

Advance Payment Update

— by Tim Heinson

You get a call on a claim that has been closed for ages. The claimant's attorney says that the statute of limitations has not, in fact, run because somebody paid property damage without the appropriate notice and this advance payment has tolled the statute. Is she correct?

ORS 12.155 requires that an advance payment can toll the applicable statute of limitations unless an appropriate notice is provided to the claimant. The statutory definition of "advance payment" is found in ORS 31.550 (formerly ORS 18.500). It is broadly defined as "compensation for the injury or death of a person or the injury or destruction of property prior to the determination of legal liability therefor." ORS 12.155 requires that the notice: (1) be given not later than 30 days after the first advance payment was made; (2) be made in writing; and (3) contain the date the applicable statute of limitations expires. If this notice is provided, the statute of limitations is not tolled. If it is not given, the statute stops running until an appropriate notice is given.

ORS 12.155 also gives authority to the Director of the Department of Consumer and Business Services to prescribe a form for the required notice. This form is currently found in Oregon Administrative Rule 836-050-0150, which requires that the notice provide:

"a) The time and location of the occurrence in regard to which the

advance payment is made.

(b) A statement to the effect that the amount of any advance payment will be credited against any judgment entered in favor of the payee.

(c) The following words: "The period of limitation for commencement of an action for damages as set by Chapter 12 of Oregon Revised Statutes will expire on _____", or such other similar words as the Director of the Department of Consumer and Business Services approves.

(d) The signature of a person authorized to act for the insurer.

(e) The date on which notice is transmitted to the party entitled to the advance payment."

The rule also requires that the type size used in the notice not be smaller than the type used for other typed or printed material and not be arranged or displayed in such a way as to obscure the content of the notice. It is a good idea to save a copy of the signed notice in your file.

This rule was amended to its present form in 2002. The prior rule was OAR 836-20-900. The only significant change was to subsection 4 (subsection (d) in the new version), which required that the notice

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contain “the signature of the party to whom the advance payments are made or his representative and the signature of a person authorized to act for the insurer.” The requirement that the person receiving payment sign the notice, of course, created difficulty for insurers since the person sometimes failed to do so. This problem was recognized and corrected in the amendment but may still come up on occasion. Although this specific issue has not been reviewed by an Oregon appellate court there is a good argument to be made that this signature requirement is not valid since OAR 836-20-900(4) appears to impose requirements more stringent than imposed by ORS 12.155.

Although the statute authorizes the Department of Consumer and Business Services to establish the form of the notice, it clearly states the required elements of the notice, as noted above. The statute also explicitly limits the form to the “notice required by this subsection.” Furthermore, an administrative rule must be consistent with the statute pursuant to which it is

promulgated. If it exceeds that statutory authority, the appellate courts are authorized to declare the rule invalid. ORS 183.400. In Oregon State Denturist Association v. Board of Dentistry, 172 Or App 693 (2001), the Oregon Court of Appeals held invalid a rule promulgated by the Board of Dentistry that was more restrictive than the statute authorizing the rule. Similarly, OAR 836-20-900(4), is arguably more restrictive than, and therefore inconsistent with, its statutory authority, ORS 12.155.

On claims you are dealing with now, be sure to follow the notice format provided by OAR 836-050-0150. If you have an older claim from when OAR 836-20-900 was in effect, a good argument can be made that the rule is invalid to the extent that it seeks to impose a requirement not found in ORS 12.155. ❖

— Please direct any questions in this area of law to the author, Tim Heinson, at 503-768-9600, or by email to tim@lerlaw.com.