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Case Study

UM Coverage: Initiating Formal Arbitration is Not Very Formal

— *by* **Jeffrey D. Eberhard**

Claims Pointer: A claimant seeking uninsured motorist coverage may use any type of written document, including a faxed-cover letter, that uses language which clearly and expressly provides "a single message, a notice, an offer, or a demand for arbitration" to formally initiate arbitration proceedings. Additionally, a claimant can expressly communicate an offer to arbitrate or commit to arbitration by one document or multiple documents.

"Heads I win, tails you lose!" seems to be the mantra Oregon appellate courts have adopted towards insurers when deciding uninsured and underinsured motorist coverage issues. For example, in October 2010, the Oregon Supreme Court decided Bonds v. Farmers, where the court held the parties did not have to adhere to the Uniform Arbitration Act to initiate arbitration proceedings in an underinsured motorist coverage matter. See Bonds, 349 Or 152, 240 P3d 1086 (2010). Instead, one of parties can initiate or begin arbitration by "communicat[ing] to the other party that the initiating party offers to arbitrate or otherwise commits to the process." Id. at 162. This holding is extremely relevant to insurers concerning attorney fee claims under ORS 742.061—a statute that eliminates an insured's right to attorney fees in uninsured and underinsured motorist coverage actions if, within six months from the proof of loss, an insurer has "consented" to submit the case to arbitration. By unconditionally consenting to arbitration of an underinsured motorist claim to avoid attorney fee exposure, an insurer sacrifices its ability to rely on a contractually-created 2 year time limitation for the claimant to bring an uninsured or underinsured motorist claim.

More recently, in Hall v. Allstate Ins. Co., the Oregon Court of Appeals drastically broadened the definition of "proof of loss" and an insurer's obligation to investigate and clarify claims in underinsured motorist insurance context. (Case No.: A145014, July 20, 2011; see *Hall v. Speer: Proof of Loss, UIM Claims, and Attorney Fees* on page 9 in this edition.)

One week after the Oregon Court of Appeals decided Hall v. Allstate, it decided Luka v. Tri-Met, which established just how informal and easy it is for claimants seeking uninsured motorist coverage to formally initiate arbitration proceedings. By initiating arbitration proceeding, claimants effectively "stop the clock" from ticking and prevents the claimant's uninsured motorist claim from being time-barred. (Case No. A141388, July 27, 2011). As a result of Luka v. Tri-Met, insurers' ability to assert a defense of statute of limitations is severely limited.

On May 13, 2006, Plaintiff was a passenger on a bus operated by Tri-Met. The bus was involved in a motor vehicle accident, which was caused by an uninsured motorist. Three days after the accident, Plaintiff filed a claim with Tri-Met. Although Tri-Met provides uninsured motorist coverage to its riders, the coverage is secondary to other coverage. So, Tri-Met sent two letters to Plaintiff requesting she provide an affidavit attesting that she did not have insurance. Tri-Met did not receive any further communication from Plaintiff until the day before the two-year anniversary of the accident. Plaintiff faxed a completed affidavit to Tri-Met. The cover page on the fax included the following statement: "[P]lease let this correspondence serve as a written notice of our request to have this matter submitted to binding arbitration in accordance with ORS 742.061." Tri-Met did not believe that Plaintiff's statement formally instituted arbitration as described in ORS 742.504(12)(a), which provides that unless a person formally initiates arbitration proceedings, the statute of limitations for that person's claim will not be suspended. Two months after receiving the fax from Plaintiff, Tri-Met denied Plaintiff's claim for uninsured motorist coverage arguing her claim was barred by the statute of limitations because she had not formally instituted arbitration proceedings or filed a lawsuit. Plaintiff filed a petition with the court to compel arbitration. The circuit court agreed with Tri-Met and denied Plaintiff's petition, which the Court of Appeals affirmed. Plaintiff appealed to the Oregon Supreme Court.

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The Oregon Supreme Court granted review, vacated the Oregon Court of Appeals' decision, and remanded the case to the Oregon Court of Appeals for reconsideration in light of another Oregon case. See Bonds, 349 OR 152 (there is no specific manner or procedure to formally initiate an arbitration proceeding; rather, an insured or insurer only needs to expressly "communicate to the other party that the initiating party offers to arbitrate or otherwise commits to the process").

On remand, the Oregon Court of Appeals explained that the Bonds v. Farmers case established that a party does not have to institute arbitration in an uninsured motorist coverage matter according to the requirements under the Uniform Arbitration Act (i.e., notifying opposing party by means previously agreed upon, or by certified mail or service akin to a summons"). Rather, the court held that to "formally institute" arbitration proceedings, a party only needs to "'expressly communicate' to the other party that the initiating party offers to arbitrate or otherwise commits to the arbitration process." The court further explained that a party may expressly communicate an offer to arbitrate or commit to arbitration by one document or multiple documents as long as "a single message, a notice, offer, or demand for arbitration" is communicated. In the present matter, the court held that Plaintiff obviously and expressly communicated a willingness to commit to arbitration by stating in her fax "[P]lease let this correspondence serve as a written notice of our request to have this matter submitted to binding arbitration…." Therefore, the Oregon Court of Appeals held Plaintiff successfully suspended the statute of limitations on her claim pursuant to ORS 742.504(12)(a); thus, she could maintain her claim against Tri-Met. ❖

— Full case available at: www.publications.ojd.state.or.us/A141388.pdf.

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About Our September Speaker

Louis D. Porrazzo, Jr.

Lou Porrazzo is Legal Counsel and National Sales Manager for Crowe Paradis Services Corporation (CPSC), a National Medicare Compliance firm. He is a Massachusetts based attorney with expertise in Medicare Secondary Payer compliance for Workers Compensation and Liability claims. He has personally been involved in thousands of settlements across the country obtaining CMS approval for Medicare Set-Aside Arrangements and negotiating Conditional Payment claims.

Lou obtained his Bachelor of Science in Business Administration from Stonehill College, with a major in Marketing and a minor in Economics. He received his Juris Doctor from Suffolk University Law School, where he was chosen to give the student address at graduation alongside former Mayor of New York City Rudy Giuliani. Prior to law school, Lou worked in sales and marketing for a start-up software company as well as Capital One. While in law school, he completed an internship with the Massachusetts State Senate Counsel office.

Lou is a member of the Defense Research Institute, a group of attorneys who "defend the interests of businesses and individuals in civil litigation." Lou received his certification as a workers' compensation professional from the Michigan State CWCP program. He is also a member of NAMSAP, an organization that continually addresses the implications of the Medicare Secondary Payer Statute and its effect on workers' compensation, liability, no fault and self-insured settlements. He is currently a member of the American Bar Association and the New Lawyers Section of the Boston Bar Association, a division of the BBA dedicated to assisting attorneys of all ages in their first decade of practice. Lou is available for on-site training pertaining to all matters of Medicare Secondary Payer statute compliance. ❖

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Hall v. Speer: Proof of Loss, UIM Claims, and Attorney Fees

By Heather C. Beasley & Hanne Eastwood

Background

On July 20, 2011, the Oregon Court of Appeals decided *Hall v. Speer*, a case that addresses what constitutes "proof of loss" in the uninsured/underinsured context for purposes of triggering the six month time line within which an insurer can try to avoid paying reasonable attorney fees under ORS 742.061(3). Oregon Revised Statute 742.061 generally provides for a plaintiff's recovery of attorney fees if (1) settlement is not made within six months from when proof of loss is provided to an insurer and (2) plaintiff's recovery exceeds the amount of tender made by the defendant. Attorney fees are not available if, within six months of the proof of loss, the insurer does one of two things: (1) accepts coverage; acknowledges that the only issues are liability of the uninsured or underinsured motorist and damages due to the insured; and consents to binding arbitration; or (2) makes an offer of settlement that the insured ends up not exceeding.

The key issue in *Hall* is what constitutes "proof of loss" for the purposes of ORS 742.061(3), which relates specifically to uninsured and underinsured benefits.

Facts

On September 16, 2006, Joann Hall, plaintiff, was injured in an automobile accident caused by an underinsured motorist. At the time, Hall carried Allstate insurance that provided liability, PIP and UIM coverage. Two days after the accident, Hall informed Allstate of the accident and her injury. On September 27, 2006, Hall submitted an application for PIP benefits to Allstate. The application described the accident and her injuries. After receipt of the application, Allstate's PIP adjuster opened a file but did not inform the UIM adjuster of Hall's claim. In February 2007, Hall was examined by a surgeon at Allstate's request. On May 24, 2007, Hall's attorney wrote to Allstate's PIP and liability adjusters to inform them of his representation of Hall. On January 28, 2009, Allstate sent Hall a letter acknowledging coverage for the UIM claim and consenting to arbitration. Ultimately, Hall won a jury verdict that exceeded Allstate's last settlement offer and petitioned for attorney fees under ORS 742.061.

Analysis

Allstate argued that an insurer does not have proof of loss until it knows the underinsured motorist's liability limits and the nature of the policyholder's injuries, which Allstate's UIM adjuster did not have until two months before its January 2009 acceptance of the claim.

"Proof of loss" is not defined in ORS 742.061. However, in the 1999 case *Dockins v. State Farm Insurance*, the Oregon Supreme Court defined "proof of loss" as used in ORS 742.061 to mean "[a]ny event or submission that would permit an insurer to estimate its obligations (taking into account the insurer's obligation to investigate and clarify uncertain terms." The court also relied on *Scott v. State Farm*, a 2008 decision which held that a proof of loss for PIP benefits would serve as proof of loss for UM benefits as well, where the proof of loss form did not specify it was solely for PIP.

Allstate argued that *Scott* is distinguishable because it relates to UM benefits, as compared to the UIM benefits sought in *Hall*. Allstate pointed out that UM claims accrue at the time the insured is injured, whereas UIM claims do not accrue until the at-fault driver's liability insurance is exhausted. Allstate argued that because the insured has better access to information about the limits of the at-fault driver's policy, the plaintiff must show that the limits are exhausted as part of their proof of loss for a UIM claim.

The court disagreed with Allstate's arguments, holding that even if a submission of proof of loss is insufficient, the insurer has a duty of inquiry. The court concluded that the plaintiff had submitted adequate proof of loss by May 24, 2007 and that Allstate's duty to inquire was triggered at that point.

Allstate argued that its duty to investigate was not triggered in May 2007 for two reasons: (1)

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Allstate's PIP and UIM branches are separate, and the UIM branch did not learn of the claim until January 2009, shortly before the letter accepting coverage; and (2) investigation of the UIM claim would be futile because that at-fault driver's insurer would not likely have disclosed the amount of its limits.

The fact that Allstate had separate PIP and UIM claims departments was not persuasive because the Oregon Supreme Court held in the earlier *Scott* case that "unilaterally imposed corporate practice" should not "compromise an injured party's right to timely acceptance of a claim." The *Hall* court rejected Allstate's futility argument because (1) a reasonable good faith investigation would not be limited to inquiries to the insurer of the at fault driver (inquiry could be directed to the at fault driver, or the claimant's attorney who, in this case, was negotiating with the at fault driver) and (2) there was no evidence that Allstate conducted any investigation. The *Hall* court did note that "[h]ad there been such evidence [of further investigation], we would have a different case with, possibly, a different outcome."

Conclusion

Under ORS ORS 742.061(3), adequate proof of loss is provided for a UIM claim when the insurer receives notice: (1) of the accident; (2) of injury; (3) that the at-fault driver was insured; and (4) that the claimant had UIM insurance. If the proof of loss is not clear as to whether there is UIM coverage available, the insurer has a duty to investigate the claim to determine its obligations. Neither the insurer's business structure nor the potential futility of investigation relieves the insurer of its duty to investigate. The still unanswered question remains: what will the outcome be if an investigation is conducted, but cannot determine whether UIM coverage is available? ❖

— Feel free to contact the authors at Davis Rothwell Earle & Xóchihua, 503/222-4422. Or contact Heather via email to hbeasley@davisrothwell.com.