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OREGON LAW UPDATE

case in point ...

"Proof of Loss" in UIM Cases: The Oregon Supreme Court Provides Clarity on a Hairy Issue

From the Desk of Jeff Eberhard: When the losing party must pay the opposing side's attorney's fees, exposure can rapidly increase. In the UIM context, failure to send a letter, within six months, after an insured files "proof of loss" stating: (1) that the insurer accepts coverage, (2) the only issues are the liability of the uninsured or underinsured driver and damages due to the insured and (3) that the insurer consents to submit the case to arbitration, can subject an insurer to attorney's fees. The issue of "when" an insured has provided sufficient "proof of loss" becomes important. Read on to learn about a new law that will make you the genius of the claims department.

Claims Pointer: The Oregon Supreme Court recently held that "proof of loss" must be evaluated in light of the facts of a case and the policy involved. In the UIM context, a threshold issue is the limit of the tortfeasor's insurance policy. To be sufficient, a "proof of loss" should, in the least, include the tortfeasor's policy limits in order to allow an insurer to evaluate its potential UIM liability. Insurers should be aware that notice of an accident coupled with PIP submissions, was not sufficient to constitute "proof of loss." The upshot is that insurers will have more time to send a letter accepting coverage, and therefore, avoiding a claim for attorney's fees.

Zimmerman v. Allstate Property and Casualty Ins. Co., --- P.3d ----, 2013 WL 5497223 (2013)

In 2006, Sarah Zimmerman ("Zimmerman") purchased an automobile policy from Allstate with PIP benefits of $15,000, and UIM coverage of $100,000 per person. In December 2006 she was injured in a car accident. Following the accident, she gave a recorded statement to Allstate, explaining that she was injured and the other driver, Louis Alvis ("Alvis"), admitted liability.

In January of 2007, an Allstate representative contacted Zimmerman in order to explain PIP benefits. She supplied Zimmerman with a PIP application and medical release forms, which she filled out. Zimmerman received $13,310.72 in PIP benefits over the course of one year. In December of the same year, Zimmerman's treating physician informed Allstate that she continued to experience left neck and upper back pain, and that in the future, it was possible that she could experience instability in her cervical spine. After that, Zimmerman did not submit any bills for medical expenses.

In July 2008, Zimmerman's lawyer sent a letter to Alvis's insurance company, Safeco, demanding payment. Zimmerman's lawyer valued her claim at $100,000. On September 24, 2008, a Safeco adjuster contacted Allstate, and advised it that Zimmerman would likely pursue a UIM claim against Allstate. Two days later, Allstate's UIM adjuster sent a letter to Zimmerman's lawyer requesting Alvis's policy limits. The letter also stated that in the event Allstate was unable to reach an agreement concerning the amount of UIM benefits due under the policy, it was willing to arbitrate the claim. Zimmerman's attorney responded to Allstate's request by refusing to disclose Alvis's policy limits, and further noted, such limits are not disclosed prior to litigation.

Safeco ultimately paid Zimmerman $25,000, the amount of Alvis's policy limits. Zimmerman sought the remaining $75,000 from Allstate under her UIM policy, which it contested. Zimmerman brought a claim against Allstate for breach of its policy, and the jury returned a verdict in her favor. Her attorney requested attorney's fees under ORS 742.061, which states that if a claim is not paid within 6 months of providing "proof of loss", and the insured recovers more than any tender by the insurance company, the insured may recover her attorney's fees.

Zimmerman argued that she provided "proof of loss" in December 2006, when she initially reported the accident to Allstate, and that Allstate failed to make an offer within 6 months. Zimmerman further argued that the safe harbor only applies when an insurer has accepted coverage and the only remaining issues relate to liability and damages. Zimmerman also argued that Allstate did not dispute whether Alvis was liable, which precluded it from claiming the protections of the safe harbor.

Allstate argued that it satisfied the requirements of the safe harbor section. It further argued that Zimmerman did not report Alvis's policy limits and Allstate could not determine whether there was UIM liability without obtaining such information.

Allstate appealed the trial decision in Zimmerman's favor, and the Oregon Court of Appeals affirmed the trial court on a different ground. In the Oregon Supreme Court, Allstate argued that the initial accident report did not

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constitute "proof of loss." In turn, Zimmerman continued to argue that her accident report was sufficient "proof of loss", and that Allstate could not avail itself of the safe harbor provisions contained in ORS 742.061.

In reversing the decision, the Court noted that the bedrock of what constitutes sufficient "proof of loss" is information that is sufficient to enable the insurer to estimate its obligations regarding an insured's claim, or to do so after a reasonable investigation. Sufficient "proof of loss" depends on the particular facts of each case and the nature of the insurance coverage at hand. In the UIM context, a threshold determination is the tortfeasor's insurance policy limits.

Even when coupled with the information her doctor provided, Zimmerman's initial report to Allstate did not constitute "proof of loss." Importantly, the Court noted that an insured's policy limits usually remain undisclosed prior to litigation, and that Allstate was not required to assume that Alvis had the minimum amount of liability coverage. The court also found that, even assuming Alvis's policy limits equaled the minimum coverage amount, nothing in her doctor's reports indicated that she would incur medical expenses or other damages in the future. There was also no evidence that her damages exceeded the statutory minimum amount of coverage. There was nothing to indicate that Allstate would incur UIM liability until September 2008, when Alvis's insurer notified it that his policy limits may not be enough to cover the total damages Zimmerman asserted in her demand.

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