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Case Study

Got an Out-of-State Insurance Policy? Oregon Attorney Fees May Still Apply

By Jeffrey D. Eberhard

Claims Pointer: If an insured files suit on any insurance policy in Oregon, attorney fees pursuant to ORS 742.061 may be available regardless of where the policy was actually delivered or issued for delivery. Claims adjusters evaluating PIP or UM/UIM claims where there is any indication that the insured may attempt to file suit in Oregon should consider issuing an Oregon ORS 742.061 “safe harbor” letter, accepting coverage and agreeing to binding arbitration even if the policy at issue is not an Oregon policy.

Although the Oregon Supreme Court’s opinion in Morgan v. Amex Assurance Company, 352 Or 363, 287 P3d 1038 (September 14, 2012), *petition for reconsideration denied*, (November 21, 2012) has the effect of significantly expanding the application of attorney fees to non-Oregon policies of insurance of all types, the Court’s holding is particularly important to insurers evaluating Personal Injury Protection and Underinsured/Uninsured Motorist claims. Insureds can now recover attorney fees pursuant to Oregon law even if the policy at issue was not issued in Oregon.

Carla Morgan lived in Vancouver, Washington where she purchased automobile insurance, including uninsured motorist (UM) coverage from Amex Assurance Company. Amex issued and delivered the policy in Washington. While Morgan was driving from Vancouver to Portland one day, she was struck by another vehicle whose driver was uninsured. Morgan filed a claim with Amex for UM coverage under her Washington automobile insurance policy. Morgan later moved to Oregon and ended up bringing suit against Amex in Oregon state court, alleging a right to attorney fees pursuant to ORS 742.061 (Oregon’s statute authorizing the recovery of attorney fees on suits involving policies of insurance if claim is not settled within six months). Amex ultimately offered to pay Morgan \$85,000 exclusive of costs or attorney fees. Morgan accepted the offer and petitioned for her attorney fees, pursuant to ORS 742.061.

Amex objected to Morgan’s attorney fees request arguing that ORS 742.001, which defines the scope of the Oregon Insurance Code, limited the application of ORS 742.061 to policies of insurance delivered or issued for delivery in Oregon, and Morgan’s policy was delivered and issued for delivery in Washington. Both the trial court and the Oregon Court of Appeals agreed with Amex and denied Morgan’s application for her attorney fees, concluding that ORS 742.061 only applied to insurance policies delivered or issued for delivery in Oregon. Morgan appealed the denial of her attorney fees to the Oregon Supreme Court.

After reviewing the legislative history relating to the original enactment of Oregon’s attorney fee statute, as well as the changes that have been made to it over the years, the Oregon Supreme Court concluded that ORS 742.061 was procedural and applied whenever an action based on an insurance policy is brought in an Oregon court, regardless of the language of ORS 742.001. Thus, the Court held Morgan was entitled to attorney fees even though her insurance policy was delivered and issued for delivery in Washington.

ORS 742.061 allows for some protection from attorney fees on PIP and UM/UIM lawsuits if the Plaintiff ultimately recovers equal to or less than any amount tendered by the insurer within six months of proof of loss, or where the insurer has accepted coverage and submitted to binding arbitration. In light of the Oregon Supreme Court’s ruling in this case, we recommend that when evaluating any PIP or UM/UIM claim, an insurer should consider issuing an ORS 742.061 safe harbor letter within six months of proof of loss if there is any reason to believe that the claimant may end up filing suit in Oregon. If you’d like a sample “safe harbor” letter, don’t hesitate to call us and we’ll forward one to you. ❖

— View the full case opinion at: www.publications.ojd.state.or.us/docs/A141913.pdf

— If you would like to be notified of these new cases, please send an email to caseupdate@smithfreed.com.



Claims Conversation

with Roger Howson, Claims Dispute Resolution, TCAA President, Editor, Education Coordinator

Can someone please explain to me why everyone has advice on how to get OFF Jury Duty rather than how to get seated IN the Jury Box?

Brandi's husband Matt got himself excused as a prospective juror on a domestic abuse case when asked

"How do you feel about 'spousal discipline'?" he answered, "After 20 years of marriage I'll take any advice on 'spousal discipline' you can give me." Matt finds nothing humorous about domestic abuse, but he says he refuses to respectfully answer any blatantly stupid question... especially when it's a twisted attempt to defend a wife-beating weasel in need of some "spousal discipline" of his own.

My mother served on the Jury in the "Tylenol tampering" murder trial, and she watched several prospective Jurors excused because they were TOO anxious to sit in judgment on a capital case — one because she strongly and obviously opposed the death penalty and another because he "need(ed) to help bring the murderer to justice". Another prospective Juror was escorted from the courtroom by the Bailiff when she became a little too insistent about her "Constitutional RIGHT" to sit on this Jury.

Several years ago during an OCAA Symposium Mock Trial the participating Judge told a story about a Juror who was dismissed when she suddenly recognized one of the attorneys trying the case as one of her regular customers. The Judge asked why she didn't mention this during Voir Dire, and she said it took her a while to figure out who he was because she'd never seen him without the cowboy hat he always wears into her strip club. The Judge mused aloud that the attorney probably didn't immediately recognize the prospective Juror because she was fully clothed.

This same Judge also told a story about another attorney complaining to him during a trial, "Your Honor, Juror #7 has fallen asleep!" To which the Judge replied, "Counselor, YOU put the Juror to sleep and it's up to YOU to wake him up."

I am never thrilled to receive a Summons for Jury Duty, but I take my civic responsibilities seriously. I am also mindful that insurance claims are (too) often resolved in court, and many other insurance claims are resolved by the THREAT of court. Therefore, I feel an even greater responsibility to take a bullet for the team by showing up whenever I am called upon to serve on a Jury.

I hear from friends and colleagues all the reasons I shouldn't be on a Jury: as a business owner I can't afford to be away from work; being an insurance claims professional will get me booted by one side or the other; after 35 years in the claims business I've worked at one time or another with most of the attorneys, their law firms, and/or their client insurance companies; I am a voracious reader, so there are very few significant news stories that escape my notice; and because of my inclusion in so many different communities such as insurance, academics, career development, business, athletics, etc. it is inevitable that I will know ONE of the participants in the litigation. It is also interesting (perhaps troubling) that I know so many felons AND law enforcement professionals... go figure.

In spite of ALL those reasons I shouldn't be able to serve on a Jury, I am proud to have been impaneled three times previously. Each Jury was different and unique in our own way and no one WANTED to be there (okay, maybe a few of the Jurors were having the time of their life), but once impaneled every Jury I had the privilege of sitting on embraced the full extent of our duties and responsibilities to hear the case with an open mind, deliberate according to the specific instructions issued by the Judge, and rule within the strictest interpretation of the law.

In fact, most of the Jury backroom drama you hear about so often is a consequence of that same commitment to the Jury's duties and responsibilities. The problem is that twelve different people will each evaluate things through their own prism of life experiences, cultural values, community interaction, and education and train-

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Claims Conversation... *(Continued)*

ing, so the Jury has twelve different perspectives for evaluating material facts, witness credibility, elements of intent, motive, and prior knowledge, and whether to abide by the letter of the law or the spirit in which it was intended. Jury deliberation is a messy process, but more often than not it works exactly the way it was intended.

This time I answered my Jury Summons without having to serve on a Jury. I thought I would be excused because I was under Subpoena (by both sides) in a Trial that would be going on at the same time as the one for which I was being considered as a Juror. The Judge told me that Trials never go on as scheduled and she said she could always ask that Judge to have my testimony heard later, but if it became a problem one of the Alternates would step in for me. After Jurors were excused “for cause” I counted the number of “preemptory challenges” remaining and then I realized that the Judge knew all along that I wouldn’t be seated on the Jury. I suspect that the Judge refused to excuse me as a way of sending a message to anyone else thinking of a lame excuse for avoiding service.

Short story long (I tend to do that), to the best of my ability I will ALWAYS answer my Jury Summons because I worry about any case in which I’m involved being decided by people who don’t know anything, don’t care about anyone else, and don’t share my values and world view. In other words, if I don’t show up for Jury Duty why should anyone else? ❖

— Roger Howson is a regular contributor to the Puget Sound Adjusters Association (PSAA) newsletter, and is their acting Editor. He has also been a presenter at OCAA Symposiums.

Laboratory Test Blood Alcohol

— By **Tami Rockholt, RN, BSN**, Director of Business Development for IINFORM Software Corporation
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The amount of alcohol in one’s system can be measured by taking a sample of blood for analysis by a laboratory. The laboratory test can be referred to in a number of ways: as blood alcohol, ethanol, ethyl alcohol, or as ETOH. The amount of alcohol present in the bloodstream is measured in milligrams of alcohol

per deciliter of blood, and is identified as “mg / dL.” (A deciliter is one tenth of a liter, or 100 milliliters, a little less than one half of a cup).

The legal driving limit in most states is 100mg / dL, noted as “0.1 percent;” some states have lowered the limit to 80mg / dL, or 0.08 percent.

The following blood alcohol levels will produce the symptoms noted:

- 50mg / dL (0.05) – sedation or tranquility
- 50 – 150mg / dL (0.05 – 0.15) – a lack of coordination
- 150 – 200mg / dL (0.15 – 0.2) – intoxication
- 300 – 400mg / dL (0.3 – 0.4) – unconsciousness
- Greater than 400mg / dL (0.4) – may be fatal

Alcohol is one of the most predictable chemical reactions for the body. It burns off at an almost perfectly precise rate of .016 BAC (blood alcohol concentration) per hour, about equal to one standard drink each hour (depending on the person’s weight). This rate is true regardless of the size of the body. A 5’2 female burns off alcohol at the same rate as a 6’1 obese male.

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Blood Alcohol... *(Continued)*

The differences, however, are in the rate with which the BAC rises. One drink in a small female of low weight constitutes a much larger percent of her BAC. It may take a male five drinks or more in an hour to reach a BAC of 0.08, while it may take a small female only two or three drinks.

Also, it tends to take longer for individuals with a lot of fat to absorb the alcohol. In other words, if two people have different fat levels but are of equal weight, drink the exact same amount of alcohol, the one with less fat will absorb the alcohol faster, causing them to feel it quicker. The one with more fat will absorb it slower, all the while the alcohol they are absorbing is still metabolizing at the same rate, so they will not experience as much of a sensation.

Regardless of size or gender, the 0.016 metabolic rate is a constant. Refer to the chart below to understand the length of time it will take for the body to get rid of all of the alcohol in the system.

Notice on this table that if the person has a BAC of 0.24, which is very drunk – he will likely be stumbling and at risk for blacking out, he will still have alcohol in the body the next day, and will still be legally drunk for 10 more hours.

Despite what many people believe, there is no way to speed up this process. Coffee may make a person more alert, but it will not get rid of the alcohol that is still in the body. ❖

Length of time it takes for the body to get rid of alcohol	
Blood Alcohol Concentration	Hours Until BAC Reaches 0.0
0.016	1.0
0.05	3.7
0.08 (legal limit)	5.0
0.10	6.25
0.16 (2 x legal limit)	10.0
0.20	12.5
0.24 (3 x legal limit)	15.0