

OREGON LAW UPDATE

Attorney Fees Are Mandatory Under ORS.742.061, But May Be Reduced if the Insurer Acts Reasonably

case in point...

From the desk of Robert May: A recent case provides insight to how a court evaluates the factors that determine reasonable attorney's fees and prejudgment interest. ORS 742.061 mandates attorney's fees if settlement does not occur within six months of the proof of loss, and the insured recovers more than the amount of any tender made within six months of the proof of loss. Conduct of the insured, such as lack of cooperation, cannot terminate fees but the court does have broad discretion to reduce the amount of fees awarded. Prejudgment interest can be recovered only if there is a finding as to the amount of covered loss. If the case settles, the amount of covered loss must be specifically identified in a settlement agreement.

Claims Pointer: Insurers and their attorneys should be aware that a court will not consider the parties' actions during litigation in determining whether to award fees under ORS 742.061. Fees can only be avoided by beating any tender made within six months of statutory proof of loss. The insurer who, in the eyes of the court, behaves unreasonably during the course of litigation will not benefit from the court's equitable discretion to reduce the reasonable attorney's fee award. Further, a settlement agreement entered to "avoid the risk of further litigation without admitting liability or coverage" may serve to terminate the insured's right to claim prejudgment interest.

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

Plaintiff Precision Seed Cleaners ("Precision Seed") suffered a fire loss to their seed cleaning and storage facility on August 26, 2009. The facility was insured by defendant Country Mutual Insurance Company ("Country Mutual"). Precision Seed submitted a written and sworn statement on its proof of loss on November 13, 2009 claiming \$5.8M for damage to equipment, inventory and business income. On June 10, 2010 Precision Seed reduced its claim to \$4.5M, then filed suit on August 31, 2010 alleging a covered loss of just under \$5.0M. Country Mutual failed to tender any payment under the policy until two years after the loss and failed to tender settlement within six months of the proof of loss.

On August 16, 2011, nearly two years after the loss, Country Mutual made a partial indemnity payment of \$700,000 for damaged equipment only. Country Mutual never denied coverage but continued to withhold further payment as to undisputed sums on the basis that the remaining covered loss was undetermined. The case was set for trial on the question of Precision Seed's covered damages only. A few weeks before trial, Country Mutual reached a settlement with Precision Seed for \$3.2M inclusive of the \$700,000 already paid for damaged equipment. The questions of Precision Seed's attorney's fees and prejudgment interest were submitted to the court. The trial court awarded Precision Seed \$539,443.20 in attorney's fees and \$148,671.55 in prejudgment interest.

Country Mutual argued that Precision Seed provided inadequate information to allow Country to determine its obligations under the policy, thereby not meeting the "proof of loss" requirement. The court declined to address the adequacy of Precision Seed's documentation, finding that the August 31, 2010 lawsuit was a dispositive proof of the loss for the purpose of ORS 742.061 and Country Mutual's failure to tender any offer within six months of suit entitles Precision Seed to fees retroactively to the date of loss. When the requirements of ORS 742.061 are met, fees are mandatory. (Petersen v. Farmers Ins. Co. of Oregon, 162 Or.App. 462.) The factors stated in ORS 20.075(1) and (2) determine the amount of fees, or any reduction in fees, but cannot be used to defeat an award.

Country Mutual then unsuccessfully argued that Precision Seed failed to cooperate with the investigation by delaying the production of requested documents, and then by filing the lawsuit. The court again disagreed with Country Mutual that failure to cooperate can preclude attorney fee recovery, finding that Oregon law is clear that when the insurer fails to tender a settlement within six months of the proof of loss, attorney's fees are mandatory. The court further made a factual finding that, given the volume of documents requested by Country Mutual, Precision Seed made reasonable efforts to cooperate and comply with these requests.

Finally, the court rejected Country Mutual's argument that Precision Seed prevented Country from ascertaining its obligations under the policy



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by changing its claim from \$5.8M to \$4.6M, then filing suit for \$5.0M. The court found that Country Mutual could have, but did not, make its own valuation of the claim, asserted then dismissed affirmative defenses to coverage yet only made one payment under the policy on August 16, 2011 when it paid \$700,000 for a portion of the damaged equipment.

Rejecting all arguments that Precision Seed is not entitled to recover its fees, the court turned to the question of reasonableness of the fee claim. Precision Seed's trial attorneys claimed \$680,000 in fees plus a "multiplier" of 150% based upon alleged unreasonable conduct of Country Mutual's counsel during the course of litigation and for refusing to settle until weeks before trial. The court rejected this multiplier, finding that attorneys for both Country Mutual and Precision Seed bear equal responsibility for needlessly prolonging the litigation, and that each side failed to effectively communicate in such a way to narrow the issues. The court named, as one example, that Precision Seed walked out of the settlement conference, while Country Mutual arrived at the conference without its own valuation information. Consequently, it noted that none of the factors listed in ORS 20.075 weighed in favor of either party.

The court used the most recent *Oregon State Bar Economic Survey* as the benchmark for calculating the reasonable hourly billing rate thus reducing the claimed hourly rate. After declining to apply the requested 150% multiplier, reducing the claimed hourly rates by about 15%, and adjusting for duplicative or unreasonable time spent, the court reduced Precision Seed's fees from \$680,000 to \$540,000. The court also exercised its discretionary power to significantly reduce fees claimed by another law firm hired by Precision Seed for the sole purpose of arguing entitlement to fees, finding this cost excessive and unnecessary.

In a surprising move, the trial court declined to award prejudgment interest on the majority of the \$3.2M settlement. The court found that the

information needed to ascertain the amount of the loss, triggering prejudgment interest, was available to Country Mutual not later than November 13, 2009 when Precision Seed presented its proof of loss.

The court noted that the dispute regarding the amount of covered damages is not enough to preclude prejudgment interest, nor was Precision Seed's changing positions regarding the amount of the claimed loss. The determining factor for the award of prejudgment interest is that at some point a jury, special interrogatory answered by the jury, or language in a settlement agreement must establish the amount of the covered damages upon which interest accrues.

The court noted that there was no jury verdict, judgment or special interrogatory establishing covered damages. The \$3.2M settlement agreement between the parties was silent as to the basis for the settlement. Therefore, the court lacked a record establishing the amount of covered damages. Finding the settlement agreement lacking any language that Precision Seed recovered payment for covered property or a covered loss, Precision Seed failed to sustain its burden that the settlement payments are attributable to specific loss. Therefore, the record did not allow the court to conclude what part of the settlement was attributable to the seed claim as opposed to the risk of continued litigation. Precision Seed was entitled to recover prejudgment interest on \$820,000 ultimately paid for the equipment loss but not on the remaining \$2.4M paid by Country Mutual as part of the \$3.2M settlement.

Therefore, the total award for prejudgment interest was reduced significantly to about \$150,000.



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