AN OVERVIEW OF EXTRA-CONTRACTUAL CLAIMS IN WASHINGTON AND OREGON

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1. Introduction

Oregon and Washington law differ substantially with regard to extra-contractual liability. Washington offers multiple avenues for so-called "bad faith" claims against an insurer; Oregon offers only narrow opportunities, mostly in the context of excess judgment claims arising in the third-party liability context.

2. Washington Law

Washington courts recognize four extra-contractual causes of action in the context of insurance coverage litigation: (1) common-law bad faith; (2) common-law negligence; (3) violation of the Washington Consumer Protection Act (CPA); and (4) violation of the Insurance Fair Conduct Act (IFCA). Although a claim for common-law attorney fees is not a separate cause of action, in Washington, an insured who is compelled to pursue legal action to obtain the benefit of an insurance contract is entitled to recover its reasonable attorney fees.[2] Local practitioners refer to these common-law attorney fees as "*Olympic Steamship*" fees. *Olympic Steamship* fees are recoverable only in coverage disputes between an insurer and the insured and are not available in disputes that concern solely the value of the insured's claim.[3] *Olympic Steamship* fees may not be recoverable if the insured breaches a policy condition, even if the insured's breach did not result in a forfeiture of coverage.[4]

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[2] *Olympic S.S. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 811 P.2d 673 (1991).

[3] *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

[4] *Pub. Util. Dist. No. 1 of Klickitat Cty v. Int'l Ins. Co*., 124 Wn.2d 789, 815, 991 P.2d 1020 (1994) ("We cannot authorize the imposition of attorney fees, however, when an insured has undisputedly failed to comply with express coverage terms, and the noncompliance may extinguish the insurer's liability under the policy.").

A. Extra-Contractual Claims

(1) Common-law Bad Faith

In Washington, an action for bad-faith handling of an insurance claim sounds in tort.[5] Courts analyze claims by an insured against an insurer for bad faith by applying the same principles applicable to any other tort: duty, breach, proximate causation, and damages.[6] To prove that the insurer breached its duty of good faith, an insured is required to show the breach was "unreasonable, frivolous, or unfounded."[7] Bad faith will not be found where a denial of coverage is based upon a reasonable interpretation of the insurance policy.[8]

If an insured prevails on a bad faith claim, the insured is limited to tort remedies, which include any foreseeable harm that flows directly from the insurer's wrongdoing. An insured, for example, may potentially recover for both financial and emotional-distress damages caused by an insurer's bad faith delay in paying policy benefits.[9] But a policyholder cannot recover exemplary or punitive damages based upon a common-law bad faith claim.[10] An insured who prevails on a common-law bad faith claim is not entitled to recover reasonable attorney fees pursuant to a bad faith cause of action.[11] But this does not preclude the insured from recovering its attorney fees under the CPA, IFCA, or *Olympic Steamship*.

Claims for bad faith and violation of the CPA exist independently of an insured's claim for coverage.[12] That is, an insured can pursue bad faith and CPA claims even if the policy does not provide coverage for the insured's loss. If an insured's claims arise out of a first-party policy, the insured must prove its actual damages.[13] And an insured under a first-party policy which prevails on its extra-contractual claims is not entitled to coverage by estoppel or a presumption of harm.[14]

In the third-party context, if the insured can prove the insurer breached the duty to indemnify, settle, or defend in bad faith, then the insured is entitled to a rebuttable

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[5] *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992).
[6] *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).
[7] *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).
[8] *Id*.
[9] *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 333, 2 P.3d 1029 (2000).
[10] *See Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 696, 635 P.2d 441 (1981) *as amended,* 649 P.2d 827 (1982) ("Under the law of this state punitive damages are not allowed unless expressly authorized by the legislature.").
[11] *Fireman's Fund Ins. Cos. v. Alaskan Pride P'ship*, 106 F.3d 1465, 1471 (9th Cir. 1997).
[12] *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 285, 961 P.2d 933 (1998).
[13] *Id*.
[14] *Id*.

presumption of harm and coverage by estoppel.[15] But if the insurer did not breach these duties, then these drastic remedies do not apply.[16]

(2) Common-law Negligence

Washington common law also requires an insurer to exercise reasonable care with respect to the insured's interests.[17] And an insured may assert a claim for negligence independent of its common-law bad faith claim.[18] Thus, even if an insurer does not engage in "unreasonable, frivolous, or unfounded" conduct, it may still be liable for failing to exercise its duty of reasonable care.[19]

To establish negligence an insured must prove the elements of duty, breach, proximate cause, and damages.[20] In most cases the remedial impact of a negligence claim is the same as for bad faith claims.[21] Accordingly, the damages recoverable for a negligence claim mirror the damages recoverable under the tort of bad faith. There is no authority for an award of attorney fees based solely upon a negligence claim. Again, however, this does not preclude recovery of attorney fees under the CPA, IFCA, or *Olympic Steamship*.

(3) The Washington Consumer Protection Act (CPA)

In addition to the two extra-contractual remedies available under Washington common law, Washington law also allows an insured to assert two statutory causes of action against an insurer. A private right of action under the CPA is codified at RCW 19.86.090. To bring a successful CPA action against an insurer, a policyholder must show: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the party in her business or property; and (5) which injury is causally linked to the unfair or deceptive act.[22] Reasonable acts performed in good faith do not violate the CPA.[23]

The Washington Insurance Commissioner promulgates regulations in the Washington Administrative Code, Title 284, Chapter 30 ("WAC 284-30"), which prohibit unfair claim-

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[15] *See Butler*, 118 Wn.2d at 390-92; *see also Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 281, 961 P.2d 933 (1998).
[16] *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc*. 165 Wn.2d 122, 133, 196 P.3d 664 (2008).
[17] *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 602, 612, 971 P.2d 953 (1999).
[18] *Id*.; *see also Burnham v. Comm'l Cas. Ins. Co*., 10 Wn.2d 624, 640, 117 P.2d 644 (1941); *Murray v. Mossman*, 56 Wn.2d 909, 911, 355 P.2d 985 (1960); *Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 628, 245 P.2d 470 (1952).
[19] *See First State*, 94 Wn. App. at 612.
[20] *Stouffer & Knight v. Cont'l Cas. Co.*, 96 Wn. App. 741, 753, 982 P.2d 105 (1999).
[21] *See Butler*, 118 Wn.2d at 398-99.
[22] *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 62, 1 P.3d 1167 (2000); *see also Indus. Indem. Co. of the N.W. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990).
[23] *Perry v. Island Sav. & Loan Ass'n*, 101 Wn.2d 795, 810-11, 684 P.2d 1281 (1984); *see also Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 143-44, 29 P.3d 777 (2001).

handling practices. Violations of WAC 284-30 do not in and of themselves create causes of action and require an attendant CPA claim to be given effect.[24] But where a violation of WAC 284-30 is shown the first two elements of a CPA claim are satisfied, and likely the third element as well.[25] The practices identified in WAC 284-30 are not exclusive and thus other acts may trigger liability under the CPA.[26]

Remedies for a CPA violation are actual damages, the costs of suit, and reasonable attorney fees.[27] The Washington Supreme Court limits the costs recoverable in a CPA action to the statutory costs defined in RCW 4.84.010.[28] Upon the finding of a CPA violation, a court can award treble damages; however, these treble damages cannot exceed $25,000.[29] If a first-party insured's contractual claims are time barred by a suit-limitation provision, damages under the CPA can still include benefits owed under the policy so long as other coverage defenses do not apply to the insured's claim.[30]

(4) The Washington Insurance Fair Conduct Act (IFCA)

A private right of action under IFCA is codified at RCW 48.30.015. Under IFCA, an insured may bring a cause of action against an insurance company for unreasonably denying the insured's claim or withholding payment.[31] To prevail under IFCA an insured must first demonstrate that the insurer unreasonably denied coverage.[32] IFCA does not create an independent cause of action for mere regulatory violations.[33] In addition, the Ninth Circuit has held in an unpublished decision that an insured under a third-party liability policy cannot assert a claim under IFCA.[34]

An insured who prevails on an IFCA claim may recover actual damages and attorney fees.[35] In addition, an insured may recover enhanced damages not to exceed three times the insured's actual damages.[36] IFCA's plain language authorizes the trial court to award these

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[24] *Hayden*, 141 Wn.2d at 62.
[25] *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 133, 196 P.3d 664 (2008) (holding that violation of WAC 284-30 establishes the first two elements of a CPA claim); RCW 48.01.030 (stating that the business of insurance affects the public interest).
[26] *See* WAC 284-30-310 ("This regulation is not exclusive, and acts performed, whether or not specified herein, may also be deemed to be violations of specific provisions of the insurance code or other regulations.").
[27] RCW 19.86.090.
[28] *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987).
[29] RCW 19.86.090.
[30] *West Beach Condo. v. Commonwealth Ins. Co. of Am*., 11 Wn. App. 2d 791, 805, 455 P.3d 1193 (2020).
[31] *Malbco Holdings, LLC v. AMCO Ins. Co.*, 546 F. Supp. 2d 1130, 1132 (E.D. Wash. 2008).
[32] *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 684, 389 P.3d 476 (2017).
[33] *Id*.
[34] *Cox v. Cont'l Cas. Co*., 703 Fed. App'x 491, 497-98 (9th Cir. 2017).
[35] RCW 48.30.015(1).
[36] RCW 48.30.015(2).

enhanced treble damages.[37] But federal courts applying Washington law have concluded that the Seventh Amendment requires a jury to award enhanced damages under IFCA.[38]

Unlike the CPA, IFCA does not cap treble damages awards at $25,000. And at least one federal district court has permitted an insured to recover "quadruple damages" under IFCA—that is, the court permitted the insured to recover its actual damages plus treble damages.[39] If a first-party insured's contractual claims are time-barred by a suit-limitation provision, damages under IFCA can still include benefits owed under the policy so long as other coverage defenses do not apply to the insured's claim.[40]

B. Extra-Contractual Claims & Third-Party Liability Policies

(1) Duty to Defend

In Washington, "[a]n insurer's duty to defend is broader than its duty to indemnify."[41] "The duty to indemnify applies to claims that are actually covered, while the duty to defend 'arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'"[42] At times, however, Washington courts have stated this doctrine even more forcefully: "the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint. . . ."[43]

To determine whether an insurer's duty to defend is triggered, Washington courts generally consider only the policy's terms and the allegations in the underlying complaint.[44] Although there are two exceptions to the rule, both exceptions favor the insured.[45] Some recent Washington decisions analyzing the duty to defend appear to greatly expand its scope.[46] Still, in at least some circumstances, an insurer is not required to defend the insured.

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[37] *Id*.
[38] *Nw. Mut. Life Ins. Co. v. Koch*, 771 F. Supp. 2d 1253, 1256-57 (W.D. Wash. 2009).
[39] *IDS Prop. & Cas. Ins. Co. v. Fellows*, 2017 WL 2600186 at *8 (W.D. Wash. June 15, 2017).
[40] *West Beach*., 11 Wn. App. 2d at 805.
[41] *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002); *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).
[42] *Nat'l Sur. Corp. v. Immunex, Corp.*, 176 Wn.2d 872, 879, 297 P.3d 688 (2013) (quoting *VanPort*, 147 Wn.2d at 760 (internal quotation omitted)); *see also E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 908, 726 P.2d 439 (1986) ("The duty of an insurer to defend an action brought against a policyholder arises when the complaint is filed and the allegations of the complaint could, if proven, impose liability upon the insured within the coverage of the policy.").
[43] *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007).
[44] *Expedia, Inc. v. Steadfast Ins. Co.,* 180 Wn.2d 793, 803, 329 P.3d 59 (2014).
[45] *VanPort*, 147 Wn.2d at 761.
[46] *See Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010) (holding that complaint alleging that insured's security guards committed post-assault negligence by dragging the underlying plaintiff back inside of club after an assault triggered the duty to defend, even though previous Washington case law held that a liability policy's assault and battery exclusion barred

"Although this duty to defend is broad, it is not triggered by claims that clearly fall outside the policy."[47]

Determining whether the duty to defend has been triggered is a separate inquiry from whether an insurer may be relieved of its duty to defend.[48] An insurer which defends an insured under a reservation of rights, is allowed to present extrinsic evidence in a declaratory judgment action to prove that the policy does not provide coverage for the insured's liability.[49] If a court determines that an insurer has no duty to defend, the insurer is relieved of its defense obligation.[50] But in the absence of specific policy language, the insurer may not recoup its defense costs from the insured.[51]

(2) Reservations of Rights & Extra-Contractual Claims

If an insurer agrees to defend the insured subject to a reservation of rights ("ROR"), then the insured can recover its pre-tender fees.[52] Washington courts have held that an insurer's failure to timely issue an ROR letter waives the insurer's coverage defenses. In the absence of extraordinary circumstances, Washington courts have held that issuing an ROR after 10 months of controlling the insured's defense is too long.[53] But shorter delays—for example, a delay of only 2 months—do not result in a presumption of prejudice, and to prevail on a waiver argument under those circumstances an insured must prove that it suffered prejudice due to the insurer's delay in reserving rights.[54]

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coverage for pre-assault negligence in similar circumstances); *see also Woo*, 161 Wn.2d at 60 (holding that complaint alleging that insured placed boars' teeth in the mouth of an employee and photographed her under anesthesia triggered the duty to defend under the insured's professional liability and CGL policies).

[47] *Immunex*, 176 Wn.2d at 879 (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998)).

[48] *Expedia*, 180 Wn.2d at 804 ("Determining whether the duty to defend has been triggered is a separate inquiry from whether an insurer may be relieved of its duty to defend or indemnify due to a defense such as a claim of late tender by the insured.").

[49] *See id*. at 804-05.

[50] *Immunex*, 176 Wn.2d at 880 ("defending under a reservation of rights enables the insurer to protect its interests without facing claims of waiver or estoppel and to walk away from the defense once a court declares it owes no duty").

[51] *Id*. at 887 ("We hold that insurers may not seek to recoup defense costs incurred under a reservation of rights defense while the insurer's duty to defend is uncertain.").

[52] *Griffin v. Allstate Ins. Co*., 108 Wn. App. 133, 142, 29 P.3d 777 (2001).

[53] *See*, *e.g*., *Transam. Ins. Group v. Chubb & Son, Inc*., 16 Wn. App. 247, 252, 554 P.2d 1080 (1976) (holding that insurer waived coverage defenses after 10 months of defending without issuing a reservation of rights); *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 7, 206 P.3d 1255 (2009) (issuing a reservation of rights letter 14 months after insured's tender breached insurer's duty of good faith).

[54] *R.A. Hanson Co., Inc. v. Aetna Cas & Sur. Co*., 15 Wn. App. 608, 610, 550 P.2d 701 (1976).

An insurer defending under an ROR has an enhanced duty to the insured.[55] In addition to its general duties of good faith and fair dealing, an insurer defending under a reservation of rights must satisfy four criteria: "(1) thoroughly investigate the claim; (2) retain competent defense counsel loyal only to the insured; (3) fully inform the insured of the reservation-of-rights defense and the progress of the lawsuit; and (4) refrain from putting the insurer's financial interests above that of the insured."[56]

Where the insurer defends under an ROR, Washington courts "impose a rebuttable presumption of harm once the insured meets the burden of establishing bad faith."[57] And "where an insurer acts in bad faith in handling a claim under a reservation of rights, the insurer is estopped from denying coverage."[58]

A policyholder may maintain a bad faith cause of action against its insurer for mishandling a claim, even if the insurer did not breach its duties to defend, settle, or indemnify.[59] But where the insurer did not breach its duties to defend, settle, or indemnify, there is no rebuttable presumption of harm and no coverage by estoppel.[60] Again, a policyholder cannot recover exemplary or punitive damages pursuant to a common-law bad faith claim.[61]

(3) Duty to Settle

Washington courts recognize that, in some circumstances, an insurer has a duty to settle claims against its insured.[62] An insurer's duty to settle arises out of its control of the insured's defense.[63] In determining whether to settle the claims asserted against the insured, an insurer must give equal consideration to the insured's interests.[64] And if an insurer breaches the duty to settle it can be liable for an excess judgment against the insured—that is,

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[55] *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 387, 715 P.2d 1133 (1986).
[56] *Ledcor*, 150 Wn. App. at 9.
[57] *Butler*, 118 Wn.2d at 390.
[58] *Butler*, 118 Wn.2d at 392.
[59] *Onvia*, 165 Wn.2d at 134.
[60] *Id*. at 133.
[61] *See Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn. 2d 692, 635 P.2d 441 (1981) ("Under the law of this state, punitive damages are not allowed unless expressly authorized by the legislature."). *But see, infra* at 4(B) and 4(D) (discussing availability of treble damages under the CPA and IFCA).
[62] *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc*., 165 Wn.2d 122, 129, 196 P.3d 664 (2008) ("Related to the two main benefits of an insurance contract, liability insurers owe a duty to settle claims against their insureds.").
[63] *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 172, 473 P.2d 193 (1970).
[64] *See Tank v. State Farm Fire & Cas. Co*., 105 Wn.2d 381, 386, 715 P.2d 1133 (1986) ("an insurance company's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests") (emphasis in original).

the insurer may be required to indemnify the insured in excess of the liability policy's limits.[65]

An insurer's duty to settle includes an obligation to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available and make an informed evaluation of the settlement demand.[66] "The insurer's duty of good faith requires it to evaluate settlement offers as though it bore the entire risk, including any judgment in excess of the policy limits."[67] The insurer must evaluate the settlement as if the insured (1) had no insurance or (2) as if the insurance policy has no limits.[68] This is sometimes referred to as the "no limit" test.[69] Washington courts have not addressed how a dispute regarding coverage with the insured affects an insurer's duty to settle.[70]

(4) Covenant Judgments

Washington permits assignments of a policyholder's rights using a mechanism known as a "covenant judgment." A covenant judgment contains three components: (1) the insured confesses judgment against itself in favor of the claimant; (2) the claimant covenants not to execute on the judgment against the insured other than as to insurance; and (3) the insured assigns its rights against its liability insurer to the claimant.[71]

After the parties enter into a covenant judgment, the court in the underlying action must conduct a "reasonableness hearing," during which the court will consider nine factors.[72] If the trial court determines that the covenant judgment is reasonable, then the amount of the judgment sets the presumptive measure of damages in the claimant's coverage action against the insurer.[73] This presumptive measure of damages sets the floor—not the ceiling—for a jury's damages award; and, thus, a jury can award damages against the insurer in excess of the covenant judgment amount.[74]

C. Extra-Contractual Liability for Adjusters

Independent adjusters normally do not owe a duty of care to an insured and, thus, they cannot be liable for common-law negligence claims.[75] A court, however, may find that a

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[65] *See Besel v. Viking Ins. Co. of Wis*., 146 Wn.2d 730, 735-36, 49 P.3d 887 (2002).
[66] *Truck Ins. Exch. of Farmers Ins. Group v. Century Indem. Co*., 76 Wn. App. 527, 534, 887 P.2d 455 (1995).
[67] *Id*.
[68] *Hamilton v. State Farm Ins. Co*., 83 Wn.2d 787, 790, 523 P.2d 193 (1974).
[69] *Id.*
[70] *Specialty Surplus Ins. Co. v. Second Chance, Inc*., 412 F. Supp. 2d 1152, 1165 (W.D. Wash. 2006).
[71] *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 764-65, 287 P.3d 551 (2012).
[72] *Id*. at 766.
[73] *Id*. at 770.
[74] *Miller v. Kenny*, 180 Wn. App. 772, 801, 325 P.3d 278 (2014).
[75] *Merriman v. Am. Guarantee & Liab. Ins. Co.*, 198 Wn. App. 594, 619, 625. 396 P.3d 351 (2017).

duty exists between an independent adjuster and an insured based on the circumstances of the specific relationship.[76] "[I]n determining whether a duty is owed to the plaintiff, the court considers 'logic, common sense, justice, policy, and precedent, as applied to the facts of the case.'"[77] Generally speaking adjusters may not be sued personally for *per se* violations of the CPA, or IFCA.[78] In an unpublished decision, however, at least one federal district court has held that a claim against an adjuster for common-law bad faith or non-*per se* CPA violation may be viable.[79]

3. Oregon Law on Extra-Contractual Damages

A. Statutory Attorney Fees

Oregon law provides for an award of attorney fees to a successful policyholder under ORS 742.061:

> [I]f settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the cost of the action and any appeal thereon.

For purposes of this statute, "proof of loss" means "[a]ny event or submission that would permit an insurer to estimate its obligations (taking into account the insurer's obligation to investigate and clarify uncertain claims) . . . ."[80] Thus, it need not be a specific form or submission that an insurance policy otherwise requires.[81] Instead, it includes "any 'event or submission' that accomplishes the purpose of a proof of loss, that is, 'to afford the insurer an adequate opportunity for investigation, to prevent fraud and imposition upon it,

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[76] *Id*. at 616-26.
[77] *Id*. at 617 (quoting *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 186 Wn.2d 58, 65, 375 P.3d 651 (2016)).
[78] *Keodalah v. Allstate Ins. Co*., 194 Wn. 2d 339, 349-53, 449 P.3d 1040 (2019).
[79] Leonard v. First Am. Prop. & Cas. Ins. Co., No. 3:19-CV-06089-RBL, 2020 WL 634430, at *2 (W.D. Wash. Feb. 11, 2020).
[80] *Dockins v. State Farm Ins. Co.*, 329 Or. 20, 29, 985 P.2d 796 (1999).
[81] *Id.* at 26–28 ("[T]he term 'proof of loss' in ORS 742.061 means something more than whatever is required by the policy at issue. . . . [T]he court's cases establish that that functional meaning of the term 'proof of loss' described above fits ORS 742.061 and that the legislature intended for that standard to apply, despite different or more formal proof-of-loss requirements in the insurance policy itself*."); Parks v. Farmers Ins. Co. of Or.*, 347 Or. 374, 382–84, 227 P.3d 1127 (2009) (providing that an insured's phone call reciting the amounts he paid and expected to pay to clean up contamination constituted a proof of loss); *Precision Seed Cleaners v. Country Mut. Ins. Co.*, 976 F. Supp. 2d 1228, 1237 (D. Or. 2013) ("The proof of loss does not require that the insured calculate the loss with sufficient specificity to enable the insurer to make a settlement offer.").

and to enable it to form an intelligent estimate of its rights and liabilities before it is obliged to pay.'"[82] To defeat an insured's right to recovery under this statute, the insurer's "tender" must be made within six months after the insured's submission of the proof of loss.[83] An insurer's offer of settlement pursuant to ORCP 54 or mid-trial payment does not defeat the right of recovery under ORS 742.061.[84]

B. First-Party Insurance

As discussed below, common-law bad faith and negligence claims are generally not available to first-party insureds under Oregon law.[85] The Oregon Legislature has adopted the Unfair Claims Settlement Practices Act ("UCSPA").[86] But Oregon courts have consistently held that there is no private right of action under this statute.[87]

(1) Bad Faith/Breach of Implied Covenant of Good Faith & Fair Dealing

In the first-party context, Oregon courts have consistently held that no independent "bad faith" tort cause of action exists; instead, "an insurer's bad faith refusal to pay policy benefits … sounds in contract …."[88] In Oregon, every contract includes an implied duty of good faith.[89] But the implied duty of good faith cannot be construed in a way that changes or inserts terms into the insurance contract.[90] Instead, it applies in a manner that will effectuate the parties' objectively reasonable expectations.[91] And it must be harmonized with the

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[82] *Zimmerman v. Allstate Prop. & Cas. Ins. Co.*, 354 Or. 271, 281, 311 P.3d 497 (2013) (quoting *Dockins*, 329 Or. at 28–29).
[83] *Precision Seed Cleaners* 976 F. Supp. 2d at 1236; *Petersen v. Farmers Ins. Co. of Oregon*, 162 Or. App. 462, 465, 986 P.2d 659 (1999).
[84] *Wilson v. Tri-Met Metro. Transp. Dist. of Oregon*, 234 Or. App. 615, 628, 228 P3d 1225, *rev den*, 348 Or 669 (2010); *Long v. Farmers Ins. Co. of Oregon*, 360 Or. 791, 388 P3d 312 (2017)
[85] *Abraham v. T. Henry Const., Inc.*, 350 Or. 29, 40 249 P.3d 534 (2011); *Strader v. Grange Mut. Ins. Co.*, 179 Or. App. 329, 335 39 P.3d 903 (2002); *Georgetown Realty, Inc. v. Home Ins. Co.*, 313 Or. 97, 106, 831 P.2d 7 (1992).
[86] ORS § 746.230.
[87] *Farris v. U. S. Fid. & Guar. Co.*, 284 Or. 453, 458, 587 P.2d 1015 (1978).
[88] *Employers' Fire Ins. Co. v. Love It Ice Cream Co.*, 64 Or. App. 784, 790-91, 670 P.2d 160 (1983) (explaining that a violation of an Oregon statute, ORS 746.230(1)(f), requiring insurers to settle claims promptly and in good faith does not give rise to tort action); *Richardson v. Guardian Life Ins. Co. of Am.*, 161 Or. App. 615, 623–24, 984 P.2d 917 (1999) ("Plaintiff's claim for violation of the Unfair Claims Settlement Practices Act was appropriately dismissed on summary judgment because violations of that act are not independently actionable.").
[89] *Brockway v. Allstate Prop. & Cas. Ins. Co.*, 284 Or. App. 83, 95, 391 P.3d 871 (2017).
[90] *Safeco Ins. Co. of Oregon v. Masood*, 264 Or. App. 173, 178, 330 P.3d 61 (2014). *See also Gibson v. Douglas Cty.*, 197 Or. App. 204, 217, 106 P.3d 151 (2005) ("[T]hat duty cannot expand the parties' substantive duties under a contract . . . .").
[91] *Brockway*, 284 Or. App. at 95.

express contractual terms.[92] Thus, for a property insurance policy, the implied duty cannot contradict the terms of coverage, including the scope of coverage.[93]

That said, the implied duty is inherently one that is not explicitly stated in the contract, as it is one that a party may breach despite not breaching an explicit contractual duty.[94] Should a breach of the implied duty occur, the relief should be contractual damages, "generally stated in terms of the 'benefit of the bargain.'"[95] That is, damages should be "limited to those foreseeable at the time of the execution of the agreement."[96]

(2) Negligence *per se*

As discussed above, Oregon law generally prohibits common-law tort actions, including negligence actions, by an insured against its insurer in the context of first-party insurance disputes arising from breach of the insurance contract."[97] While Oregon state courts have not directly addressed the question of whether negligence *per se* is applicable to an alleged violation of the UCSPA, a recent series of unpublished decisions by federal courts

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[92] *Eggiman v. Mid-Century Ins. Co.*, 134 Or. App. 381, 386, 895 P.2d 333 (1995) ("[A] duty of good faith will not be implied and enforced in contravention of a parties' express contractual rights . . . .").
[93] *See Richardson*, 161 Or. App. at 624 ("However, any implied covenant of good faith and fair dealing must be consistent with the terms of a contract, in this case the scope of coverage provided by the policies. . . . The covenant of good faith that plaintiff seeks to imply would be inconsistent with the coverage provisions of the policies. Therefore, we conclude that the trial court did not err in dismissing plaintiff's claim for breach of the duty of good faith and fair dealing.").
[94] See *Foraker v. USAA Cas. Ins. Co.,* No. 3:14-CV-87-SI, 2020 WL 1914935, at *6 (D. Or. Apr. 20, 2020) (holding that insurer's compelling insured to initiate litigation was "prima facie evidence of an unfair claim settlement practice under Oregon's Unfair Claim Settlement Practices law" and as a result breached the implied covenant of good faith and fair dealing); *Elliott v. Tektronix, Inc.*, 102 Or. App. 388, 396, 796 P.2d 361 (1990) ("The jury's finding that defendants did not breach the contract does not necessarily resolve the implied duty claim, because a party may violate its duty of good faith and fair dealing without also breaching the express provisions of a contract."); *Malbco Holdings, LLC v. AMCO Ins. Co.*, 2008 WL 5205202, at *11 (D. Or. Dec. 11, 2008) ("As discussed above, Oregon does not recognize a tort claim against an insurer for breach of a duty of good faith and fair dealing. Instead, any claim for breach of good faith is incorporated into a breach of contract claim for failing to provide insurance coverage.").
[95] *HTI Holdings, Inc. v. Hartford Cas. Ins. Co.*, 2011 WL 4595799, at *10 (D. Or. Aug. 24, 2011) (quoting *Corder v. A & J Lumber Co., Inc.*, 223 Or. 443, 449, 354 P.2d 807 (1960)), *report and recommendation adopted by* 2011 WL 6205903 (D. Or. Dec. 8, 2011).
[96] *Id.; cf.* Foraker at *9 where Judge Simon substantially expanded the scope of what many insurers consider "foreseeable" damages, to include prejudgment interest, unrecovered litigation costs, and personal injury noneconomic damages (which the court did not award because of a failure of proof). *Foraker* is on appeal.
[97] *Clymo v. Am. States Ins. Co.*, No. 2:18-cv-00168-SU, 2018 WL 4092022, at *3 (D. Or. June 7, 2018), report and recommendation adopted, No. 2:18-cv-0168-SU, 2018 WL 3752857 (Aug. 8, 2018) (citing *Georgetown Realty, Inc. v. Home Ins. Co.*, 313 Or. 97, 106 (1992); *Strader v. Grange Mut. Ins. Co.*, 179 Or. App. 329, 335 (2002); *Abraham v. T. Henry Const., Inc.*, 350 Or. 29, 40 (2011)).

have addressed the issue, and almost uniformly have predicted that Oregon law would not permit a negligence *per se* claim in the first-party insurance context based on the UCSPA and arising from breach of an insurance contract.[98] Attorneys who represent policyholders would note, however, that these federal decisions are not binding on Oregon courts and, at best, reflect only an "*Erie* guess" about how the Oregon Supreme Court would resolve this issue.

As noted in *Clymo v. Am. States. Ins. Co.*,[99] "Oregon law prohibits common-law tort actions by an insured against its insurer in the context of first-party insurance disputes, arising from breach of the insurance contract."[100] In addition, "[t]here is no private statutory cause of action for a UCSPA violation."[101] The *Clymo* court held that although a negligence *per se* claim is a "negligence claim based on a violation of a standard of care set out by a statute or rule," it is likely still barred: [102]

> Given the bar on a common-law negligence claim against the insurer arising from the insurance contract, and the bar on a statutory UCSPA claim, a plaintiff cannot attempt to combine these prohibited causes of action into a hybrid negligence per se claim. …. To allow such a claim would defeat both the prohibitions on the common-law negligence claim and on the statutory UCSPA claim.[103]

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[98] *Braun-Salinas v. Am. Fam. Ins. Grp.*, 665 Fed. Appx. 576, 578 (9th Cir. 2016); *Clymo v. Am. States Ins. Co.*, No. 2:18-cv-00168-SU, 2018 WL 4092022, at *6 (D. Or. June 7, 2018), *report and recommendation adopted*, No. 2:18-cv-0168-SU, 2018 WL 3752857 (Aug. 8, 2018); *Foraker v. USAA Cas. Ins. Co.*, No. 3:14-cv-87-SI, 2017 WL 3184716, at *8 (D. Or. July 26, 2017); *Vail v. Country Mut. Ins. Co.*, No. 2:13-cv-02029-SU, 2015 WL 2207952, at *8 (D. Or. May 11, 2015); *Braun-Salinas v. Am. Fam. Ins. Grp.*, No. 3:13–CV–00264–AC, 2014 WL 1333731, at *8 (D. Or. Apr. 1, 2014); *HTI Holdings, Inc. v. Hartford Cas. Ins. Co.*, No. CIV. 10-6021-AA, 2011 WL 6205903, at *5 (D. Or. Dec. 8, 2011).

[99] No. 2:18-cv-00168-SU, 2018 WL 4092022, at *6 (D. Or. June 7, 2018), report and recommendation adopted, No. 2:18-cv-0168-SU, 2018 WL 3752857 (Aug. 8, 2018).

[100] *Id*. at *3 (citing *Georgetown Realty, Inc.*, 313 Or. at 106 (1992); *Strader*, 179 Or. App. at 335; *Abraham*, 350 Or. at 40).

[101] *Id.* (citing *Emps.' Fire Ins. Co. v. Love It Ice Cream Co.*, 64 Or. App. 784, 790 (1983); *Richardson v. Guardian Life Ins. Co. of Am.*, 161 Or. App. 615, 623-24 (1999)).

[102] *Id*. (quoting *Abraham v. T. Henry Const., Inc.*, 230 Or. App. 564, 573, aff'd, 350 Or. 29 (2011); see also *Deckard v. Bunch*, 358 Or. 754, 761 n.6 (2016)).

[103] *Id*.

The Ninth Circuit[104] and four other Oregon district courts[105] have employed the same reasoning to predict that Oregon law does not permit a negligence *per se* claim premised on the UCSPA.

Clinicient, Inc. v. Sentinel Ins. Co., Ltd.,[106] runs against the majority of opinions and allowed a plaintiff to avoid summary judgment and maintain a claim for negligence *per se* premised on violations of the UCSPA. *Clinicient* relied on an Oregon Supreme Court opinion finding that even when a statute does not itself create a civil cause of action, that statute may provide a standard of care to support a negligence claim[107] and the Oregon Court of Appeals decision in *Abraham,* cited above, to conclude that "despite the fact that the UCSPA does not permit a statutory cause of action, it could nonetheless provide a standard of care for a negligence *per se* claim."[108] Insurers contend that *Clinicient* is distinguishable because it did not consider both prongs of the analysis used in cases like *Clymo*, focusing only on the ability to use the UCSPA to establish a standard of care, and did not consider the Ninth Circuit's holding in *Braun-Salinas.* Policyholders cite to *Clinicient,* and the Oregon state-court decisions on which it relies, as support for reconsidering the federal courts' "*Erie* guess" about what an Oregon court would hold if it were squarely presented with the issue.

(3) Claims Based on Intentional Conduct

Oregon courts have recognized that in some extreme situations a policyholder may be able to recover extracontractual damages based on the torts of intentional infliction of emotional distress or outrageous conduct, or intentional interference with economic relations.[109]

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[104] *Id*. at *4 (citing *Braun-Salinas*, 665 Fed. Appx. At 578.
[105] *Id*. (citing *Foraker*, 2017 WL 3184716, at *8; *Vail*, 2015 WL 2207952, at *8; *Braun-Salinas*, 2014 WL 1333731, at *8; *HTI Holdings, Inc*, 2011 WL 6205903, at *5).
[106] No. 3:16-cv-478-PK, 2016 WL 8470106, at *4-6 (D. Or. Nov. 28, 2016), *report and recommendation adopted*, No. 3:16-cv-478-PK, 2017 WL 991295 (Mar. 14, 2017).
[107] *Id*. at *5.
[108] *Clymo*, 2018 WL 4092022, at *4 (citing *Clinicient*, 2016 WL 8470106, at *6).
[109] *See, e.g., Gross v. Progressive Cas. Ins. Co*., No. 1:17-CV-00828-CL, 2017 WL 6945173, at *3 (D. Or. Dec. 5, 2017), *report and recommendation adopted*, No. 1:17-CV-00828-CL, 2018 WL 401532 (D. Or. Jan. 12, 2018); *Allstate Ins. Co. v. Breeden*, 410 Fed. Appx. 6, 10 (9th Cir. 2010) (rejecting insured's claim for IIED); *Rossi v. State Farm Mut. Auto. Ins. Co.*, 90 Or. App. 589, 591–92, 752 P.2d 1298, *rev. den.*, 306 Or. 414 (1988) (typical dispute over coverage did not rise to the level of outrageous conduct).

C. Third-Party Liability Policies

In Oregon, whether an insurer has a duty to defend the insured is matter of contract interpretation and, as such, an insurer's incorrect refusal to defend does not give rise to a claim for bad faith.[110] Oregon law does not recognize "coverage by estoppel."[111]

But if an insurer agrees to defend the insured, the insurer's decision creates a fiduciary relationship that exists independent of the insurance contract and can therefore give rise to extracontractual liability.[112] In this situation, the insurer must exercise due diligence in defending the insured, or risk being liable to the insured in tort.[113]

The most common extracontractual liability arising from an insurer's improper defense is the "excess liability" scenario, in which the insurer fails to settle within policy limits and the eventual judgment exceeds policy limits. In that scenario the insurer is generally liable for the excess judgment notwithstanding the contractual limits.[114] However, the fact of an excess verdict is not *ipso facto* proof of bad faith; the policyholder must establish that the failure to settle was not reasonable in light of a proper evaluation of the claim, or that the failure resulted from some other unreasonable action by the insurer.[115]

An insured may recover punitive damages for the tort of bad faith failure to settle,[116] and under some circumstances may recover emotional distress damages.[117]

Insurers may resist these claims by arguing a material breach of the policy by the insured.[118] And there is some question about whether ORS 742.061 fees are available to a successful policyholder on a purely extra-contractual exposure claim.[119]

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[110] *Warren v. Farmers Ins. Co. of Oregon*, 115 Or. App. 319, 324–25, 838 P.2d 620, 623 (1992).
[111] *See Northwest Pump & Equip. Co. v. American States Ins. Co*., 144 Or. App. 222, 226-27, 925 P.2d 1241, 1243-44 (1996).
[112] *Fountaincourt Homeowners' Ass'n v. Fountaincourt Dev., LLC*, 360 Or. 341, 354–55, 380 P.3d 916, 924 (2016); *Georgetown Realty, Inc. v. Home Ins. Co.*, 313 Or. 97, 111, 831 P.2d 7 (1992).
[113] *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 298 Or. 514, 518–19, 693 P.2d 1296 (1985); *O'Keefe v. Safeco Ins. Co. of Am.*, 55 Or. App. 811, 815, 639 P.2d 1312, *rev den*, 292 Or. 863 (1982).
[114] *Goddard ex rel. Estate of Goddard v. Farmers Ins. Co. of Oregon*, 173 Or. App. 633, 641–42, 22 P.3d 1224, *rev. den*,. 332 Or. 631 (2001).
[115] *See generally O'Keefe, supra.*
[116] *Georgetown Realty, supra.*
[117] *Mancuso v. Am. Family Mut. Ins. Co.*, CV-07-835-ST, 2009 WL 130259 at *4 (D Or Jan 16, 2009)
[118] *Stumpf v. Cont'l Cas. Co.*, 102 Or. App. 302, 309, 794 P.2d 1228 (1990).
[119] *Goddard v. Farmers Ins. Co. of Oregon*, 177 Or. App. 621, 623, 33 P.3d 1075 (2001).

A policyholder may generally assign its rights including a bad-faith claim to the underlying plaintiff as part of a covenant judgment arrangement.[120]

In short, under Oregon law, a policyholder cannot sue an insurer for bad faith denial of the duty to defend, but, if the insurer defends, the insurer may be exposed to extra-contractual liability if it mishandles the defense or breaches the duty to settle in bad faith.

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[120] *Brownstone Home Condo. Ass'n v. Brownstone Forest Heights, LLC*, 358 Or. 223, 363 P.3d 467 (2015)