

COLE | WATHEN | LEID | HALL

Insurance Law Newsletter

NOVEMBER 2015

Volume 5, Issue 11

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Jury Finds Seattle Fire Department Battalion Chief Commits Arson

In November, 2011, Mr. Schmidt and Ms. Demeter made a claim to American Commerce for a total fire loss on their family home. Shortly after initiating its claim investigation, American Commerce began to uncover what eventually turned out to be evidence of fraud and arson by Mr. Schmidt.

In August 2011, Mr. Schmidt and Ms. Demeter filed suit against American Commerce asking the court to declare that there is coverage and that American Commerce committed the tort of Bad Faith, violated the Consumer Protection Act, and Violated the Insurance Fair Conduct Act.

After a five-week, jury trial, which commenced on September 8, 2015, the insureds requested that the jury award them nearly \$8,000,000 plus attorney fees; they also asked the court for trebling of the jury award under the Insurance Fair Conduct Act.

The jury found that the fire loss was caused by Mr. Schmidt intentionally setting his family home on fire and American Commerce obtained a full defense verdict.

We believe that this is the largest residential civil arson finding in the State of Washington

Rory W. Leid, III, assisted by Arezou Arefi-Afshar, represented American Commerce Insurance Company in the insurance bad faith lawsuit, *Schmidt v. American Commerce Insurance Company*, KCC No.: 11-2-28529-4.

MAJOR IFCA RULINGS

▪ Loss Reserves are Protected as Work Product in IFCA Case

In pre-suit events, the insured gave American Family formal notice via a 20 day IFCA Notice, that unless American Family paid the insured's claim within 20 days, the insured would bring a suit against the insurer for bad faith refusal to pay the claim. This notice was served by the insured on American Family in September of 2012, months prior to the insured's December 2012 demand for UIM arbitration, the results of which ultimately led to the insured filing this bad faith lawsuit.

In the subsequent bad faith litigation which followed, the insured moved to compel discovery of the reserves that American Family set on the claim after receiving the IFCA Notice, arguing that setting the reserves was business in nature, because state law required the insurer to maintain reserves. American Family took the position that the reserves set by American Family after it was put on notice of potential litigation by the insured's IFCA notice necessarily included a "calculation of risk predicated upon the claim being placed into suit." The district court denied the plaintiff insured's motion to compel and, in so doing, applied the "because of" test. Under this test, dual purpose documents are deemed prepared because of litigation if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."

The district found that, "taking into account the totality of the circumstances, the loss reserve documents 'can be fairly said to have been prepared or obtained because of the prospect of litigation.'" This is because, "individual loss reserve documents created once an insurer anticipates litigation are not 'created in [a] substantially similar form' to those created in the absence of impending litigation".

Rory W. Leid, III,
assisted by Kimberly
Larsen Rider,
represented American
Family Insurance
Company in the
insurance bad faith
lawsuit, *Theresa L.
Schreib v. American
Family Mut. Ins. Co.*,
W.D. Wash., No.: C14-
0165JLR.

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■ UIM Arbitration Award Not Proper Measure of IFCA Damages

In the underlying action, the insured demanded UIM arbitration pursuant to the policy alleging various claims of personal injuries and damages, including a mild traumatic brain injury and loss of income/impairment of earning capacity claim, resulting from a motor vehicle collision with an underinsured driver. In October of 2013, the UIM arbitrator issued an arbitration award in favor of the insured and awarded total damages in the amount of \$1,186,988.00. Thereafter, the insured filed a bad faith action against American Family which was removed to the Western District of Washington in February, 2014.

Judge James Robart granted American Family's motion for partial summary judgment ruling, *inter alia*, that an arbitration award is not the "proper measure of 'actual damages'" for violating IFCA or the CPA or for committing the tort of bad faith. Judge Robart also found that emotional distress damages are not "actual damages" under IFCA and that attorneys' fees and other litigation costs are not "actual damages" under IFCA or the CPA. See, *Schreib v. American Family Mut. Ins. Co.*, No. 14-0165 (W.D. Wash. Sep. 3, 2015).

■ Excess Verdict Not Proper Measure of IFCA Damages

In the underlying action, Mr. Ross was involved in a motor vehicle accident and sued by Ms. Slocombe, the other party involved in the accident. Trial in the Slocombe litigation began in December of 2013, and on December 24, 2013, the jury delivered a verdict in favor of Ms. Slocombe against Mr. Ross.

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A final judgment was entered against Mr. Ross in the amount of \$672,921.26 on January 13, 2014. The verdict was in excess of GEICO's automobile insurance policy liability limit of \$100,000. GEICO subsequently paid the final judgment. Thereafter, Mr. Ross filed a bad faith action against GEICO and sought treble the amount of the final judgment.

In a recent decision, Judge Palmer Robinson granted GEICO's motion for partial summary judgment ruling, *inter alia*, that Plaintiffs may not recover the paid verdict judgment as "actual damages" for violating IFCA or the CPA or for committing the tort of bad faith. See, *Ross v. GEICO Gen. Ins. Co., et al.*, KCC No. 14-2-15160-8.

Marion County Cases- Defense Verdict Rejecting PIP Suit for Medical Bills and Attorney Fees

Plaintiffs sued to recover \$ 5,989.52 and \$3,843.87 respectively in PIP benefits they claimed were owed following a motor vehicle accident. Plaintiff's also sought to obtain attorneys fees. Suit involved issues relating to suspicious chiropractic treatment and billing. Arbitrator found multiple discrepancies between Plaintiff's testimony as to injuries sustained and treatment the provider billed for. Obtained complete defense verdict with no further amounts owed and no ward of fees against insurer.

Rory W. Leid, III,
assisted by Jean Y.
Kang, represented
GEICO General
Insurance Company in
the insurance bad faith
lawsuit, *Ross, et. al. v.*
GEICO Gen. Ins. Co., et
al., KCC No.: 14-2-
15160-8.

Ryan J. Hall
represented Farmers
Insurance in
Nancy Reyes v.
Farmers Insurance
Company of Oregon;
Marion County Circuit
Court Case No. 14C-
20739
&
Yolanda Alfaro Murillo
v. Farmers Insurance
Company of Oregon
Marion County Circuit
Court Case No. 14C-
21455

Arbitration Panel Awards Complete Defense Verdict with No Award of Fees or Costs

Case submitted to three person arbitration panel for the determination of disputed PIP benefits in the amount of \$7,441.14. The panel unanimously concluded there was insufficient evidence to conclude the disputed medical treatment was related to the motor vehicle accident. Complete defense verdict was handed down after the panel found the delay in treatment a compelling reason to disallow any further treatment beyond what had already been paid by the insurer.

Ryan J. Hall
represented Farmers
Insurance in
*Omar DeLeon
Gomez v. Farmers
Insurance Company*
which was a PIP
arbitration panel
demand from opposing

Court Upholds PIP Suit Limitation Provision – Grants Directed Verdict Against Chiropractic Clinic

Chiropractic clinic brought suit against insurer based upon an assignment from an insured, for non-payment of medical expenses associated with a PIP claim. Court granted directed verdict that Plaintiff had not filed suit within the time period set out in the policy, and therefore was precluded from maintaining suit.

Ryan J. Hall
represented Allstate
Insurance Company in
*Auto & Work Injury,
LLC v. Allstate et al.*
*Multnomah County
Circuit Court Case No.
1301-00986*

Multnomah County Case – Defense Verdict Rejecting PIP Suit for Medical Bills and Attorney Fees

Obtained complete defense verdict against Plaintiffs who sued to recover in excess of \$13,000.00 in PIP benefits they claimed were due following a motor vehicle accident. Suit involved issues relating to suspicious chiropractic treatment and billing. Arbitrator found Plaintiff to be an unreliable witness specifically stating he believed the driver spoke with an attorney who “promptly sent [him] in for medical treatment for the purposes of advancing the claim against the other driver.”

Ryan J. Hall
represented Allstate
Insurance in *Luis Baez-
Hernandez et al. v.
Allstate Fire & Casualty
Insurance Company;
Multnomah County
Circuit Court Case Nos.
1311-16294 (lead case)*

Mark S. Cole Retirement

In announcing his upcoming retirement from the firm, Mark commented as follows:

“The firm has always been committed to providing insightful advice and effective representation for the client. The recent victory in the Schmidt v American Commerce case is one, of many, examples of this ongoing commitment. I am proud of Rick, Rory, Ryan, and the firm and their ability to deliver results which benefit the client.”

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