

OREGON LAW UPDATE

Insured is Limited to Recovering Contractual Damages from an Insurer

From the desk of Jeff Eberhard: Plaintiffs will sometimes sue an insurer in both contract and in tort for failing to pay the benefits on an insurance policy. The merit of these claims is highly debated and varies from state to state, but a Federal District Court in Oregon reaffirmed Oregon's rule that an insured is generally limited to recovering only contractual damages from an insurer.

Claims Pointer: The Unfair Claims Settlement Practices Act does not impose a "special relationship" or create an independent standard of care with the insurer to support a tort cause of action. An insurer's election of an explicit contractual right does not breach the covenant of good faith and fair dealing or warrant an award of emotional distress damages.

case in point...

Braun-Salinas v. American Family Ins. Group d/b/a American Family Mut. Ins. Co., 13-cv-264-AC (D.Or. April 1, 2014)

Braun-Salinas and Macedo, husband and wife, ("Plaintiffs") were seriously injured in a motor vehicle accident caused by the negligence of Huy Thang Hoang ("Hoang"). Hoang's insurer tendered its policy limits of \$25,000 per person, \$50,000 per occurrence, to the plaintiffs. After recovering from Hoang's insurer, the plaintiffs sought uninsured motorist (UIM) benefits under their automobile insurance policy with American Family to cover their unpaid damages. American Family tendered the full UIM policy limits after accounting for the recovery from Hoang's liability insurer. In addition to their automobile policy, the plaintiffs maintained a \$1 million umbrella policy with American Family. After recovering the UIM policy limits, the plaintiffs sought the full limits available under the umbrella policy to recover their remaining damages. After American Family gathered all of the damages information, it offered to settle the claim for \$200,000, which was rejected by the plaintiffs.

The plaintiffs then filed suit against American Family alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, and negligence *per se*. In addition, the plaintiffs sought to recover emotional distress damages on their claim for breach of contract. American Family moved for summary judgment on each of the plaintiffs' claims—aside from the claim strictly for breach of contract damages—on the ground that the claims were not recognized under Oregon law. In response, the plaintiffs conceded their claims for intentional and negligent infliction of emotional distress, but argued the remaining claims were viable and should proceed to trial.

In support of their claim for recovery of emotional damages based on the insurer's breach of the implied covenant of good faith and fair dealing, the plaintiffs alleged that the insurer failed to conduct a reasonable investigation, did not make a reasonable and timely settlement offer, and compelled the plaintiffs to initiate litigation. Each of the standards cited by the plaintiffs is articulated in the Oregon Unfair Claims Settlement Practices Act, ORS 746.230, which the plaintiffs argued was part of the insurer's obligation to act in good faith and deal fairly with the insured. The court stated that a party invoking its express, written contractual rights does not, merely by doing so, violate the duty of good faith. The policy specifically provides that if American Family and an insured do not agree on the amount of damages payable under the UIM endorsement, the matter may be arbitrated or litigated.

Further, the plaintiffs argued the Oregon Supreme Court recognized that the Unfair Claims Settlement Practices Act constituted the duties imposed on an insurer in *Ivanov v. Farmers Ins. Co. of Oregon*, 344 Or 421, 185 P3d 417 (2008). The court noted that the *Ivanov* matter involved a claim for personal injury protection (PIP) damages, which are statutorily presumed reasonable and necessary if not denied within 60 days based upon a reasonable investigation. According to the court, *Ivanov* cited to the Unfair Claims Settlement Practices Act merely because it contains a provision concerning an insurer's obligation to investigate—as required in order to deny PIP claims—and that material facts existed regarding the sufficiency of the insurance company's investigation prior to denying PIP benefits. However, the *Ivanov* case did not provide a standard of care that would impose independent tort liability nor does it apply in UIM cases, such as this matter.



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The court also rejected the plaintiffs' claim for negligence per se in the performance of contract. As noted by the court, quoting from *Employers' Fire Ins. Co. v. Love-It Ice Cream*, 64 Or App 784, 791, 670 P2d 170 (1983), Oregon courts have "unequivocally held that 'an insurer's bad faith refusal to pay policy benefits to its insured sounds in contract and is not actionable in tort in Oregon.'" The plaintiffs conceded they did not have a "special relationship" with the insurer as required under Oregon law to impose tort liability, but again argued the Unfair Claims Settlement Practices Act created an independent standard of care. The court acknowledged that Oregon has recognized that certain statutory provisions create an independent standard of care, but Oregon courts have specifically rejected the argument that the insurance code—including the Unfair Claims Settlement Practices Act—provides the independent duty necessary to support a tort cause of action.

Finally, the court rejected husband's claim for loss of consortium based on the injuries to his wife. The policy obligated American Family to pay damages for bodily injury suffered by an insured and defines bodily injury as physical damage – "bodily injury to or sickness, disease or death of any person." The court interpreted this definition to explicitly exclude "loss of services" and rejected the plaintiffs reading of the policy based on the plain meaning of the provision.

The court disagreed with the plaintiffs, and granted American Family's motion for summary judgment in full.



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