

OREGON LAW UPDATE

Part I: Factors That Can Slash Down an Award of Attorney's Fees

case in point...

From the desk of Jeffrey Eberhard: The Oregon statute allowing attorney's fees, in cases dealing with insurance claims, provides for an award of attorney's fees if the insured (1) files a proof of loss with its insurer, (2) settlement does not occur within six months of filing the proof of loss, (3) the insured brings a court action to recover on the policy and (4) the insured recovers more than the amount of any tender made by the insurer in the action (ORS 742.061). When an insured fulfills all four requirements, then the only option left for insurers is mitigating the amount of fees awarded. A recent case provides insight to how a court evaluates the factors that reduce or increase otherwise reasonable attorney's fees.

Claims Pointer: Insurers and their attorneys should be aware that a court will consider the parties' actions, ranging from the conduct of the parties that gave rise to the litigation, to the parties' diligence in pursuing settlement of the case, in determining whether to adjust an otherwise reasonable award of attorney's fees. In determining the reasonableness of an hourly rate, the court will rely heavily on the *Oregon State Bar Economic Survey*, which lists the average and median rates for attorneys in a particular locality. A party, who behaves badly, in the eyes of the court, is likely to miss out on an increase to an otherwise reasonable attorney's fee, especially if the fee is higher than that listed in the OSB survey.

Precision Seed Cleaners v. Country Mutual Ins.. Co., 2013WL5524689 (2013).

The fire causing the claimed loss occurred on August 26, 2009, and Precision Seed Cleaners ("Precision Seed") reported it to Country Mutual Insurance Company ("Country Mutual"). Within hours, Country Mutual sent its adjusters and attorneys to the scene. Around November 13, 2009, Precision Seed provided a written and sworn statement to Country Mutual claiming losses of \$5,800,917.70.

Country Mutual was concerned with the veracity of the losses and notified Precision Seed that it may require an examination under oath (EUO) as part of its investigations. Country Mutual first requested documents, in advance of the EUOs, on December 29, 2009. A month later, Country Mutual, again, requested documents and reiterated that it had not made a coverage determination. On February 15, 2010, Precision Seed's new counsel notified Country Mutual that he had been retained by Precision Seed, and requested that Country Mutual identify the individuals whom it wished to examine in the EUOs and provide a copy of the insurance policy. Country Mutual provided the requested documents. Country Mutual requested additional documents on March 10, 2010. On March 25, 2010, Country Mutual reminded Precision Seed that the claim remained under investigation, and that no coverage determination had been made, as

Country Mutual was still awaiting documents from Precision Seed. Additionally, Country Mutual advised Precision Seed that it could not schedule the EUOs until Precision Seed provided the requested documents. When Country Mutual received the documents, it scheduled the EUOs of three individuals for June 10th and 11th. The day before the EUOs were to begin, Precision Seed amended its losses, citing a lower amount than originally claimed, \$4,543,317.20. After the initial EUO was continued, for reasons unknown, Precision Seed filed suit in the United States District Court for the District of Oregon on August 31, 2010, seeking the claimed losses. It also sought recovery for breach of contract, breach of implied covenant of good faith and fair dealing, intentional interference with economic relationship and failure to obtain insurance coverage.

In June of 2011, Country Mutual requested that the parties participate in mediation in order to reach a settlement. Precision Seed responded that it would be willing to participate in a settlement conference after issues related to third parties were resolved. Precision Seed also told Country Mutual it would not stay in litigation unless Country Mutual paid \$1 million toward the claim. On August 16, 2011, Country Mutual offered \$700,000 toward partial settlement on the condition that Precision Seed agree to stay the litigation during the settlement negotiations. The initial settlement



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negotiations were unsuccessful, but Precision Seed eventually, settled in April 2013, for \$3,320,000, inclusive of the \$700,000 paid in August of 2011. In addition, Precision Seed sought attorney's fees of \$1,159,223.19 and prejudgment interest of \$944,772.50. The court awarded Precision Seed \$539,443.20 in attorney's fees and \$148,671.55 in prejudgment interest.

With regard to the amount of fees awarded the court held: (1) the insured was entitled to attorney's fees under ORS 742.061, (2) both the insured and the insurer engaged in conduct that needlessly prolonged litigation, and ORS 20.075 statutory factors that are considered in determining the amount of fees did not warrant an adjustment of an otherwise reasonable award of attorney's fees in favor of either party, (3) the reasonable hourly rate for the insured's attorney was \$350, rather than \$400 as requested by the attorney, (4) the reasonable hourly rate for two law clerks that assisted the firm in representing the insured was \$110 rather than \$185 and (5) the reasonable hourly rate for the paralegals was \$125 rather than \$170.

In reaching the conclusion that Precision Seed was entitled to fees under ORS 742.061, the court rejected Country Mutual's argument that Precision Seed should be precluded from recovering fees because it failed to cooperate with the investigation, and in doing so, prevented Country Mutual from investigating the claim. The court, found that the record did not support the assertion that Precision Seed failed to cooperate with the investigation. The court noted that Country Mutual requested, in its March 2010 request, 13 categories of documents, including multiple years of certain types of documents. Country Mutual also added three types of documents specific to forklifts and physical inventories. Given the amount of documents, Precision Seed's late April to early May 2010 response did not indicate a

lack of cooperation. The court also rejected the argument that an award of attorney's fees could be denied ORS 20.075, which lists the factors that a court should consider when determining the amount of an award of attorney's fees.

In rejecting both parties' arguments that the fees should be adjusted, the court noted that both of the parties' actions needlessly prolonged litigation. The court found that Precision Seed's actions, when evaluated under the factors in ORS 20.075 (1), were not particularly reasonable. The court observed that even though Precision Seed was not uncooperative, it would have been prudent to wait until Country Mutual finished its investigation before filing a complaint. Moreover, Precision Seed complicated litigation by adding tort claims to its complaint, even when those claims were highly unlikely to succeed. Conversely, Country Mutual also prolonged litigation by asserting a number of affirmative defenses and withdrawing them more than a year later.

In evaluating the factors under ORS 20.075(2), the court first addressed ORS 20.075(2), subsection (b), the factor which focused on the likelihood, if apparent to the client, that the acceptance of the case would preclude the attorney from taking other cases. Even though the case took three years to litigate, involved several thousand pages of discovery and 500 photographs, taking the case did not preclude other employment. The court also rejected Precision Seed's counsel's argument that his firm was small and devoted a substantial amount of time to the case, because he did not show that Precision Seed, his client, was aware that acceptance of the case would preclude him from taking on other cases.

Next, the court evaluated ORS 20.075(2), subsection (d), which looks to the amount obtained in the controversy and the results



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obtained. Precision Seed sought more than \$4.9 million in contract-based damages and settled for a little over \$3.2 million. In finding that subsection (d) did not weigh in favor of increasing fees, the court noted that Precision Seed sought additional tort damages of \$700,000, plus punitive damages. When that amount was included, Precision Seed recovered approximately 50% of the recovery sought. This result was favorable, but not overwhelmingly so, hinting that in order for this factor to weigh in favor of increasing an award of fees, that result would need to be overwhelmingly successful.

The court also evaluated ORS 20.075(2)(h), the factor addressing whether the case was taken on a contingency or on an hourly basis. The court held that this factor did not weigh in favor of increasing fees because, once six months passed without a settlement offer of any kind from Country Mutual, Precision Seed could be confident that if it settled for any amount, it would be entitled to attorney's fees under ORS 742.061. This reduced the impact of the contingent nature of the case.

The last factors evaluated under 20.075 (2), were subsections (c) and (g), which required an analysis of the fee customarily charged in the community and the experience, reputation and ability of the attorney performing the services. The Court used the most recent *Oregon State Bar Economic Survey* as the benchmark for comparing an attorney's billing rate with the fee customarily charged in the locality. The most recent survey, in 2012, set the average rate of Portland attorneys with 13-15 years of experience at \$312 and the median at \$300 per hour. In denying Precision Seed's lead counsel's request of \$400 per hour, the court noted that (1) the Precision Seed's expert, who provided a declaration as to the reasonableness of the fees, believed \$350 per hour was reasonable, (2) the rate was higher than the average, (3) even though the attorney in question was

an insurance law expert, his handling of the case was not better than average, which would have been required to award \$400 per hour and (4) the \$350 per hour rate would be applied to all hours dating back to 2010, when the average fee for Portland attorneys was even less.

In its evaluation of the reasonableness of the hourly rates for the two law clerks that were not licensed to practice law, the court looked to the OSB survey which showed an average of \$182 for 0-3 year attorneys, and recent cases which awarded between \$80-\$125 per hour for law clerks. Based on these two sources, the court held that, as to these law clerks, a reasonable rate was \$110. As to the two law clerks that were licensed to practice law, the court awarded \$125, noting that they worked on the case as law clerks.

Next, the court evaluated the reasonableness of the paralegals' hourly rate. In coming to its conclusion that the rates requested were unreasonable, the court stated that a paralegal's rate should not exceed that of a first year associate, as listed in the OSB economic survey for the relevant year. The court observed that the amount was a ceiling, and it was not necessarily determinative of reasonableness. The court further looked to the amount awarded for paralegals' work in recent cases which was between \$100 and \$125 per hour.

Stay tuned for next week's case update which will continue to explore the court's analysis of: (1) the reasonableness of the amount of hours and (2) prejudgment interest.



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