

OREGON LAW UPDATE

Insurer's Ability to Avoid Payment of Insured's Attorney Fees Under ORS 742.061(1)

From the desk of Jeff Eberhard: Can an insurance provider who has failed to pay a claim within six months after the proof of loss still avoid paying attorney fees under ORS 742.061(1)?

Claims Pointer: Yes, by paying the full amount sought by the insured before the court issues a money judgment. It is well established that an insurer cannot defeat an attorney fee claim by filing an Offer to Allow Judgment more than six months after statutory proof of loss. However, Under the Oregon Court of Appeals' decision in *Triangle Holdings, II, LLC v. Stewart Title Guaranty Co.*, in order for an insured to recover its attorney fees under ORS 742.061(1), the insured must have a "recovery"—meaning a money judgment—issued by the court. If the insurer pays the full amount claimed before judgment is entered, the insurer does not have to pay any amount in attorney's fees under ORS 742.061(1).

case in point...

Triangle Holdings, II, LLC, v. Stewart Title Guaranty Co., --- P.3d --- (Or. App. Oct. 22, 2014).

The plaintiff in this case, Triangle Holdings, II, LLC ("Triangle"), a private lender, loaned \$210,000 to a builder and received a trust deed to certain real property. Triangle then obtained a title insurance policy from defendant Stewart Title Guaranty Co. ("Stewart") to insure against priority issues associated with the property. In May 2010, Triangle learned that several construction liens had been placed on the property. After notifying Stewart of the liens, Triangle paid the liens itself. It then sought reimbursement from Stewart. On May 10, 2011, Stewart agreed to reimburse Triangle upon documentation of the payment.

Four weeks later, on June 6, 2011, Triangle sent Stewart the requested documentation. Two weeks later, on June 20, 2011, Stewart informed Triangle that it had ordered a check and would forward it promptly. Before the checks were issued by Stewart, on June 21, 2011, Triangle filed this lawsuit against Stewart seeking reimbursement.

Due to the pending litigation Stewart withheld payment until March, 2012 when Stewart paid Triangle the full amount sought, plus interest. Stewart then moved for summary judgment, arguing Triangle's claim was moot because Stewart paid the full amount demanded. In response, Triangle argued its claim was not moot because it was still entitled to attorneys' fees under ORS 742.061(1). The trial court agreed with Stewart that Triangle's claim was moot and granted Stewart's motion for summary judgment. The court denied Triangle's fee petition in its entirety. Triangle appealed.

The key issue on appeal was whether Triangle met the "recovery" requirement. ORS 742.061(1) allows a plaintiff to recover attorneys' fees if three

requirements are met: (1) there is no settlement within six months of the insured's filing of proof of loss with its insurer; (2) someone brings an action on the policy; and (3) the insured's "recovery" exceeds the amount of any tender that the insurer made within the six-month period after the insured filed the proof of loss. Triangle argued that it had satisfied the statutory requirements because Stewart had not tendered the full amount of Triangle's claim within six months of the proof of loss, and Triangle had recovered the full amount of its claim when Stewart paid—i.e., Triangle's "recovery" exceeded any timely tender by Stewart.

Relying heavily on *McGraw v. Gwinner*, 282 Or 393 (1978), Stewart argued that a "recovery" for purposes of ORS 742.061(1), is a money judgment, and Triangle did not obtain a money judgment. Rather, Triangle's claims were dismissed after Stewart voluntarily paid the claim before trial. Triangle responded, contending that if "recovery" under the statute means only a money judgment, an insurer can defeat the purpose of the statute by waiting until just before the verdict is rendered for the insured to pay the full amount that the insured seeks. Doing so would deprive the insured of the benefit of statutory fees or, alternatively, remove fee exposure as an incentive to pay disputed claims.

The Court of Appeals rejected Triangle's argument, concluding that "recovery" requires a money judgment. Any other means of recovering money from the insurer—even through a jury verdict—does not satisfy the statute. Here, Stewart paid Triangle the full amount of the claim. However, that payment was made voluntarily by Stewart before trial and no money judgment was entered. Therefore, the court concluded, Triangle did not have a "recovery" for purposes of ORS 742.061(1) and it could not recover attorneys' fees from Stewart for the untimely tender.



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