

OREGON LAW UPDATE

Time to Avoid Attorney Fees

From the desk of Jeff Eberhard: When it comes to avoiding attorney fees, does the timing of tender really matter?

Claims Pointer: Yes, but timing requirements vary by statute. A defendant seeking to avoid attorney fees under ORS 742.061 must make a tender offer in an amount greater than plaintiff's recovery within six months of the date of proof of loss; a late tender offer will not suffice. In contrast, attorney fees imposed by ORS 20.080 can be avoided so long as a tender offer of nothing less than the plaintiff's recovery is made prior to the filing of the complaint.

case in point...

Jones v. Nava, --- P.3d ----, 2014 (Or App) (July 9, 2014)

Kristina Jones (Jones) suffered physical injuries and emotional distress after her car was hit by an intoxicated and uninsured motorist while driving at night. Shortly after the accident, Jones submitted a claim to her insurance carrier, Workmen's Auto Insurance Company (WAIC), offering proof of loss and requesting uninsured motorist benefits. WAIC's first offer of settlement, \$3,000, came eight months after Jones' request. The offer was later raised to \$6,000, but Jones rejected both offers and demanded her policy limits of \$25,000. At court mandatory arbitration, Jones was awarded \$11,926.99 in damages, as well as \$9,259 in attorney fees. WAIC appealed the award and demanded a jury trial.

At trial, the jury returned a verdict for Jones in the amount of \$5,856.49, a figure less than WAIC's final settlement offer. However, Jones also asked for \$25,182 in attorney fees, which was awarded. WAIC appealed the attorney fee award, arguing that Jones was not entitled to attorney fees.

Pursuant to ORS 742.061, attorney fees are precluded when a defendant offers settlement within six months from the date of proof of loss and the offer exceeds the plaintiff's recovery. WAIC argued that even though its settlement offer was not made within six months of the proof of loss date, Jones was not entitled to attorney fees because at trial she was awarded less than WAIC's settlement offer. WAIC attempted to distinguish contrary case law by suggesting that the six month timeframe did not apply to situations where suit had yet to be filed. The Oregon Court of Appeals was not persuaded, and consistent with the lower court held that Jones was entitled to attorney fees.

ORS 742.061 and its six month time limit provides

an interesting contrast to ORS 20.080, which allows for attorneys fees in cases where the amount sought is \$10,000 or less. Prior to the formal filing of the complaint, the statute requires that the plaintiff make a written demand for damages and wait thirty days before filing a lawsuit. However, Oregon courts have held that the offer is timely if made any time prior to the filing of the complaint. In fact, one case has held that the offer can be made the same day as when the complaint is filed. See *Kile v. York*, 234 Or App 358 (2010). These statutes and associated case law make clear that timing is crucial when it comes to avoiding attorney fees.



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