IDAHO UPDATE ON UNINSURED/UNDERINSURED MOTORIST CLAIMS

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I.

DOES A COMPANY ACTUALLY HAVE TO PAY THE UNDISPUTED AMOUNTOF A UM/UIM CLAIM WITHIN 30 DAYS?

Clearly, it is the position of plaintiffs' counsel in Idaho that I.C. § 41-1839 requires an insurance company to "pay" within 30 days of an insured's submission of a proof of loss, an amount which is "justly due" under the policy. These advocates would have courts ignore the language of subsection (2) of Idaho Code § 41-1839, which states that, if a "tender" is made before suit is filed, then there may be an exception to the rule stated in subsection (1) quoted above. Obviously, the Legislature did not use the term "pay" in paragraph (2), and thus arguably meant something different by the use of the word "tender." The definition of "tender" found in Black's Law Dictionary is "an unconditional offer of money or performance to satisfy a debt or obligation" (2d ed. 2001) (emphasis added). It should be noted, however, that subparagraph (2) continues and states that the "tender" must "thereupon be paid into court." In ***Halliday v. Farmers Ins. Exchange,*** 89 Idaho 293, 404 P.2d 634 (1965), the court explained the purpose of subsection (2):

> Under the Idaho statute the insurer has a safeguard against claims which it feels are excessive. The second provision of the statute allows the insurer to tender into court the amount which the insurer feels is a just amount for payment in settlement of the dispute. Should the insured fail to recover a sum in excess of the tender, then and in that event attorney fees are not assessable.

Id., 89 Idaho at 293. The court has also stated that "[e]ven in a disputed claim, however, the insurer must tender to the insured, or into court, the amount it feels is justly due." ***Anderson v. Farmers Ins. Co.,*** 130 Idaho 755, 758, 947 P.2d 1003, 1006 (1997).

Obviously, it would have been an easier analysis if the Legislature had used the term "thereafter," which could arguably allow payment of the "tender" at any time, including after the lawsuit was filed. Because it used the term "thereupon," one should anticipate an argument that such a "tender" must be paid at or about the time it is made. What the plaintiff's bar may overlook when making such an argument is that, typically, no payment could be made into the court until there is a case number under

which it could be filed.

Furthermore, subsection (1) refers to an action "thereafter" brought against the insurer, which refers to an action brought after 30 days has elapsed since the proof of loss was filed. Subsection (2) states that if "in any such action" it is "alleged" that before the commencement thereof a "tender" of the full amount was made and that amount is "thereupon" deposited in the court, and, indeed, determined to be equal to or more than the amount justly due, no attorney fees may be recovered. This reinforces our argument that the payment into court cannot be made until suit is filed and an Answer filed in response thereto, because the only way to make such an "allegation" is in the Answer. ***See Stein-McMurray Ins. Co. v. Highlands Ins. Co.***, 95 Idaho 818, 819, 520 P.2d 865, 866 (1974) (insurer "tendered" an amount which was refused and then deposited that amount into the district court after suit was filed and the court held no attorney fees could be recovered).

Due to the fact that there are no Idaho appellate cases on point regarding this issue, and the legislative history is silent on this as well, it may still be the most prudent course of action to analyze the case within the first 30 days after receipt of the proof of loss and send a check for the undisputed amount to the claimant, his or her counsel, or into court pursuant to the requirements of subparagraph (2) of § 41-1839.

II.

PREJUDGMENT INTEREST

A major issue in underinsured and uninsured motorist claims is prejudgment interest. Prejudgment interest is a component of recovery allowed on money due by an express contract such as an uninsured motorist policy. Prejudgment interest accrues from the date the insurance company's contractual duty arises: i.e., from the date of the accident for general damages, and from the date expenses were incurred for special damages. ***Brinkman v. AID Ins. Co.***, 115 Idaho 346, 354, 766 P.2d 1227, 1235 (1988).

If it is determined the carrier paid an amount less than what is due, that payment does not stop the accrual of interest on any amount still due to the insured. Therefore, in the event of the insured being awarded any amount above what has been provided, the company would be held responsible for the prejudgment interest on that additional amount, dating back to the date of loss and/or incurring of expenses.

III.

ATTORNEY FEES

Another key issue in UM/UIM matters is whether a claimant under such a policy is entitled to attorney fees if the judgment exceeds the tender by only a nominal amount. In summary, Idaho cases hold that an insured is entitled to attorney fees if the amount awarded by the jury or arbitrator exceeds the amount tendered in settlement, even if by a nominal amount. However, it is notable that a proof of loss, if required by the policy, must be submitted before the insurer has a duty to tender a settlement offer. Moreover, that proof of loss may require some statement or claim of a specific amount of damages.

Idaho Code § 41-1839 provides for the recovery of attorney fees where a claim is made by the insured against the insurer, but the insurer fails to tender the full amount justly due. Specifically:

> Any insurer ... which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in policy ... to pay to the person entitled thereto the amount justly due under such policy ... shall in any action thereafter brought against the insurer in any court in this state for recovery under the terms of the policy ... pay such further amount as the court shall adjudge reasonable as attorney's fees in such action.

I.C. § 41-1839(1). However:

> In any such action, if it is alleged that before the commencement thereof, a tender of the full amount justly due was made to the person entitled thereto, and such amount is thereupon deposited in the court, and if the allegation is found to be true, or if it is determined in such action that no amount is justly due, then no such attorney's fees may be recovered.

I.C. § 41-1839(2).

In ***Associates Discount Corp. v. Yosemite Ins. Co.***, 96 Idaho 249, 257, 526 P.2d 854, 862 (1974), the court noted that "[i]n general, no amount is 'justly due' from the insurer until facts substantially indicative of the uninsured motorist's liability are shown the insurer, or, in the absence of

such facts, until the uninsured motorist's liability is admitted or judicially declared." ***Id.***, 96 Idaho at 256 (quoting ***Dawson v. Olson***, 94 Idaho 636, 641, 496 P.2d 97, 102 (1972)). Unfortunately, the "[a]mount justly due means either an amount determined by an arbitrator or after trial," and "can only be determined in retrospect." ***Am. Foreign Ins. Co. v. Reichert***, 140 Idaho 394, 403, 94 P.3d 699, 708 (2004) (citations omitted). The amount justly due must be tendered within thirty-days, irrespective of whether the parties have engaged in arbitration; i.e., arbitration does not toll the thirty-day period. ***See Martin v. State Farm Mut. Auto. Ins. Co.***, 138 Idaho 244, 248, 61 P.3d 601, 605 (2002). What constitutes reasonable attorney fees "is a question for the determination of the court, taking into consideration the nature of the litigation, the amount involved in the controversy, the length of time utilized in preparation for and the trial of the case and other related factors viewed in the light of the knowledge and experience of the court as a lawyer and judge...." ***Halliday v. Farmers Ins. Exch.***, 89 Idaho 293, 301, 404 P.2d 634, 638-39 (1965). If the insurer fails to tender an amount "justly due," the issue becomes whether a plaintiff bringing suit under this section is entitled to attorney fees so long as the judgment exceeds the amount tendered, even if that amount is only a nominal sum, or whether there must be some significant difference between the judgment and the amount tendered.

The Idaho Supreme Court has noted that "[w]hen an insurer fails to tender the amount justly due under an insurance policy within thirty days after receiving proof of loss, I.C. § 41-1839(1) mandates an award of reasonable attorney fees to the insured." ***Slaathaug v. Allstate Ins. Co.***, 132 Idaho 705, 711, 979 P.2d 107, 113 (1999). The court explained that while the insured must prevail in such a suit in order to be entitled to an award of attorney fees, "the insured need not obtain a verdict for the full amount requested." ***Id.*** Rather, "[t]he insured need only be awarded an amount greater than that tendered by the insurer." ***Id. See also, Continental Re-Insurance Co. v. Spanton***, 667 F.2d 1289, 1291 (9th Cir. 1982) (noting that under I.C. § 41-1839, an insured who furnishes proof of loss as required by the statute "may recover attorney fees against the insurer if the amount ultimately recovered in the action exceeds the amount tendered by the insurer prior to the commencement of the action."); ***Associates Discount Corp. v. Yosemite Ins. Co.***, 96 Idaho 249, 257, 526 P.2d 854, 862 (1974) ("...under I.C. § 41-1839, any person who has a claim under a policy of insurance and who furnishes proof of loss as provided in the statute may recover attorney fees against the insurer if the amount ultimately recovered in the action exceeds the amount tendered by the insurer before the commencement of the action."); ***Halliday v. Farmers Ins. Exch.***, 89 Idaho 293, 301, 404 P.2d 634, 638-39 (1965) (indicating that the insured is not entitled to attorney fees under the statute "if the insured fail[s] to recover a sum in excess of the tender"). However, in ***Martin v. State Farm Mut. Auto.***

Ins. Co., 138 Idaho 244, 61 P.3d 601 (2002), the court noted that an insurance company is liable for attorney fees under the statute "if the insurance company makes no tender within thirty days, or makes a tender that is substantially less than the arbitrator's eventual award ...." ***Id.***, 138 Idaho at 248 (emphasis added). The court may have simply been repeating the facts of the case, and it is doubtful that this is the prevailing attitude among Idaho trial judges. ***See id.***, 138 Idaho at 246; ***c.f., Barber v. State Farm Mut. Auto. Ins. Co.***, 129 Idaho 677, 680, 931 P.2d 1195, 1198 (1997) (noting that "[u]nder Idaho law an insured with an uninsured motorist claim who complies with the notice requirements of section 41-1839 of the Idaho Code and recovers more in arbitration than the insurer offered is entitled to recover attorney fees form the insurer.").

Our Supreme Court has suggested, however, that in order for a right to recover attorney fees to arise, the proof of claim must mention a specific sum. ***See Associates Discount Corp. v. Yosemite Ins. Co.***, 96 Idaho 249, 526 P.2d 854 (1974); ***Carter v. Cascade Ins. Co.***, 92 Idaho 136, 438 P.2d 566 (1968) overruled in part, ***Associates Discount Corp., supra***. In Carter, the plaintiffs were struck and injured by an uninsured motorist and made a claim under their uninsured motorist coverage. Although the plaintiffs submitted a proof of loss, the plaintiffs "indicated no specific sum as sufficient satisfaction for their claims." ***Carter***, 92 Idaho at 138. ***See also, id.*** ("Neither respondents nor appellant have ever mentioned a specific sum as acceptable in satisfaction or settlement of the claims."). Based in part on these facts, the court broadly held that "[i]n absence of statute expressly and precisely compelling an opposite result, the general rule is that an insurer's refusal to pay a claim under its policy must be unreasonable before a court may award attorney fees as part of the recovery in a subsequent action by the claimant." ***Id.***, 92 Idaho at 139. In other words, "there must be evidence that an insurer has acted unreasonably or unjustly before a court may award attorney fees under I.C. § 41-1839." ***Id.***, 92 Idaho at 140. Although this general holding of ***Carter*** was overturned by the court in ***Associates Discount Corp.***, the court noted that "the result reached in the Carter decision was correct in view of the fact that *the proof of claim filed with the insurer did not mention a specific sum and therefore no tender could be made* ...." ***Associates Discount Corp.***, 96 Idaho at 257 (emphasis added). Thus, the court concluded that "under I.C. § 41-1839, any person who has a claim under a policy of insurance *and who furnishes proof of loss as provided in the statute* may recover attorney fees against the insurer if the amount ultimately recovered in the action exceeds the amount tendered by the insurer before the commencement of the action." ***Id.*** (emphasis added).

The court has elsewhere held that an insured is not entitled to an award of attorney fees under I.C. § 41-1839 where the insured fails to provide evidence of an amount justly due, or fails to present evidence

"establishing that [the insurer] had failed to pay a specific amount 'justly due' under the ... policy, a distinct statutory requirement." ***Northland Ins. Co. v. Boise's Best Autos & Repairs***, 131 Idaho 432, 434, 958 P.2d 589, 591 (1998) (quoting ***Union Warehouse and Supply Co. v. Illinois R.B. Jones, Inc.***, 128 Idaho 660, 669, 917 P.2d 1300, 1309 (1996)) (brackets and ellipses in original). The proof of loss cannot "require more than is necessary for a prima facie case," but "[t]he purpose of a provision for notice and proofs of loss is to allow the insurer to form an intelligent estimate of its rights and liabilities, to afford it an opportunity for investigation, and to prevent fraud and imposition upon it." ***Brinkman v. Aid Ins. Co.***, 115 Idaho 346, 349-50, 766 P.2d 1227, 1230-31 (1988). In other words, "[t]he purpose of proof of loss statements, in general, is to furnish the insurer with the particulars of the loss and all data necessary to determine its liability and the amount thereof, if any." ***Id.***, 115 Idaho at 350. Thus:

> The insured, when required to do so under his policy, should provide the information reasonably available to him regarding his injury and the circumstances of the accident.
>
> The amount of information provided should be proportional to the amount reasonably available to the insured. If the information provided is insufficient to give the insurer an opportunity to investigate and determine its liability, the insurer may deny coverage. Otherwise, the insurer must investigate and/or determine its rights and liabilities. The documentation is the "proof." The explanation of physical and/or financial injury is the "loss." "Loss" must be distinguished from liability. The insurer will determine its liability with the knowledge that it must be fair and accurate or suffer the consequences.

Id. In ***Brinkman***, even though not required under the policy to submit a proof of loss, the insured provided a "settlement brochure," that demanded $305,000 "and generally described Brinkman's injuries and medical expenses incurred up to that time." ***Id.*** Thus, the court concluded that even if the insured had been required to submit a proof of loss, the settlement brochure qualified as such. ***Id.***

In sum, the majority of cases hold that the insured is entitled to attorney fees if the amount awarded by the jury or arbitrator exceeds the amount tendered in settlement, even if by a nominal amount. Although ***Martin v. State Farm Mut. Auto. Ins. Co.,*** 138 Idaho 244, 61 P.3d 601

(2002), appears to hold otherwise, the court's language appears to be merely repeating the facts, ***see Id.***, 138 Idaho at 246, rather than holding that a substantial difference is required.