SMITH FREED & EBERHARD P.C.

OREGON LAW UPDATE

case in point...

Think You Have Safe Harbor? Think Again.

From the desk of Joshua P. Hayward: When an insured prevails on a claim against its insurer, the insured may recover attorney fees. In PIP, UM or UIM cases, insurers can protect themselves from attorney fees if they send what is commonly referred to as a "safe harbor letter." For a UM or UIM claim, the letter must state that the insurer accepts coverage and agrees that the only issues remaining are liability and damages. They must also agree to binding arbitration. A proper safe harbor letter will cut off the insured's right to recover attorney fees even if the insured files a lawsuit instead of pursuing arbitration. But what happens if in the insurer raises defenses that could imply that they intend to litigate coverage issues? Read on to see whether an insurer can accidentally sail out of the "safe harbor."

Claims Pointer: In the following case, an insurer denied a UIM claim, but sent a proper safe harbor letter. Nonetheless, the Court of Appeals held that a safe harbor letter does not cut off an insured's right to attorney fees if the insurer's pleadings raise arguments that go beyond the issues of liability and damages. In this case, the insurer raised "offset" and "contractual compliance" as affirmative defenses. Even though the insurer did not attempt to prove those, the insured was still entitled to recover attorney fees. The impact of this case cannot be understated. In a UIM claim where a proper safe harbor letter has been sent, it is still imperative that the insurers' pleadings do not raise potential coverage defenses.

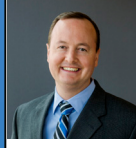
Kiryuta v. Country Preferred Ins. Co. 273 Or App 469 (September 2, 2015).

Roman Kiryuta was injured in a motor vehicle accident caused by an underinsured motorist. Kiryuta's insurer, Country Preferred Insurance Company (Country) paid Kiryuta's PIP claim, but denied his UIM claim. Within six months of Kiryuta providing proof of loss, Country sent Kiryuta a safe harbor letter containing all the necessary elements. Country consented to arbitration and stipulated that the only issues would be the liability of the underinsured driver and the amount of damages due to Kiryuta. Kiryuta filed a lawsuit against Country instead of proceeding to binding arbitration. In its answer, Country asserted the affirmative defenses of "Contractual Compliance" and "Offset."

Kiryuta prevailed at arbitration and requested attorney fees. The arbitrator awarded attorney fees because it concluded that Country's defenses raised issues beyond liability and the amount of damages due to Kiryuta. Country appealed the arbitrator's award of attorney fees to the trial court, arguing that even though it raised affirmative defenses implicating issues beyond liability and damages, it never argued those theories and the arbitrator did not consider them. The trial court reversed the award of attorney fees.

Kiryuta appealed.

On appeal, Kiryuta argued that even though Country did not litigate its affirmative defenses, Kiryuta was required to prepare and anticipate those arguments because Country had raised the defenses and responded to requests for admissions in ways that preserved those defenses. The Court of Appeals agreed. The Court explained that a defendant's answer both notifies the plaintiff of what it intends to prove at trial and provides a foundation for testimony and instructing the jury. The Court found that Country raised affirmative defenses that created a foundation on which to argue that the contract prevented Kiryuta's recovery. Country's affirmative defenses opened the door to issues beyond liability and damages, so it could not take advantage of the safe harbor immunity from attorney fees.



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