CAUSES OF ACTION AND REMEDIES AVAILABLE AGAINST INSURERS UNDER OREGON LAW

This working paper discusses causes of action and remedies currently available under Oregon law to members of the public in actions against insurers.

SUMMARY

Consumers and insurance policy holders in Oregon currently have a great number of remedies available to them to enforce contracts of insurance, redress wrongful insurer conduct, and punish insurers who are guilty of deliberate or intentional misconduct. This is an overview of remedies that are discussed in further detail in the body of this working paper:

1. Breach of contract for policy benefits;
2. Consequential damages for breach of contract;
3. Emotional distress damages for breaches of contract that directly cause physical injury;
4. Damages in excess of the stated policy limit for failing to adequately defend the insured;
5. Unrestricted damages for the tort of intentional infliction of emotional distress;
6. Unrestricted damages for the tort of intentional interference with contractual relations;
7. Unrestricted damages for the tort of fraudulent reductions or denials of benefits;

8. Punitive damages where the misconduct of the insurer has been deliberate, intentional, wanton and willful;

9. Assignability of claims against insurers;

10. Attorneys fees for actions on the policy;

11. Actions against the insurer to recover policy proceeds following entry of a judgment.

These remedies are discussed in more detail below.

1. BREACH OF CONTRACT

a. First-Party Insurance

Oregon has recognized that breach of contract claim exists against an insurer who fails to perform duties under a policy. In addition to recovery of the policy benefits, Oregon has recognized the general rule in contract actions that consequential damages which were foreseeable at the inception of the contract are recoverable as damages. Commentators have noted as one example the business owner who sustains lost profits after a wrongful denial of coverage. OSB Insurance CLE Sec. 10.31.

Emotional distress damages are generally not available for breach of an insurance contract. *Allstate Ins. Co. v. Breedan*, 410 Fed Appx 6, 10 (9th Cir 2010). Damages for emotional distress are recoverable in a breach of contract action when the breach actually causes physical harm and resulting distress, for example, when a health insurer wrongfully fails to authorize surgery for a medical condition resulting in physical harm. "Ordinarily, emotional distress caused by pecuniary loss resulting from a breach of contract is not recoverable. When, however, the emotional distress is caused by physical harm that results from the breach of contract, the case is different." *McKenzie v. Pacific*

Health & Life Ins. Co., 118 Or App 377, 381 (1993); *Restatement* 2d *Contracts* §353 (1979).

There is no entitlement to noneconomic damages from the insurer absent direct physical injury caused by the breach. *Farris v. U.S. Fid. And Guar. Co.*, 284 Or 453 (1979). Likewise, punitive damages are not available for a simple breach of contract. *Id.*

2. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING AND THE TORT OF THIRD PARTY BAD FAITH

The covenant of "good faith and fair dealing" is implied in every contract. The covenant governs the performance of every contract so that the objectively reasonable expectations of the parties may be fulfilled. Oregon courts have held that a party can breach the covenant of good faith and fair dealing without breaching an express term of the contract. *McKenzie, Supra.* If a "special relationship" exists between the contracting parties it will give rise to a duty independent of the terms of the agreement. A breach of the special relationship will expose the defendant to tort liability as opposed to simply contract damages. *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97 (1992).

To allege a tort claim against an insurer, the insured must prove: (1) "that the defendant's conduct violated some standard of care that is not part of the defendant's explicit or implied contractual obligations" and (2) "that the independent standard of care stems from a particular special relationship between the parties." *Strader v. Grange Mut. Ins. Co.*, 179 Or App 329 (2002).

A "special relationship" has been held to exist in the insured's execution in its duty to defend. When a liability insurer undertakes to defend its insured, the insured relinquishes control of the litigation to the insurer, and generally loses the right to negotiate a settlement. In addition, when the settlement value of the case approaches

policy limits, the insurer may be tempted to gamble, while the insured becomes more anxious to settle. Because of this potential conflict, and in light of the insurer's control of the action, the insurer has been held to a high standard of good faith and fair dealing. This relationship, gives rise to tort liability on the part of the insurer if it fails to use such care as would have been exercised by an ordinarily prudent insurer with no policy limit applicable to the claim. *Santilli v. State Farm*, 278 Or 53 (1977). An insurer may be liable for an excess verdict if it fails to negotiate reasonably or acts negligently in the defense of the insured. *Goddard v. Farmers Ins. Co.*, 173 Or App 633, 637 (2001). If the insurer's conduct is not only negligent, but rises to a level supporting punitive damages, then such damages are recoverable. *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97 (1992).

3. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The claim of intentional infliction of emotional distress is available in the first party insurance context. Although a claim for intentional infliction will generally not arise when the situation involves no more than a legitimate disagreement about coverage, it can spring from a situation involving an insurer's overbearing conduct. *Green v. State Farm*, 667 F2d 22 (9th Cir 1982). In *Green*, the insured, who suffered a fire loss, claimed that the insurer, although having a reasonable basis to deny the claim, acted in an unreasonable and outrageous manner in the investigation and adjustment of the loss, including trying to have the insured indicted for arson when he pressed his claim. The trial court awarded compensatory and punitive damages, and the judgment was affirmed on appeal. *Green* demonstrates that the actions of the insurer might give rise to a tort

even when the insurer has a legitimate basis to deny the claim, however, the conduct must be an extreme departure from societal norms.

4. INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS

The claim of intentional interference with economic relations was recognized as potentially applicable to the denial of a first-party claim in *Employers' Fire Ins. V. Love It Ice Cream*, 64 Or App 784 (1983). In that case, the court held that the plaintiff had pleaded a sufficient claim for intentional interference based on allegations that the company had wrongfully denied its fire-loss claim and delayed payment, intending to prevent the insured from resuming its business, thus potentially decreasing the possible amounts owed under the policy.

5. FRAUD

It is generally accepted that an action for fraud will be available to an insured if benefits are denied or reduced due to the fraudulent conduct of an insurer. *Foltz v. State Farm*, 326 Or 294, 952 P2d 1012 (1998). In *Foltz*, the insured claimed that her benefits had been denied and reduced because of the alleged fraudulent use of an outside medical review service. On questions certified to the Oregon Supreme Court by the U.S. District Court, the Oregon court stated that such a cause of action would be available as long as an arbitration proceeding had determined that she was owed further benefits.

6. ATTORNEYS FEES

In a direct action against an insurer the insured can recover attorney fees. The recovery of attorney fees is mandatory. The court must award reasonable attorney fees if settlement is not made within six months of filing the proof of loss, an action is brought on the policy, and the plaintiff's recovery exceeds the amount of the tender made by the

defendant in that action. ORS 742.061; *Foles v. U. S. Fidelity & Guaranty*, 259 OR 337 (1971).

ORS 20.075, which lists the factors that courts must consider when an award of attorney fees is discretionary with the court, does not apply to fee awards under ORS 742.061 because awards under the latter statute are mandatory. *Peterson v. Farmers Ins. Co.*, 162 Or App 562 (1999).

In filed actions for Personal Injury Protection (PIP) benefits, a plaintiff who prevails is entitled to recovery of attorney fees. Grisby v. Progressive Ins. Co., 343 Or 394 (2007).

7. ACTIONS ON JUDGMENTS AGAINST TORTFEASORS

If a party injured by accident obtains a final judgment against an insured tortfeasor and if the judgment is not satisfied within 30 days after it is rendered or if the tortfeasor is bankrupt or insolvent, then the party may recover the amount of the judgment from the insurer, subject to the policy limits. ORS 742.031 The judgment debtor is also entitled to attorney fees under ORS 742.031. *N.W. Marine Iron v. Western Casualty*, 45 Or App 269, 271-272 (1980).

8. ASSIGNMENTS OF CAUSES OF ACTION AGAINST INSURERS

A judgment creditor can obtain an assignment from the insured against whom a judgment in excess of the insured's policy limits has been recovered. The judgment creditor may then bring a law action for a failure to settle within the policy limits, and, if the judgment creditor prevails he is also entitled to attorney fees. *Groce v. Fidelity General Insurance*, 252 Or 296 (1969).

A policy provision prohibiting assignment does not preclude the assignment of a cause of action for failure to settle the claim in good faith. *Groce v. Fidelity General Insurance*, 252 Or 296, 306 (1969). ORS 17.100.