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**TRIAL NEWS**

WASHINGTON STATE TRIAL LAWYERS ASSOCIATION

### **UIM Jury Trials - Suing for Breach of Contract**

*Robert Dawson*

It used to be that if a UIM claim could not be settled then it was arbitrated. For nearly all of my 22 years of law practice UIM policies typically called for arbitration. Arbitration is fast, efficient, and a low cost way of deciding UIM claims. However, recently some insurers have rewritten their UIM policies to call for a jury trial when resolving UIM disputes. Apparently some UIM carriers feel that a jury trial is more favorable to them than the old UIM arbitration forum.

Some attorneys have attempted to challenge the UIM "jury trial" provision in insurance policies. Some attorneys have had success when the provision is ambiguous or one-sided. However, let us assume that the UIM carrier has rejected your request to arbitrate the claim and you are going to have to file suit. This month I have a few suggestions on how you might structure the UIM claim and perhaps improve your chances of resolving the claim early, or make for a more effective presentation in the event you actually have a UIM jury trial.

#### **CAREFULLY DRAFT YOUR COMPLAINT**

How you word the complaint will structure how the UIM claim will be presented. As attorneys we are used to UIM claims only involving the fault of the underinsured driver, and what damages the underinsured driver caused our client. The temptation is to file a complaint that seeks resolution of these same issues. However, limiting the complaint to those two issues may be a mistake.

Your UIM complaint should of course plead the amount of damages your client is entitled to be determined. In my opinion, many plaintiffs will also want to litigate whether the UIM insurer lived up to the duties it owed its insured under its contract. Under the typical UIM contract the insurer has a duty to investigate the claim, to fairly evaluate the claim, and to make a prompt, fair and equitable settlement of the claim. In many UIM claims the UIM insurer has not conducted an adequate investigation, has not reasonably evaluated the claim, and has not made reasonable efforts to settle the claim.

Jurors expect legitimate claims to be paid promptly. After doing several focus groups on insurer bad faith I am convinced that lay people have very high expectations for how fast insurance companies should evaluate and pay claims. If you and your client have been truthful with the insurer, and have given access to the relevant information, then you can expect that jurors will look unfavorably at the delay and settlement practices that are common in the industry. I suggest you include some paragraphs like the following in your complaint.

The USAA Washington Automobile Insurance Policy number 555- 1212-0808, attached as Exhibit A to this Complaint is a valid contract with Joe Client.

Under its contract USAA had a duty to Joe Client to conduct a reasonable investigation of Joe Client's UIM claim.

Under its contract USAA had a duty to Joe Client to fairly evaluate Joe Client's UIM claim.

Under its contract USAA had a duty to Joe Client to effectuate a prompt, fair, and equitable settlement of Joe Client's UIM claim.

USAA breached the above duties to Joe Client.

USAA's breach of the above duties caused damages to Joe Client.

### **FOLLOW UP WITH APPROPRIATE DISCOVERY**

When one of the issues is whether the UIM carrier breached duties to its insured you should be able to follow up with discovery on those issues. Here are a few basic discovery requests that you might want to use.

**You want to make sure you have the correct policy language.**

REQUEST FOR ADMISSION: That attached as Exhibit 1 is a true and correct copy of the entire USAA Insurance Company policy and declaration sheet applicable to Joe Client's underinsured motorist claim arising out of the June 16, 2001 incident which caused his brain injury.

RESPONSE:

**You want to make sure that the insurer does not contend that your client failed to comply with the terms of the insurance policy.**

INTERROGATORY: Please state as follows as to when USAA Insurance Company was first notified of the UIM claim.

- (a) Date;
- (b) Person who provided notice of the UIM claim; and
- (c) How notified (phone call, letter, etc.).

RESPONSE:

INTERROGATORY: Has Joe Client fully complied with the terms of the USAA Insurance

Company Policy in effect on June 16, 2001? If not, please state:

- (a) Why USAA believes Joe Client is not in compliance; and
- (b) What USAA believes Joe Client needs to do to be in compliance.

**RESPONSE:**

You want to find out what issues the insurer has considered in evaluating the claim.

**INTERROGATORY:** Does USAA Insurance Company contend that Joe Client is at fault in any way in the collision of June 16, 2001? If yes, please state:

- (a) All facts upon which you allege Joe Client is at fault;
- (b) Name, address, telephone number and employer of each person believed to have knowledge concerning the affirmative defense; and
- (c) Identify all documents pertaining to your allegation, and the custodians thereof.

**RESPONSE:**

**REQUEST FOR PRODUCTION:** Please produce all documents identified in the preceding interrogatory.

**RESPONSE:**

**INTERROGATORY:** Does USAA allege any affirmative defenses to Joe Client's UIM claims? If so, please state as to each:

- (a) All facts upon which you base the affirmative defense;
- (b) Name, address, telephone number and employer of each person believed to have knowledge concerning the affirmative defense; and
- (c) Identify all documents pertaining to the affirmative defense, and the custodians thereof.

**RESPONSE:**

**REQUEST FOR PRODUCTION:** Please produce all documents identified in the preceding interrogatory.

**RESPONSE:**

**INTERROGATORY:** Is the liability of Jim Defendant to Joe Client for the damages caused on

June 16, 2001 reasonably clear? If not, please state why not.

RESPONSE:

**You want to find out what insurance company personnel have worked on the claim.**

INTERROGATORY: For the USAA adjusters who have worked on this UIM claim, please state their:

- (a) Name, work address, and work phone number; and
- (b) Time period(s) each adjuster worked on the claim.

RESPONSE:

INTERROGATORY: For the USAA supervisors who have worked on this UIM claim please state their:

- (c) Name, work address, and work phone number; and
- (d) Time period(s) each supervisor worked on the claim.

RESPONSE:

INTERROGATORY: For any other USAA Insurance Company personnel who worked on this UIM claim please state their:

- (a) Name, work address, and work phone number; and
- (b) Time period(s) each person worked on the claim.

RESPONSE:

**You want to find out how the insurance company files are organized, whether they will produce the file, and what documents the insurance company claims are privileged.**

INTERROGATORY: Please describe in general how the USAA Insurance Company file or files regarding Joe Client's UIM claim are organized. Please include in your description the basic categories of information maintained, what information is maintained on file folders or jackets, in the files themselves, and what information is stored electronically.

RESPONSE:

REQUEST FOR PRODUCTION: Please produce a true and complete copy of Joe Client's UIM file or files.

RESPONSE:

INTERROGATORY: Does USAA Insurance Company contend that portions of Joe Client's UIM file(s) are not discoverable? If so, then please identify those documents or items in a privilege log containing at least the following information:

DATE AUTHOR

RECIPIENT DESCRIPTION

PRIVILEGE CLAIMED

BATES NO.

RESPONSE:

REQUEST FOR PRODUCTION: Please produce a copy of the USAA procedures manual for handling UIM claims that was in effect on June 16, 2001.

RESPONSE:

**You also want to identify and depose those insurance company personnel that worked on the file. This can be done with a CR 30(b)(6) deposition notice containing language like the following.**

Pursuant to CR 30(b)(6), demand is made that United Services Automobile Association duly designate one or more of its partners, officers, directors, managing agents or other persons, who consent to testify on its behalf. The person(s) so designated shall testify as to the following matters known or reasonably available to United Services Automobile Association.

1. In general how USAA is organized as a company.
2. How USAA organizes its various files relating to UIM claims.
3. USAA policies for handling UIM claims.
4. How USAA investigated Joe Client's UIM claim.
5. How USAA evaluated Joe Client's UIM claim.
6. The actions USAA took in response to Joe Client's UIM claim, and how decisions on Joe Client's UIM claim were made.

CONCLUSION

Handling UIM claims as stated above may not be appropriate in every case. If the UIM insurer has

conducted a full and fair investigation of the case, fairly evaluated the case, and if the insurer has made reasonable efforts to settle, then you might just want to plead that the jury determine the amount of damages that were caused by the underinsured driver.

However, if the insurer has breached any of the duties under its contract then you might want to proceed as stated above. You will get the UIM insurer's attention. You will get the defense counsel's attention. If you are successful with the discovery, and have good evidence of the breach of contract by the insurer, then the case is likely to settle, or be in a favorable posture to present at trial.

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