

# CONSTRUCTION DEFECT CASE UPDATE

## New Trick for Small Subcontractor Claims

case in point ...

**From the desk of Jack Levy:** In Oregon, there is a growing trend from the plaintiffs bar to make construction defect claims for property damages under \$10,000 that carry along potential exposure to attorney fees.

**Claims Pointer:** If a claim is received with a demand for payment of under \$10,000 for property damages and a demand for attorney fees under ORS 20.080, the claims professional should immediately evaluate and respond to the claim with a reasonable offer prior to suit. Failure to respond with an offer within 30 days of the demand exposes the insured to a claim for attorney fees. Importantly, the fee claim cannot be capped or contained by an offer of judgment after the lawsuit is filed.

ORS 20.080 demands are familiar to claims professionals handling personal injury cases. The statute is intended to create pressure to settle low-level injury and damage cases - claims under \$10,000 - by creating an attorney's fee exposure if the plaintiff beats the pre-suit offer. Recently, the construction defect (CD) plaintiff bar has begun using ORS 20.080 demands to leverage settlements from low exposure subcontractors. CD claims professionals should be aware of the pitfalls of handling these claims, especially given the practical challenges of resolving even small claims pre-suit.

The typical scenario involves plaintiff's counsel notifying a subcontractor and its multiple insurers with time on risk of a property damage claim for under \$10,000 and providing only minimal backup - such as a copy of a repair estimate - and a demand for attorney's fees under ORS 20.080. Many of the plaintiff CD firms, as a matter of firm policy, do not respond to requests for information from claims professionals. The insurance policies generally exclude coverage for repair and replacement of the subcontractor's work/product as well as other exclusions which may apply depending on what a complaint may or may not ultimately allege. It may also be difficult for the claims professional to coordinate a response to plaintiff if there are several carriers involved with time on risk for the claim. With these challenges at hand, the claims professional is not in a good position to make an offer. After 30 days elapse from the date of the demand, and without an offer in hand, plaintiff's counsel files a lawsuit.

In this scenario, ORS 20.080 would allow the plaintiff reasonable attorney fees if the amount plead in the lawsuit is \$10,000 or less, if the written demand for payment was made on the defendant and/or its insurer not less than 30 days before filing the lawsuit and if the plaintiff beats the offer, if any made. In

other words, if no offer is made, plaintiff is entitled to reasonable attorney fees if it prevails in any amount, even for \$1. Once the lawsuit is filed, there is no opportunity to mitigate or cap the fee exposure other than beating the pre-suit offer. Significantly, the Oregon Supreme Court held in *Powers v. Quigley*, 345 Or. 432 (2008) that an offer of judgment made in the lawsuit (which could otherwise cap an attorney's fee exposure) will not limit the attorney fees to be awarded under ORS 20.080.

To re-cap, it is important to flag ORS 20.080 demands for early evaluation and resolution because the only opportunity to avoid or minimize the risk of attorney fee exposure is within the first 30 days after the notice is received. Getting cooperation for the offer from plaintiff's counsel and/or other carriers may be challenging, but making an offer may be worthwhile to avoid or minimize the exposure to fees.



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