

# Issue Brief

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## Washington Referendum 67 Opponents Fight to Stop Enactment of Bad Faith Law

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### Introduction

When voters in Washington State go to the polls on Nov. 6, one measure they will be asked to consider is Referendum 67, which, if approved by voters, would allow a new bad faith law to take effect in the state.

This *Issue Brief* looks at the circumstances that gave rise to passage of Engrossed Substitute Senate Bill 5726, the so-called Insurance Fair Conduct Act,<sup>1</sup> and to the efforts of a broad-based coalition of consumer, business and taxpayer groups known as Consumers Against Higher Insurance Rates<sup>2</sup> that is trying to defeat the referendum.

### Senate Bill 5726

On December 11, 2006, the Association of Trial Lawyers of America announced that it was changing its name to the American Association of Justice to more accurately reflect its role as “advocates for justice” and to help reframe the debate in the court of public opinion. In a letter to his nearly 40,000 colleagues, then AAJ President Lewis S. “Mike” Eidson, a Coral Gables, Fla. trial attorney, said of the name change: “It better articulates what we do: fight to ensure that every person has access to justice and can get a fair shake.”<sup>3</sup>

Since the announcement, AAJ and its state chapters across the country have launched a renewed attack on the insurance industry by introducing bad faith legislative proposals in a handful of states.

In Washington, the manifestation of the AAJ charge came about when the Washington State Trial Lawyers Association persuaded Democratic Senators Brian Weinstein, Adam Kline and Rosa Franklin to introduce SB 5726 on Jan. 29, 2007. As initially drafted, the bill would have allowed “any insured

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Founded in 1895, the National Association of Mutual Insurance Companies (NAMIC) is a full-service national trade association serving the property/casualty insurance industry with more than 1,400 member companies that underwrite more than 40 percent of the property/casualty insurance premium in the United States. NAMIC members are small farm mutual companies, state and regional insurance companies, risk retention groups, national writers, reinsurance companies, and international insurance giants. Together, we are NAMIC.

or beneficiary to a policy of insurance who is unreasonably or negligently denied a claim for coverage or payment of benefits by an insurer to bring an action in the Superior Court.”

The bill was referred to the Senate Committee on Consumer Protection & Housing, where it was amended to limit it to first-party claimants and to remove the “negligently denied” phrase. However, attempts to make any attorney’s fees “discretionary” instead of “mandatory” were lost as well as an attempt to remove treble damages from the bill.

A substitute bill was then offered that removed “unreasonable delays” from the definition of a bad faith claim and narrowed the language surrounding the awarding of treble damages. That bill passed the full Senate on March 13 by a 30-17 vote.

In the House, the bill was referred to the Committee on Insurance and Financial Services & Consumer Protection, where additional attempts to limit the treble damage language were defeated. However, the reference to insurance rules that can serve as the basis for treble damages was narrowed. That amendment passed the House by a 59 to 38 vote. It was returned to the Senate, where senators concurred by a 31-18 margin. Democratic Gov. Chris Gregoire signed the bill into law on May 15.

The enacted law allows a first-party claimant to sue an insurer in Superior Court for an unreasonable denial of coverage or payment of benefits. The insured can recover the actual damages sustained, together with the costs of the action, including reasonable attorney’s fees and litigation costs. Health plans offered by health carriers are exempt from the law.

In addition, the insured may also recover damages upon a finding that the insurer violated one of five rules adopted by the Office of the Insurance

Commissioner and codified in Chapter 284-30 of the Washington Administrative Code or any additional rules that the OIC adopts that are intended to implement the law.

The five WAC rules regulate insurers’ actions in 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.

If a claimant chooses to seek damages under the WAC rules, that individual must notify both the insurer and OIC in writing 20 days before filing suit. The notice must provide for the basis of the cause of action. If the insurer does not resolve the claim in those 20 days, the claimant may proceed with the suit without further notice.

Upon finding a violation of the act, 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 also has the discretion to increase the total award of damages to an amount that does not exceed three times the actual damages suffered by the plaintiff. A court’s ability to make any other determination regarding unfair or deceptive practices or to provide any other available remedy is not limited.<sup>4</sup>

### **The Response to SB 5726**

Insurance organizations, including the National Association of Mutual Insurance Companies, and other business lobbyists worked diligently to try to defeat SB 5726 as the bill made its way through the legislative process, but it became clear early on in that process that the Democratic-controlled House and Senate chambers were receptive to the bill.

As a result, the insurance industry, working with other business organizations, began to develop a strategy in response to the legislation.

One opportunity came about after Gov. Gregorie had already signed SB 5726 into law. The governor, who has set as a goal to make Washington one of the most business-friendly states in the country, convened a working group in June to establish a dialogue between insurers and the Washington State Trial Lawyers Association, the organization behind the legislation. However, those discussions were not productive.<sup>5</sup>

Under Washington law, any enacted legislation can be challenged by the state's voters if petitioners can gain enough signatures to place a referendum on the ballot. To be eligible, any referendum petitions must be filed with the Secretary of State within 90 days after final adjournment of the session in which the measure passed.

In the case of SB 5726, Consumers Against Higher Insurance Rates (CAHIR) quickly began circulating petitions and on July 20, the organization submitted more than 155,000 petition signatures to the Secretary of State's office. State law requires 112,440 valid signatures in order for a referendum to be placed on the ballot.

On July 30, Secretary of State Sam Reed issued a news release<sup>6</sup> indicating that Referendum 67 had sufficient valid signatures to qualify for the November election.

The release also issued the official ballot summary. It reads: "Engrossed Substitute Senate Bill 5726 would make it unlawful for insurers to unreasonably deny a claim for coverage or payment of benefits to any "first party claimant", as defined in the bill, or to violate insurance fair practices regulation. With court approval, successful claimants would be entitled to actual

damages plus costs and reasonable attorney fees, and in some cases up to triple damages. The bill would not apply to health plans offered by health carriers."

### Reason to Fight Referendum 67

On July 26, the Washington State Supreme Court, in *Woo v. Fireman's Fund Insurance Co.*,<sup>7</sup> ruled that Fireman's Fund Insurance Company had engaged in common law bad faith by failing to provide its insured, Dr. Robert C. Woo, a dentist who played a practical joke on his sedated assistant, with a legal defense against the dental assistant's legal action against him. Woo was awarded \$750,000 in so-called bad faith damages.

Specifically, the Woo case involved a claim brought by a dental assistant against her employer, who had put boar tusks into her mouth while she was sedated and received a dental procedure. The dentist pried the assistant's eyes open and took pictures of the practical joke as part of an office gag. The dental assistant filed suit against Dr. Woo for the humiliation. The dentist's commercial insurance carrier refused to defend the dentist on the grounds that this was an "intentional act" and was not part of a legitimate dental procedure covered by the commercial insurance policy. The Washington State Supreme Court reinstated the trial court's holding and awarded the dentist \$750,000. The court also granted Dr. Woo an award of attorney fees and costs, which included the settlement of \$250,000 paid to the victim of the dentist's practical joke.

In a news release<sup>8</sup> issued by Dana Childers, the spokesperson for Consumers Against Higher Insurance Rates, Childers stated, "Referendum 67 gives consumers the last say on whether their insurance premiums should go up because of excessive court awards, like in the Woo decision. Under Referendum 67, Dr. Woo would have recovered 12 times more than his victim. This is an example of why Referendum 67 must be

rejected by voters. Voters must reject Referendum 67 or face an onslaught of lawsuits that will raise insurance premiums while trial lawyers get richer.” Childers also pointed out that, “Justice [James] Johnson correctly recognized in his written dissent that the burden for paying for lawsuits such as the Woo case falls directly on the shoulders of all other insurance policyholders.”

“This time the courts forced insurance companies to cover a humiliating practical joke as being part of a dentist’s scope of practice,” Childers added. “Who knows what else they’ll sue for with the prospect of tripling their jackpot justice awards.”

## CAHIR

Consumers Against Higher Insurance Rates is a broad-based coalition that has been formed to have voters reject Referendum No. 67 and thus stop SB 5726 from taking effect.

CAHIR counts among its membership diverse organizations like the Association of Washington Business, the Building Industry Association of Washington, the Washington Food Industry, Washington Retail Association and the Washington State Medical Association.

And CAHIR representatives have been vocal in their opposition to SB 5726. Consider Steve Mullin, president of the Washington Roundtable, a nonprofit, public policy organizations composed of chief executives of major private sector employers throughout the state. In a guest opinion column in the *Puget Sound Business Journal*, Mullin noted, “From a global perspective, this bill will have potentially significant impact on state competitiveness and the ability to keep and create jobs in Washington. Rising insurance premiums on top of the already high cost of doing business here may force employers to take their jobs elsewhere, threatening the economic growth we’ve been taking for granted in recent years.

“ESSB 5726 was no doubt well intentioned, but its unintended consequences are not consumer – or business – friendly. Punitive damages are not the way to go if we want to keep our state business climate vibrant, expanding and producing family-wage jobs,” Mullin concluded.<sup>9</sup>

Two businessmen, Scottie Marable and Chuck Mott voiced a similar comment to the *Seattle Times*. “The bill, Senate Bill 5726, would expand liability, which is bound to spur litigation and cost all of us without providing real benefits for consumers or businesses. In expanding liability, the bill provides the lowest threshold in the nation for suing insurance companies and allows punitive triple damage. This in turn will raise insurance premiums for all businesses, adding to the already burdensome unemployment and worker-compensation costs, which are among the highest in the nation.”<sup>10</sup>

## Contributions

Individuals or member companies interested in making a financial contribution to Consumers Against Higher Insurance Rates can mail checks to:

Consumers Against Higher Insurance Rates  
2033 6<sup>th</sup> Avenue, Suite 1100  
Seattle, WA 98121  
Phone: (425) 868-2698  
Email: info@reject67.org

Contributions are not deductible for income tax purposes.

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**Endnotes**

<sup>1</sup>Engrossed Substitute Senate Bill 5726 can be found at: [www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Session%20Law%202007/5726-S.SL.pdf](http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Session%20Law%202007/5726-S.SL.pdf).

<sup>2</sup>Information about Consumers Against Higher Insurance Rates can be found at their website, [www.reject67.org/](http://www.reject67.org/)

<sup>3</sup>A copy of the letter from AAJ President Mike Eidson can be found at: [www.atla.org/about/aaj.aspx](http://www.atla.org/about/aaj.aspx)

<sup>4</sup>See footnote 1.

<sup>5</sup>See “Insurers Join Together to Defeat Referendum 67,” dated July 23 and found at: [www.namic.org/newsreleases07/070723nr1.asp](http://www.namic.org/newsreleases07/070723nr1.asp)

<sup>6</sup>The news release issued by Washington Secretary of State Sam Reed can be found at: [www.secstate.wa.gov/office/osos\\_news.aspx?i=w%2fUDWxeriLSgfgO7h6JU8A%3d%3d](http://www.secstate.wa.gov/office/osos_news.aspx?i=w%2fUDWxeriLSgfgO7h6JU8A%3d%3d)

<sup>7</sup>A copy of the *Woo* decision can be found at [www.namic.org/pdf/07WashWooOpinion.pdf](http://www.namic.org/pdf/07WashWooOpinion.pdf)

<sup>8</sup>Secretary of State Certifies Referendum 67; Rejection of R-67 Will Stop Trial Lawyer-Backed Law from Raising Insurance Rates,” Consumers Against Higher Insurance Rates news release, dated July 30, 2007. It can be accessed at [www.reject67.org/news\\_release\\_0730.html](http://www.reject67.org/news_release_0730.html).

<sup>9</sup>See “Insurance-damages law will raise costs, bring suits.” *Puget Sound Business Journal*, April 27, 2007. It can be found at: <http://seattle.bizjournals.com/seattle/stories/2007/04/30/editorial4.html>

<sup>10</sup>See “Expanding insurance liability will hurt businesses, consumers,” *The Seattle Times*, May 7, 2007. It can be found at: <http://archives.seattletimes.nwsourc.com/cgi-bin/taxis.cgi/web/vortex/display?slug=stark07&date=20070507&query=insurance>