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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 CENTRAL PUGET SOUND REGIONAL  
TRANSIT AUTHORITY,

11 Plaintiff,

12 v.

13 LEXINGTON INSURANCE  
14 COMPANY,

15 Defendant.

CASE NO. C14-778 MJP

ORDER ON PLAINTIFF'S  
MOTIONS TO AMEND  
COMPLAINT AND CERTIFY  
QUESTION TO SUPREME COURT

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17 THIS MATTER comes before the Court on Plaintiff's motions to amend complaint and  
18 to certify question of state law to the Washington Supreme Court. (Dkt. Nos. 14, 20.) Having  
19 considered the Parties' briefing and all related papers, the Court finds that leave to amend would  
20 be futile and DENIES the motion to amend complaint. Plaintiff's motion to certify question is  
21 therefore DISMISSED as moot.

22 **Background**

23 This case involves a dispute over indemnification allegedly owed to Plaintiff Central  
24 Puget Sound Regional Transit Authority by Defendant Lexington Insurance Company. (Dkt.

1 No. 12 at 1-2.) Plaintiff asserts causes of action for breach of contract, bad faith, and violation of  
2 the Washington Consumer Protection Act, stemming from Defendant’s handling of Plaintiff’s  
3 indemnification claims arising out of its third-party liability insurance policy. (Id.) Plaintiff now  
4 seeks to amend its complaint to include an additional cause of action for violation of  
5 Washington’s Insurance Fair Conduct Act. (Id.) Recognizing that the logic of this Court’s  
6 ruling in Cox v. Cont’l Cas. Co., Case No. C13-2288MJP, 2014 WL 2560433 (W.D. Wash. June  
7 6, 2014), forecloses an Insurance Fair Conduct Act claim under the facts here, Plaintiff requests  
8 the Court grant leave to amend and then certify to the Washington Supreme Court the question of  
9 whether it may state an Insurance Fair Conduct Act claim. (Dkt. Nos. 19, 20.)

## 10 Discussion

### 11 I. Legal Standards

#### 12 A. Leave to Amend

13 Whether to grant leave to amend “is within the sound discretion of the trial court” guided  
14 by Fed. R. Civ. P. 15’s underlying purpose of facilitating decisions on the merits. United States  
15 v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). In considering whether to permit amendment,  
16 courts consider the following factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing  
17 party, (4) futility of amendment, and (5) whether plaintiff has previously amended the complaint.  
18 Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990). Futility can, by itself, justify  
19 denial of a motion for leave to amend. Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995). The  
20 consideration of prejudice to the opposing party, however, “carries the greatest weight.” Sonoma  
21 Cnty. Ass'n of Retired Employees v. Sonoma Cnty., 708 F.3d 1109, 1117 (9th Cir. 2013).

1 B. Certification to the Supreme Court

2 This Court may certify a question to the Washington Supreme Court when “it is  
3 necessary to ascertain the local law of this state in order to dispose of [a] proceeding and the  
4 local law has not been clearly determined.” RCW 2.60.020. The certification process is  
5 designed to “build a cooperative judicial federalism” and serve the interests of judicial efficiency  
6 and comity. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). Use of the certification  
7 procedure “rests in the sound discretion of the federal court.” Id.

8 Certification is particularly appropriate when there is no appellate authority interpreting a  
9 statute at issue, when the state law issue is especially complex, and when the issue has significant  
10 policy implications. Perez-Farias v. Global Horizons, Inc., 668 F.3d 588, 589, 593 (9th Cir.  
11 2011). Stated differently, certification is appropriate where the law “is not entirely settled,” and  
12 an answer to the question would “have far-reaching effects.” Keystone Land & Dev. Co. v.  
13 Xerox Corp., 353 F.3d 1093, 1097 (9th Cir. 2003).

14 II. Leave to Amend

15 A. Futility

16 Resolution of this motion turns on whether the proposed amendment to include an  
17 Insurance Fair Conduct Act (“IFCA”) claim is futile under the logic of this Court’s ruling in Cox  
18 v. Cont’l Cas. Co., Case No. C13-2288MJP, 2014 WL 2560433 (W.D. Wash. June 6, 2014),  
19 because Plaintiff holds a third-party professional liability insurance policy and the IFCA applies  
20 only to “first party claimants.” Defendant argues that amendment is futile because this case  
21 presents the exact question decided by the Court in Cox. (Dkt. No. 17 at 5-9.) Plaintiff agrees  
22 that Cox presents a problem for its position, but argues that the text of the statute requires a  
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1 | contrary determination and requests that amendment be permitted and the issue be certified to the  
2 | Supreme Court. (Dkt. No. 19 at 2.)

3 | In Cox, the Court was presented with the issue of whether an IFCA claim could be  
4 | asserted against an insurer that provided third-party liability insurance. Plaintiffs in that case  
5 | alleged an IFCA violation against the insurer who provided professional liability insurance for  
6 | their dentist. In examining the application of the IFCA, the Court wrote:

7 | Washington defines first-party insurance as a policy that “pay[s] specified  
8 | benefits directly to the insured when a ‘determinable contingency’ occurs,”  
9 | “allow[ing] an insured to make her own personal claim for payment against her  
10 | insurer.” Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc., 161 Wash.2d  
11 | 903, 914 n. 8, 169 P.3d 1 (2007) (citing Thomas W. Harris, Washington Insurance  
12 | Law § 1.2 (2d ed.2006)). An example is renter's insurance. In contrast, a third-  
13 | party insurance policy “indemnif[ies] an insured for covered claims which others  
14 | [third-party claimants] file against him.” Id. The professional liability policy Dr.  
15 | Duyzend had with Continental is a third-party policy. Thus, he was never a “first  
16 | party claimant” under the IFCA and could not assign an IFCA claim to Plaintiffs.

17 | Cox v. Cont'l Cas. Co., Case No. C13-2288MJP, 2014 WL 2011238, at \*5 (W.D. Wash. May 16,  
18 | 2014), reconsideration denied, Case No. C13-2288MJP, 2014 WL 2560433 (W.D. Wash. June 6,  
19 | 2014).

20 | Plaintiffs in Cox moved for reconsideration and, just as Plaintiff Central Puget Sound  
21 | Regional Transit authority does here, argued that the Court had conflated ‘first-party coverage’  
22 | with ‘first-party claimant.’ Cox v. Cont'l Cas. Co., No. C13-2288 MJP, 2014 WL 2560433, at \*2  
23 | (W.D. Wash. June 6, 2014). Here, as in Cox, Plaintiff argues that “nothing in the statutory text  
24 | exempts first party claimants under third party liability policies from coverage.” (Dkt. No. 19 at

4.) The Court rejected this argument in Cox, finding that:

[T]he text of the IFCA defines “first party claimant” in a narrow way that applies  
only to first-party insurance. In the definition, the IFCA requires the claimant to  
hold a policy requiring the insurer to “pay[ ]” benefits to that individual or entity  
upon the occurrence of a “contingency or loss.” See RCW 48.30.015(4). Third-  
party insurance such as a malpractice policy does not conform to this definition.

1 Cox v. Cont'l Cas. Co., No. C13-2288 MJP, 2014 WL 2560433, at \*2 (W.D. Wash. June 6,  
2 2014).

3 Plaintiff here advances statutory interpretation arguments identical to Plaintiffs'  
4 arguments in Cox, cites to the same cases, and further contends that indemnification payments  
5 from an insurer for money paid by an insured are first-party claims because Defendant is  
6 obligated to pay benefits to Plaintiff directly upon a determinable contingency, here, a payment  
7 by Plaintiff to a third party for which Plaintiff seeks indemnification. (Dkt. No. 19 at 3.) Stated  
8 differently, Plaintiff argues it “is a first party claimant asserting a right to payment as a covered  
9 entity; it is not a third party claimant because it is not asserting a claim against a covered entity.”  
10 (Id. (emphasis in original).)

11 As in Cox, the Court is not persuaded by Plaintiff’s arguments, and concludes that leave  
12 to amend would be futile because Plaintiff cannot state an IFCA claim against Defendant. Under  
13 Washington law, coverage which “indemnif[ies] an insured for covered claims which others  
14 [third-party claimants] file against him” is third-party coverage. Mut. of Enumclaw Ins. Co. v.  
15 Dan Paulson Const., Inc., 161 Wash. 2d 903, 914 n.8 (2007). As discussed in Cox, the IFCA  
16 defines “first party claimant” in a narrow way that applies only to first-party insurance. See  
17 RCW 48.30.015(4).

18 Accordingly, the Court turns to the question of whether Plaintiff should nonetheless be  
19 able to amend its complaint so as to certify the question to the Washington Supreme Court.

### 20 III. Certification to the Washington Supreme Court

21 Plaintiff argues this Court should allow amendment and certify the following question:  
22 “under IFCA, is an insured seeking coverage directly under its own insurance policy a first party  
23 claimant?” (Dkt. No. 20 at 2.) Plaintiff argues certification is appropriate because Washington  
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1 appellate opinions concerning IFCA are sparse and have not addressed the issue presented here,  
2 because IFCA provides for punitive damages, significant because punitive damages are usually  
3 not available in civil cases in Washington, and because certification would not unduly delay  
4 proceedings in this Court. (Id. at 4-7.) Defendant argues that the issue presented has already  
5 been decided by this Court, is not necessary to dispose of the proceedings, and does not have far-  
6 reaching effects. (Dkt. No. 21.)

7 Certification is appropriate when “it is necessary to ascertain the local law of  
8 [Washington] in order to dispose of a proceeding and the local law has not been clearly  
9 determined,” RCW 2.60.020, and where the state law issue has “significant policy implications,”  
10 Perez -Farias, 668 F.3d at 593, and resolution would “have far-reaching effects.” Keystone Land  
11 & Dev., 353 F.3d at 1097.

12 This question has been considered, and ruled on, twice by this Court. Although the  
13 moving party here was not involved in the earlier rulings, the issue is not unsettled. Absent a  
14 new Washington appellate ruling that conflicts with this Court’s rulings, certification is  
15 inappropriate on these facts. See Robertson v. GMAC Mortgage, LLC, Case No. C12-2017MJP,  
16 2013 WL 2351725, at \*1 (W.D. Wash. May 30, 2013) (noting the “presumption against  
17 certifying a question to a state supreme court after a federal district court has issued a decision”).  
18 Moreover, certification in this instance would not serve certification’s goals of efficiency and  
19 comity. Use of the certification procedure “rests in the sound discretion of the federal court.”  
20 Schein, 416 U.S. at 391. The Court finds certification inappropriate.

### 21 **Conclusion**

22 The Court finds that leave to amend Plaintiff’s complaint would be futile because  
23 Plaintiff cannot state an IFCA claim against Defendant as a matter of law. The Court finds  
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1 certification of this question inappropriate, and thus declines to allow amendment for the purpose  
2 of certification. Accordingly, Plaintiff's motion to amend is DENIED and Plaintiff's motion to  
3 certify is DISMISSED as moot.

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5 The clerk is ordered to provide copies of this order to all counsel.

6 Dated this 11th day of November, 2014.

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10 Marsha J. Pechman  
Chief United States District Judge