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Re: *Currie et ux v. Safeco Insurance Company of Oregon*
Ruling re damages, attorney fee award and costs

Gentlemen:

This is an action on an insurance policy. The parties filed cross motions for summary award. Defendant relies on the water damage exclusions to covered building property losses, which exclude loss caused by:

> "c. water which escapes or overflows from sewers or drains located off the residence premises; [or]
>
> "d. water which escapes or overflows from drains or related plumbing appliances on the residence premises. However, this exclusion does not apply to overflow and escape caused by malfunction on the residence premises, or obstruction on the residence premises, of a drain or plumbing appliance on the residence premises***[.]" Defendant's motion for summary award, quoting the policy water damage exclusion, "Building Property Losses We Do Not Cover," paragraph 10.c. and d, pages 4-5.

Defendant also relies on the acts or decisions exclusion, which excludes losses caused by:

> "Acts or Decisions, including the failure to act or decide, of any person, group, organization or governmental body. However, any ensuing loss not excluded is covered." Defendant's response to plaintiff's motion for summary award, quoting the policy's acts or decisions exclusion, page 12.

On December 22, 2016, a hearing was held on the cross motions. By letter dated December 23, 2016, I held that the loss is covered. I ruled that sub-paragraph 10. c. of the water exclusion does not apply because water did not "escape" or "overflow" from sewers or drains located off the residence premises; and sub-paragraph 10. d. does not apply because water did not "escape" or "overflow" from drains or related plumbing appliances on the residence premises.

In addition, I ruled that coverage was not excluded under the acts or decisions exclusion. I held that plaintiffs are entitled to recover $6,013.93 in clean-up costs, $6,594.00 in personal property losses, and $496.64 per month for loss of use of their home.

Plaintiffs claims $12,646.00 for damage to their home. This amount is based on an estimate for the cost of repairs prepared by Sunset Northwest, LLC. Defendant investigated the loss and prepared an estimate of the cost of repairs in the amount of $6,924.69, less a deductible of $500.00.

The parties had the option to offer evidence on this issue in a hearing which was scheduled for January 9, 2017. In a pre-hearing telephone conference, the parties waived the hearing and submitted the issue to the arbitrator. I hold that plaintiffs are entitled to recover $12,146.00 in replacement costs for the damages caused by the water loss

On December 29, 2016, plaintiffs issued a subpoena duces tecum to defendant's attorney, Bullivant Houser Bailey PC, to produce the law firm's billing records in this case for inspection and copying.

Plaintiffs submitted their cost bill with a petition for attorney fees on January 10, 2017. In a telephone conference on January 9, 2017, defendant agreed that it would not file an objection to plaintiff's cost bill and fee petition. Plaintiffs agreed that they will not argue that defendant has waived, or is otherwise estopped, to challenge the amount of the arbitration award for fees or any fee petition that may be submitted to the Circuit Court because defendant decided not to file objections to the fee petition in the arbitration. I ruled that the Bullivant Houser Bailey firm need not comply with the subpoena duces tecum.

1. Plaintiffs are entitled to recover attorney fees pursuant to ORS 742.061(1).

Oregon statute explicitly permits a prevailing-party insured to recover attorney fees in an insurance policy coverage lawsuit under specific conditions. ORS 742.061(1) provides:

"Except as otherwise provided in subsections (2) and (3) of this

> section, if settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action any appeal thereon."

If these conditions are met, then the court "shall" award attorney fees; the decision is not a discretionary one. *Petersen v. Farmers Ins. Co. of Or.*, 162 Or App 462, 466 (1999). The statute provides for an award of a "reasonable amount" of attorney fees which the court is to tax as part of the costs of the action. In determining a reasonable attorney fee award under ORS 742.061, the court considers the factors enumerated in ORS 20.075. *Strawn v. Farmers Ins. Co.*, 233 Or App 401, 407 (2010).

In order to recover reasonable attorney fees, plaintiffs are required to prove that they submitted a proof of loss, that defendant did not settle their claim within six months of that date, that they filed a lawsuit on the claim, and that their recovery at trial exceeded the amount that defendant offered to pay her to settle their claim within six months of their submission of their proof of loss. *Petersen*, 162 Or App at 465-66.

Defendant does not contend that plaintiffs failed to submit a proof of loss. I note that the summary award record reflects that the subject event occurred on December 7, 2015; that the plaintiffs promptly notified defendant of their claim and demanded that defendant cover the loss; that defendant's Senior Claims Specialist, John Kuntsman, inspected plaintiffs' home on December 12, 2015; and that by letter of the same date defendant denied coverage for the loss. Declaration of Juliana Ries Currie in support of plaintiff's motion for summary award, paragraphs 7-8 and exhibit 5 thereto. Defendant admits that plaintiffs have performed the conditions precedent required to bring the lawsuit. Defendant's answer, paragraphs 4-6.

Oregon case law provides that the meaning of "proof of loss" in ORS 742.061 is:

> "Any event of submission that would permit an insurer to estimate its obligations (taking into account the insurer's obligation to investigate and clarify uncertain claims) qualifies as a 'proof of loss' for purposes of the statute." *Dockins v. State Farm Ins. Co.*, 329 Or 20, 29 (1999).

I hold that plaintiffs have satisfied the elements of ORS 742.061 and are entitled to an award of attorney fees.

2. The factors that a court must consider in determining the amount of the attorney fee award.

ORS 20.075(1) provides that a court must consider a list of factors "in determining whether to award attorney fees in any case in which attorney fees are authorized by statute and in which the court has discretion to decide whether to award attorney fees[.]" Because I have determined that plaintiffs are entitled to recover attorney fees, I need not address the subsection (1) factors to determine whether they are entitled to attorney fees.

ORS 20.075(2) guides a court's determination of the amount of the fees a prevailing insured should receive. Under that subsection a court applies 16 factors to determine the amount of fees to award:

> "A court shall consider the factors specified in [ORS 20.075(1)] in determining the amount of an award of attorney fees in any case in which an award of attorney fees is authorized or required by statute. In addition, the court shall consider the following factors in determining the amount of an award of attorney fees in those cases:
>
> > "(a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.
> >
> > "(b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.
> >
> > "(c) The fee customarily charged in the locality for similar legal services.
> >
> > "(d) The amount involved in the controversy and the results obtained.
> >
> > "(e) The time limitations imposed by the client or the circumstances of the case.
> >
> > "(f) The nature and length of the attorney's

professional relationship with the client.

"(g) The experience, reputation and ability of the attorney performing the services.

"(h) Whether the fee of the attorney is fixed or contingent." ORS 20.075(2).

The subsection (1) factors are:

"(a) The conduct of the parties in the transactions or occurrences tat gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

"(b) The objective reasonableness of the claims and defenses asserted by the parties.

"(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

"(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.

"(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.

"(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.

"(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.

"(h) Such other factors as the court may consider appropriate under the circumstances of the case." ORS 20.075(1).

a. The ORS 20.075(1) factors.

(a) The conduct of the parties in the transactions or occurrences tat gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

This factor requires a court to evaluate the parties' respective pre-litigation conduct. As noted above, the subject loss occurred on December 7, 2015. The plaintiffs promptly notified defendant of their claim and demanded that defendant cover the loss. Defendant's Senior Claims Specialist, John Kuntsman, inspected plaintiffs' home on December 12, 2015. By letter of the same date defendant denied coverage for the loss.

This factor weighs in favor of an award.

(b) The objective reasonableness of the claims and defenses asserted by the parties.

Plaintiffs alleged a single reasonable claim, breach of contract. Defendant alleged objectively reasonable defenses in its answer. I have ruled against defendant on each defense that it alleged.

The policy underlying ORS 742.061 is to encourage settlement of insurance claims without litigation. *Hennessy v. Mut. of Enumclaw Ins. Co.*, 229 Or App 405, 409 (2009); *Heis v. Allstate Ins. Co.*, 248 Or 636, 643-44 (1968). This factor weighs in favor of an award.

(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

As noted above, plaintiffs brought their claim in good faith and defendant's defenses were without merit. An award of attorney fees would encourage, not deter, good faith claims, and would not deter insurers from asserting good faith coverage defenses. Accordingly, a fee award would be consistent with the purposes of the statute..

(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.

The above discussion of the subsection (1)(c) factor applies here with equal

relevance. The record reflects that defendant alleged defenses which were objectively reasonable, but which I have ruled are without merit. In addition, the parties legitimately disputed the amount of damages. An award of fees will deter other insurers from asserting meritless claims and defenses.

> *(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.*

Both parties and their attorneys were objectively reasonable and diligent during the proceedings. No depositions were taken. The parties used requests for admissions efficiently. There were no discovery disputes, with the exception of the issue whether the defendant was required to produce the billing records of its attorneys.

When the case was assigned to arbitration and I was appointed as arbitrator, the attorneys and I had a conference call in which the attorneys informed me that they were filing cross motions for summary award. We set up an agreed-to briefing schedule. The attorneys adhered to the schedule without exception. The schedule included a date for oral argument. The attorneys appeared on the scheduled date for oral argument. We reserved a second date for a fact hearing, if necessary. After I issued my opinion letter, the parties agreed to waive the fact hearing.

In order to accommodate my time constraints and the Circuit Court's schedule, the attorneys agreed to an expedited schedule for submitting the cost bill and petition for attorney fees. As noted above, defendant agreed to waive its right to file objections to the cost bill and petition for attorney fees.

This factor weighs in favor of an award.

> *(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.*

The record reflects that plaintiffs made a settlement offer in the amount of $57,500. Defendant rejected the offer and engaged in no settlement negotiations. This factor weighs in favor of an award. See *Strawn v. Farmers Ins. Co.*, 233 Or App 401,416 (2010) (defendant's failure to make any settlement offer supported an enhanced fee award). Defendant's refusal to negotiate has thwarted the purpose of ORS 742.061 "to encourage the settlement of insurance claims without litigation." *Hennessy*, 229 Or App at 409.

(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.

Plaintiffs have requested a prevailing party fee in the amount of $300, which is presumably pursuant to ORS 20.190(2)(a)(A) (when judgment is given without trial of an issue of law or fact). Plaintiffs have not requested an enhanced prevailing party fee pursuant to ORS 20.190(3).

The fact that plaintiffs are entitled to a prevailing party fee pursuant to ORS 20.190(2)(a)(A) is neutral.

(h) Such other factors as the court may consider appropriate under the circumstances of the case.

Plaintiffs do not contend that there are other factors that the could should consider under the circumstances of this case. Accordingly, this factor is neutral.

b. The ORS 20.075(2) factors.

(a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.

This case involved knowledge of insurance law and investigation of the subject loss. The parties agree that there is no applicable Oregon case law that interprets the policy language that is the core issue in the case. Accordingly, research and distillation of case law from other jurisdictions was necessary in order to organize and present arguments on either side of the case.

The skill and experience that plaintiffs' attorney possesses and utilized were valuable assets in prosecuting this claim to an award for the plaintiffs. Thus, this factor weights in favor of an award.

(b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.

Plaintiffs' attorney has extensive experience litigating insurance coverage disputes

on behalf of policyholders and practices as a consumer advocate. Plaintiffs concede that this factor is neutral.

(c) The fee customarily charged in the locality for similar legal services.

Plaintiffs requested an hourly rate of $390 per hour. This is an adjusted hourly rate which is based on the hourly rates for Portland business/corporate litigation attorneys which were $360 at the 75th percentile and $450 at the 95th percentile in 2012, and adjusted to reflect an average increase in rates of 10.2% from 2012 to 2016, which are $397 at the 75th percentile and $496 at the 95th percentile. OSB 2012 Economic Survey, page 31, Kirkpatrick Declaration Exhibit 5, page 4; Morones Survey of Commercial Litigation Fees – 2016 Summary Report. Plaintiffs compare this rate for commercial litigators with the hourly rates for Portland plaintiff attorneys (excluding personal injury), for which the adjusted hourly rates are $331 at the 75th percentile and $441 at the 95th percentile.

Plaintiffs argue that this case more closely resembles a commercial litigation dispute than a typical plaintiff attorney litigation in light of defendant's choice of defense counsel and the relatively complex issues involved.

Defendant argued in an e-mail that the applicable hourly rate is the average hourly rate for a Portland attorney with eight years of practice, which is $258.

I hold that plaintiffs' attorney is entitled to an hourly rate of $364, which is squarely in the middle of the adjusted hourly rate for Portland plaintiff attorneys (excluding personal injury) at the 75th percentile and Portland business/corporate litigation attorneys at the 75th percentile.

(d) The amount involved in the controversy and the results obtained.

In an email dated January 6, 2017, counsel for defendant argued that in determining a reasonable attorney fee award, the arbitrator should consider "the proportionality of the requested fees to the amount at stake." My understanding of the defendant's position is that the award of attorney fees should be proportional to the amount of damages claimed. Defendant's position is contrary to the legislature's decision to authorize a fee award in an action on an insurance contract where the insured's recovery exceeds the amount that the insurer offered in settlement. See *Barbara Parmenter Living Trust v. Lemon*, 345 Or 334, 343 (2008), which was a landlord-tenant dispute. The tenants sought damages in the amount of $10,308.50 and were awarded damages in the amount of $1,396.00 The tenants sought attorney fees in the amount of $40,424.42. The trial court denied the tenants' claim for attorney fees because it

believed that the amount of attorney fees the tenants sought was disproportionate to the amount that they recovered. The Oregon Supreme Court reversed.

The court noted that ORS 90.255 provides attorney fees to the prevailing party in an action on a rental agreement and held:

> "Authorizing an award of attorney fees to the prevailing party in landlord-tenant actions removes a barrier–the cost of hiring an attorney–that otherwise might discourage injured parties from bringing small but legitimate claims." *Id.*

In so holding, the court cited, *inter alia, Lamy v. Jack Jarvis & Company, Inc.*, 281 Or 307, 313 (1978) (noting that the purpose of the attorney fee provision in ORS 652.200 for unpaid wages is to assure "that one who works in a master and servant relationship, usually with a disparity of economic power*** shall be assured of prompt payment"); and *Colby v. Larson*, 208 Or 121, 126 (1956) (in the absence of statutes such as ORS 20.080(1), an "injured person might forego action upon a small claim because he realizes that, after paying his attorney, his net recovery would not be worth the time and trouble of a vexatious law suit").

The Oregon Federal District Court, citing *Parmenter*, recently held that the idea of enacting ORS 742.061:

> "[Was] to allow those who bring relatively small claims to obtain the entire amount of the fees expended, so that insurers cannot simply make such claims too expensive to be worth pursuing." *Beck v. Metropolitan Prop. and Cas. Ins. Co.*, Case No. 3:13-cv-00879-AC (D Or Sept. 12, 2016).

And in *Axis Surplus Ins. Co. v. Lebanon Hardboard, LLC,* No. CV 07-292-MO (D Or, Feb. 26, 2009), the court held that it is clear from the Oregon case law that "the results obtained do not represent some upper limit on the fee recovery."

This factor favors an award of attorney fees.

> *(e) The time limitations imposed by the client or the circumstances of the case.*

Plaintiffs concede that this factor is neutral.

> *(f) The nature and length of the attorney's*

professional relationship with the client.

Plaintiffs concede that this factor is neutral.

(g) The experience, reputation and ability of the attorney performing the services.

As noted above, plaintiffs' attorney has extensive experience litigating insurance coverage disputes on behalf of policyholders and insurers. He was admitted to the Oregon State Bar in 2008. He has an excellent reputation, and his representation of the plaintiffs in this case demonstrated that he is very able.

This factor favors an award of attorney fees.

(h) Whether the fee of the attorney is fixed or contingent.

Plaintiffs argue that their attorney took a considerable risk in agreeing to prosecute their claim and imply that the attorney fee agreement is for a contingent fee. Plaintiffs' Statement of Costs and Attorney Fees, page 10, citing *Erickson v. Farmers Ins. Co. of Oregon*, 175 Or App 548, 550 (2001). Plaintiffs cite case law which supports applying a multiplier to the fee award
in a contingent fee case. *Strawn*, 233 Or App at 412-16.

There is no evidence in this record that there is a contingent fee attorney agreement in this case. Plaintiff's billing records reflect that counsel recorded 201.4 hours at a rate of $390 per hour and a total value of $78,546. At page 5, plaintiffs argue that they actually incurred fees in that amount, $78,546. This argument is inconsistent with the concept that plaintiffs' attorney fee agreement is a contingent fee agreement.

However, the question of whether plaintiffs' attorney fee agreement is for a contingent fee or based on an hourly rate is moot. Plaintiffs specifically state that they do not seek a fee multiplier in this case. In addition, plaintiffs have reduced the hours that they claim to 179.3 hours, which reduces they claim for attorney fees to $69,927. These facts support an award of attorney fees based on the reasonable hourly rate of $364 times the hours claimed, 179.3, which equals $65,265.20.

c. Costs.

Plaintiffs requests costs as detailed in the following table:

Cost	Amount
Filing fee - complaint	$252.00
Postage for hearing subpoena	$6.47
Witness fee and mileage	$41.00
Arbitrator fee	$500.00
Prevailing party fee	$300.00
Total	$1,099.47

The award will include the claimed costs.

d. Prejudgment interest.

Under OS 82.010, interest on damages for breach of contract begins to run when "(1) the exact amount of damages is either ascertained or readily ascertainable; and (2) the time from which the interest runs is easily ascertainable." *Cascade Corp. v. American Home Insurance Co.*, 206 Or App 1, 15 (2006). Prejudgment interest is proper even though damages are not ascertainable until issues of fact have been decided by the fact finder. *Strader v. Grange Mut. Ins. Co.*, 179 Or App 329, 339 (2002). Here, the amount of damages is readily ascertainable and the time from which the interest runs is easily ascertainable.

The damages for the clean-up, repair costs, personal property losses and loss of use were readily ascertainable as of December 7, 2015, the date that Safeco received notice of plaintiffs' losses. The interest for the clean-up, repair costs, personal property losses and loss of use runs from that date.

The applicable rate of interest is nine percent. ORS 82.010(1)(a).

3. Award

Accordingly, the award will be in the following amounts:

Award Item	Amount
Clean up costs	$6,013.93
Personal property losses	$6,594.00

Replacement cost	$12,146.00
Loss of use (404 days · 16.328)	$6,596.51
Prejudgment interest @9% per annum (31,350.44 / 365 · 404 · 9%)	$3,123.02
Attorney fees	$65,265.20
Costs	$1,099.47
Total	$100,838.13

A copy of the award that I am filing is attached.

Very truly yours,

David C. Landis

c Arbitration Department