

# OREGON LAW UPDATE

case in point...

## ORS 742.061 Attorney Fees Only Available After Insured Prevails at Trial

**From the desk of Jeff Eberhard: In this case the Oregon Court of Appeals explained, in detail, how and when an insured may recover attorney fees under ORS 742.061.**

**Claims Pointer:** Insurers can expect to face ongoing difficulties in avoiding attorney fees in disputes with insureds, as Oregon courts have clarified that prevailing insureds are entitled to attorney fees in coverage disputes when the insured's award exceeds the insurer's tender. Additionally, the fact that the prevailing party has multiple insurers will not excuse an insurer from paying the full costs of litigating a coverage dispute. The good news is that fees still must be "reasonable," and Oregon continues to use a relatively straightforward method for calculating fees.

ZRZ Realty Co. v. Beneficial Fire and Casualty Ins. Co., in the Court of Appeals of the State of Oregon, A121145 (March 6, 2013).

Plaintiffs (collectively "Zidell") were engaged in the business of decommissioning military ships. In the course of this business, Zidell released a number of pollutants into local water supplies. In 1994, the Oregon Department of Environmental Quality ("DEQ") notified Zidell that it was responsible for the water contamination. At the time, Zidell was insured through a number of companies, including the defendants (collectively "London"). Zidell requested that London, pursuant to various policies it had issued, defend Zidell and indemnify it for the costs of cleaning up environmental damage that had resulted from Zidell's business. London denied any such obligations and Zidell brought suit, alleging that London had breached the insurance contract.

The trial court ruled that London was obligated to pay Zidell's costs of defense. The trial court also awarded Zidell's more than \$1.3 million in attorney fees. Both parties appealed the attorney fees.

On review, the Oregon Court of Appeals held that once an insured obtains recovery that exceeds the insurer's tender, the insured is entitled to recover all of its attorney fees incurred in litigating the policy, including coverage issues. Additionally, Zidell could only recover those fees that were related to London's duty to defend, not the duty to indemnify. Addressing London's concerns that the attorney fees amounted to a windfall, the Court noted that, pursuant to ORS 742.061, the proper standard against which attorney fees are measured is "reasonableness." According to the Court, the method used by the trial court to calculate attorney fees is common and, thus, was reasonable. That

method is the so-called "lodestar" method, wherein an attorney is awarded a fee based on a reasonable hourly rate, multiplied by a reasonable number of hours devoted to work on the case, with certain adjustments for facts such as the risk of loss and the quality of the legal work.

London made one final attempt to contest the fees, arguing that because Zidell's other insurers had a common obligation to defend Zidell under ORS 742.061, holding London responsible for all of Zidell's attorney fees would be unfair. The Court rejected this argument, noting that while the duty to defend is a shared obligation, liability for attorney fees under ORS 742.061 is a statutory obligation that arises only after the insured prevails at trial. Therefore, Zidell's other insurers were not responsible for the attorney fees.

Contact: Jeff Eberhard | [www.smithfreed.com](http://www.smithfreed.com) | email: [jeberhard@smithfreed.com](mailto:jeberhard@smithfreed.com)

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW 5th Ave, Suite 4300 | Portland | OR | 97204

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