

# OREGON CASE UPDATE

## Will an Insurer's Reference to a Nonissue Disqualify it from the Attorney Fee Exemption?

From the desk of Cliff J. Wilson: What operates to disqualify a motor vehicle insurer from the "safe harbor" of Oregon's first party attorney fee statute? Find out in this week's case update.

case in point...

**Claims Pointer:** The Oregon Court of Appeals held that Tri-County Metropolitan Transportation (Tri-Met) was entitled to the ORS 742.061 attorney fee exemption because its safe harbor letter was effective and Tri-Met did not raise impermissible issues through its affirmative defenses, including its offset defense, which was not actually developed, disputed or decided. Addressing an issue of first impression, the Court established an important precedent regarding the fee exemption statute for motor vehicle insurers, namely that affirmative defenses raised in litigation, if not actually developed, will likely not preclude the exemption.

Robinson v. Tri-Met, 277 Or App 60 (March 16, 2016).

Oregon statute 742.061(1) provides a mechanism for an insured to recover attorney fees if the insured makes a proof of loss, settlement is not achieved within six months of the proof of loss, and the insured recovers more in court than what was offered by the insurer in settlement. Section (3) of the statute also provides a "safe harbor" from the insurer's obligation to pay attorney fees. This "safe harbor" applies in actions to recover UM/UIM benefits if the insurer provides timely written notice of its acceptance of coverage and the only issues in dispute are the liability of the uninsured/underinsured motorist and the damages due to the insured. The writing must consent to submit the case to binding arbitration.

In this case, Plaintiff was a passenger on a bus operated by Defendant, Tri-County Metropolitan Transportation (Tri-Met). She was thrown within the bus and injured after the bus stopped suddenly or made an evasive maneuver to avoid a collision with a negligent driver. Because her injuries occurred without a collision and the negligent driver was unknown, she was the victim of a so-called "phantom

vehicle," which qualified as an uninsured motor vehicle. Tri-Met provided uninsured motorist (UM) benefits under the same terms as a motor vehicle insurer. Plaintiff thereafter gave proof of loss to Tri-Met for UM benefits.

Within six months, Tri-Met responded with a "safe harbor" letter, offering to arbitrate the claim and limiting the issues to a determination of the damages due in order to avoid exposure to attorney fees.

Rather than proceed with arbitration, Plaintiff chose to file the action in court. The case was referred to non-binding court-annexed arbitration. In her complaint, she alleged the accident was caused by an uninsured vehicle, and she also alleged that as the result of the negligence of Tri-Met she had medical expenses of \$8,395 and noneconomic damages of \$16,605, the apparent remaining balance of Tri-Met's UM benefit limit.

In its answer, Tri-Met reiterated the terms of its safe harbor letter and provided affirmative defenses, including that UM benefits were limited to \$25,000 and Plaintiff's damages were offset by other payments Plaintiff already received. In its discovery responses, Tri-Met reiterated that it had accepted coverage and



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that the only issue was the damages due the Plaintiff.

The arbitrator awarded economic damages and noneconomic damages, but denied attorney fees. On appeal to the trial court, the court agreed that Tri-Met's "safe harbor" letter was effective and that the affirmative defenses and discovery responses were consistent with conditions for the statutory safe harbor and did not raise impermissible issues.

On appeal to the Oregon Court of Appeals, the court affirmed the trial court's ruling and held that Tri-Met's "safe harbor" letter was effective and that the defenses and responses did not make Tri-Met's safe harbor letter ineffective.

In its analysis, the Court of Appeals first refuted Plaintiff's argument that the letter was ineffective simply because it failed to mimic the statutory terms in every detail.

The next issue was whether Tri-Met's offset defense to recognize damages already paid raised an impermissible issue, namely the possibility of zero damages. The court again rejected this argument. As stated recently by the Oregon Court of Appeals in *Spearman v. Progressive Classic Ins. Co.*, personal injury protection (PIP) "benefits" and UM/UIM "damages" are different terms within the statute and are determined differently. According to the court, a zero recovery can be a permissible outcome in a UM/UIM claim and is within the bounds of the fee exemption.

Looking further at the offset defense, the court considered Plaintiff's argument regarding whether Tri-Met's mere allegation of a collateral-source offset in itself created an impermissible issue that disqualified the insurer

from the fee exemption. The record reflected that the offset defense was undeveloped, not actually disputed and a nonissue. The court considered the text of the "safe harbor" statute regarding that the insurer accept coverage and that the only *issues* are liability and damages due. After reviewing the definition of "issue," the court concluded that Tri-Met's reference to a nonissue did not disqualify Tri-Met from the fee exemption. The court determined that because of the adversarial context of arbitration or litigation, an issue is a matter of live controversy, active contest, or actual dispute. Therefore, because the offset defense was not actually disputed, Tri-Met's boilerplate affirmative defense was a nonissue and the defense did not make the fee exemption inapplicable.

In its analysis, the court discussed another relevant Oregon Court of Appeals case, *Kiryuta v. Country Preferred Ins. Co.*, and indicated that while the insurer had gone too far in that case by effectively reserving all coverage defenses, the court did not foreclose the possibility that an insurer could be eligible for the fee exemption by amending the complaint or otherwise establishing that the only disputed issues were fault and damages.

Therefore, the court found that Tri-Met was entitled to the attorney fee exemption due to its effective safe harbor letter and absent a showing that it raised impermissible issues in its admissions and affirmative defenses. The trial court's ruling was affirmed.

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