

Prevailing Party Attorney Fees in Oregon Time for a Change?

— by Jay D. Enloe

How often have you gone to trial, to have the jury either tell the plaintiff that you were right and that no damages are owed or that the amount of damages owed are less than the amount you offered to settle the case for before trial? In other words, how often have you “won” at trial? As the cases collected in our jury verdict database demonstrate (<http://www.lerlaw.com/verdictsrch.asp>), juries in the Portland tri-county area frequently return full defense verdicts in anywhere from 25% to 50% of the cases, depending on which courts and what calendar quarters are being considered. Verdicts in which the plaintiff receives less than the offer are frequent as well, based upon anecdotal experiences of trial lawyers.

So, why is it the case went to trial? And, when you “won”, what did you win? Did you still have to pay something for the “win”? My defense attorney colleagues and I do enjoy what we do, but we have not yet gotten to the point of offering our services free of charge. Nor have experts, courts, court reporters, and others involved with litigation. All casualty insurers—as well as all self-insureds—and, yes, this includes insurers who make use of house counsel, pay for the privilege of proving the plaintiff wrong. The reason cases go to trial, often times, is that the plaintiff and the plaintiff’s attorney do not risk much by going to trial and rolling the dice. They may pay several hundred or even more than a thousand dollars in expenses and court fees in a losing effort, plus a defense cost bill of usually less than a thousand dollars, but there is very little opportunity for prevailing defendants to recover attorney fees and costs of defense beyond very modest “cost and disbursements” provided by statute.

The question is whether statutes providing for prevailing attorney fees for defendants should be adopted. If a case goes to trial and defendants and insurers are put to the expense and trouble of participating, should there be a means of reimbursing them when the jury agrees with their position? Our law does provide for plaintiffs to recover attorney fees in certain circumstances (claims against an insurer or

small property damage or bodily injury claims are examples), on the reasoning that it is not fair for insurers to force a person to go to trial if a jury says that person was right. What makes it any more “fair” for such a person to force a defendant or an insurer to take the time and spend the money to participate in a trial when the jury decides the defendant was right?

Attorney fee responsibility in this country has largely developed along entirely different lines than it developed in England and many European countries. In England (from which much of our law derives), the “English Rule” applies—which is “loser pays”. Except for the State of Alaska, which has a type of English Rule, the English Rule does not exist in this country. Should our statutes provide for it? Let’s start by examining a few situations in which prevailing attorney fees are already allowed.

Insurance Claims

ORS 742.061 provides, generally, that attorney fees are available to a person with a claim against an insurer “if settlement is not made within six months from the date proof of loss is filed with an insurer... and the plaintiff’s recovery exceeds the amount of any tender made by the defendant in such action...”. Recent legislative amendments have provided that, in UM/UIM and PIP claims, steps can be taken by insurers to eliminate exposure to attorney fee claims, but those steps are fraught with opportunities to fail to dot an “i” or cross a “t”, such that an insured can still claim attorney fees in some cases. This is a particular problem for insurers that do not have a local presence and may not understand all the nuances of our local practice. Even insurers with a significant Oregon presence can get caught up in the attorney fee trap of this statute. Some of the problems involve trying to determine when an insured has “filed” a “proof of loss” with the insurer. Many insurers do not use a “proof of loss” form, which has led the courts to decide whether other communications from the insured or the insured’s attorney constitute a “proof

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of loss”. There have even been situations in which an insured’s attorney has failed to provide information critical to a proper evaluation of the claim, while purporting to present a “proof of loss”, in an apparent hope that six months will elapse without settlement being made and without the insurer taking the necessary steps to avoid exposure to attorney fees.

Since attorney fees are allowed to an insured who is forced to prosecute a claim against an insurer, and who recovers more than the insurer had offered, then why should the insurer not be allowed the same opportunity when its evaluation is proven to have been the correct one? In other words, if it is fair that an insured with a \$20,000 claim (as determined by a jury), for which the insurer had offered only \$10,000, to recover the cost of having to go to trial to collect the \$20,000, why is it not likewise fair for an insurer who has offered \$10,000, but the jury says the claim is worth less than that, to recover its cost of having to go to trial to defend the claim? Allowing attorney fees to the prevailing party in these cases, whether that is the insured or the insurer, would be one step forward in this area.

ORS 20.080 Claims

We all know what an ORS 20.080 claim is. It is a claim for property damage or bodily injury in which the damages sought are \$5,500 or less, the plaintiff has given the defendant a written demand to pay the claim not less than ten days before commencement of litigation, and the plaintiff receives a greater award than had been offered before commencement of the action. As with ORS 742.061, there is no opportunity for defense attorney fees under this statute, with the rare exception in which the defendant files a counterclaim not to exceed \$5,500. The purpose of the statute, of course, is to force small claims that are owed to be paid, without litigation. In theory, this is a worthy goal. In practice, there are abuses in application of the statute.

Probably the most flagrant abuse of the statute is when a “20.080 letter” is sent to the insured, without copying the insurer, and the litigation is commenced on the 11th day. The insured may or may not have passed the letter along to the insurer within that time. Or, the plaintiff’s attorney may have taken the courteous step (not required by statute) of sending a copy of the letter to the insurer, but not provide sufficient supporting information with which the insurer can evaluate the claim. Such tactics accomplish the intended purpose—the insurer is “set up” to pay a plaintiff’s attorney fee, regardless of whether the insurer had been given an opportunity to evaluate and settle the case. In a recent reported case, a plaintiff’s attorney sent a 20.080 letter and then seemed to abandon the claim for attorney fees by commencing

litigation for more than \$5,500, without seeking attorney fees. The case went to arbitration, where the plaintiff was awarded \$3,178. This was followed by the plaintiff’s appeal to a jury trial. Three days before trial, the plaintiff’s attorney sought to amend the complaint down to \$5,500 and to claim attorney fees under ORS 20.080. The trial judge allowed the amendment, the jury then awarded \$5,500, and the plaintiff’s attorney was awarded attorney fees of \$9,033. Where is the fairness in this? The insurer did not even know there was a potential for attorney fees being awarded until three days before trial.

Appeals from Arbitration

Appeals from court-annexed arbitration (usually available where claimed damages are \$50,000 or less) do have a relatively modest provision for prevailing attorney fees, available to the party who did not appeal and whose position is affirmed by a subsequent jury verdict, but not available to an appealing party (unless that party has an independent right to attorney fees and improves its position). Attorney fees available in this context are much less than the amounts that can be awarded under ORS 742.061 or ORS 20.080, which are essentially without limitation other than the court’s discretion.

Appeals from court-annexed arbitration are governed by ORS 36.425, which provides that if the plaintiff appeals and its position is not improved, the defendant is entitled to attorney fees in an amount not to exceed ten percent of the amount claimed in the complaint. Since this statute deals only with claims of \$50,000 or less, that puts a cap on attorney fees that can be awarded to the defendant of \$5,000, unless the plaintiff seeks more damages at trial than had been claimed at arbitration. If the defendant appeals and its position is not improved, the plaintiff is entitled to an attorney fee not to exceed twenty percent of the judgment, so a maximum of \$10,000 (assuming a \$50,000 judgment), unless more damages are sought at trial, and are awarded.

Other Attorney Fee Provisions

There are various other prevailing attorney fee type provisions that come up from time to time under Oregon law: up to a \$5,000 prevailing fee (the usual prevailing fee is \$500 after a trial) if the court determines that the non-prevailing party’s conduct was “reckless, willful, malicious, in bad faith or illegal”, or was objectively unreasonable in a number of particulars, under ORS 20.082; sanctions for false certifications in pleadings or motions, under ORCP 17; attorney fees to the plaintiff in an interpleader action, under ORCP 31, or in a class action, under ORCP 32;

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attorney fees as expenses for having to seek discovery rulings, under ORCP 46; attorney fees in actions brought by a personal representative for injuries, but not for wrongful death, under ORS 30.075; and some other statutory provisions that do not come up frequently.

Options

Alaska has had a modified English Rule since the nineteenth century. Under Alaska Civil Rule 82, prevailing attorney fees for a plaintiff are limited to 20% of the first \$25,000 judgment amount and 10% of any additional amount. Prevailing attorney fees for a defendant are limited to 30% of actual reasonable fees. In 1995, the Alaska experience was studied closely by the Alaska Judicial Council for its effect on settlement and litigation in general. This study concluded that the possibility of attorney fees had a significant effect on settlement decisions in 35% of the cases. The study also concluded that a substantial majority of the attorneys sampled felt the rule should be retained. On the other hand, some attorneys felt the existence of a claim for attorney fees put undue pressure on the parties (including insurers) to settle. Any proposed statutory solution in Oregon should take into account the factors discussed in the Alaska study. The complete Alaska study can be found at <http://www.ajc.state.ak.us/reports/testframe.htm>.

An option to the Alaska rule would be to allow prevailing attorney fees and costs of litigation in any

civil action for money damages where the party prevails, in the sense of equaling or improving its pre-litigation settlement position, subject to the discretion of the court to consider all of the circumstances bearing on whether the case should have gone to trial. Among the factors the court could consider would be the objective reasonableness of the parties in such matters as providing medical records and wage loss documentation and the parties' efforts to settle the case once sufficient information was available to evaluate it. Although it could be subject to criticism that it would increase the workload of judges, it would probably also have the effect of causing fewer cases to be filed and to go to trial. The Alaska study concluded that judges did not feel increased workload was a problem.

At the very least, if no new statutes are adopted in Oregon, it seems to this writer that prevailing attorney fees in cases controlled by statutes that already provide for attorney fees to prevailing plaintiffs should be reciprocal, so as to provide for attorney fees to defendants who equal or improve upon their pre-litigation settlement positions, with provision for offsets from judgments awarded plaintiffs. This would encourage settlement and help discourage plaintiffs from just "rolling the dice" in attorney fee cases, to the expense of defendants and the court system. ❖

— *If you wish to discuss any aspect of the issues that are the subject of this article, please feel free to contact the writer at jay@lerlaw.com or 503-768-9600.*