faith, and conversion. State Farm moved for dismissal of the ridiculous lawsuit under

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CR 12(b)(6), relying on *Averill v. Farmers Insurance Co. of Washington*, 229 P.3d 830 (Wash. App. 2010), in which the Court of Appeals had held that the Made Whole Doctrine does not extend to this type of subrogation action, and confirmed that WAC § 284-30-393 only required subrogated insurers to return a pro-rata portion of deductibles where the insured was partially responsible for the accident. State Farm argued that nothing in its policy language required it to return the full deductible before allocating to itself the proceeds of a direct subrogation action, and that the Made Whole Doctrine has not historically been applied to auto property subrogation.

The trial court granted State Farm's motion to dismiss, and the Court of Appeals affirmed. Daniels appealed to the Supreme Court, despite the fact that only a little money was at play in this particular case. Turning it into a class action, however, the stakes became higher for the entire industry. The issues on appeal were:

1. Whether Washington's Made Whole Doctrine requires that insurers allocate subrogation proceeds to the full reimbursement of its insureds' deductibles before allocating any portion of the proceeds to itself.
2. Whether, in the absence of an acknowledgement that an insured bears comparative fault, WAC § 284-30-393 requires an insurer to recover and return its insured's full deductible.
3. Whether State Farm's policy language required that it allocate subrogation proceeds to the full reimbursement of its insureds' deductibles before allocating any portion of the proceeds to itself.

The July 3rd decision in *Daniels* was a major expansion of the Made Whole Doctrine in Washington, expanding it unambiguously to deductible reimbursement and more broadly to property damage recoveries generally, where it had never applied before. Prior to this, it was doubtful that the Made Whole Doctrine applied at all to auto property/collision subrogation in Washington. Now, whether in a reimbursement action or a direct subrogation action, a carrier subrogating under Washington law is bluntly precluded from any subrogation recovery unless and until the insured's damages—including, arguably, the insured's unliquidated bodily injury damages—are fully compensated. The Supreme Court wrote:

> *Whether in the context of a reimbursement request, offset, or direct subrogation action, a fault-free insured must be made whole for their entire loss before an insurer may offset*

or recover its own payments. Stated another way, the proceeds of any recovery from a third-party tortfeasor, whether in a subrogation action or otherwise, must be allocated in such a way as to first make the insured whole.

The Court made clear that a fault-free insured must be reimbursed for its entire loss before an insurer may offset or recover its own payments. Application of the Made Whole Doctrine to auto property/collision subrogation efforts is now clearly the law in Washington despite any contrary language in the insurance policy. The Supreme Court clearly stated that its interpretation of the policy language "is consistent, *as it must be*, with the Made Whole Doctrine and the basic principles of subrogation". The cases of *Thiringer v. American Motors Ins. Co.,* 91 Wash.2d 215 (1978) (where Washington first expressly adopted the Made Whole Doctrine) and *Sherry v. Financial Indemnity Co.,* 160 Wash.2d 611 (2007) (where the Court ruled that the insured must be made whole regardless of comparative fault) were expressly approved.

Regarding the reimbursement of deductibles, the high court did appear to make an exception to allow a pro-rata reimbursement of deductibles when the insured had some percentage of comparative fault. However, given the breadth and severity of the opinion, cautious auto insurers will likely take the prudent approach and reimburse 100% of the insured's deductible in the absence of a judicial determination of fault. In most cases, this will effectively eliminate any pro rata reduction of the deductible reimbursed where the matter settles without a judicial determination. Insurance companies would not be well-advised to make that determination independently, given the potential bad faith or conflict of interest considerations that could arise. This issue is now on the radar of every trial lawyer in Washington, not to mention trial lawyers in other states who will now attempt the same coup in other states across the country.

The Made Whole Doctrine has long been applicable to Med Pay and PIP subrogation in Washington. However, until now, property/collision subrogation has enjoyed an exemption. That all ended on July 3rd. The bottom-line is that deductibles must now be fully reimbursed "off the top" of any Washington subrogation recovery. The case of *Averill v. Farmers*, 155 Wash. App. 114 (2010), which previously held to the contrary, is now bad law. It is now more important than ever that no auto property subrogation recovery be made or even attempted before confirmation that any and all of the insured's damages are satisfied and made whole. ❖

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We can't say enough about the advantages of membership in the Puget Sound Adjusters Association. The benefits are numerous!
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PSAA Membership Application for 2019-2020

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Puget Sound Adjusters Association is a professional organization dedicated to the ongoing education of the claims community — providing an arena for member interaction and the sharing of knowledge and resources.

☑ Share timely & professional information
☑ Camaraderie with colleagues & service providers
☑ Keep current regarding professional products & services
☑ Learn skills that enhance daily service operations & delivery

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