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Case Study

ORS 20.080: Making a Settlement Offer “Prior to Commencement of a Claim”

— by Jeffrey D. Eberhard

Claims Pointer: As long as a settlement offer is more than a plaintiff’s award, a defendant may avoid attorney fees under ORS 20.080 by extending a settlement offer any time before plaintiff files the lawsuit, even if that offer is made on the same day that the plaintiff files his or her complaint.

The notorious ORS 20.080, which can transform small claims into large payouts to claimants was recently amended by the Oregon State Legislature. Most notably, the amendment extended the claim limit from \$5,500 to 7,500 (and \$10,000 or less for all claims filed on or after January 1, 2012). Even though claimants are now required to provide additional disclosures and must wait 30 days (as opposed to the previous 10 day requirement) from sending a demand before filing, ORS 20.080 is a minefield for insurance claims representatives. However, a recent Oregon Court of Appeals case, Kile v. York, may have provided defendants an ever-so-slight glimmer of relief under ORS 20.080. (Case no: A14002, March 17, 2010). Although the court of appeals was analyzing the 2007 version of ORS 20.080 in its analysis of Kile v. York, the 2009 amendments did not change the language that the court was analyzing. Thus, the Oregon Court of Appeal’s ruling indicates how the court would interpret the 2009 version of ORS 20.080.

Plaintiffs Ryan Coffey and his passenger, Davis Kile (collectively “Plaintiffs”), were injured in a motor vehicle accident with Defendant Kathleen York (“Defendant”). Plaintiffs sued Defendant for their injuries and a jury awarded \$1,953.50 to Coffey and \$1,829 to Kile. Plaintiffs then filed a motion for attorney fees under ORS 20.080. The 2007 version of ORS 20.080 granted attorney fees to a prevailing plaintiff for claims of \$5,500 or less if

the plaintiff tendered a written demand for payment at least 10 days before commencing a lawsuit. However, a plaintiff’s entitlement to attorney fees was eliminated if a defendant made a settlement offer to the plaintiff that: (1) was prior to the commencement of the action; and (2) the settlement offer was greater than plaintiff’s ultimate award. In the present case, Defendant maintained that Plaintiffs were not entitled to attorney fees under ORS 20.080 because she had, through her insurer, offered Plaintiffs \$2,000 each—exceeding both Plaintiffs’ awards—to settle their claims six hours before Plaintiffs filed their complaints. The trial court rejected Defendant’s argument finding the “spirit and intent” of ORS 20.080 demands that “prior to commencement” means a defendant’s settlement offer must be offered “prior to the date the complaint was filed,” in other words, at least one day before a plaintiff files a complaint. Defendant appealed to the court of appeals.

The Oregon Court of Appeals granted review to interpret the meaning of ORS 20.080. In analyzing ORS 20.080, the court looked to the statute’s plain language—specifically the words “prior to commencement of the action.” The court of appeals turned to Webster’s Third New International Dictionary (unabridged ed. 2002), which defined “prior to” as “in advance of” or “before.” The court of appeals also determined that the statutory language “commencement of the action” is legally defined, with the exception of statutes of limitations, as “filing a complaint with the clerk of the court.” ORCP 3. The court of appeals held that the statutory language is clear and does not require a defendant to make a settlement offer one day before the complaint is filed; rather the offer can be made any time before the complaint is filed.

Thus, the court of appeals reversed the trial court’s attorney fee award against Defendant and remanded the case back to the trial court to determine whether Defendant actually offered Plaintiffs \$2,000 before Plaintiffs filed their complaints. ❖

— Full case available at: www.publications.ojd.state.or.us/A141002.htm

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

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Lachenmeier Enloe Rall & Heinson
Attorneys at Law

New Decision Regarding Effect of Offer to Allow Judgment

— by Flavio A. Ortiz

The Oregon Court of Appeals recently issued a decision addressing the effect of an offer to allow judgment on a claim for attorney fees under ORS 742.061. This decision raises a general question about the effect of offers to allow judgment on statutory claims for attorney fees.

The new decision, Wilson v. Tri-County Met., -- Or. App. -- (2009), involves a claim for statutory attorney fees under ORS 742.061. Under that statute, an insured who makes a direct claim against his or her insurer may be entitled to attorney fees. ORS 742.061 states that if an insurer does not settle a claim within six months of the proof of loss and the insured's recovery exceeds any tender by the insurer, the insured will be entitled to recover attorney fees. In Dockins v. State Farm Ins. Co., 329 Or. 20 (1999), the Oregon Supreme Court held that a tender (i.e. offer) made to prevent an attorney fee claim under ORS 742.061 must be made within six months of the proof of loss. (The statute also contains special provisions regarding PIP and UIM claims).

For a number of reasons, an insurer may want to make an offer after six months have passed since the proof of loss. As noted above, such an offer would not prevent an attorney fee claim under ORS 742.061. The question has often arisen, however, whether the insurer can cut off or limit a claim for additional attorney fees by serving an offer to allow judgment pursuant to Oregon Rule of Civil Procedure (ORCP) 54 E. ORCP 54 E provides that an offer to allow judgment may be served on an opposing party up to 10 days before trial. According to the rule, if the offer to allow judgment is not accepted and the offer exceeds the opposing party's recovery, the opposing party would not be entitled

to costs or attorney fees incurred after the date of the offer to allow judgment.

In Wilson v. Tri-County Met., -- Or. App. -- (2009), the Oregon Court of Appeals held that an offer to allow judgment, filed more than six months after proof of loss, will not cut off or limit an insured's attorney fee claim under ORS 742.061. The decision relied heavily on a recent Oregon Supreme Court opinion, Powers v. Quigley, 345 Or. 432 (2008), which also addressed the effect of an offer to allow judgment.

In Powers, the Oregon Supreme Court held that an offer to allow judgment does not cut off attorney fees that are based on ORS 20.080. The rationale was that ORS 20.080 was designed to pressure defendants and their insurers to settle small claims prior to litigation when written demand is made at least 10 days before filing a lawsuit. (The statute now requires that written demand be made 30 days before filing a lawsuit). The court felt that if defendants were allowed to reduce or limit attorney fee claims by filing offers to allow judgment after a lawsuit had been filed, the purpose of ORS 20.080 would be undermined. The court decided that ORS 20.080 and ORCP 54 E were in conflict, and it chose to enforce ORS 20.080 because it was considered to be more specific.

Similarly, in Wilson, the Court of Appeals held that the purpose of ORS 742.061 was to pressure insurers to settle claims within six months of proof of loss. The court held that allowing an insurer to reduce or limit an attorney fee claim by serving an offer to allow judgment more than six months after proof of loss would undermine the purpose of ORS 742.061. The court went to conclude that ORS 742.061 was considered an exception to ORCP 54 E and that an offer to allow judgment (served more than six months after proof of loss) could not be used to cut off fees or limit fees in an ORS 742.061 claim.

The defendant in the Wilson case may petition the Oregon Supreme Court for review of the appellate court's decision. But for now, the Wilson decision emphasizes the need to promptly investigate, evaluate, and negotiate first party insurance claims that may be subject to ORS 742.061.

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Perspectives... *(Continued from previous page)*

Because the above cases indicate that an offer to allow judgment will not cut off or limit attorney fees under ORS 20.080 or ORS 742.061, a question may arise whether an offer to allow judgment can cut off attorney fee claims based on other statutes, such as the Oregon Landlord Tenant Act. It should be noted that both ORS 20.080 and ORS 742.061 both have a distinct characteristic – both statutes specify how much time a defendant has to make an offer which can prevent an attorney fee

claim. But it is at least possible some courts might nevertheless hold that an offer to allow judgment will not cut off attorney fee claims based on statutes other than ORS 20.080 or ORS 742.061. There is some potential uncertainty in the law and it would be helpful to have the legislature clarify exactly when an offer to allow judgment may be used to cut off claims for attorney fee based on statute. ❖

— If you have any questions, please feel free to contact the author: Flavio A. Ortiz (alex@lerlaw.com) at 503-768-9600.