Case Study

Clarifying the "Made on Defendant" Requirement in ORS 20.080

— by **Jeffrey D. Eberhard**

You probably already know about ORS 20.080, where a claimant can get attorney fees for property damages or bodily injury if the claim is $5,500 or less. However, you may not know that a claimant is not entitled to fees unless he properly serves the defendant with a written demand for payment before filing suit. the court recently clarified how a defendant satisfies this requirement in *Woods v. Carl Karcher Enterprises, Inc.*, 202 Or App 372, ___ P3d ___ (2003).

Carol Woods filed an insurance claim after she slipped and fell at defendant's Carl's Jr. restaurant. The restaurant's insurer, Constitution State Service Company (CSSC), investigated but denied Woods' claim. As the two-year statute of limitations approached, Woods' attorney contacted CSSC seeking records of the investigation and threatening to sue if the matter was not resolved quickly. CSSC responded by reiterating that defendant was not liable and invited Woods' attorney to follow up with any questions.

Woods' attorney then send an ORS 20.080 demand letter by first class mail (no return receipt requested) to the restaurant where plaintiff fell, addressed "To Whom It May Concern." Two weeks later, Woods filed a complaint seeking damages and attorney fees under ORS 20.080. Following arbitration and appeal, plaintiff received a damage award and costs, but no attorney fees, based on the finding that she failed to satisfy the notice requirements of ORS 20.080. The court of appeals affirmed.

The court first examined the requirement that a written demand for payment of the claim be "made on the defendant." Noting that although the statute does not define this phrase, the Oregon Rules of Civil Procedure provide a context for construing ORS 20.080. The court found the 20.080 notice requirement was analogous to a service of summons on a defendant, and adopted similar requirements. Therefore, a demand is "made on the defendant" only if it is served "in a manner reasonably calculated, under all the circumstances, to apprise the defendant of the demand and to afford a reasonable opportunity to respond as required."

Applying this standard to plaintiff's service of the demand, the court found it was inadequate. The letter was only sent via first class mail – it was not coupled with service by certified, registered mail, or express mail – presumptively reasonable service methods in the analogous service of summons context. Furthermore, the court found that sending the letter to defendant's restaurant addressed "To Whom it May Concern" was not reasonably calculated to ensure receipt by someone who would be able to respond timely. Finally, the fact that plaintiff chose not to serve the demand on CSSC, while not dispositive, was further evidence that plaintiff's method of making her demand was unreasonable.

Alexander Wylie arbitrated the underlying matter and successfully argued the case on appeal for the defendant. In February 2005, Alex joined Smith Freed & Eberhard, P.C. and is an associate on Dennis Freed's team. ❖

Claims Pointer: A plaintiff is not entitled to attorney fees under ORS 20.080 if he or she fails to properly serve a written demand for payment at least 10 days before the action is filed. The written demand must be made "in a manner reasonably calculated, under all the circumstances, to apprise the defendant of the demand and to afford a reasonable opportunity to respond as required."

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