

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PATRICIA S. HAWTHORNE, individually  
and as assignee of Oklahoma Court Services,  
Inc.,

Plaintiff,

v.

MID-CONTINENT CASUALTY  
COMPANY, OKLAHOMA SURETY  
COMPANY, an Oklahoma Insurance  
Company,

Defendant.

Case No. C16-1948RSL

ORDER DENYING IN PART AND  
GRANTING IN PART CROSS-  
MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT, AND  
GRANTING PLAINTIFF'S MOTION  
FOR LEAVE TO AMEND  
COMPLAINT

This matter comes before the Court on defendant Oklahoma Surety Company's "Motion for Partial Summary Judgment on Choice of Law and Claims Brought in Plaintiff's Individual Capacity," Dkt. # 54, on plaintiff Patricia S. Hawthorne's "Renewed Motion for Partial Summary Judgment Re: The Duty to Defend," Dkt. # 58, and on plaintiff's "Motion for Leave to File Second Amended Complaint," Dkt. # 44. Having considered the parties' briefing and the remainder of the record, the Court denies in part and grants in part the parties' cross-motions for partial summary judgment, and grants plaintiff's motion for leave to amend.

ORDER DENYING IN PART AND GRANTING  
IN PART CROSS-MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT, AND GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO AMEND COMPLAINT - 1

1 **I. BACKGROUND**

2 In November 2016, acting in her individual capacity and as assignee of various insurance  
3 claims by Oklahoma Court Services, Inc. (“OCS”), plaintiff filed this action in King County  
4 Superior Court against OCS’s insurer, Oklahoma Surety Company (“Oklahoma Surety”), for bad  
5 faith, violation of Washington’s Consumer Protection Act, and breach of the contractual duties  
6 to defend, settle, and indemnify. Dkt. # 1-1. On December 21, 2016, Oklahoma Surety removed  
7 this case to federal court, Dkt. # 1, and shortly thereafter moved to dismiss the case for lack of  
8 personal jurisdiction, Dkt. # 9. The Court denied that motion on April 4, 2017. Dkt. # 39.

9 On April 20, 2017, plaintiff moved for leave to file a second amended complaint,  
10 specifically to add a claim under Washington’s Insurance Fair Conduct Act (IFCA) because the  
11 required 20 days had elapsed since plaintiff submitted notices to the Washington Insurance  
12 Commissioner and to Oklahoma Surety and Mid-Continent Casualty Company, as required by  
13 RCW 48.030.015(8)(a). Dkt. # 44. Oklahoma Surety opposed plaintiff’s motion, arguing that  
14 Oklahoma law applies in this case rather than Washington law, but that an IFCA claim would be  
15 futile in any event. Dkt. # 52.

16 On May 4, 2017, just three days after filing its response to plaintiff’s motion for leave to  
17 amend, Oklahoma Surety moved for partial summary judgment on the question of choice of law.  
18 Dkt. # 54. As in its opposition to plaintiff’s motion for leave to amend, Oklahoma Surety argues  
19 that Oklahoma rather than Washington law applies to all of plaintiff’s claims. Oklahoma Surety  
20 also asks the Court to dismiss the claims that plaintiff has brought “individually,” as opposed to  
21 as assignee of OCS. A week later, plaintiff renewed her motion for partial summary judgment,  
22 which seeks resolution both of the choice-of-law issue and of the merits question whether  
23 Oklahoma Surety breached its duties under the applicable law. Dkt. # 58.<sup>1</sup>

24 \_\_\_\_\_  
25 <sup>1</sup> On April 4, 2017, the Court denied plaintiff’s original motion for partial summary judgment  
and granted defendant’s motion under Fed. R. Civ. P. 56(d). Dkt. # 38.

1 **II. DISCUSSION**

2 Because the choice-of-law issue bears on plaintiff’s motion for leave to add a Washington  
3 IFCA claim, this order addresses the parties’ cross-motions for partial summary judgment first,  
4 before turning to plaintiff’s motion for leave to file a second amended complaint.

5 **A. The Parties’ Cross-Motions for Partial Summary Judgment**

6 Both Oklahoma Surety and plaintiff seek partial summary judgment on the question  
7 whether Washington or Oklahoma law applies in this case. Oklahoma Surety also seeks  
8 dismissal of plaintiff’s claims to the extent she brings them in her individual capacity rather than  
9 as assignee of OCS’s claims arising from its insurance contract with Oklahoma Surety.

10 Summary judgment is appropriate if, viewing the evidence in the light most favorable to  
11 the nonmoving party, “the movant shows that there is no genuine dispute as to any material fact  
12 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); L.A. Printex  
13 Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012). The moving party “bears the  
14 initial responsibility of informing the district court of the basis for its motion.” Celotex Corp. v.  
15 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has satisfied its burden, it is entitled  
16 to summary judgment if the non-moving party fails to designate “specific facts showing that  
17 there is a genuine issue for trial.” Id. “The mere existence of a scintilla of evidence in support  
18 of the non-moving party’s position is not sufficient”; the opposing party must present probative  
19 evidence in support of its claim or defense. Arpin v. Santa Clara Valley Transp. Agency, 261  
20 F.3d 912, 919 (9th Cir. 2001); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551,  
21 1558 (9th Cir. 1991). “An issue is ‘genuine’ only if there is a sufficient evidentiary basis on  
22 which a reasonable fact finder could find for the nonmoving party.” In re Barboza, 545 F.3d  
23 702, 707 (9th Cir. 2008) (internal citations omitted).

1           1.       *Plaintiff's Claims in Her Individual Capacity*

2           Oklahoma Surety asks the Court to dismiss plaintiff's claims to the extent she brings them  
3 in her individual capacity rather than as assignee of OCS. The Court agrees that because  
4 plaintiff is not insured by Oklahoma Surety, she lacks standing to bring individual claims for  
5 breach of the contractual duties to defend, settle, and indemnify. And as a third party, plaintiff  
6 also lacks standing to bring a bad faith claim in her individual capacity against Oklahoma Surety  
7 for its failure to defend OCS against *plaintiff's* lawsuit. See Tank v. State Farm & Cas. Co., 105  
8 Wn.2d 381, 391–94 (1986) (“We hold that third party claimants may not sue an insurance  
9 company directly for alleged breach of duty of good faith under a liability policy.”). Neither  
10 party addresses plaintiff's standing to bring a claim under Washington's Consumer Protection  
11 Act, RCW 19.86.010 *et seq.*, but plaintiff does not appear to dispute that she lacks standing to  
12 bring any of her claims in her individual capacity. Dkt. # 69 at 36. Accordingly, she may  
13 litigate this suit only as assignee of OCS's claims against Oklahoma Surety. Oklahoma Surety's  
14 motion for partial summary judgment on this point is GRANTED.

15           2.       *Choice of Law*

16           Oklahoma Surety argues that Oklahoma law, not Washington law, should apply to all of  
17 plaintiff's claims in this case. Plaintiff argues the opposite. As a federal court sitting in  
18 diversity in Washington, this Court applies Washington's choice-of-law rules. See Patton v.  
19 Cox, 276 F.3d 493, 495 (9th Cir. 2001). Under Washington's rules, Washington law applies  
20 unless there is an actual conflict between Washington law and the laws or interests of another  
21 state. See Erwin v. Cotter Health Centers, 161 Wn.2d 676, 692 (2007). An actual conflict exists  
22 if the laws of the two states result in different outcomes on the same issue. Id. In the case of an  
23 actual conflict, the Court applies the factors prescribed by the Restatement (Second) Conflict of  
24 Laws (“Restatement”) to determine which law applies. Id. Washington applies the rule of  
25 “dépeçage,” which requires a separate choice-of-law analysis for each individual issue in the

1 case. See Brewer v. Dodson Aviation, 447 F. Supp. 2d 1166, 1175 (W.D. Wash. 2006).

2 The Court determines the law applicable to plaintiff’s contract claims first, and her tort  
3 claims second.

4 a.) Contract claims

5 Plaintiff’s claims for breach of the duties to defend, settle, and indemnify arise from  
6 OCS’s insurance policy with Oklahoma Surety – a contract. See Greer v. Northwestern Nat. Ins.  
7 Co., 109 Wn.2d 191, 197 (1984). Because there is no choice of law provision in OCS’s  
8 insurance policy, see generally Dkt. # 10-2, the Court applies the Washington conflict-of-law  
9 analysis described above. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 188(2) (1971). If  
10 Washington and Oklahoma law conflict, the Court asks which state has the “most significant  
11 relationship” to the contract dispute, applying the factors enumerated in the Restatement. See  
12 RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 6, 188 (1971).

13 In this case, no conflict exists between Washington law and Oklahoma law on plaintiff’s  
14 duty to defend and duty to indemnify claims. As to the duty to defend, it is true that Washington  
15 law limits the analysis to the “eight corners” of the underlying complaint and the insurance  
16 policy, Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 803 (2014), while Oklahoma law  
17 considers extrinsic evidence, such as information that the insurer “gleaned from the petition and  
18 other pleadings, from the insured, and from other sources,” First Bank of Turley v. Fidelity and  
19 Deposit Ins. Co. of Maryland, 928 P.2d 298, 303–04 (Okla. 1996). But both Washington and  
20 Oklahoma law require the insurer to defend whenever there is the *possibility of coverage* under  
21 the policy. Compare First Bank of Turley, 928 P.2d at 303–04 & n.14, with Am. Best Food, Inc.  
22 v. Alea London, Ltd., 168 Wn.2d 398, 404 (2010). In any case where coverage possibly exists  
23 according to the eight corners of the complaint and the policy, coverage also possibly exists even  
24 when extrinsic information is added to the inquiry. Accordingly, no conflict exists on the duty to  
25 defend issue.

26 ORDER DENYING IN PART AND GRANTING  
27 IN PART CROSS-MOTIONS FOR PARTIAL  
28 SUMMARY JUDGMENT, AND GRANTING PLAINTIFF’S  
MOTION FOR LEAVE TO AMEND COMPLAINT - 5

1 As to the duty to indemnify, Oklahoma Surety argues that Oklahoma law recognizes the  
2 “reasonable expectations” doctrine, while Washington law does not. Though Oklahoma Surety  
3 is correct that the doctrine is available equally to insurers and insureds, its purpose is to estop  
4 parties that have made representations inconsistent with the actual terms of an insurance policy.  
5 Most often, the party making representations will be the insurer, not the insured. See Max True  
6 Plastering Co. v. U.S. Fid. & Guar. Co., 912 P.2d 861, 862, 864, 868 (Okla. 1996) (“Under the  
7 doctrine, *if the insurer or its agent* creates a reasonable expectation of coverage *in the insured*  
8 which is not supported by policy language, the expectation will prevail over the language of the  
9 policy.” (emphasis added)). Moreover, the doctrine operates only where the misrepresented  
10 terms of the contract are “technical or obscure.” Id. at 868. The doctrine thus does not void  
11 contractual duties that are clearly established by the terms of a policy, like the duties asserted in  
12 this case. Accordingly, whether or not the doctrine is available to Oklahoma Surety will have no  
13 impact on the outcome of the duty to indemnify issue in this case, and no actual conflict exists.

14 Oklahoma Surety has not argued that a conflict exists between Oklahoma and  
15 Washington law as to the duty to settle issue, and so the Court does not reach this question.

16 Absent an actual conflict between Washington law and Oklahoma law on the contractual  
17 issues of duty to defend and duty to indemnify, the Court concludes that Washington law applies  
18 to both. See Erwin, 161 Wn.2d at 692.

19 b.) Tort claims

20 Plaintiff’s claims for bad faith and violation of the Consumer Protection Act (CPA) sound  
21 in tort law. Under Washington choice-of-law rules, where an actual conflict exists, Section 145  
22 of the Restatement applies. See Rice v. Dow Chem. Co., 124 Wn.2d 205, 213 (1994). Like  
23 Section 188 in the context of contract law, Section 145 directs the court to consider which state  
24 has the “most significant relationship” to the occurrence and the parties. See RESTATEMENT  
25 (SECOND) CONFLICT OF LAWS § 145(1).

1 Oklahoma Surety argues that a conflict exists as to both tort issues in this case because  
2 neither type of claim is assignable under Oklahoma law, and both types are assignable under  
3 Washington law. Compare United Adjustment Servs., Inc. v. Prof'l Insurors Agency, LLC, 307  
4 P.3d 400, 404 (Okla. Ct. App. 2013), with Carlile v. Harbour Homes, Inc., 147 Wn. App. 193,  
5 210 (2008). Because this distinction would create different outcomes as to the tort issues in this  
6 case, an actual conflict exists.

7 Under Section 145 of the Restatement, to determine which state has the “most significant  
8 relationship,” the Court considers (1) the place where the injury occurred; (2) the place where  
9 the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of  
10 incorporation and place of business of the parties; and (4) the place where the relationship, if  
11 any, between the parties is centered. Other important factors are “the needs of the interstate and  
12 international systems, the relevant policies of the forum, the relevant policies of other interested  
13 states and particularly of the state with the dominant interest in the determination of the  
14 particular issue, and ease in the determination and application of the law to be applied.” See  
15 RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 cmt. b.

16 Courts in this district have concluded that, in the context of a failure to defend or  
17 indemnify, the state where the insured is sued has the “most significant relationship” to the bad  
18 faith and CPA claims that result. In Travelers Prop. Cas. Co. of Am. v. AF Evans Co., No. C10-  
19 1110JCC, 2012 WL 4113279 (W.D. Wash. Sept. 19, 2012), the court concluded that “the injury  
20 suffered by [the insured] as a result of [the insurer’s] bad-faith failure to defend occurred in  
21 Washington, where they incurred the costs of defending themselves against the [plaintiff’s]  
22 claims, and where the Washington Superior Court entered a stipulated judgment against them.”  
23 2012 WL 4113279, at \*8. Moreover, the court noted that the complaint against the insured  
24 asserted Washington law claims for harm that occurred in Washington. The court also placed  
25 special weight on Washington’s “strong interest in protecting insureds who must resort to

1 litigation to establish coverage,” and “in using the amount of a covenant judgment as the  
2 presumptive measure of an insured’s harm caused by an insurer’s tortious bad faith.” Id. at  
3 \*8–9. Thus, even though the insured was incorporated in California, the insurance policies were  
4 issued to the insured at a California address, and “all claims activities took place in California by  
5 [an insurer] claims handler based in California,” the court held that Washington had the most  
6 significant relationship to the insured’s bad faith claim. Id. at 10. See also Tilden-Coil  
7 Constructors, Inc. v. Landmark Am. Ins. Co., 721 F. Supp. 2d 1007, 1015–16 (W.D. Wash.  
8 2010) (holding that Washington had the most significant relationship to bad faith and CPA  
9 claims arising from a breach of the duty to defend against a suit in Washington).

10         The Court finds this reasoning persuasive and applies it here. While the relationship  
11 between Oklahoma Surety and OCS is “centered” in Oklahoma, where both corporations are  
12 headquartered, OCS’s injury occurred in Washington, where it was forced to defend against a  
13 suit as a result of Oklahoma Surety’s alleged bad faith refusal to defend and indemnify. The  
14 forum state’s strong interest in protecting insureds against bad faith and in enforcing covenant  
15 judgments weigh just as strongly here as in AF Evans. See also Tilden-Coil, 721 F. Supp. 2d at  
16 1015–16. Accordingly, Washington has the most significant relationship to plaintiff’s bad faith  
17 and CPA claims, and Washington law applies.

18         Oklahoma Surety’s motion for partial summary judgment on the choice of law issues is  
19 therefore DENIED. Plaintiff’s renewed motion for partial summary judgment is GRANTED as  
20 to the question of which law applies to her claims, and DENIED without prejudice as to the  
21 merits question whether Oklahoma Surety violated the applicable law. For all the reasons given  
22 in the Court’s earlier order granting Oklahoma Surety’s Rule 56(d) motion, see Dkt. # 38, a  
23 merits ruling at this stage of the litigation would be premature, and Oklahoma Surety’s renewed  
24 Rule 56(d) motion (Dkt. # 64) is GRANTED.

25  
26 ORDER DENYING IN PART AND GRANTING  
27 IN PART CROSS-MOTIONS FOR PARTIAL  
28 SUMMARY JUDGMENT, AND GRANTING PLAINTIFF’S  
MOTION FOR LEAVE TO AMEND COMPLAINT - 8



1 **B. Plaintiff’s Motion for Leave to File Second Amended Complaint**

2 Plaintiff moves for leave to file a second amended complaint adding a claim under  
3 Washington’s Insurance Fair Conduct Act (IFCA), RCW 48.30.015, as she has now exhausted  
4 the procedural requirements necessary to bring an IFCA claim.

5 Courts “should freely give leave [to amend] when justice so requires.” Fed. R. Civ.  
6 P. 15(a)(2). There is a “strong policy in favor of allowing amendment” after “considering four  
7 factors: bad faith, undue delay, prejudice to the opposing party, and the futility of amendment.”  
8 Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994). The underlying purpose of Rule 15 is “to  
9 facilitate decision on the merits, rather than on the pleadings or technicalities.” Lopez v. Smith,  
10 203 F.3d 1122, 1127 (9th Cir. 2000). However, if the proposed amendment would be futile (*i.e.*,  
11 it would be immediately subject to dismissal if challenged under Rule 12(b)(6)), there is no  
12 reason to put defendants through the unnecessary expense and delay of responding to the  
13 amendment. Nordyke v. King, 644 F.3d 776, 787 n.12 (9th Cir. 2011).

14 Oklahoma Surety argues that plaintiff’s proposed IFCA claim would be futile because  
15 Oklahoma law, not Washington law, applies. Dkt. # 52. For all the reasons discussed in Part  
16 A.2.b, the Court concludes that Washington has the most significant relationship to plaintiff’s  
17 tort claim under IFCA – which, like plaintiff’s bad faith and CPA claims, arises from Oklahoma  
18 Surety’s failure to defend against a lawsuit in Washington – and accordingly Washington law  
19 applies. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(1).

20 Oklahoma Surety also argues that plaintiff lacks standing to bring an IFCA claim arising  
21 from OCS’s insurance policy, because IFCA creates a cause of action only for “first party  
22 claimant[s].” RCW 48.30.015(1). But because OCS expressly assigned its IFCA claims to  
23 plaintiff, Dkt. # 45-2 at 7–8, plaintiff may bring an IFCA cause of action as the assignee of a  
24 first-party claimant. Cf. Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., 176 Wn.  
25 App. 185, 203 (2013) (finding lack of standing where first-party insured did not “expressly


1 assign any IFCA and CPA claims” to the plaintiff).

2 Finally, Oklahoma Surety argues that plaintiff’s IFCA claim is futile because its refusal to  
3 pay the \$7.2 million demanded is not unreasonable. At this stage of the litigation, the Court  
4 cannot conclude that Oklahoma Surety’s refusal was reasonable as a matter of law, and  
5 Oklahoma Surety does not argue that plaintiff’s claim would fail to survive a motion under Fed.  
6 R. Civ. P. 12(b)(6). Accordingly, amendment of plaintiff’s complaint to add an IFCA claim  
7 would not be futile. Plaintiff’s motion for leave to amend is GRANTED.

8 **III. CONCLUSION**

9 For all the foregoing reasons, defendant’s motion for partial summary judgment (Dkt.  
10 # 54) is GRANTED in part and DENIED in part. Plaintiff’s renewed motion for partial  
11 summary judgment (Dkt. # 58) is GRANTED in part and DENIED without prejudice in part.  
12 Plaintiff’s claims in her individual capacity are dismissed with prejudice, and she may pursue her  
13 claims only in her capacity as assignee of OCS. Washington law applies to plaintiff’s  
14 contractual claims for breach of the duties to defend and indemnify, and to the tort claims that  
15 arise from these breaches. Plaintiff’s motion for leave file a second amended complaint (Dkt.  
16 # 44) is GRANTED.

17  
18 DATED this 31st day of July, 2017.

19  
20   
21 Robert S. Lasnik  
22 United States District Judge  
23  
24  
25

26 ORDER DENYING IN PART AND GRANTING  
27 IN PART CROSS-MOTIONS FOR PARTIAL  
28 SUMMARY JUDGMENT, AND GRANTING PLAINTIFF’S  
MOTION FOR LEAVE TO AMEND COMPLAINT - 10