OREGON "BAD FAITH" LITIGATION AGAINST INSURANCE CARRIERS:

THE PLAINTIFF'S PERSPECTIVE

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I. INTRODUCTION

This paper is written to provide guidance for plaintiff's counsel in their handling of the underlying claim and subsequent bad faith case. Even though I refer throughout this paper to "bad faith," this is a misnomer, because the correct legal standard is ordinary care only. *Maine Bonding v. Centennial Insurance Company,* 298 Or 514, 518 – 519 (1985). The courts have explicitly stated the subjective connotations of good faith or bad faith are not the criteria in assessing whether a carrier has exercised reasonable care. See however, ORS 746.230 (1)(f) which by its terms requires insurance companies to attempt, in ". . . good faith, to promptly and equitably settle claims in which liability has become reasonably clear." (Emphasis added.)

It is important to understand that currently Oregon only recognizes third-party "bad faith," meaning circumstances wherein the insureds have, by terms of their insurance contract, given away the right to defend, negotiate and legally represent themselves. This most typically occurs in automobile and general liability cases wherein an insured tenders a complaint filed against him to his carrier for a defense.

Contrast this with first-party actions by a policyholder**,** such as in property, life or health, when the policyholder makes a claim directly against their own insurance company. The important distinction is that in third-party cases, when the insurance carrier undertakes to defend,

it agrees to provide legal representation and to stand in the shoes of the party that has been sued. Most policies further provide the carrier can defend as it "deems appropriate." Generally, the insurance company can settle without the consent of its insured. The insured relinquishes control over the defense of the asserted claim; thereby placing its monetary liability in the hands of the insurer. Contrast this with most doctor professional liability policies which require the insured's consent in order to settle.

II. THE *GEORGETOWN* TRILOGY

There are approximately 20 Oregon appellate decisions defining the law in this area. With the completion of the *Georgetown* trilogy in 1992 and the *Goddard* series, most of the long-standing issues in the third-party bad faith area are settled, at least for the time being. The bottom line is that bad faith is now acknowledged to sound in both contract and tort. The primary consequence is that emotional injuries and punitive damages are legally possible.

A cryptic history of *Georgetown* is in order. *Georgetown Realty v. The Home Ins. Co.,* 102 Or App 611 (1990), *Georgetown I,* the first Court of Appeals decision in this matter, involved a third-party excess claim wherein a jury had awarded the plaintiff damages in excess of the insurance policy limits Georgetown Realty had purchased from the Home Insurance Company. After entry of judgment, Georgetown Realty sued its insurance carrier, alleging that the carrier had breached its duties to Georgetown in the defense of the underlying claim, thereby causing Georgetown to become indebted in the amount of the judgment, minus its policy limits with The Home Ins. Co. In the later bad faith trial, the jury found in Georgetown's favor on both a contract and a tort theory. The general damages were $32,500 on the breach of contract claim,

$35,000 for the tort claim, with an additional $1,500,000 for punitive damages on the tort allegations.

In *Georgetown I*, the Court of Appeals reversed the judgment on the tort theory, holding that because the cause of action was founded on the underlying insurance contract, the plaintiff's remedy was therefore in contract only. The verdict for emotional and punitive damages was also reversed as a result.

The Supreme Court initially denied review, thereby affirming the Court of Appeals decision in *Georgetown I.* In *Georgetown II,* 313 Or 97 (1992), the Supreme Court reversed itself and reinstated the underlying tort cause of action. In summary, the Court ruled, at page 106, that:

> "The lesson to be drawn from this court's cases discussing the choice between contract and tort remedies is this: When the relationship involved is between contracting parties, and the gravamen of the complaint is that one party caused damage to the other negligently performing its obligations under the contract, even though the relationship between the parties arises out of the contact, the injured party may bring a claim for negligence if the other party is subject to a standard of care independent of the terms of the contract."

Further, at 110-111,

> "When a liability insurer undertakes to 'defend,' it agrees to provide legal representation and to stand in the shoes of the party that has been sued. The insured relinquishes control over the defense of the claim asserted. Its potential monetary liability is in the hands of the insurer. That kind of relationship carries with it a standard of care that exists independent of the contract and without reference to the specific terms of the contact . . . therefore, plaintiff's excess claim can be brought as a claim for negligence."

The Supreme Court then remanded to the Court of Appeals for resolution of issues concerning punitive damage and attorney fees, thus spawning *Georgetown III.*

Georgetown III is found at 113 Or App 641 (1992). Probably the most important aspect of this final *Georgetown* decision is the favorable language found at page 644 concerning the matter of punitive damages in bad faith claims:

> "Two of defendant's assignments are directed against the court's submission of the punitive damage claim to the jury. Defendant contends that the evidence showed, at worst, that it was negligent in not settling. The trial court disagreed, explaining that it could be inferred from the evidence that defendant chose to expose their insured to a very substantial claim, and they evidently knew they were not going to pay the claim, although they had not warned their insured that they were not going to pay it. They did that for the purpose of protecting a much smaller amount of their own money.
>
> Under these circumstances from all of the evidence that was offered, I'm satisfied that if punitive damages are permissible in Oregon that this is an appropriate case to submit to the jury."

The Supreme Court approved the term of negligence as an appropriate denomination of the tort claim, but commented at 313 Or 97, 110 footnote 7 that it could also be properly labeled a "breach of a fiduciary duty." As a practice matter, I recommend that the case caption label the cause of action as "Negligence - Breach of Fiduciary Duty" with a similar allegation set forth in the body of the complaint. This supports a later jury instruction advising that the insurance carrier is in a fiduciary relationship with its insured, and a further explanation of what a fiduciary relationship is. See Jury Instruction No 2.

The importance of that special relationship is discussed at *Georgetown III, 113 Or App* at page 645, "Negligence may be the standard of liability, but the relationship of the parties clearly involves fiduciary standards."

Farris v. U.S. Fidelity and Guaranty Co., 284 Or 453, 587 P2d 1015 (1978) also discusses the fiduciary relationship:

"In an action for failure to settle within the policy limits, the insurance company is charged with acting in a fiduciary capacity as an attorney in fact representing the insured's interest in litigation. The company's interest comes into conflict with that of the insured's while representing him; and, arguably, acting in its own interests to the detriment of the insured's interest while acting in such a fiduciary capacity is a tort. In the present case, defendant did not undertake this fiduciary duty to represent the insured's interest in the litigation it refused it. It did not, in the course of representing plaintiffs, violate its fiduciary duty arising out of sole control of the settlement. It never undertook any fiduciary duty by purporting to act in the interests of the insured." *Id.* at 460.

III. TRIAL TACTICS AND ARGUMENTS

From the plaintiff's perspective, the trial of a third-party claim has a number of unique features. The following is an inventory of suggestions, practice tips and cautions. I have lumped these suggestions topically into comments concerning analysis of the carrier's duty and how to plead it, followed by negotiations with attendant demand letters, including punitive damages, attorneys' fees and finally, generic arguments.

IV. DUTY AND PLEADINGS

A. Every insurance company has multiple primary responsibilities to its insured, under both ORS 746.230 and the policy they sold. These include at least the following:

1. To investigate both the facts and applicable law;
2. To evaluate the claim;
3. To negotiate with the plaintiff (as if there were no policy limits);
4. To fully communicate with their insured; and,
5. To competently defend the claim if necessary.

Georgetown II at 313 Or 97 at page 101, footnote 2, has a comprehensive listing of the traditional allegations of fault.

B. Any analysis of the insurance carrier's duty starts with a careful reading of ORS 746.230. Cases underscore the importance of the statutes, even though they do not create a private right of action. *Bollam v. Fireman's Fund Insurance Company,* 76 Or App 267, 270 (1985); *Goddard v. Farmers Insurance Company,* 173 Or App 633, 638 (2001); *Employers Fire Ins. v. Love It Ice Cream,* 64 Or App 784 (1983). The statute is, however, some evidence the jury can consider in assessing whether the defendant's conduct was reasonable. *Hagen v. Gemstate Manufacturing, Inc.*, 328 Or 535, 538-540 (1990).

746.230 Unfair claim settlement practices. (1) No insurer or other person shall commit or perform any of the following unfair claim settlement practices:

(a) Misrepresenting facts or policy provisions in settling claims;

(b) Failing to acknowledge and act promptly upon communications relating to claims;

(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims;

(d) Refusing to pay claims without conducting a reasonable investigation based on all available information;

(e) Failing to affirm or deny coverage of claims within a reasonable time after completed proof of loss statements have been submitted;

(f) Not attempting, in good faith, to promptly and equitably settle claims in which liability has become reasonably clear;

(g) Compelling claimants to initiate litigation to recover amounts due by offering substantially less than amounts ultimately recovered in actions brought by such claimants;

(h) Attempting to settle claims for less than the amount to which a reasonable person would believe a reasonable person was entitled after referring to written or printed advertising material accompanying or made part of an application;

(i) Attempting to settle claims based on an application altered without notice to or consent of the applicant;

(j) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made;

(k) Delaying investigation or payment of claims by requiring a claimant or the physician of the claimant to submit a preliminary claim report and then requiring subsequent submission of loss forms when both require essentially the same information;

(l) Failing to promptly settle claims under one coverage of a policy where liability has become reasonably clear in order to influence settlements under other coverages of the policy; or,

(m) Failing to promptly provide the proper explanation of the basis relied on in the insurance policy in relation to the facts or applicable law for the denial of a claim.

C. Affirmatively plead any statutory allegations (ORS 746.230) you may be relying on. This anticipates and responds to any later defense "notice" arguments that they are surprised because you didn't plead the statutes. Expect the defense to later contend that you should have done just the opposite, i.e., if you do plead the statutes then you are pleading law and, if you don't, then they were never on notice. Err on the side of caution. Plead the statutes, and then let the defense move to strike them. It really does not matter whether ORS 746.230 is in the pleadings; you just want to make sure that you have done everything the particular judge thinks is necessary to assure that your experts can discuss the statutes and that the jury will later be properly instructed concerning them.

D. The Insurance Commissioner's office has also generated numerous administrative regulations that control the conduct of the insurance industry. They are topically indexed and easy to access and research. For example, see OAR 836-080-0215 which requires that an insurance carrier maintain its files sufficiently so that they can later be reconstructed. This affirmative legal duty is in addition to any "weaker and less satisfactory" instruction you may be entitled to if documents have been altered, lost or destroyed by either the carrier or the counsel they selected and hired to defend their insured.

E. Every company has extensive internal policies and procedures regarding how the company should do business. Enlarge these for the jury to prove the defendant's negligence; i.e.,

they didn't follow their own rules. Attached in the appendix to this article is a list of items to request in discovery.

F. Richard Langerman (1) advises as follows concerning who to sue:

The duty of good faith and fair dealing is ordinarily limited to parties to an insurance contract. Under some circumstances, however, a bad faith claim may be brought against a person/entity who is not a party to the insurance contract. These situations include suits against insurance holding companies and claim handling companies.

Many insurers are part of an insurance holding company system. An insurance holding company system is a group of affiliated companies, one or more of which sells insurance. Well-known insurance holding company systems include the Farmers Insurance Group, the UnumProvident companies, and AIG.

Insurance holding company systems are regulated by statute. Under ORS § 732.548 "insurance holding company system" is defined as:

"'Insurance holding company system' means two or more affiliated persons, one or more of which is an insurer, and includes a financial holding company as described in section 103 of the federal Gramm-Leach-Bliley Act (P.L. 106-102)." ORS § 732.548(2).

An insurance holding company is a company that has the power to "control" an insurance company. Control is defined as:

"'Control' means possessing the direct or indirect power to manage a person or set the person's policies, whether by owning voting securities, by contract other than a commercial contract for goods or non-management services, or otherwise, unless the power is the result of an official position or corporate office the person holds." ORS § 732.548(5).

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1 Langerman, Richard, "Proving Insurance Company Bad Faith: Ten Things I Have Learned Along The Way."

Insurance holding companies exercise control over insurers either through ownership of stock (such as UnumProvident's ownership of Unum, Provident, and Paul Revere) or through the use of management contracts (such as Farmer Group, Inc.'s control over the insurers in the Farmers Insurance Company or AIG's relationship with the insurers of its group). If an insurance holding company effectively controls an insurer (i.e., the insurer is the "alter ego" of the holding company), then the holding company can be found vicariously liable for the tortious conduct of the insurer if justice requires. See *Gatecliff v. Great Republic Life Ins. Co.*, 821 P2d 725, 729 (Ariz. 1991). The Arizona Supreme Court in the *Gatecliff* case relied on well settled corporation law in reaching this conclusion:

'We have previously stated that despite the well settled law that a corporation is a separate legal entity, when one corporation so dominates and controls another as to make the other a simple instrumentality or adjunct to it, the courts will look beyond the legal fiction of distinct corporate existence, as the interests of justice require.' *Id.*

Epton v. Moskee Inv. Co., 180 Or 86, 174 P2d 418 (1946), is in accord:

"It is well settled that, when a corporate entity is used to accomplish fraud or injustice, the courts will disregard it, and will look through the corporate form to the real actor or actors in the transaction. 18 C.J.S., Corporations, § 7b, p. 380; Anderson, Limitations of Corporate Entity, §§ 21, 23, 48; *Security Sav. & Trust Co. v. Portland Flour Mills Co.*, 124 Or. 276, 288, 261 P. 432; *Murray v. Wiley*, 169 Or. 381, 399, 127 P.2d 112, 129 P.2d 66; Annotation, 1 A.L.R. 610, 613; 34 A.L.R. 597, 600. This rule is applicable whether the stock is owned by one person or by many, or by another

corporation. *Security Sav. & Trust Co. v. Portland Flouring Mills Co.*, supra; Ballantine, Separate Entity of Corporations, 60 Am.Law Rev. 2960 Am. Law Rev. 29."

Proof of "control" under an alter ego theory of liability is often based, in part, on evidence in the registration statements filed by the insurance company with the Department of Insurance in the states where the insurer operates. Under insurance holding company system acts, whenever another company acquires effective control of an insurer, the acquiring company must file a registration statement. These registration statements are called *Form A Registration Statements*. A Form A Registration Statement contains information about the acquiring company and how it will exercise control over the domestic insurer.

Insurers who are part of insurance holding company systems must also file a *Form B Registration Statement*. The Form B Registration Statement contains information regarding the capital structure of the insurer and identifies all other members of the insurance holding company system. The Form B Registration Statement also includes information about agreements between the affiliated companies such as cost sharing agreements and management or service contracts.

Both Form A and Form B Registration Statements usually include a representation that the parent company "controls" the subsidiary insurer.

Veil piercing is not limited to corporate parent/wholly owned subsidiary situations, and may also apply to claims against affiliated corporations such as claim handling companies. See, *State ex rel. Neidig v. Superior Nat. Ins. Co*, 343 Or. 434, 173 P. 3^{d} 123 (2007).

G. Generally, carriers can settle when they "deem it appropriate" under their policy. This demonstrates the clear disparity of power between a defendant policyholder and the carrier.

H. Review the insurance agent's entire file. The defendant insured has probably bought insurance from the Holy Grail Insurance Company for years, faithfully paying its premiums with hardly a claim. Hopefully, you can start your proof years before with a policyholder who never wrote a bad check for their premiums and bought a reasonable level of protection from the carrier's friendly agent. Remember: try your case, not the carrier's case.

I. An Insurance carrier must evaluate the claim acting as if it were liable for the entire judgment that might eventually be entered against the insured. *Kuzmanich v. United Fire and Casualty,* 242 Or 529 (1966). *Eastham v. Oregon Auto Insurance Co.,* 273 Or 600 at 607 (1975).

> "With respect to settlement and trial, an insurance company must, in the exercise of good faith, act as if there were not policy limits applicable to the claim, and as if the rest of the loss was entirely its own."

J. Many tactical and strategic problems can be solved by the seldom-used technique of alternative pleadings. See ORCP 16 (c) and *Goddard v. Farmers* at p.640, footnote 5. An example is if the plaintiff would not have accepted a policy limits offer because of a prior misrepresentation by a representative of the insurance company. Consider asserting the alternative allegations in the reply rather than the complaint.

K. If the defense raises allegations of comparative fault against their policyholder, consider moving to strike them. In *Stumpf v. Continental Casualty Company,* 102 Or

App 302, 308-310 (1990), the court ruled that any duties the policyholder owed to the company were derived solely from the contract of the insurer. These duties are generally limited to notifying the carrier of any claim, appearing at court hearings and cooperating.

L. In *Warren v. Farmers Ins. Co. of Oregon*, 115 Or App. 319, 325, P2d, (1992), the court ruled that when an insurance company incorrectly fails to undertake a defense, claiming a lack of coverage, the plaintiff's subsequent remedy is in contract only. If the defense is not undertaken, the tort duty to exercise reasonable care does not arise. See also *Strader v. Grange Mutual Insurance Company,* 179 Or App 329, 332 – 335, P2d, (2002).

At page 326, the Court of Appeals effectively invited the Supreme Court to overrule *Farris* saying:

> "In all fairness, it is difficult to see why the insurer should be in a better position by refusing to defend, and thereby breaching the insurance contract, than it would have been had it undertaken the defense, but done so negligently. We fail to see any principled distinction between the conflict of interest that exists when an insurer makes a decision whether to defend, and the conflict that exists when, having undertaken the defense, a settlement opportunity arises that would cost the insurer its policy limits but would result in no personal liability for the insured. Were we writing on a clean slate, we might reach a different result."

The Oregon Supreme Court denied plaintiff's petition for review.

V. NEGOTIATIONS AND DEMAND LETTERS

A. It is invigorating to be an advocate; however, as the attorney in the successful underlying case, you should be a historical fact witness in the later "bad faith" case. Therefore, when you finally do attend the big party, meaning the later "bad faith" trial, it should be as a witness and not a lawyer.

B. Your offers of settlement, meaning your demand letters, must on their face show the verdict was not only foreseeable - it was predictable. The insurance company knew because "I told them so" is what your letters should prove. Your demand letter should carefully explain the obvious and be sent by email and regular mail. It is not hindsight, it was foresight, and here is the proof!

Confirm important telephone conversations to the adjusters and defense counsel with notes to the file and letters. Your correspondence will document the history of the negotiations and thereby enhance your credibility with the jury when you testify years later concerning who said what, and when.

C. Typical defense requests in the underlying case include extensions of time or requests for "IME" examinations and depositions of the parties or witnesses. There are no hard and fast rules declaring exactly what is reasonable or unreasonable. The key question will always be whether the insurance company's conduct in the handling of the case was reasonable - under all the facts. If the carrier does eventually pay the policy limits - then both your client and the defendant win. If the insurance company does not pay, and they failed to meet your time limited demand, then once again both your client and the defendant will ultimately win. Because of its own negligence, meaning by failing to have accepted your reasonable offer, the insurance company has now "bought" coverage for all the plaintiff's damages, and also possibly exposed itself to punitive damages.

D. You need to be able to explain why you turned down the company's tardy offer of the policy limits, particularly if it is only a few days or, perhaps, even hours late.

When five o'clock p.m. passes on the specific date you have given the company to accept your offer, your offer is explicitly withdrawn. "TIME IS OF THE ESSENCE," meaning it will have "expired by its own terms," thus there is nothing for the carrier to accept, and the matter will then proceed to trial and judgment. Your demand letter, and subsequent testimony, should explain the medical and financial straits of your client, and why a prompt settlement was so important. You might even have been willing to cut your fee if the matter had been promptly settled.

Carefully craft your demand letters. Assume the demand letters issued over your signature will be Exhibit 1 in the later bad faith trial (a generic demand letter is included in the Appendix to this paper). You will be both deposed and cross-examined before a jury on every representation you make.

E. It is helpful when the defendant hires his or her own excess attorney who, in response to your settlement offer to the insurance company, also wrote a separate letter demanding the carrier settle this case.

F. When the plaintiff alleges in the bad faith case that the insurance company failed to negotiate reasonably in the underlying claim, then it's possible all of the parties' prior settlement conduct is admissible as proof in the later bad faith case. Remember, under *Goddard*, 173 Or App 633, 640-641 (2001), the duty to negotiate also extends throughout the pendency of any appeal.

Anything occurring during a mediation or settlement conference will not be admissible in the original case, ORE 408. It is an open question how much of the initial mediation might be admissible in the subsequent "bad faith" trial. ORS 36.222 (7) states:

"The limitations on disclosure imposed by this section include disclosure during any discovery conducted as part of a subsequent adjudicatory proceeding, and no person who is prohibited from disclosing information under the provisions of this section may be compelled to reveal confidential communications or agreements in any discovery proceeding conducted as part of a subsequent adjudicatory proceeding."

Cases involving allegations of legal negligence in the underlying case have limited the admissibility of what occurred in the initial mediation in the next generation of cases. *Alfieri v. Solomon*, 358 Or 383 (2015); *Yoshida's Inc. v Dunn Carney Allen Higgins & Tongue LLP*, 272 Or App 436 (2015). To the extent there is a mediation privilege, it appears all parties must waive it. It is an open question whether by filing the later bad faith case, the insured and their assignee have legally waived any privileges concerning mediation.

VI. TACTICS

A. Are there any "smoking guns" in the claim files? Do not settle a "bad faith" claim without first thoroughly reviewing all of the claim files. This includes the local, regional and home office files. If there is nothing for the insurance company to be worried about, then the carrier should not mind showing you the proof. This includes the entire file for all assigned defense attorneys the insurance company hired to represent its insured.

B. Be careful when drafting an assignment. It must not extinguish the assignor's ultimate responsibility in the underlying case. ORS 31.825 "Assignment of cause of action against insurer" provides:

> "A defendant in a tort action against whom a judgment has been rendered may assign any cause of action that defendant has against the defendant's insurer as a result of the judgment to the plaintiff in whose favor the judgment has been

entered. That assignment and any release or covenant given for the assignment shall not extinguish the cause of action against the insurer unless the assignment specifically so provides."

C. *North Pacific Insurance Company v. Wilson Distributing,* 138 Or App 166 (1995) prevents an insurance company from filing a declaratory judgment action to resolve coverage prior to the trial of the underlying case when the "dec action" discovery might be to the policy holder's disadvantage in the pending underlying case.

D. Three Oregon ethics opinions define the relationship and duties owed by the attorney the insurer hired to represent its insured. See, OR Eth. Op. 2005-30 "Conflicts of Interest, Current Clients: Simultaneous Representation of Insurer and Insured," OR Eth. Op. 2005-77 "Conflicts of Interest, Current Clients: Representation of Insured After Investigation or Matter for Insurer," and OR Eth. Op. 2005-121 "Conflicts of Interest, Current Clients: Insurance Defense." In summary, retained counsel ". . . must treat the insured as the 'primary client' whose protection must be the lawyer's 'dominant' concern." (OR Eth. Op. 2005-121). Questions involving defending claims of which some may be covered by the insurance policy and others not is not a problem until the carrier defends under a reservation of rights; then, a thorough conflict of interest disclosure is mandated. (OR Eth. Op. 2005-77) The bottom line is set out in ORPC 5.4 (c): "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." (OR Eth. Op. 2005-30)

E. Distinguish between verdict range and reasonable settlement value. A critical examination of the insurance claim evaluations in the underlying case will reveal that they were always within policy limits. I am sure there are a thousand good reasons why this always

happens, but it continues to amaze me. The insurance company's analysis seems to begin at zero dollars and magically peak out just below the policy limits. No one from the insurance industry would ever agree with the foregoing statement, but it seems to be the *modus operandi*. Once the reserves are set, the carrier then begins to work backwards trying to save a dollar.

F. Is there the possibility the insured may be liable for a kind or type of damages excluded under the contractual terms of the policy? Note at the bottom of page 643 in footnote 1 in *Georgetown III*, the comment is made in passing that the insurance company took the position that not all of the damages sought in the underlying action were covered by the policy, even if they came within its monetary limits. Under a tort theory, duty is a function of foreseeability and the insurance company is responsible for consequential damages.

G. Generally punitive damages are not dischargeable in bankruptcy, meaning they follow the insured to the grave. This is the stuff fiduciary duties are made of.

H. Because Oregon has adopted the "judgment" rule, the amount of the contractual damages flowing from the insurance company's breach in a later bad faith contract action is the amount of the judgment and costs entered in the underlying case, with accrued statutory interest since its entry, as well as any allowable fees necessitated by having to pursue the claims. Once a certified copy of the underlying judgment comes into evidence there is nothing for the jury to decide factually concerning the measure of contract damages. See *Stumpf v. Continental Casualty Company,* 102 Or App 302, 312-313 (1990). The judgment in the underlying case thus becomes a kind of "specials" in the later "bad faith" tort action.

I. After an "excess" verdict the carrier has some tough decisions to make. Remember their duty continues after the entry of a judgment and during the pendency of any appeal. The

carrier must post an appeal bond (Supersedeas Undertaking ORS 19.335 (1)) in order to stay a creditor's remedies during the pendency of an appeal. Defend the judgment on appeal and, when it's affirmed, then you can simply collect on the bond.

All you will probably have at this point are your demand letters, the carrier's response or non-response, and a letter from the insured's "excess" or private counsel demanding that the carrier settle in keeping with your policy limits demand. You may also have been told they wrote to the carrier requesting it to pay your policy limits demand. You also know how your liability and damages proof unfolded in trial, and that you received a verdict and judgement in excess of the policy limits and, hopefully, one that's significantly over the limits.

If the insurer doesn't appeal and chooses not to pay the judgement, the question becomes do you want to consider an assignment pursuant to ORS 31.825. You will want to weigh the advantages of "splitting the cause of action." (See section M on page 21-22 of this paper.) Take the matter to an experienced bad faith lawyer.

I am not aware of any bad faith jury verdict in Oregon in favor of the defense. After *Goddard*, the carriers generally either pay the judgement or file an appeal with a supersedeas bond. Make the defendant file an appeal bond with an A or A+ rated insurance company during the pendency of any appeal. As a practical matter this wraps up most claims.

An insurer's payment of an excess verdict does not defeat an action for bad faith. Such conduct only reduces the amount of the insurer's exposure; however, it does not vitiate previous bad faith conduct or defeat a cause of action for the policy holder's emotional distress and maybe even punitive damages. *Hulett v. Farmers Ins. Exch.*, 12 Cal. Rptr. 2d 902, 908 (1992).

In the *Goddard* case, we asked for no emotional damages for the policyholder John Munson. This was a strategic decision. We felt Mrs. Goddard was an excellent witness, and it was the Farmer's policy holder, John Munson, who had killed her son, and was later convicted of criminally negligent homicide. He also had, by his own admission, lied when providing prior statements to Farmers concerning whether he had Mrs. Foley's permission to be driving her car when he had been drinking alcohol. Proof at trial was that Munson's blood alcohol content at the time of the collision was approximately .23 percent. He obviously was not a sympathetic client, yet because Mrs. Goddard was standing before the jury based on an assignment from Munson of any claim he may have had against Farmers, we needed to minimize Munson's prominence during the trial. The only general damages proof we placed in evidence was the judgment in the underlying wrongful death case. The jury found Munson 20 percent at fault under Farmers' allegation of comparative fault. Remember, any comparative fault does not reduce the amount of punitive damages the jury may award, which was the real issue in the later bad faith trial.

J. Subpoena the assigned defense counsel's annual billings with this particular carrier for past years. This is relevant to prove the bias, interest and motive of the assigned defense lawyer(s) when you later argue that the lawyers the insurance company selected and paid for put the interests of the carrier ahead of the policy holder they were assigned to defend, who was the "real client" to whom they owed their undivided loyalty. Carefully review the reserves the company set on the case as some evidence of "bad faith." See *Kabatoff v. Safeco Ins. Co.,* 627 F 2d 207 9th Cir. (1980).

K. There may be a claim against the assigned defense counsel for legal negligence which can be combined with an allegation of agency to increase opportunities for recovery. The

problem is you're now bringing in another defense attorney and providing the defense a second opportunity for jury selection, opening, direct, cross, and closing. Not good. You're better to make allegations of negligence (perhaps grounded in ethical violations) and agency without naming the attorney(s) or their law firm individually. See, *Stumpf v. Continental Casualty Co*., 102 Or App 302, 794 P2d 1228 (1990). You can assume the defense attorney the carrier selected to represent their insured is legally the carrier's agent. This agency relationship should "open the door" and render everything in the company and assigned defense counsel's files admissible, and therefore discoverable. Once you receive an assignment from the defendant, obtain a release from the original defendant in your favor, which you then tender to the carrier.

L. When conducting discovery, look carefully for evidence of conflicts of interest between the carrier and its policyholder. Some conflicts are structurally inherent in the nature of the relationship when the policyholder is exposed for an excess verdict. Juries are sensitive to policyholder's vulnerabilities.

M. There are clear advantages to "splitting" the bad faith cause of action. *Stumpf v. Continental Casualty Co*., 102 Or App 302, 794 P2d 1228 (1990) involves the insured assigning the claim for the underlying judgment while reserving his claim for emotional and punitive damages for himself. The benefits are there are two plaintiffs' lawyers at counsel table thus resulting in two jury selections, openings, directs, cross-exams, and closings. Two lawsuits may be filed but they must be consolidated for trial in order to avoid multiplicity of suits. The *Stumpf* decision affirmed that "[t]he fact that plaintiffs outnumbered defendant does not constitute ground for reversal." *Stumpf v. Continental Casualty Co*., 102 Or App 302, 794 P2d 1228 (1990).

N. Expert witnesses are important. Find high quality attorneys experienced in the handling of insurance defense matters. One of plaintiff counsel's biggest challenges is locating experts who have previously represented insurance companies and are now willing to crossover and testify against an insurance carrier.

O. Be mindful of the collateral source rule. ORS 18.580. File a motion in limine to exclude evidence the plaintiff in the underlying case received money from any other source. The defendant will try to reduce the amount of the plaintiff's judgment for general damages in order to impact the multiplier when there are punitive damages and a due process question is raised. *Parrott v. Carr Chevrolet, Inc.* 331 Or 537, 562, 17 P3d 473 (2001).

P. As a generalization, everything in the company's and assigned attorney's files should be admissible under ORE 404(3) in order to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Q. Most every insurance company has written internal cost containment guidelines that assigned defense counsel are expected to follow. These may include such matters as not ordering depositions typed up until 60 days before trial, or not routinely filing Rule 21 motions because they are viewed to be inefficient and non-productive or limiting depositions. They were trying to "pinch pennies" and save a buck rather than permitting the assigned lawyer to be "thorough and prepared." ORPC 1.1.

R. Use insurance company jingles such as:

- "Nationwide is on your side."
- "Blanket of protection."
- "Like a good neighbor, State Farm is there."

- "Aetna is glad they met ya."
- "You know us."
- "You're in good hands with Allstate."

S. I see no reason under Oregon law in third-party claims to allege the breach of an "implied covenant of good faith and fair dealing." You get everything you need under existing law. For a discussion of this, see Chapter 2.07 "The Implied Covenant of Good Faith and Fair Dealing" (pages 2-23) in *Bad Faith Actions---Liability and Damages*, 2nd Ed. By Stephen E. Ashley.

T. Choice of laws - We become siloed into our own state's bad faith laws without appreciating this is an area ripe for strategic choice of laws. It might be the state of the insurance company's home office, the state where the policy was purchased, the residence of the consumer who bought the policy, or perhaps the state where the loss occurred. Each can have benefits and burdens given the facts of your case and the laws of the different states. As an example, 22 states authorize punitive damages, etc. Some states have first party bad faith, others don't. Some policies have favorable terms on choice of laws. Carefully consider all your alternatives.

Another situation in which counsel might consider "choice of laws" is when there is an option to file in state or federal court. Oregon law does not allow remittitur; however, federal courts in Oregon apply remittitur to excessive verdicts. The only instance in which a federal court in Oregon will follow state law concerning remittitur is in diversity cases. *See, VanValkenburg v. Oregon Dept. of Corrections*, 2017 WL 532950, *5 (Or. Dist. Ct. 02/08/2017).

U. Stipulating to a judgment - An alternative to trying the underlying case is collaborating with the insured through their private counsel and arriving at a stipulated or agreed

upon judgment. This approach has mixed benefits and burdens.

The insured is insulated from the rigors and trauma of the underlying trial. Remember, even if there's a later assignment of the insured's claims, technically your "plaintiff" is still the aggrieved policy holder or insured. You, of course, have sped up the proceedings because the stipulated judgment now allows you to proceed directly to filing the bad faith claim.

When an assignment is taken from a stipulated judgment rather than a jury verdict, the defense can still litigate the reasonableness of the value or face amount of the judgment in the later bad faith trial.

V. Recitals in any assignment or stipulated judgment - This is a real opportunity to literally create evidence in the later bad faith trial. Think about it. If the insurance policy has a provision prohibiting an assignment, recite a long string of factually accurate recitals showing how the carrier breached its contract and/or fiduciary duty to its insured.

Once an insurance company has breached its contractual duties to its insured, the rule is it can't later defend on a provision in the same contract barring an assignment.

Be creative in what you select to recite. Load up your document. When you're through, ask yourself: "Would the defense want this ("speaking") document offered into evidence in the later trial?" The answer should be no.

VII. PUNITIVE DAMAGES

A. Three Oregon cases discussing awards of punitive damages in "bad faith" claims contain helpful language. In *Groce v. Fidelity General Insurance Co.,* 252 Or 296, at 303-304 (1969) the court stated:

> "Long before the cases were filed, the agents of the defendant knew that the damage claims were not the kind that would, if tried, would be likely to result

> in verdicts within the insurance limits. Notwithstanding the high probability of verdicts far in excess of policy limits, there is no evidence that the Defendant ever consulted the insured or considered any interest he might have had in avoiding judgments in excess of his insurance coverage. On the contrary, affirmative evidence showed that the Defendant, at least through the mouth of its adjuster, reflected an arrogant disdain for the right of its bankrupt insured, and was willing to use the insured's insolvency as additional leverage in an attempt to settle the claims for less than the meager limits of the policy. The adjuster, who had learned from his own investigation that the insured was intoxicated at the time of the accident and who knew there was virtually no defense on the issue of fault, wrote to his supervisor, 'In this adjuster's experience, he has never paid a policy limit to date, and does not intend to start with the subject claim.'" (Emphasis added)

See also *Farris v. United States Fidelity and Guaranty Co.,* 284 Or 453 at 455 (1978), a pre-*Georgetown* case that did not allow tort claims, or therefore punitives. The insurance company's file apparently showed that the claims manager wrote, "Let's bluff it out - we can always buy out at a later date." (Emphasis added.) See Justice Lent's language in his dissent in *Farris* at page 481, arguing that punitive damages should have been allowed in this case because the conduct to be deterred was that of a liability insurer refusing in bad faith to defend its insured by "bluffing it out." See also the favorable language in *Georgetown III,* 113 Or App 641 at 644 (1992).

B. In *Williams v. Philip Morris, Inc*., 182 Or App 44 at 52 (2002), the defendant made (mis)representations to the general consuming public concerning the safety of their cigarettes. It isn't much different when an insurance company like Farmers markets itself saying they are "Fast, Fair and Friendly" or that "America Can Depend on Farmers" and your proof is to the contrary.

VIII. ARGUMENTS

A. It is generally easy to have a plaintiff whom the jury can relate to when suing on an assignment taken from the original defendant in the underlying case. Yes, it is true their original wrongdoing caused someone else serious injury, but that is exactly the reason they purchased insurance. Because the insurance company chose to "go for broke," he or she is now strapped with a large judgment they cannot afford to pay.

B. Jurors understand that an institution makes a profit by taking in more money than it pays out; therefore, the less it pays out the more profit it will make. The motivation any insurance company has to compromise its duties to its insured is obvious. Insurance companies traditionally "lose" money when you compare the total dollars paid out, compared with the premium dollars they take in. Their profits are in the "time value" of money and the investment they make when holding onto the collected premiums before they ultimately pay them out.

C. Argue that the insurance company is asking this jury to "second guess" the first jury's verdict rendered in the underlying case. Able defense counsel can always generate an explanation for why the jury "went crazy with the big numbers," thereby suggesting the first verdict was a big surprise. Respond that this argument slurs the integrity of the entire jury system, and is a slap in the face of the citizen jurors who take the time to serve on the second "bad faith" case. You can also point to your initial demand letter that predicted a significant verdict.

D. In a sense, many bad faith defense arguments are that the insured simply did not buy enough insurance. After all, if their insured was going to have a really big accident, then he certainly should have had the foresight to also go out and buy a really big policy!

E. Argue that even when an insurance company pays the policy limits, they may arguably lose a little, but if they do not and they are wrong, then the insured loses everything.

F. The defendants always argue that the underlying verdict was a fluke, and that what is really going on is hindsight. Respond that the verdict was affirmed by not only the trial judge when he or she denied all defense post-trial motions, but also that the appellate judges of this state agreed in affirming the underlying judgment when the defense appealed the matter. This includes both the Court of Appeals when they affirmed the underlying judgment, again when they denied the petition for rehearing, and finally the Supreme Court when they denied the defendant's petition for review. The insurance company has tried to tell the trial judge and appellate courts of this state that the first jury's verdict was a fluke. Apparently, because no one has yet agreed with them, they are once again back on their knees with the same tired arguments.

IX. ATTORNEYS' FEES

A. The plaintiff should plead conjunctive theories of liability, in both contract and tort. This is because ORS 742.061 permits an award of attorneys' fees. This is what was done in the *Georgetown* case. Both theories went to the jury with a special verdict form. See *Goddard v. Farmers Ins. Co.,* 177 Or App 621 (2001).

B. Keep time records because they are important proof in the later attorney's fee hearing on the contract claim. Expect any attorney's fees to be awarded at an hourly rate, as opposed to a contingency fee; however, this is a matter of judicial discretion. *See Stumpf* at 102 Or App 302, 313-314 (1990) where a contingency fee award was approved for both plaintiff parties who "split" the causes of action.

X. FARMERS' "POOLING" AGREEMENT

Farmers Insurance Company of Oregon, Inc. is a paper entity that owns no physical assets and has no employees. Under a "subscription agreement," Farmers of Oregon contracts the evaluation, negotiation and settlement of all policies it sells to Farmers Insurance Exchange. Eighty percent of Farmers of Oregon's stock is owned by Farmers' Exchange and 20 percent by Truck Insurance Exchange, another one of Farmers' companies. Under the terms of the pooling agreement, note that Farmers of Oregon only pays 4.28 percent of any judgment entered against it. In the *Goddard* case, the defense tried to exclude the pooling agreement as being insurance under ORE 411. The court disagreed. *Goddard v Farmers Ins. Co. of Oregon*, 202 Or. App. 79, 81, 120 P.3d 1260, 1262 (2005). The pooling agreement is not insurance, it is proof of what the defendant is.

Pooling agreements are also admissible on the issue of punitive damages to show the amount necessary to punish both the defendant, and others similarly situated.

XI. THE *GODDARD* ODYSSEY

Goddard v. Farmers Ins. Co., 202 Or App 79,120 P3rd 1260 (2005), modified in part, 203 Or App 744, 126 P3rd 682 (2006) came out of our office. The litigation process spanned twenty-two years involving seven appeals in the underlying case, three declaratory judgment actions on two potential $100,000 policies, and then three more in the bad faith claim. I have included a separate section labeled as "XII. Sample Jury Instructions" that includes instructions that were used in the *Goddard* case. The underlying case was a wrongful death claim resulting in a January 1990 judgment for $863,274 in Marion County.

On October 27, 1987, John Munson turned his vehicle directly in front of Marc Goddard's oncoming pickup truck, killing Goddard. The defendant Munson was convicted of criminally negligent homicide. Civil liability was therefore obvious. The decedent Goddard was a 19-year-old with a checkered past who was entering college.

Munson was potentially covered by two $100,000 Farmers policies. The first policy was his own, the second Farmers policy was written to his friend Foley, who loaned Munson the pickup truck he was driving the night of the collision. In June 1988, the wrongful death action was filed. Farmers defended Munson in the civil wrongful death claim under a reservation of rights. Munson had no assets beyond the policies.

In December 1988 Farmers filed a declaratory judgment action (hereinafter referred to as "dec action"), in an attempt to determine the coverage, if any, under the two Farmers policies. Remember this was pre-*North Pacific Ins. Co. v. Wilson's Distributing* 138 Or App 166 (1995). In the dec actions, Farmer's contested under Foley's policy whether Munson was driving Foley's pickup with her "permission" and, under Munson's policy, argued there was no coverage because he had the "regular and frequent" use of Foley's truck. The Goddard estate argued in the dec actions that both policies applied, and further that the two policies "stacked" to provide $200,000 in total coverage.

Trial in the underlying wrongful death claim occurred in late January 1990. The jury returned a plaintiff's verdict for $863,274. After entry of the wrongful death judgment, the plaintiff obtained an assignment (then ORS 17.100) from Munson of any rights he had against Farmers. The bad faith claim was filed in May of 1990.

Meanwhile, the Court of Appeals affirmed the judgment in the underlying wrongful death claim. 108 Or App 342 (1991). Farmers obtained a judicial stay of the bad faith claim pending final resolution of the dec action, arguing that if there was no coverage under either policy, then as a matter of law, there could be no bad faith claim.

The dec actions were tried three times: in 1991 (reversed - 127 Or App 413 (1994), in 1995 (reversed - 145 Or App 512 (1996)), and in 1998. The ultimate result was a finding that Munson had been driving Foley's pickup truck with her permission and, therefore, there was coverage under her Farmers policy; however, there was no coverage for Munson under his own policy because he had the "regular and frequent use" of Foley's pickup at the time of the collision.

Once coverage was finally found under the $100,000 Munson policy, the judicial stay was lifted in the bad faith claim. Prior to trial, the court granted the defendant's motion for summary judgment, concluding that, even if Farmers had offered the $100,000 (which it was finally determined they owed), there was no evidence that the plaintiff would ever have accepted it. Therefore, even if Farmers had never offered the $100,000, there could be no bad faith because the element of "causation" was missing.

The Court of Appeals reversed this ruling. 173 Or App 633 (2001). In a later Court of Appeals decision, the appellate court also ruled there would be no attorney's fees because the plaintiff's claim had proceeded only in tort, and not on the contract. *Goddard v. Farmers Ins. Co.,* 177 Or App 621 (2001). Remember, in April 2002, a Multnomah County jury awarded the plaintiff $20,700,000 in punitive damages.

From this tortured history the 2001 *Goddard* decision clarified the prominence of ORS 746.230 as a basis for liability, and that an insurance carrier's duty to their insured extends not

just through trial and entry of judgment, but also throughout the period of any appeal. This duty, of course, includes the responsibility to negotiate. The court stated ". . . a liability insurer owes an 'even greater duty' to its insured following entry of judgment." *Goddard*, 173 Or App at 641.

Once an excess judgment is entered in the underlying case, what is the carrier's exact duty during the pendency of any appeal? Is it, as the defense claims, to only tender the policy limits, or as the plaintiff argues, to act "reasonably" and pay more than the policy because those are the known damages that have resulted from the carrier's earlier breach of its duty? This issue is raised by way of defense rule 21 motions to force the plaintiff to plead "causation," i.e., that they would have settled for policy limits if they would have been offered during the pendency of the appeal. The problem with this is by this time the plaintiff has already tendered many offers to settle for the policy limits. Now that the judgment in excess of the policy has occurred, the plaintiff understandably requests that they pay the full judgment that resulted from the carrier's prior negligence.

In the final *Goddard* appeal, the plaintiff argued that the carrier's duty is always to act "reasonably," and given the carrier's prior breach of its duty to settle, the company has now "bought" the entire amount of the underlying judgment. See, *Goddard v. Farmers*, 173, Or App 633, 642, 22 P3d 1224:

> "Following entry of judgment in excess of its policy limits an insurer must continue to give equal consideration to the interests of its insured. The insurer must act as if it alone was liable for the amount of the entire judgment, and the reasonableness of the insurer's actions after judgment should be viewed in this context."

The 41 pages long 2005 decision chronicles many, but not all, of the facts that gave rise to the jury's award of $20,718,576 and the factual and legal analysis leading to the Court's reduction

of the punitives down to a 3:1 ratio with the general damages. See, *State Farm Mut. Auto. Ins. Co. V. Campbell*, 538 U.S. 408, 123 S. CT. 1513, 155 L. Ed. 585 (2003). In section II of the decision, the court reviews the 17-year history of the litigation up to that point. In its 2006 supplemental decision, modified in part, 203 Or App 744, 126 P3rd 682 (2006), the Court refined its analysis of prejudgment interest for the limited purposes of assessing the punitive damages "ratio."

XII. SAMPLE JURY INSTRUCTIONS

Prepare a separate set of instructions for each juror. Also, request that the jury be charged prior to closing arguments. ORCP 58 B [8]. Preparing a separate set of written instructions for each juror takes a little more work, but it's worth it. The following instructions are taken from the *Goddard* case. I have set forth the proposed instruction, then its authority, and finally have included a comment section where I discuss the strategies and arguments supporting the instruction.

PLAINTIFF'S JURY INSTRUCTION NO. 1

John Munson previously assigned all of his rights, including the right to file this lawsuit against Farmers Insurance Company, to Margie A. Goddard, as the personal representative of the Estate of Marc E. Goddard. This is legally proper and thereby gives Margie Goddard, as the personal representative of the Estate of Marc E. Goddard, the right to bring this lawsuit against Farmers Insurance Company.

AUTHORITY: ORS 31.825

Comment: Jurors have trouble understanding who the "real" plaintiff is. This instruction answers their question and legitimizes the assignment.

PLAINTIFF'S JURY INSTRUCTION NO. 2
Duties of a Fiduciary

Under Oregon law, an insurer, that is an insurance company, is in a fiduciary relationship to its insured. A fiduciary is one who is in a position of trust and confidence with another, usually called a principal, while acting for and on behalf of the other.

A fiduciary is legally bound in equity and good conscience to act in good faith and for the best interests of the principal. A fiduciary's loyalty must be to its principal.

Any conduct that is intended to place a fiduciary's own interests or the interests of any other party ahead of the best interests of the fiduciary's principal is a breach of the fiduciary's duty.

AUTHORITY: *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97, 110, footnote 7 (1992)

Comment: While the cause of action is in negligence, this favorable language characterizing the relationship as fiduciary goes a long way toward preempting any comparative fault allegations.

See also, UCJI 50.01 *Fiduciary Duty* Defined, UCJI 50.02 Breach of Fiduciary Duty, and UCJI 50.03 Breach of Fiduciary Duty---Self-Dealing or Conflict of Interest.

PLAINTIFF'S JURY INSTRUCTION NO. 3

I instruct you that it is the law of the State of Oregon that no insurer or other person shall commit or perform any of the following unfair claim settlement practices.

(a) Misrepresenting facts in settling claims;
(b) Failing to acknowledge and act promptly upon communications relating to claims;
(c) Refusing to pay claims without conducting a reasonable investigation based on all available information;
(d) Failing to affirm or deny coverage of claims within a reasonable time after completed proof of loss statements have been submitted; and,
(e) Not attempting in good faith, to promptly and equitably settle claims in which liability has become reasonably clear.

AUTHORITY: ORS 746.230 (1) (a), (b), (d), (e), (g).

Comment: This is at the heart of the plaintiff's case. Begin your liability analysis here. Your pleadings, argument and instructions should be centered around the demand letter and this law.

PLAINTIFF'S JURY INSTRUCTION NO. 4

Oregon has various laws concerning the conduct and practices of insurance companies. You may consider whether the defendant, or any of their agents, violated one or more of these insurance laws in determining whether the defendant or their agents were negligent.

AUTHORITY: *Axen v. American Home Products Corp.,* 158 Or App 292, 305-307 (1999)

Hagan v. Gemstate Manufacturing, Inc., 328 Or 535, 538-540 (1999)

Volt Services Group v. Adecco Employment Services, 178 Or App 121, 129 – 131 (2001)

PLAINTIFF'S JURY INSTRUCTION NO. 5

In conducting the defense of a claim against their insured, an insurance company must use such care as would have been used by an ordinary, prudent insurance company with no policy limits applicable to the claim against their insured. The defendant insurance company was negligent in failing to settle if an opportunity to settle existed, if in choosing not to settle it was taking an unreasonable risk. A risk is deemed unreasonable if it involved chances of unfavorable results out of reasonable proportion to the chances of favorable results.

AUTHORITY: *Maine Bonding v. Centennial Insurance Company*, 298 Or 514, 518-519 (1984)

Comment: This is the "gold standard" statement of an insurance company's duty.

PLAINTIFF'S JURY INSTRUCTION NO. 6

An insurance company's duty to defend is independent of, and not limited by, its duty to pay and indemnify. The duty to defend requires that the insurance company exercise reasonable care to protect its insured's interests, in addition to its own. This obligation requires that the insurance company negotiate with a view to settling the case within policy limits.

AUTHORITY: *Maine Bonding v. Centennial Insurance Company*, 298 Or 514, 519 (1985)

Spray v. Continental Casualty Co., 86 Or App 156, 161 (1987)

Comment: The last sentence declares that the carrier has an affirmative duty to its policyholder to settle the case if possible. This is an ongoing duty and continues after the trial, entry of judgment, and during any appeals. Thus, the carrier cannot sit on an earlier offer if events have changed, such as the trial has gone badly. See *Spray* at Page 161, footnote No. 4.

PLAINTIFF'S JURY INSTRUCTION NO. 7

An insurance company may be negligent in unduly delaying making an offer, or counteroffer, to settle.

AUTHORITY: *Maine Bonding v. Centennial Insurance Company*, 298 Or 514, 524-525 (1984)

> "A liability insurer is not necessarily free from excess liability because the claimant made no offer to settle within the policy limits. Due care may require an insurer to institute settlement negotiations. The insurer's conduct in conducting settlement negotiations 'must be considered with reference to the context in which the failure or delay occurs.'"

PLAINTIFF'S JURY INSTRUCTION NO. 8

If you find that Farmers' negligence resulted in the judgment of February 5, 1990, against their insured John Munson for $863,274, then Farmers must act as if it alone were liable for the amount of the entire judgment. The reasonableness of the insurer's actions after the entry of any judgment should be viewed in this context.

AUTHORITY: *Goddard v. Farmers Ins. Co.,* 173 Or App 633, 641 (2001)

PLAINTIFF'S JURY INSTRUCTION NO. 9

If the defendant insurance company failed to exercise the care of an ordinary prudent insurer with no policy limits applicable to the claim, it may be liable for the excess judgment entered against the insured, regardless of the amount of the policy limits, the amount of the excess judgment, or whether the policy provided coverage for punitive damages.

AUTHORITY: *Spray v. Continental Casualty Company,* 86 Or App 156, 162 (1987)

Comment: Under a tort theory, there are no contractual limitations. If the case could have, and should have been settled, then it is no subsequent defense that some aspects of the resulting judgment included matters that were contractually excluded by the policy.

PLAINTIFF'S JURY INSTRUCTION NO. 10

I further instruct you that the Marc E. Goddard estate may be excused from failing to accept an otherwise reasonable offer by Farmers, if the defendant through its agents, misrepresented facts or policy provisions to the estate's lawyers, and those lawyers then reasonably relied on Farmers representations in declining such offers by Farmers.

AUTHORITY: *Goddard v. Farmers Ins. Co.,* 173 Or App 633, 641 (2001)

Comment: ORS 746.230 (1-a) declares that no insurer may misrepresent either facts or policy provisions. This is a good place to consider alternative pleadings under ORCP 16-C. The plaintiff would have accepted a timely offer of policy limits, and alternatively, if he or she would not have, it was because of misrepresentations made by the insurance carrier's representatives. See *Goddard at 640,* footnote No. 5.

PLAINTIFF'S JURY INSTRUCTION NO. 11
Constructive Knowledge

I instruct you that the knowledge of an agent is legally imputed to its principal.

Comment: This standard instruction is useful when the ultimate decision maker at the regional or home office did not know everything the adjusters in the field knew at the branch office or anything the defense counsel may have known but not communicated.

PLAINTIFF'S JURY INSTRUCTION NO. 12

I instruct you that at all times James Sellers, MaryKay Hendrickson, Randy Voth, Dave Strand, Doug Heatherington, Dick Younge, Don McClure, Martin French, Frank Soldano, Stan Benion and Edward Austin Morris were employees of the Farmers Insurance Exchange.

MaryAnn Selzer and Don DeWolfe, signatories to the Farmers Insurance Company of Oregon policies issued to John Munson and Helen Foley, were employees of Farmers Group, Inc.

Farmers Group, Inc., Farmers Insurance Exchange, and the defendant Farmers Insurance Company of Oregon are all separate legal entities.

Farmers Insurance Group is not a legal entity. It is a federally registered service mark.

Comment: Many insurance companies are not ordinary corporate creatures. Farmers Insurance Company of Oregon has no employees or physical assets. It is party to a pooling agreement of wholly owned Farmers Companies that all reinsure each other. They all contract with the Farmers Insurance Group for the investigation, evaluation and negotiation of all their claims. The agents within the geographical confines of the state say Farmers Insurance Company of Oregon sell policies with limits of $100,000, yet the adjusters in the Portland Regional office have only $50,000 in authority. Thus, the settlement of larger claims, and the filing of all declaratory judgment actions, all must be referred on to Farmers' home office in Los Angeles.

PLAINTIFF'S JURY INSTRUCTION NO. 13

An insurance company may be civilly liable for the actions of its agents, including the attorneys it selects to represent its insureds.

AUTHORITY: *Stumpf v. Continental Casualty Co.*, 102 Or App 302, 308 (1990).

Comment: This should be used when the assigned defense attorney arguably places the interest of the carrier ahead of the insured, the "real client." Most defense counsel have long standing relationships with carriers, and earn substantial sums from carriers over the years. These numbers should be both discoverable and admissible to impeach the attorneys' bias, interest and motive.

PLAINTIFF'S JURY INSTRUCTION NO. 14

The duties of both the defendant insurance company and the lawyers they select to protect the interests of their insureds are not reduced or altered by the fact that their insured may have retained their own counsel.

AUTHORITY: *Cathay Motorway*, 582 F Supp 650, 659 (1984)

Comment: Use when the insured has hired his or her own excess attorney, and the carrier tries to deflect their contractual responsibilities onto the excess attorney.

PLAINTIFF'S JURY INSTRUCTION NO. 15

If you find the defendant reasonably relied on good faith evaluations of the attorneys it selects, then you may consider such relevance as evidence of defendant's exercise of due care.

If, however, you find the defendant attempted to affect the opinions or services of such attorneys, or chose to ignore their recommendation, then you may also consider such evidence as a lack of due care toward its insured.

AUTHORITY: *Stumpf v. Continental Casualty Company,* 102 Or App 302, 308 at footnote No. 8 (1990)

Bohemia Inc. v. Home Insurance Company, 725 F. 2d 506, 511 (1984).

Comment: Request this when there is evidence the carrier failed to follow the advice of its own lawyer.

PLAINTIFF'S JURY INSTRUCTION NO. 16
UCJI No. 75.02 – MODIFIED PUNITIVE DAMAGES

If you decide to award punitive damages, you may properly consider the following items in fixing the amount:

(a) The likelihood that serious harm would arise from the defendant's misconduct;
(b) The degree of the defendant's awareness of that likelihood;
(c) The profitability or potential profitability of the defendant's misconduct;
(d) The defendant's motive;
(e) The duration of the misconduct and any concealment of it;
(f) The attitude and character of the defendant's conduct upon discovery of the misconduct;
(g) The number and position of employees involved in causing or covering up the misconduct;
(h) The sum of money that would be required to discourage the defendant and others similarly situated, from engaging in such conduct in the future; and
(I) The income, assets and financial condition of the defendant Farmers Insurance Company of Oregon.

AUTHORITY: *State ex rel Young v. Crookham* 290 Or 61, 618 P2d 1268 (1980)

> "The finder of fact must determine what punitive damages, if any, to award based on the proper premise of deterring future similar misconduct by the defendant or others. To this end, a number of factors may be relevant, including the seriousness of the hazard to the public, the attitude and conduct of the wrongdoer upon learning of the hazard, the number and position of employees involved in causing or covering up the misconduct, the duration of the misconduct and/or its cover-up, the financial condition of the wrongdoer, and prior and potential punishment from similarly situated plaintiffs or other sources."

Comment: Depending on your facts, the *Crookham* decision presents language that may provide better material for a punitive damages instruction than the standard UCJI No. 7502.

APPENDIX

PROVING BAD FAITH (2)

Items to request in discovery to prove bad faith:

1. Insurance policies
   a. Claim manuals and memorandums
   b. Claim department training materials
   c. Claim department forms
   d. Quality assurance manuals and audit procedures
2. Evidence of a pattern of wrongful conduct
   a. Other claim files involving similar claims
   b. Department of Insurance consumer complaints
   c. Department of Insurance Market Conduct Examinations
   d. Internal databases---Explanation of Benefit forms
   e. Files of preferred customers
3. Claim payment goals/incentive plans
   a. Reduction in average claim costs
   b. Savings generated by fraud unit
   c. Performance measurements
      (1) Performance evaluations
      (2) Incentive plans
      (3) Operation costs
      (4) Management conference handouts/presentations
      (5) Communications with insurance rating companies
4. Liability of affiliated companies
   a. Form A Registration statement
   b. Form B Registration statement
   c. Management contracts
   d. Service/claim handling agreements

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2 This list was provided by Arizona attorney Richard W. Langerman, 4506 N. 12th St., Phoenix, AZ 85014 (602) 240-5525

SAMPLE OF AN OREGON BAD FAITH DEMAND LETTER

Date

Via U.S. Certified Mail Return Receipt Requested and Email

Defense Attorney
Address

Re: Case Name/Number

OFFER TO SETTLE FOR POLICY LIMITS IN EXCHANGE FOR A COMPLETE RELEASE

Dear Counsel:

As you know, we represent the plaintiff in the above-captioned case. I am writing to offer to settle plaintiff's claims against (Defendant) for the available insurance policy limits.

We have reviewed the insurance information provided by (Defendant). Our analysis of this information indicates that the total insurance coverage available to protect (Defendant) is $_____ (set out all policies and limits applicable to claim).

(State all relevant and compelling facts)

There is abundant evidence in this case to prove that (Defendant) was negligent in his actions while driving and that negligence catastrophically injured (Plaintiff). This evidence includes (list evidence).

Although commonsense would dictate that (Defendant) is responsible for the crash that catastrophically injured (Plaintiff), (Defendant) refuses to acknowledge liability. A _____ County jury will reject this defense and punish those who offer it.

Given this background, a verdict against your client in favor of the plaintiff is highly probable. Plaintiff suffered serious damages and a jury award against (Defendant) will exceed available insurance coverage.

Under Oregon law, insurance companies are charged with a fiduciary duty to protect their insured from any excess judgment. *Goddard v. Farmers Insurance Co. of Oregon*, 173 Or App. 633, 637, (2001). This duty often includes the obligation to affirmatively seek settlement and make inquiries to determine if settlement is possible within the policy limits. *Maine Bonding & Casualty Co. v. Centennial Ins. Co*., 298 Or. 514, 519 (1985). The legal standard insurance companies must meet is clear:

> "In an action for failure to settle within the policy limits, the insurance company is charged with acting in a fiduciary capacity as an attorney in fact representing the insured's interest in litigation." *Farris v. United*

> *States Fidelity and Guaranty Company*, 284 Or 453, 460, 587 P2d 1015, 1018-1019 (1978) (underlining added).
>
> "With respect to settlement and trial, an insurance company must, in the exercise of good faith, act as if there were no policy limits applicable to the claim and as if the risk of loss was entirely its own." *Eastham v. Oregon Automobile Insurance Company*, 273 Or 600, 607, 540 P2d 364, 367 (1975) (underlining added).
>
> "In determining whether to settle claims against the insured, the insurer must act as if it were liable for the entire judgment that might eventually be entered against the insured." *Kuzmanich v. United Fire and Casualty Company*, 242 Or 529, 532, 410 P2d 812, 813 (1966) (underlining added).

I also note that, where an insurer breaches its insurance contract by unreasonably failing to settle, the insurer is responsible for the full amount of any judgment ultimately entered against the insured, even if that judgment exceeds the policy limits. *Stumpf v. Continental Casualty Company*, 102 Or App 302, 312-314, 794 P2d 1228, 1234-1236 (1990). Under this rule, any award against (Defendant) will be consequential damages in any later claim against his insurer(s).

Additionally, *Georgetown Realty v. The Home Insurance Co.*, 313 Or 97, 831 P2d 7 (1992), provides that an insured may recover compensatory and punitive damages, as well as attorneys' fees, in a tort action against its insurer where the insurer has breached its fiduciary duties to the insured by unreasonably failing to settle within policy limits.

(Defendant) purchased the applicable insurance policies. (Defendant's) insurer(s) owe (Defendant) fiduciary duties. Indeed, (Defendant) has potential claim(s) against any insurer that acts in bad faith by unreasonably declining to settle within policy limits.

In the probable event we obtain a judgment against (Defendant) in excess of the policy limits of $_____, we will aggressively pursue all available creditors' remedies, including any actions to set aside attempts by insurers to buy any future "bad faith" claims held by the insured.

Plaintiff writes this letter outside of the mediation process, so it is not subject to any privilege or other cloak of confidentiality. This letter will serve as evidence in any subsequent "bad faith" litigation.

This offer will remain open until (Date) at (Time (PST)) at which time it EXPIRES BY ITS TERMS if we have not received a response. Any request for an extension of time must be in writing. TIME IS OF THE ESSENCE.

Best regards,

(Plaintiff's Law Firm/Attorney)