

A recent pair of decisions from Oregon courts has clarified the meanings of two statutes which are often the source of concern to the insurance industry. In *Johnson v. Swaim*, ___ Or App ___, (November 15, 2006), the court discussed the procedural requirements for a written demand sufficient to set up a claim for attorneys fees under ORS 20.080. In *Hamilton v. Paynter*, ___ Or ___ (December 7, 2006), the court held that the statute of limitations may be suspended by an advance payment under ORS 12.155 even when the advance payment is made by an individual rather than an insurer.

In *Johnson v. Swaim*, ___ Or App ___, (November 15, 2006), the defendant appealed a trial court award of attorney fees under ORS 20.080 after a jury returned a verdict in favor of the plaintiff for damages in a motor vehicle accident on October 4, 2001. The defendant appealed, arguing that the plaintiff failed to comply with the procedural requirements of ORS 20.080 by failing to make a “written demand for the payment of [the] claim ... not less than 10 days before the commencement of the action.” The Oregon Court of Appeals agreed with the defendant and reversed the award of attorney fees.

The court focused on three communications from the plaintiff. On July 11, 2002, plaintiff sent a letter to the defendant’s insurer stating that “a claim is being pursued” and suggesting that the adjuster leave the matter open “until fair and full compensation is paid for all losses.” The court of appeals held that the letter failed to satisfy the statutory requirements because it did not contain a written demand for a specific dollar amount. Under *Lander v. E. Texas Motor Frt. Lines*, 266 Or 473 (1973), a written statement that plaintiff is pursuing a claim under ORS 20.080 would sufficiently specify that the dollar amount of the claim is \$5,500 (or less). However, plaintiff’s July 11, 2002 letter gave no indication of the dollar

amount of the demand, nor did it state that a claim was made pursuant to ORS 20.080.

On October 14, 2003, plaintiff spoke with another adjuster and orally demanded \$5,000.00 in damages. The court held that this communication did not satisfy ORS 20.080 because it was not a “written demand.” Furthermore, the court rejected the argument that this oral conversation, combined with the July 11, 2002 letter, satisfied the requirements of ORS 20.080, because the “writing” must contain the reference to a specific dollar amount.

On September 29, 2003, plaintiff’s attorney sent a letter demanding \$5,500 pursuant to ORS 20.080. This letter was sent shortly before the claim was about to expire pursuant to the two year statute of limitations. The next day, a Complaint was filed seeking \$5,500 in damages. The court held that the letter did not meet the requirements of ORS 20.080, because it was not sent at least ten days prior to the filing of a Complaint.

The plaintiff also argued that the defendant had waived the requirements of ORS 20.080 when defendant’s insurance adjuster wrote one week after the Complaint was filed that “pursuant to ORS 20.080, I am offering your client \$500.00.” The court held that this statement did not constitute a waiver of the right to have plaintiff comply with the statutory requirements, because there was no intentional relinquishment of a known right. Thus, it appears that a fairly strict compliance with the statute is still required in order for a plaintiff to perfect the right to an attorney fee award under ORS 20.080.

In *Hamilton v. Paynter*, ___ Or ___ (December 7, 2006), the Oregon Supreme Court held that ORS 12.155, the advance payment statute, applied to payments made by individuals as well as insurers, overruling the

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Oregon Court of Appeals. In *Hamilton*, the plaintiff was injured on August 19, 2001, when her car was rear ended by a forklift operated by defendant George Paynter and owned by defendants Carvalho Fisheries Inc. and William Carvalho. On November 2, 2001, defendants gave plaintiff \$1000 as a “partial payment.” Plaintiff did not file an action until November 28, 2003, two years and three months after the accident. However, the plaintiff claimed that the two year statute of limitations was suspended by ORS 12.155 because an advance payment was given without notification that payment would not suspend the statute of limitations. The defendants claimed that they were not “persons” who made payment under the ORS 12.155, relying on language from prior decisions indicating that the statute only applied to insurers who have made payments in the third party context.

The court held that statutory term “persons” included individuals, and not just insurers. Although there were indications that the legislature intended the rule to be applied to insurers, the legislature ultimately passed a broader rule which would allow tolling of the statute of limitations when any person, including an individual, makes an advance payment.

Because the advance payment statute applies to payments made by individuals, insurers should take care in determining whether their insureds have made any payments for any reason to third party claimants. If an insured has paid a third party claimant, this may toll the statute of limitations. ❖

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