

## In Lawyers We Trust?

— by Tim Heinson

A recent Court of Appeals decision, State Farm v. Hale, 215 Or App 19 (September 12, 2007) should give adjusters pause before agreeing to allow an insured's attorney to "hold in trust" PIP benefits pending resolution of a UIM claim. Although that case is limited to its specific facts, it will likely be cited by insureds' attorneys as authority for not repaying your PIP.

In Hale, State Farm paid PIP benefits on behalf of its insured, Hale. It then sought direct reimbursement from the liability carrier, Farmers, telling Hale to take no action to recover the PIP. Hale, through his attorney, reached an agreement with Farmers for the policy limit. State Farm gave its approval, on the condition that Hale reimburse the PIP. Hale's attorney replied that State Farm could not impose this condition, to which State Farm responded that it would seek reimbursement directly from Hale, under ORS 742.538. State Farm and Hale's attorney eventually agreed that the PIP "would be held in trust until the dispute regarding our right to recover from the underlying limit has been resolved." State Farm then withdrew its subrogation demand against Farmers.

Although the trial court found for State Farm, the Court of Appeals reversed. State Farm relied on ORS 742.538, which provides that the PIP insurer is entitled to reimbursement from the liability settlement if "the interinsurer reimbursement benefit of ORS 742.534 is not available." The Court of Appeals ruled that the interinsurer reimbursement benefit of ORS 742.534 actually had been available:

"It is undisputed that those three conditions were met in this case. First, (State Farm) was entitled to proceed under ORS 742.534 pursuant to the terms of its policy (and in

fact notified (Hale) it would do so). Second, (State Farm) had not given notice that it would elect recovery via a lien pursuant to ORS 742.536. Finally, (State Farm) did, in fact "request[ ] such reimbursement" from Farmers."

The Court concluded that at the time State Farm "dropped its efforts to seek reimbursement of PIP benefits under ORS 742.534 and announced its intention to pursue reimbursement from (Hale) pursuant to ORS 742.538, no settlement had yet occurred" so the reimbursement mechanism under ORS 742.534 was still available at that time. In short, the interinsurer reimbursement benefit became unavailable only because State Farm "chose to drop its claim."

The Court went out of its way to say that the opinion is limited to these facts and that it was not deciding whether ORS 742.538 is generally available to allow reimbursement when the other insurer has paid its policy limits directly to the insured. In fact, the parties in Hale agreed that the dispute was whether State Farm would be entitled to any reimbursement, pursuant to ORS 742.538, not the extent to which the PIP would offset any UIM award.

Even so, you can expect the opinion to be raised in many cases in which the insured's lawyer is holding your PIP money "in trust." Although you may eventually win that battle, it will come with higher litigation costs. Rather than inviting this by allowing your insured's attorney to hold the PIP "in trust," it may be better to tell him or her to, in the words of Jerry Maguire, "show me the money!" when settling with the liability carrier. Short of that, be sure to document your agreement so that there will be no room for disagreement at the conclusion of the UIM claim. ❖

— Please direct any questions in this area of law to the author, Tim Heinson, at 503/768-9600, or by email to [tim@lerlaw.com](mailto:tim@lerlaw.com).

Case Study



## OR Supreme Court Defines Pre-Filing Requirements

— by Jeffrey D. Eberhard

### Oregon Supreme Court Defines Pre-Filing Requirements for Pursuing Attorney Fees in Small Damage Tort Cases

A recent Oregon Supreme Court case held that the “written” pre-filing requirements of ORS 20.080, which provides for attorney fees in certain unsettled low value tort cases, must be just that – in writing. ORS 20.080 makes available an award of reasonable attorney fees to a prevailing plaintiff in tort claims of \$5,500 or less if certain pre-suit requirements are satisfied. The statute requires the plaintiff submit a demand for payment in writing no less than 10 days before filing suit. A defendant can avoid incurring liability for attorney fees if he tenders the plaintiff a pre-filing settlement offer for an amount equal to or greater than what the plaintiff obtains in court.

The Court analyzed the “written demand” requirement in *Johnson v. Swaim*, ---P.3d---, WL 4140114 (November 23, 2007). On October 4, 2001, defendant Gregory Swaim rear-ended plaintiff Jessie Johnson, Jr., causing Johnson physical injury and totaling his car. In July 2002, Johnson notified Swaim’s insurer in writing that he intended to pursue a claim. Johnson’s letter did not indicate specific damages or a specific dollar amount. Over a year later in August 2003, Johnson telephoned an adjuster for Swaim’s insurer and verbally demanded \$5,000. A month later the same adjuster sent Johnson a letter declining to make a settlement citing Johnson’s failure to document his injuries until almost two years after the accident. The adjuster did however, leave the door open for Johnson to submit additional information related to the claim and reminded Johnson of the statute of limitations expiration date coming up in the next month.

Immediately after receiving the adjuster’s letter, Johnson hired an attorney, who sent the adjuster a letter on September 29, 2003, demanding \$5,500 in damages pursuant to ORS 20.080. The attorney’s letter indicated that Johnson would file suit, claim-

ing attorney fees, if the insurer failed to settle the claim in 10 days. Rather than waiting the full 10 days (the statute of limitations expired on October 4, 2003), Johnson filed a complaint pleading \$5,500 in damages one day after his written demand. One week after the complaint was filed, the claims adjuster made a written counteroffer of \$500, “pursuant to ORS 20.080.” Plaintiff rejected the offer and the case went to trial.

A jury awarded Johnson \$2,500 in damages and the court awarded him over \$9000 in attorney fees under ORS 20.080. The trial court judge reasoned that Johnson’s initial letter combined with his oral demand satisfied the “written” notice requirement of ORS 20.080. The court found that in the alternative, defendant had waived the statute’s written demand requirements in the two letters sent by the claims adjuster.

Defendant appealed and the Court of Appeals reversed the award of attorney fees. The Supreme Court affirmed the Court of Appeals, holding that none of Johnson’s communications met the notice requirements of the statute. First, it ruled that Johnson’s July 2002 letter did not assert a demand for payment as required by the statute. Second, Johnson’s August 2003 telephone call did not meet the statute’s written requirement. Finally, Johnson’s September 29, 2003 letter that did set forth a specific monetary demand was sent one day before Johnson filed, not the requisite 10 days before filing required by ORS 20.080. Both appellate courts soundly rejected the approach of taking all of Johnson’s communications “as a whole.”

Johnson argued that the language of the statute does not require a written demand with a specific monetary amount. While the Court agreed that an exact dollar amount was not necessary to meet the statute’s requirements, the intent of the statute is to place the demand’s recipient on notice that the claim is subject to the statute and its \$5,500 claim cap. Therefore, the Court explained that in the absence of a specific dollar amount, a written reference to the statute satisfies the notice requirement.

The Court also rejected Johnson’s assertion that his compliance with the statute’s notice requirements was waived by the adjuster’s initial letter declining a settlement and the second post-filing letter that made the \$500 settlement offer “pursuant to ORS

**Claims Pointer:** Pursuant to ORS 20.080, in order to receive attorney fees for a claim of less than \$5,500, a plaintiff must provide a written demand for payment of a claim no less than 10 days before filing a formal complaint. Furthermore, the Oregon Supreme Court has held that the written settlement request must either: 1) identify a specific monetary amount or 2) reference the applicable statute (ORS 20.080) if a dollar amount is not specified in the written demand. Neither an oral settlement demand by itself, nor an oral supplement to an incomplete written demand, satisfies the statute's pre-filing written requirement.

20.080.” In rejecting Johnson’s argument that defendant waived compliance, the Court noted, “The statute...requires nothing of the defendant. It merely creates an *incentive* for the defendant to make a reasonable settlement offer by putting the defendant at risk of bearing attorney fees if the defendant does not do so.” A defendant’s refusal to settle at a par-

ticular time will not be considered a waiver of its right to receive the written demand required by statute. Additionally, while the Court acknowledged the adjuster’s post-filing settlement offer of October 8, 2003 was an attempt to invoke the statute’s “safe harbor” provision, the letter itself did not waive defendant’s rights under the statute.

The *Johnson* case affirms that a claimant’s strict compliance of the written pre-filing notice requirements is necessary to advance the statute’s intent and, more importantly, to entitle plaintiff to attorney fees if the verdict exceeds the pre-trial tender. ❖

— *If you would like to be notified of these new cases, please send an email to [caseupdate@smithfreed.com](mailto:caseupdate@smithfreed.com).*

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Medical Notes

## Upright Positional MRI of the Lumbar Spine

Article provided by Health Cost Management

— by **J. Michael Burke, D.C., Chiropractic Physician, Board Certified Chiropractic Orthopedist**

The magnetic resonance phenomenon was discovered in 1946, but its use was limited to chemical and physical analysis. In 1971 it was found that Magnetic Resonance Imaging, or MRI, could differentiate between normal tissue and tumors. The first human MRI examination took place in 1977. Faster and more accurate imaging and computer techniques are responsible for the continuing advancement of diagnostic MRI. With respect to the spine and spinal biomechanics, interest in the effects of gravity, positioning, and movement has stimulated research into new MR methods of imaging.

Recumbent MRI (rMRI) has long been the standard positioning method. However, the function of joints and muscles is motion and weight bearing, so pathology that only occurs during activity can be missed on static rMRI examination. Clinically, spine-related symptoms such as low back pain, and

numbness, weakness and pain in the legs and feet are known to be made worse with changes in body position and certain physical activities. Knowledge of normal positional changes is, of course, essential to the ability to detect pathological changes on positional MRI (pMRI). Some changes in the size of the spinal canal and the neural foramina are normal and without consequence for the individual.

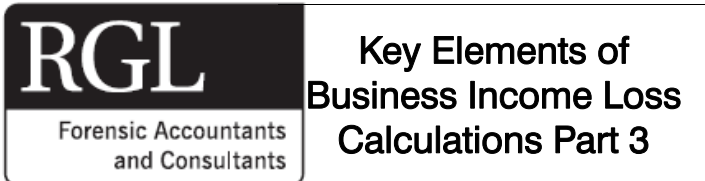
The first efforts at evaluating axial loading on the spine by conventional MRI were done using compression devices to simulate the effects of gravity. However, such methods allowed a combination of weight-bearing with flexion, extension, lateral bending, or rotational movements to only a limited degree if at all.

The advent of vertical, open-configuration MR systems allows more freedom of patient positioning. These “double doughnut” systems enable examinations in true weight-bearing positions including standing and sitting. Special techniques to load the spine increase sensitivity in detecting canal stenosis. However, vertically open-configuration systems sacrifice magnetic energy efficiency when compared with conventional closed MR scanners.

Positional MRI for lumbar spine imaging is no longer experimental. A substantial body of research supports its use in the differential diagnosis of pa-

tients with presentations of mechanical back pain with neurological symptoms, and research has demonstrated validity and reliability. These techniques could potentially reduce the incidence of false positives and improve consistency with clinical findings. ❖

*Note: This article was abridged from the full text version to fit the newsletter format. For a copy of the original article, with references, please contact HCM by phone, FAX or email. Just refer to the November 2007 HCM newsletter article for a quick response.*



Last month's column focused on the period of restoration and factors to consider to reduce misunderstandings with the insured about periods of time that may not qualify for Business Income loss recovery. Part III focuses on the importance of the sales projection in a Business Income loss calculation.

The sales projection is a critical element of a Business Income loss calculation, and is often an area of disagreement and spirited debate between policyholders and insurance companies. Some key considerations that impact the sales projection are seasonality and trend analysis. To support a sales projection, it is important to present a forecast that falls within a reasonable range, i.e., what the business likely *would* have done, as opposed to what the business *could* have done. The former has a basis in fact, while the latter is merely "possible."

In projecting sales, it is important to review the insured's sales history. The amount of sales data needed to project sales is dependent upon the length of the loss period and other situational factors. As a general rule of thumb, monthly sales for two years prior to the loss should be reviewed. Typically, monthly profit and loss or income statements contain the detail needed to project sales. However, there are other business records that provide sales data such as federal tax returns, state sales tax returns, sales journals, general ledgers, and cash receipt journals. Once a sales history has been obtained, there are a number of methods that can be used to project sales, including:

## 1. Percentage Change From Prior Year

This is the most common method used to project sales. The first step in utilizing this method is to determine the increase or decrease in sales (expressed as a percentage) prior to the loss based on a comparison of the same months from the prior year. After a base period is established, the next step is to apply the percentage increase or decrease to the loss period.

At first glance, this appears to be a straightforward calculation. However, it is important to keep in mind that a credible sales projection is one that can be explained in real terms, not just in terms of the math, and is consistent with the experience of the business and/or changes in market conditions. For instance, an annual sales trend may not be applicable if just prior to the loss incident the insured lost its largest customer, closed or sold an unprofitable segment, or its employees went on strike. It is critical to exercise good judgment in formulating sales projections. Without common sense, sales projections are just mathematical computations.

## 2. Pre-Loss Average

When a business is stable (no growth or declining trends) and not seasonal, a pre-loss monthly or daily average can be used to project sales. This method works best for a short loss period. For example, it might be appropriate to project sales for an established dental practice that is closed for one week using a pre-loss daily average.

The pre-loss sales projection method is not appropriate when the insured is a highly seasonal business, or when the loss period extends several months. Also, it is best to avoid this method if sales have been trending up or down.

### 3. Ratio of Actual to Budgeted Sales Prior to the Loss

Budgets can be a good source for projecting sales, but first you must determine the reliability of the budgeted sales. On a monthly basis, compare pre-loss budgeted sales to actual sales. If the ratio between actual and budgeted sales is consistent over numerous months, reliance upon the budget as a basis to project sales may have merit.

Typically, the insured's own sales history is the best indicator of future sales. But before choosing

a method to project sales, it is important to understand the insured's business and the impact of any experience or change in business conditions leading up to the loss event. Good judgment and common sense should be used in selecting a base period to project sales. The best sales projections are those considered to be *likely* as opposed to *merely possible*. ❖

— Author Russell Matheson CPA, CFE, may be reached at [rmatheson@us.rgl.com](mailto:rmatheson@us.rgl.com) or 206/682-6500. Katharyn E. Thompson in RGL's Portland office may be reached at 503/224-6600 or [kthompson@us.rgl.com](mailto:kthompson@us.rgl.com).