

1 HONORABLE RONALD B. LEIGHTON

2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 CHARLON R. JOHNSON,

10 Plaintiff,

v.

11 GALLAGHER BASSETT SERVICES
12 INC., et al.,

13 Defendants.

CASE NO. C18-5029 RBL

ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS TO
DISMISS

14 THIS MATTER is before the Court on Defendant Gallagher Bassett's Motion to Dismiss
15 [Dkt. # 12], Defendant' ACE American Insurance Co.'s similar Motion to Dismiss and Partial
16 Joinder in Gallagher Bassett's Motion [Dkt. # 13] and Gallagher Bassett's Motion to Join in
17 ACE's Reply in support of its own Motion. [Dkt. # 23]. The Motions to Join are **GRANTED**.

18 The case arises from an automobile accident and a subsequent a UIM claim. Plaintiff
19 Johnson was injured when her vehicle was struck by a stolen truck. Her ACE insurance policy
20 included a \$50,000 UIM coverage. She made a policy limits UIM claim to ACE's claims service
21 provider, Gallagher Bassett, and neither Gallagher Bassett nor ACE offered or paid her anything.
22 She sued in state court, alleging state law specific performance (of contract), Insurance Fair
23
24

1 Conduct Act, and related “bad faith”/breach of fiduciary duty/CPA claims. Defendants removed
2 the case to this Court under 28 U.S.C. § 1332 (diversity jurisdiction).

3 Gallagher Bassett seeks dismissal with prejudice, arguing that Johnson has not pled and
4 cannot plausibly plead that she had a contractual relationship (of insurance or otherwise) with
5 Gallagher Bassett, and that because it is not an insurer, it owed her “no duties.” ACE—which did
6 have a contract, is an insurer, and does owe its insureds various duties, even in the UIM
7 context—joins in this motion.

8 ACE also asks the Court to dismiss with prejudice all of Johnson’s claims against it. It
9 argues that Johnson’s “specific performance” contract claim cannot proceed where her claim is
10 really one for breach of contract and money damages, though it implicitly concedes that she
11 could assert a claim for the latter. It also seeks dismissal of her “fiduciary duty” claim, arguing
12 that ACE owed her no such duty as a matter of law, particularly in the UIM context. It seeks
13 dismissal (with prejudice) of Johnson’s remaining “bad faith” claims, arguing essentially that
14 Johnson has not plausibly pled that it denied her claim for UIM benefits under her ACE policy.

15 In response, Johnson filed an amended complaint which adds detail, including her efforts
16 to obtain benefits and specifically alleging the Gallagher Bassett’s and ACE’s failure to respond
17 is “effectively a denial of” her claim, and that it has “unreasonably denied payment of UIM
18 benefits.” She retains her “specific performance” contract claim but adds a “breach of contract”
19 claim. Johnson has since voluntarily dismissed her specific performance and CPA claims [Dkt. #
20 19].

21 Gallagher Bassett’s Reply concedes that it is ACE’s adjuster and agent, but continues to
22 argue that because it is not an insurer it is not bound by the IFCA, and that it has no contractual
23
24

1 (or other) duties to Johnson. It reiterates that Johnson’s UIM claim has not been denied argues
2 that delay in responding to or handing a claim does not necessarily amount to bad faith.

3 ACE’s Reply argues that its (and Gallagher Bassett’s) delay in responding to or in the
4 handling of Johnson’s UIM claim was “not unreasonable.” It does not say “as a matter of law,”
5 but this is nevertheless a summary judgment argument. Both defendants appear to concede that
6 Johnson was insured, that she was injured in an auto accident with an underinsured driver, that
7 she made claim—in July, or at the latest, November—and that neither defendant has responded
8 or paid any amount.

9 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal
10 theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
11 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff’s complaint must allege
12 facts to state a claim for relief that is plausible on its face. *See Aschcroft v. Iqbal*, 129 S. Ct.
13 1937, 1949 (2009). A claim has “facial plausibility” when the party seeking relief “pleads factual
14 content that allows the court to draw the reasonable inference that the defendant is liable for the
15 misconduct alleged.” *Id.* Although the Court must accept as true the Complaint’s well-pled facts,
16 conclusory allegations of law and unwarranted inferences will not defeat a Rule 12(b)(6) motion.
17 *Vazquez v. L. A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State*
18 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation to provide the ‘grounds’
19 of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic
20 recitation of the elements of a cause of action will not do. Factual allegations must be enough to
21 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
22 (2007) (citations and footnotes omitted). This requires a plaintiff to plead “more than an
23
24

1 unadorned, the-defendant-unlawfully-harmed-me-accusation.” *Iqbal*, 129 S. Ct. at 1949 (citing
2 *Twombly*).

3 On a 12(b)(6) motion, “a district court should grant leave to amend even if no request to
4 amend the pleading was made, unless it determines that the pleading could not possibly be cured
5 by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242,
6 247 (9th Cir. 1990). However, where the facts are not in dispute, and the sole issue is whether
7 there is liability as a matter of substantive law, the court may deny leave to amend. *Albrecht v.*
8 *Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

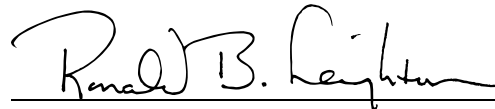
9 A proposed amendment is futile “if no set of facts can be proved under the amendment to
10 the pleadings that would constitute a valid and sufficient claim or defense.” *Gaskill v. Travelers*
11 *Ins. Co.*, No. 11-cv-05847-RJB, 2012 WL 1605221, at *2 (W.D. Wash. May 8, 2012) (citing
12 *Sweeney v. Ada County, Idaho*, 119 F.3d 1385, 1393 (9th Cir.1997)).

13 An insurer has a duty of good faith to its policyholder and violation of that duty may give
14 rise to a tort action for bad faith. *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wash.2d 751,
15 765, 58 P.3d 276 (2002). To succeed on a bad faith claim, the policyholder must show the
16 insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. *Overton v.*
17 *Consol. Ins. Co.*, 145 Wash.2d 417, 433, 38 P.3d 322 (2002). Whether an insurer acted in bad
18 faith is a question of fact. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash.2d 784, 796, 16
19 P.3d 574 (2001). If reasonable minds could differ that an insurer's conduct was reasonable, or if
20 there are material issues of fact with respect to the reasonableness of the insurer's action, then
21 summary judgment is not appropriate. *Smith v. Safeco Ins. Co.*, 150 Wash. 2d 478, 486, 78 P.3d
22 1274, 1277-78 (2003).

1 Gallagher Basset's claim that it does not owe Johnson a *fiduciary* duty is correct, and that
2 specific claim is dismissed. Johnson's breach of contract claim against Gallagher Basset is also
3 implausible, in the absence of any such contract. But the claim that an outside adjuster owes an
4 insured no duty whatsoever—that it is free to ignore her claim—is not correct. An adjuster
5 cannot claim immunity from the various statutes, regulations, "bad faith" opinions governing
6 claims handling by pointing to the absence of a contract, any more than an insurer can immunize
7 itself by delegating its claims handling to an outside adjuster. Johnson's core, "unreasonable
8 claims handling" claims are sufficiently pled for the defendants to know what she is claiming.
9 Defendants' Motions to Dismiss those claims—IFCA, negligence and bad faith—are DENIED.

10 IT IS SO ORDERED.

11 Dated this 23rd day of April, 2018.

12
13 

14 Ronald B. Leighton
United States District Judge