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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 JODI LYNN SCANLON,

9 Plaintiff,

10 v.

11 LIFE INSURANCE COMPANY OF NORTH
12 AMERICA,

13 Defendant.

CASE NO. C08-0256-JCC

ORDER

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16 This matter comes before the Court on Defendant's Motion for Partial Summary Judgment (Dkt.
17 No. 9), Plaintiff's Response (Dkt. No. 11) and Special Motion for Oral Argument (Dkt. No. 15), and
18 Defendant's Reply (Dkt. No. 14). In addition, numerous discovery-related motions are before the Court
19 on Plaintiff's Motion to Quash Subpoena Duces Tecum (Dkt. No. 17), Defendant's Response (Dkt. No.
20 19), King County's Response (Dkt. No. 20), and Plaintiff's Reply (Dkt. No. 26); Defendant's Motion to
21 Compel Discovery (Dkt. No. 21), Plaintiff's Response (Dkt. No. 29), and Defendant's Reply (Dkt. No.
22 31); and Plaintiff's Motion to Compel Production of Insurance Company Documents (Dkt. No. 23),
23 Defendant's Response (Dkt. No. 27), and Plaintiff's Reply (Dkt. No. 30). The Court has carefully
24 considered all these documents, their supporting declarations and exhibits, and the balance of relevant
25 materials in the case file, and has determined that oral argument is not necessary, and rules as follows.

1 **I. FACTUAL BACKGROUND**

2 This case involves a claim for insurance benefits under an accidental death insurance policy.
3 Plaintiff Jodi Scanlon alleges that Defendant Life Insurance Company of North America (“LINA”)
4 wrongfully denied her accidental death insurance benefits following the death of her husband.

5 Plaintiff is employed by King County. In addition to a variety of insurance coverages that Plaintiff
6 received as a benefit of her employment, she also had the right to purchase additional coverages through
7 King County for herself and her family. (*See* Ins. Enrollment (Dkt. No. 10 at 5–9).) Periodically, Plaintiff
8 had the option to enroll in these insurance programs, and depending on her elections, deductions from her
9 payroll would automatically occur to cover her portion of the premium for her selected coverages. (*See*
10 *id.*) On October 20, 2003, Plaintiff selected medical, life, and accidental death insurance for herself and
11 her husband. (*Id.*) With respect to life insurance, Plaintiff selected coverage for herself at four times her
12 annual salary and selected life insurance for her husband at fifty percent of her own coverage. (*Id.*)
13 Plaintiff’s life insurance policy is not at issue in this suit. With respect to accidental death insurance, she
14 purchased a \$500,000 accidental death and dismemberment (“AD&D”) insurance policy for herself and
15 her husband, Michael Scanlon. Defendant LINA issued this AD&D policy, the coverage of which is at
16 issue in this lawsuit. (*See* Policy (Dkt. No. 10 at 16–50).)

17 The AD&D policy provides that LINA agrees to pay benefits for injuries “caused by an accident
18 which happens while an insured is covered by this policy; and which, directly and from no other causes,
19 result in a covered loss.” (*Id.* at 1.) The policy also states that LINA will not pay benefits if the loss was
20 caused by “sickness disease, or bodily infirmity.” (*Id.*)

21 On November 2, 2006, Mr. Scanlon died, at the age of 56, following a fall and injury to his head.
22 (Death Cert. (Dkt. No. 12 at 11–12).) King County Medical Examiner, Aldo Fusaro, D.O., performed an
23 autopsy of Mr. Scanlon and prepared a death certificate. The Certificate of Death lists the following
24 “Causes of Death”: “(a) Subdural hematoma (b) Presumed occult blunt force injury of head.” (*Id.*) Under
25 “Manner of Death,” Dr. Fusaro checked the box next to “Accident,” and he also listed “Clopidogrel and

1 aspirin therapy for coronary artery disease” in the box titled “Other significant conditions contributing to
2 death, but not resulting in the underlying cause given above.” (*Id.*) In the Autopsy Report, Dr. Fusaro
3 stated the following opinion:

4 This 56 year old white male is found unresponsive in his assisted living facility. At
5 examination, the decedent has a large subdural hemorrhage with secondary midbrain and
6 pontine hemorrhage not seen on initial CT scan performed the day before death. It is
7 presumed minor occult blunt force injury played a role in the development of the subdural
8 hemorrhage as specific impact points on the head were not identified at autopsy. It is felt
9 that clopidogrel and aspirin therapy for coronary artery disease were likely contributors to
10 death. The manner of death is accident.

11 (Autopsy 1 (Dkt. No. 10 at 55).)

12 On November 8, 2006, Plaintiff filed a claim with LINA seeking \$500,000 in accidental death life
13 insurance benefits as her husband’s sole beneficiary. (Proof of Loss (Dkt. No. 10 at 11–14).) On April 6,
14 2007, Defendant denied the claim, stating: “The medical evidence and our Physician Advisor’s review has
15 established that Michael Scanlon’s fall was the result of an acute myocardial infarction and accelerated by
16 anti-coagulant therapy.” (2007 Denial (Dkt. No. 10 at 68).) In other words, Defendant believed that Mr.
17 Scanlon’s fall was caused by a heart attack, accelerated by his use of blood thinning medication, and
18 therefore the loss was not covered by the policy because it resulted from illness or disease. (*See id.*)
19 Thereafter, Plaintiff retained counsel, who sent a letter to Defendant requesting a reconsideration of its
20 denial. (Nov. 2007 Letter (Dkt. 12-2 at 2–20).) The letter detailed the reasons Plaintiff considered the
21 denial to be wrongful, and included a pathological report prepared by Dr. Omalu, who was retained to
22 review the cause of death. (*See id.*) Dr. Omalu concluded that “Mr. Scanlon died as a result of a
23 traumatic brain injury . . . Mr. Scanlon did not suffer from any underlying disease that would have
24 caused spontaneous intracranial hemorrhages.” (*Id.* at 7.) Defendant did not change its position that the
25 claim was not covered by the AD&D policy.

26 On December 6, 2007, the Insurance Fair Conduct Act (“IFCA”) became effective after passage
of Referendum 67. *See* WASH. REV. CODE 48.30.015. On December 31, 2007, Plaintiff served her
twenty-day pre-suit notice on Defendant, as required by IFCA. (Dec. 2007 Letter (Dkt. No. 12-2 at

1 53–58).) Defendant apparently re-examined the claim, including the additional information provided by
2 Plaintiff, and again maintained its position that no accidental death benefits were due. (Jan. 2008 Letter
3 (Dkt. No. 12-2 at 65–72).) In denying benefits, Defendant relied on the medical opinion of a different
4 physician than it had previously. (*Id.*) The letter concluded that:

5 As Mr. Scanlon’s death due to subdural hematoma was in large part the result of his
6 anticoagulation therapy, which was treatment due to his advanced congestive heart failure
7 and associated cardiac conditions, benefits would specifically excluded under the terms of
8 [the] policy

9 (*Id.*) Thereafter, on February 14, 2008, Plaintiff filed the instant lawsuit alleging breach of contract,
10 violation of the Consumer Protection Act, negligence, bad faith, and violations of IFCA (Compl. (Dkt.
11 No. 1).) Defendant now moves for partial summary judgment, requesting that the Court dismiss
12 Plaintiff’s IFCA claim (Dkt. No. 9). In addition, the parties are embroiled in several discovery disputes,
13 which form the basis for three discovery-related motions.

14 **II. ANALYSIS**

15 **A. Discovery Disputes**

16 Plaintiff moves for an order quashing Defendant’s Subpoena Duces Tecum (“SDT”) served on
17 King County, and for a protective order shielding from discovery the documents sought therein (Dkt. No.
18 17). In addition to opposing the motion, Defendant moves for an order compelling Plaintiff to produce
19 the documents sought in the SDT (Dkt. No. 21). In a limited appearance, King County requests that the
20 Court protect it from any undue burden or expense, and it informs the Court that some of the material
21 sought by the SDT may contain protected health information or other sensitive information protected by
22 federal law (Dkt. No. 20). Finally, Plaintiff moves for an order compelling Defendant to produce
23 documents relating to its training and claims manuals (Dkt. No. 23).

24 **1. Plaintiff’s Motion to Quash and Defendant’s Motion to Compel**

25 While the courts liberally construe the discovery provisions to encourage the free flow of
26 information among litigants, limits do exist. For example, a court may issue a protective order and limit

1 the scope of discovery for “good cause” to protect a party from “annoyance, embarrassment, oppression,
2 or undue burden or expense.” FED. R. CIV. P. 26(c). Similarly, a court may quash a subpoena where it
3 “subjects a person to undue burden.” *Id.* at 45(c)(3)(A). In determining whether undue burden exists,
4 courts “weigh the burden to the subpoenaed party against the value of the information to the serving
5 party.” *Travels Indem. Co. v. Metro. Life Ins. Co.*, 228 F.R.D. 11, 113 (D. Conn. 2005). This evaluation
6 requires a case-specific inquiry that turns on factors such as “relevance, the need of the party for the
7 documents, the breadth of the document request, the time period covered by it, the particularity with
8 which the documents are described and the burden imposed.” *Concord Boat Corp. v. Brunswick Corp.*,
9 169 F.R.D. 44, 53 (S.D.N.Y. 1996).

10 Plaintiff argues that the information sought by Defendant is irrelevant and inadmissible. At issue in
11 this dispute is Defendant’s Subpoena Duces Tecum requesting:

12 1. Any and all documents relating to enrollment in and coverage under an insurance plan,
13 including but not limited to group or individual heal [sic], accident disability and or life
insurance policies pertaining to Jodie Lynn Scanlon, her spouse and/or dependents.

14 2. Any and all documents reflecting payment of premiums for said insurance polices and/or
15 plans identified in request No. 1, including but not limited to, automatic payroll
deductions.

16 (SDT (Dkt. No. 17-3 at 35).)¹ Defendant contends that evidence of other insurance policies obtained
17 through King County “will help illustrate the issue of policy scope by highlighting the spectrum of risks
18 each policy is intended to cover and the corresponding premium based on the risks assumed.” (Def.’s
19 Resp. 5 (Dkt. No. 19).) Defendant also asserts that “the existence of, and pricing related to [Plaintiff’s]
20 other coverages are relevant to show the scope and extent of coverage provided by the policy at issue.”
21 (*Id.* at 3.) Plaintiff maintains that the “scope, content, coverages, terms, and extent of any other insurance
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23 ¹ Defendant also sought these documents through interrogatories and requests for production.
24 Plaintiff objected to the discovery requests and stated: “Any insurance policies, other than the one that is
25 subject of this action, are subject to the Collateral Source Rule and therefore are not discoverable.” (Pl.’s
Mot. to Quash 3 (Dkt. No. 17).)

1 policy is wholly and completely irrelevant.” (Pl.’s Reply 2 (Dkt. No. 26).) The Court agrees.

2 Generally, a party may obtain discovery “regarding any matter, not privileged, that is *relevant* to
3 the claim or defense of any party.” FED. R. CIV. P. 26(b)(1) (emphasis added). “Relevant information need
4 not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of
5 admissible evidence.” *Id.* Evidence is relevant if it tends to make the existence of a material fact more or
6 less probable than it would have been without the evidence. *See* FED. R. EVID. 401. There are two
7 components to relevant evidence: materiality and probative value. 1 MCCORMICK ON EVID. § 185 (6th
8 ed. 2006). A fact is “material” if it “is of consequence to the determination of the action.” *See id.*
9 Evidence has probative value if its existence makes it either more or less likely that a disputed fact is true.
10 *Id.*

11 The information sought by Defendant here is neither material nor probative of the determinative
12 issues presented in this case. The sole issue in this case is whether Mr. Scanlon’s death was a covered
13 loss under the terms of the *AD&D policy issued by Defendant*, not whether the loss may also be covered
14 by some other policy.² The resolution of this issue turns solely on interpreting the specific policy language
15 at issue in light of the medical evidence and testimony regarding the cause and manner of Mr. Scanlon’s
16 death. The existence and scope of other insurance policies is immaterial because Plaintiff’s coverage under
17 other policies is not “of consequence” to the sole issue in this case—whether Mr. Scanlon’s death was a
18 covered loss under the AD&D policy. The information sought also lacks probative value because the
19 existence of other insurance policies, and the risks covered, does not make it more or less likely that Mr.
20 Scanlon’s death was the result of an illness or disease, and hence excluded from the AD&D policy as
21 Defendant claims. (*See* Def.’s Resp. 3 (Dkt. No. 19).) In short, the existence and scope of other insurance
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23 ² Defendant admits that “the central issue in this case is whether Mrs. Scanlon’s claim for
24 insurance benefits based on the death of her husband, Michael Scanlon, was properly denied under an
25 accidental death and disability (“AD&D”) insurance policy . . . underwritten by [Defendant].” (Def.’s
26 Mot. 1 (Dkt. No. 21).)

1 policies does not make the existence of a material fact more or less probable, and therefore, such
2 information is irrelevant to the claims and defenses in this case.³ The Court therefore finds “good cause”
3 to protect Plaintiff from the undue burden and annoyance of producing such irrelevant information, and
4 to protect King County from the undue burden of producing documents not relevant to this litigation.
5 Accordingly, the Court GRANTS Plaintiff’s Motion to Quash Subpoena Duces Tecum and Motion for
6 Protective Order, and DENIES Defendant’s Motion to Compel Discovery.

7 **2. Plaintiff’s Motion to Compel**

8 Plaintiff also moves for an order compelling Defendant to produce insurance company documents
9 relating to its training and claims manuals (Dkt. No. 23). Defendant argues that the motion to compel is
10 premature because Plaintiff’s counsel failed to hold a discovery conference to discuss its proposed
11 resolution prior to bringing the instant motion. (Def.’s Resp. 3–4 (Dkt. No. 27).) On October 20, 2008,
12 the parties conducted a discovery conference to discuss outstanding discovery issues. (Bluechel Decl. ¶ 3
13 (Dkt. No. 28).) At that conference, the parties discussed Plaintiff’s request for production of training and
14 claim manuals. (*Id.*) Thereafter, on October 24, 2008, Defendant amended its previous response and
15 offered to provide the material subject to a proposed “confidentiality agreement.” (*Id.*) The proposed
16 confidentiality agreement requires Plaintiff to confine her use of the training and claims manuals to the
17 context of this litigation. (Agreement (Dkt. No. 28).) Defendant asserts that the agreement is necessary to
18 protect the dissemination of its proprietary information involving its internal processes, which are
19 important to its competitive advantage. (Def.’s Resp. 2 (Dkt. No. 27).) Plaintiff apparently never
20 attempted to confer with Defendant regarding the terms of the proposed agreement or to discuss her
21 objections to its application. (Bluechel Decl. ¶ 8 (Dkt. No. 28).)

22
23 ³ The rationale and policy concerns behind the collateral source rule provide further justification
24 to protect from discovery any information evidencing benefits received by Plaintiff from other insurance
25 policies. *See Cox v. Spangler*, 5 P.2d 1265, 1270 (Wash. 2000) (“[T]he very essence of the collateral
26 source rule requires exclusion of evidence of other money received by the claimant so the fact finder will
not infer the claimant is receiving a windfall and nullify the defendant’s responsibility.”)

1 The Federal Rules of Civil Procedure provide that a party bringing a motion to compel discovery
2 must certify that it “has in good faith conferred or attempted to confer with the person or party failing to
3 make disclosure or discovery in an effort to obtain it without court action.” FED. R. CIV. P. 37(a)(1). The
4 conference requirement is imposed for the benefit of both the Court and the parties and is intended to
5 ensure that only unresolvable discovery disputes are brought before the Court. *See Mikron Indus., Inc. v.*
6 *Hurd Windows & Doors*, No. C07-532RSL, 2008 WL 1805727 (W.D. Wash. 2008). This rule promotes
7 the general policy of encouraging parties to attempt to settle all discovery disputes in good faith, and to
8 bring a motion to compel only as a last resort. A conference on the specific discovery dispute may even
9 assist in narrowing the issues of disagreement to be resolved by the Court. Plaintiff offers no explanation
10 as to why Defendant’s proposed resolution to the specific discovery dispute is unreasonable or
11 inadequate. *See Haselhorst v. Wal-mart Stores*, 163 F.R.D. 10, 11 (D. Kan. 1995) (denying motion to
12 compel where defendant’s assertion that plaintiff’s counsel failed to make a reasonable effort to resolve
13 the dispute was uncontested). The Court finds that Plaintiff has failed to show that she attempted to
14 confer in good faith to resolve the specific discovery issue in dispute. Accordingly, the Court DENIES
15 Plaintiff’s motion as premature. The Court finds that the circumstances do not warrant an award of
16 attorney’s fees to either party. *See* FED. R. CIV. P. 37(a)(5)(B).

17 **B. Defendant’s Motion for Partial Summary Judgment**

18 **1. Legal Standard**

19 Summary judgment is proper “if the pleadings, the discovery and disclosure materials on file, and
20 any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to
21 judgment as a matter of law.” FED. R. CIV. P. 56(c). In determining whether an issue of fact exists, the
22 Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable
23 inferences in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); *Bagdadi*
24 *v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is
25 sufficient evidence for a reasonable factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at

1 248. The inquiry is “whether the evidence presents a sufficient disagreement to require submission to a
2 jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251–52. The
3 moving party bears the initial burden of showing that there is no evidence which supports an element
4 essential to the nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant
5 has met this burden, the nonmoving party then must show that there is a genuine issue for trial. *Anderson*,
6 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact,
7 “the moving party is entitled to judgment as a matter of law.” *Celotex*, 477 U.S. at 323–24.

8 **2. Washington’s Insurance Fair Conduct Act**

9 IFCA creates a new cause of action against insurance companies for unreasonably denying an
10 insured’s claim for coverage or benefits. The statute also provides for the award of treble damages and
11 attorney’s fees:

12 (1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for
13 coverage or payment of benefits by an insurer may bring an action in the superior court of
14 this state to recover the actual damages sustained, together with the costs of the action,
including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of
this section.

15 (2) The superior court may, after finding that an insurer has acted unreasonably in denying
16 a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this
section, increase the total award of damages to an amount not to exceed three times the
actual damages.

17 (3) The superior court shall, after a finding of unreasonable denial of a claim for coverage
18 or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this
19 section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert
witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an
action.

20 WASH. REV. CODE § 48.30.015(1)–(3).

21 Defendant argues that the IFCA claim should be dismissed because its claims handling and denial
22 of Plaintiff’s claim for insurance benefits occurred before IFCA became effective on December, 6, 2007.
23 (Mot. 5 (Dkt. No. 9).) Defendant contends that, because IFCA does not apply retroactively, Plaintiff
24 cannot assert a claim under IFCA for conduct occurring prior to its effective date. (*Id.*)
25

1 **3. Retroactive Application of the Insurance Fair Conduct Act**

2 While the Washington Supreme Court has yet to rule on the issue, Washington’s federal district
3 courts have unanimously held that IFCA does not apply retroactively.⁴ *HSS Enterprises, LLC v. AMCO*
4 *Ins. Co.*, No. C06-1485-JPD, 2008 WL 312695 (W.D. Wash. 2008); *Malbco Holdings, LLC v. AMCO*
5 *Ins. Co.*, 546 F. Supp. 2d 1130 (E.D. Wash. 2008); *Aecon Bldgs., Inc. v. Zurich N. Am.*, No. C07-
6 832MJP, 2008 WL 895978 (W.D. Wash. 2008); *Pac. Coast Container, Inc. v. Royal Surplus Lines Ins.*
7 *Co.*, No. C08-0278MJP, 2008 WL 2705588 (W.D. Wash. 2008). In *HSS Enterprises*, plaintiff, an auto
8 repair company, brought suit in 2006 against its insurer for failing to pay claimed losses that occurred in a
9 fire one year earlier. 2008 WL 312695, at *1. After IFCA became effective, plaintiff filed a motion to
10 amend its complaint to add a claim for relief under IFCA. *Id.* The Court denied the motion, finding that
11 IFCA did not apply retroactively to provide a cause of action for conduct occurring prior to its effective
12 date. *Id.* at *3–4. The Court found that the presumption of prospective application controlled because the
13 Washington Legislature had not expressed any intent to apply IFCA retroactively, the statute was written
14 in present and future tenses, and the statute was not remedial in nature. *Id.*

15 In *Malbco Holdings*, a hotel owner brought suit against two insurers claiming they unreasonably
16 denied claims for water damage to the hotel. 546 F. Supp. 2d at 1131. The original claims were tendered
17 to the insurers in 2004 and again in 2006. *Id.* After the insurers denied the claims for benefits in March
18 and September of 2007, the plaintiff filed suit in October 2007. The plaintiff then sought leave to amend
19 the complaint to include a claim under IFCA after it became effective. The court held that IFCA was not
20 retroactive because it “is apparent from the language of the IFCA that the Legislature did not provide for
21 retroactivity, it is not curative, and is not remedial.” *Id.* at 1133. The court explained that the
22 “precipitating event” giving rise to the application of IFCA is the “unreasonable denial of a claim for
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24 ⁴Because the Washington Supreme Court has not decided whether IFCA applies retroactively, a
25 federal court sitting in diversity, must predict how the Washington Supreme Court would decide the
26 issue. *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940, 944 (9th Cir. 2004).

1 coverage.” *Id.* at 1133–34. The court therefore denied the motion to amend because the plaintiff could
2 not assert an IFCA claim based on a pre-IFCA enactment conduct. *Id.*

3 *Aecon Buildings* involved an insurance coverage action arising from claims made by the Quinalt
4 Indian Nation against Aecon, the general contractor in a casino and hotel construction project. 2008 WL
5 895978, at *1. Aecon settled the underlying claims with the Tribe and then tendered a request for
6 indemnification to its insurer, Zurich, in 2006. *Id.* After Zurich declined to accept the tender, Aecon filed
7 suit in April 2007. After IFCA became effective, Aecon sought to amend its complaint to include a claim
8 under IFCA. *Id.* Zurich argued that amendment would be futile because “the events underlying Aecon’s
9 claims occurred before the IFCA became effective and the IFCA does not apply retroactively.” *Id.* at *2.
10 The Court agreed and denied the motion to amend, finding that “[b]ecause it affects substantive rights,
11 imposes a penalty, and is couched in forward-looking language, the IFCA applies prospectively.” *Id.*

12 Recognizing that these cases would seemingly preclude her IFCA claim, Plaintiff argues that
13 retroactivity does not apply where, as here, she has followed the statutorily defined procedures required
14 under IFCA *prior* to filing suit. (Resp. 1–3 (Dkt. No. 11).) Plaintiff attempts to distinguish the three cases
15 above on the basis that they all involved lawsuits filed pre-IFCA whereas Plaintiff filed suit post-IFCA
16 and only after she first provided notice and opportunity for Defendant to cure its denial. (*Id.* at 11–12.)
17 Plaintiff’s argument necessarily relies on her proposition that the precipitating event triggering liability
18 under IFCA is “not the underlying denial, but the post-Notice confirmation of that denial or failure to
19 cure that gives rise to a claim under the Act.” (*Id.* at 9.) This argument runs counter to the express
20 language of the statute, and has been explicitly rejected by Washington’s federal district courts.

21 **4. The Precipitating Event Under the Insurance Fair Conduct Act**

22 Under IFCA, a plaintiff must follow certain procedures prior to filing a claim:

23 (8) (a) Twenty days prior to filing an action based on this section, a first party claimant
24 must provide written notice of the basis for the cause of action to the insurer and office of
25 the insurance commissioner. Notice may be provided by regular mail, registered mail, or
certified mail with return receipt requested. Proof of notice by mail may be made in the
same manner as prescribed by court rule or statute for proof of service by mail. The

1 insurer and insurance commissioner are deemed to have received notice three business
2 days after the notice is mailed.

3 (b) If the insurer fails to resolve the basis for the action within the twenty-day period after
4 the written notice by the first party claimant, the first party claimant may bring the action
5 without any further notice.

6 (c) The first party claimant may bring an action after the required period of time in (a) of
7 this subsection has elapsed.

8 WASH. REV. CODE § 48.30.015(8). Plaintiff asserts that providing the statutory notice and opportunity to
9 cure post-IFCA, and prior to initiating a suit, are the “triggers” that create IFCA liability for an insurance
10 company. (Resp. 9 (Dkt. No. 11).)

11 The statutory notice and opportunity to cure, however, merely provide the procedural
12 requirements that a plaintiff must follow to establish an *otherwise existing and valid* claim under IFCA.
13 Subsection (8) sets forth the required procedures that must be taken “prior to filing an action based on
14 *this section.*” WASH. REV. CODE § 48.30.015(8) (emphasis added). The act of following these procedures
15 does not *ipso facto* create an IFCA claim because the plaintiff must still satisfy the substantive
16 requirement set forth in subsection (1), which creates a cause of action for a claimant “who *is*
17 unreasonably denied a claim for coverage or payment of benefits by an insurer.” *Id.* at § 48.30.015(1)
18 (emphasis added).⁵ As the courts have explained, the use of the present tense verb “is” evidences a clear
19 intent for IFCA to apply only to an unreasonable denial of an insurance claim occurring *after* the statute’s
20 effective date. *See Malbco Holdings*, 546 F. Supp. 2d at 1133; *Aecon Bldgs.*, 2008 WL 895978, at *2.
21 Thus, the fact that Plaintiff served notice, provided opportunity to cure, and filed suit post-IFCA is of no
22 moment because those procedural requirements only attach where a plaintiff *is unreasonably denied*
23 insurance coverage post-IFCA.⁶ In other words, the “precipitating event” giving rise to liability under

24 ⁵ An “unreasonable denial” can be established by showing a violation of certain insurance
25 regulations or an unfair claims settlement practice. WASH. REV. CODE § 48.30.015(5).

26 ⁶ The procedures in subsection (8) are only relevant insofar as they relate to an existing cause of
27 action under subsection (1).

1 IFCA is the unreasonable denial of coverage that forms the basis of a plaintiff's claim for relief. *See*
2 *Malbco Holdings*, 546 F. Supp. 2d at 1133 ("The statutory language shows that the 'precipitating event'
3 that gives rise to the application of the IFCA is the unreasonable denial of a claim for coverage.").

4 Because Plaintiff's claim for relief necessarily relies on Defendant's original denial of her claim for
5 benefits prior to IFCA's enactment, no cause of action exists under the express terms of the statute.

6 Plaintiff attempts to side-step this logic by arguing that Defendant's January 2008 denial is the
7 "operative" denial because it included a new and different basis for denying coverage than originally
8 relied upon in the April 2007 denial. (Resp. 7-8 (Dkt. No. 11).) In *Malbco Holdings*, the U.S. District
9 Court for the Eastern District of Washington explicitly rejected such an argument. 546 F. Supp. 2d at
10 1133-34. There, the plaintiff argued that "its re-submission of its claims and [the] subsequent wrongful
11 denial of coverage after the IFCA was approved and enacted is a new or continuing violation." *Id.* The
12 court found no merit to the argument and stated: "To permit a party to proceed on this basis would allow
13 an end run around the Legislature's intent." *Id.* Because the original denial was the "precipitating event"
14 giving rise liability under IFCA, the plaintiff's claim based on pre-IFCA conduct necessarily failed. *Id.*

15 This Court also recently considered, and rejected, Plaintiff's argument on facts directly analogous
16 to the case at bar. In *Pacific Coast*, the insurer, Royal, agreed to defend Pacific Coast under a reservation
17 of rights against a negligence claim by an employee. 2008 WL 2705588, at *1. In August 2007, Royal
18 denied coverage because it determined that the employee was a "leased worker" whose claim against
19 Pacific Coast was excluded from coverage. *Id.* at *2. The lawsuit subsequently settled and Pacific Coast
20 paid the settlement amount. *Id.* During the following months, Pacific Coast and Royal disputed whether
21 the employee was a "leased worker" that was excluded under the policy, or a "temporary worker" that
22 was not excluded. *Id.* On December 21, 2007, after IFCA became effective, Pacific Coast sent a letter to
23 Royal arguing that a newly discovered stop gap endorsement in the policy applied, and therefore, covered
24 the claim. *Id.* In January 2008, Pacific Coast brought suit against Royal and asserted a claim under IFCA.
25 *Id.* Pacific Coast argued that Royal's failure to disclose the stop gap endorsement after IFCA's effective

1 date was an independent violation of IFCA and thereby subjected it to liability under the statute. *Id.* at *9.
2 This Court rejected such an argument, finding that “[b]ecause royal denied Pacific Coast’s claim before
3 December 6, 2007, Pacific Coast does not have a cause of action under the IFCA.” *Id.* The Court
4 explained that “[o]nly subsection (1) of the statue provides insureds with a cause of action,” and
5 therefore, “the operative date in determining whether the IFCA applies is the *date that a claim for*
6 *coverage is denied.*” *Id.* (emphasis added).

7 As in *Pacific Coast*, the insurer here originally denied the claim pre-IFCA and then affirmed its
8 denial again after the plaintiff brought suit post-IFCA. Regardless of whether Defendant’s January 2008
9 affirmation of its denial asserted a different basis for denying coverage, Plaintiff’s claim for relief is
10 necessarily based upon the original denial of coverage in April 2007 before IFCA became effective.⁷
11 Accordingly, Plaintiff cannot maintain a cause of action under IFCA because her claim for relief relies
12 upon Defendant’s denial of coverage before the statute’s effective date.

13 **III. CONCLUSION**

14 For the foregoing reasons, the Court hereby rules as follows:

15 (1) Plaintiff’s Motion to Quash Subpoena Duces Tecum of Life Insurance Company of North
16 America and Motion for Protective Order (Dkt. No. 17) is GRANTED. Accordingly, the Court hereby
17 QUASHES the Subpoena Duces Tecum and Notice of Deposition issued by Defendant to King County,
18 and ISSUES a protective order preventing Defendant from seeking production of the information sought
19 in the Subpoena Duces Tecum.

20 (2) Defendant’s Motion to Compel Discovery (Dkt. No. 21) is DENIED.

21 (3) Plaintiff’s Motion to Compel Production of Insurance Company Documents (Dkt. No. 23) is
22 DENIED.

24 ⁷ The record indicates that although Defendant’s January 2008 denial may have been based on
25 different medical expert testimony and rationale, it was still based on the same basic policy language that
excludes coverage for a loss resulting from an illness or disease.

1 (4) Defendant's Motion for Partial Summary Judgment (Dkt. No. 9) is GRANTED and Plaintiff's
2 Special Motion for Oral Argument (Dkt. No. 15) is DENIED. Accordingly, Plaintiff's Fifth Cause of
3 Action, based on violations of the Insurance Fair Conduct Act, is hereby DISMISSED with prejudice.
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5 SO ORDERED this 12th day of December, 2008.
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10 John C. Coughenour

11 UNITED STATES DISTRICT JUDGE
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