Chapter 45

ATTORNEY FEES

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§ 45.1 INTRODUCTION

This chapter addresses (1) substantive entitlement to attorney fees (*see* § 45.2 to § 45.6) and (2) rules and procedures to determine the reasonable amount of attorney fees (*see* § 45.7-1 to § 45.7-3(f)).

§ 45.2 DIRECT ACTIONS AGAINST INSURERS UNDER ORS 742.061

ORS 742.061 provides for an award of attorney fees to any insurance consumer who prevails in an action on an insurance policy, if (1) settlement is not made within six months from the date on which proof of loss is filed with the insurer and (2) the plaintiff's recovery exceeds the amount of any tender made by the insurer.

> NOTE: "Safe harbor" exceptions for insurers in personal injury protection (PIP) claims and uninsured or underinsured motorist (UM/UIM) claims are discussed in § 45.4.

ORS 742.061 is a "one-way" statute, and provides no reciprocal right to insurers. The statute, in various iterations, has been a part of Oregon law since 1919. ORS 742.061 provides as follows:

> (1) 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 and any appeal thereon. If the action is brought upon the bond of a contractor or subcontractor executed and delivered as provided in ORS 279B.055 [competitive sealed bidding], 279B.060 [competitive sealed proposals], 297C.380 [performance bond] or 701.430 [performance bond] and the plaintiff's recovery does not exceed 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 and allowed to the defendant as part of the costs of the action and any appeal thereon. If in an action brought upon such a bond the surety is allowed attorney fees and costs and the contractor or subcontractor has incurred expenses for attorney fees and costs in defending the action, the attorney fees and costs allowed the surety shall be applied first to reimbursing the contractor or subcontractor for such expenses.
>
> (2) Subsection (1) of this section does not apply to actions to recover personal injury protection benefits if, in writing, not later than six months from the date proof of loss is filed with the insurer:
>
> (a) The insurer has accepted coverage and the only issue is the amount of benefits due the insured; and
>
> (b) The insurer has consented to submit the case to binding arbitration.
>
> (3) Subsection (1) of this section does not apply to actions to recover uninsured or underinsured motorist benefits if, in writing, not later than six months from the date proof of loss is filed with the insurer:
>
> (a) The insurer has accepted coverage and the only issues are the liability of the uninsured or underinsured motorist and the damages due the insured; and
>
> (b) The insurer has consented to submit the case to binding arbitration.

The statute applies to actions on "any policy of insurance of any kind or nature." ORS 742.061(1).

ORS 742.061 has been held to apply to claims against insurance companies for failing to settle liability claims, thereby exposing the insured person to a judgment in excess of the liability policy limits. This issue was first addressed by the Oregon Supreme Court in *Groce v. Fid. Gen. Ins. Co.*, 252 Or 296, 448 P2d 544 (1968). The court explained that excess exposure arises out of an insurance contract. *Groce*, 252 Or at 311–12. Even though the claim in *Groce* was classified as negligence, the negligence was in the insurer's breach of its duty under the insurance contract. The claim existed only because of the insurance contract. Without the insurance contract, there would be no claim, whether it be negligence, bad faith, breach of contract, or any other theory. No matter how the claim is pleaded, it comes from an insurance contract. *Groce*, 252 Or at 311–12.

> The statute [now ORS 742.061] no doubt was drawn in contemplation of the type of claim ordinarily made by means of a 'proof of loss' form and for one reason or another denied by the insurer. The language of the statute, however, is broad enough to permit recovery of attorney fees in a case of the type we have here.
>
> The remedial nature of the statute is clear, and the legislative intent would be served by allowing attorney fees. The allowance of such fees would be consistent with our decision in *Radcliffe v. Franklin National Ins. Co.*, *supra*. The duty owed by an insurer to its insured to use good faith in seeking to settle litigation within policy limits is a duty that arises out of the contract of insurance. Some courts say that the duty arises out of the relation of the parties rather than from any specific provision of the policy. Other courts find within the reservation-of-rights provision of the typical liability policy a covenant by the insurer to protect the insured by settlement in exchange for the surrender of the insured's control over the negotiations and litigation. The cases are collected and discussed in Robert E. Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv.L.Rev. 1136 (1954). We believe the better view is that the rights of the parties in these cases are contractual, and that it is consistent with the purposes of ORS 743.114 to allow attorney fees in this case. If attorney fees were not allowed, the insured, or his assignees, would not be made whole. *See*, construing a comparable Florida statute so as to allow fees in a similar case, *American Fidelity & Casualty Co. v. Greyhound Corp.*, 258 F.2d 709, 718 (5th Cir. 1958).

Groce was recognized and followed by the Court of Appeals in *Nw. Marine Iron Works v. W. Cas. & Sur. Co.*, 45 Or App 269, 271, 608 P2d 199, 200, *rev den*, 289 Or 209 (1980), and *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 64 Or App 97, 667 P2d 548 (1983), *aff'd*, 298 Or 514, 693 P2d 1296 (1985). The insurer in *Maine Bonding* sought review of the court of appeals' decision on the underlying excess-exposure claim, but accepted the court of appeals' decision on the plaintiff's right to recover attorney fees. *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 298 Or 514, 693 P2d 1296 (1985). On the basis of this line of cases, the court of appeals upheld the award of attorney fees in another excess-exposure case, *Spray v. Cont'l Cas. Co.*, 86 Or App 156, 739 P2d 40, *rev den*, 304 Or 185 (1987). Three years later, in *Stumpf v. Cont'l Cas. Co.*, 102 Or App 302, 794 P2d 1228 (1990), the insurer acknowledged the plaintiffs' right to recover attorney fees in their excess-exposure claim, contesting only the amount of the attorney fees awarded.

Several years later, in *Goddard v. Farmers Ins. Co. of Oregon*, 177 Or App 621, 33 P3d 1075 (2001), the court of appeals held contrary to the line of cases discussed above. *Goddard* was a significant excess-exposure case arising from a motor-vehicle collision in which punitive damages were awarded, leading to an excess-exposure case against Farmers Insurance that also resulted in an award of punitive damages of $20,718,576. *Goddard v. Farmers Ins. Co. of Oregon*, 202 Or App 79, 120 P3d 1260 (2005), *adh'd to as modified on recons*, 203 Or App 744 (2006), *aff'd as modified*, 344 Or 232 (2008). There were several related cases between the parties and multiple appellate court opinions. Along the way, the court of appeals denied the plaintiff's request for an award of attorney fees, holding that ORS 742.061 did not apply to tort claims. *Goddard*, 177 Or App at 625–26. Although the court of appeals' opinion does not discuss *Groce* or *Northwest Marine Iron Works*, the court stated: "This court did not decide, either in *Georgetown Realty or in any other case*, that an insured is entitled to recover attorney fees incurred in prosecuting a tort claim against an insurer arising from the insurer's failure to settle a claim." *Goddard*, 177 Or App at 625 (emphasis added).

The legal question, then, is whether *Goddard* controls because it is the latest word from the appellate courts, even though it arguably conflicts with the precedent that had been established since 1968.

An award of attorney fees under the statute is part of the "costs," and is therefore a procedural law. Procedural laws are controlled by the forum state. *Straight Grain Builders v. Track N' Trail*, 93 Or App 86, 90, 760 P2d 1350, *rev den*, 307 Or 246 (1988). The laws of other states do not control the recovery of costs in cases brought in Oregon courts. Consequently, the statute applies to insurance policies issued outside Oregon when the claim is brought in Oregon. *Morgan v. Amex Assur. Co.*, 352 Or 363, 287 P3d 1038 (2012).

§ 45.3 THE INSURED MUST MEET FOUR STATUTORY REQUIREMENTS

Under ORS 742.061, the insured must prove that

(1) the insured submitted "proof of loss" (*see* § 45.3-1);

(2) the insurer did not settle the claim within six months of the submission of the proof of loss (*see* § 45.3-2);

(3) the insured filed a lawsuit on the insurance policy (*see* § 45.3-3); and

(4) the insured's "recovery" exceeded the amount offered by the insurer within six months of the submission of the proof of loss (*see* § 45.3-4).

§ 45.3-1 What Constitutes Submission of a "Proof of Loss"

Although insurance policies purport to define and regulate the form of "proof of loss," and ORS 742.053 expressly references "forms of proof of loss," and ORS 742.230 expressly refers to "proof of loss forms," Oregon Supreme Court decisions have addressed policy and statutory terms relating to proof of loss.

In *Dockins v. State Farm Ins. Co.*, 329 Or 20, 26–29, 985 P2d 796 (1999), the Oregon Supreme Court held that a complaint filed in a lawsuit qualified as a "proof of loss." The court explained the meaning of the statutory term *proof of loss*: "Any event or 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*, 329 Or at 29.

In *Parks v. Farmers Ins. Co. of Oregon*, 347 Or 374, 227 P3d 1127 (2009), the Oregon Supreme Court further liberalized the "proof of loss" requirement, and held that the insureds' telephone call to their insurance agent to report a loss qualified as "proof of loss." The court explained that the insureds' telephone call reporting the loss "conveyed sufficient information to allow Farmers to ascertain its obligations . . . taking into account Farmers' duty to investigate and clarify uncertain claims." *Parks*, 347 Or at 388.

§ 45.3-2 No Settlement within Six Months of Submission of the Proof of Loss

This statutory requirement is straightforward. The insured must show that the insurer failed to settle the claim within six months of the submission of the proof of loss. ORS 742.061(1).

§ 45.3-3 Filing of a Lawsuit

This statutory requirement is likewise straightforward. The insured must show that he or she filed an action in Oregon on the insurance policy. ORS 742.061(1).

§ 45.3-4 The Insured's Recovery Exceeds the Insurer's Tender

This statutory requirement has been a potential trap for the unwary until recently. The statute requires that the insured's "recovery exceeds the amount of any tender made by the defendant in such action." ORS 742.061(1). Insurers had long taken the position that the term "recovery" required the insured to obtain a judgment. In the past, an insurer could argue that it had no obligation for attorney fees under ORS 742.061 by paying an insured a sufficient amount of money on the day before trial. The basis of the insurer's argument was that the insured had not obtained a recovery in the form of a judgment.

In *Long v. Farmers Ins. Co. of Oregon*, 360 Or 791, 388 P3d 312 (2017), the plaintiffs proceeded to trial, they recovered no additional money, and judgment was entered for Farmers. Despite the adverse trial

result, the Oregon Supreme Court determined that the plaintiffs were entitled to attorney fees under ORS 742.061 because Farmers had made mid-litigation payments more than six months after the proof of loss. The Oregon Supreme Court explained: "[T]he terms of ORS 742.061 and its predecessors should be interpreted in light of their function within the statute's overall purpose. . . . [i]t becomes evident that the term 'recovery' must be read to include mid-litigation payments such as the ones Farmers made in this case." *Long*, 360 Or at 804.

§ 45.4 EXCEPTIONS FOR PIP AND UM/UIM CLAIMS

Subsection (2) of ORS 742.061 allows exceptions in claims for PIP benefits, and subsection (3) allows exceptions for claims for UM/UIM benefits. These are commonly referred to as "safe harbor" provisions.

Subsection (2) allows the insurance company to avoid responsibility for the claimant's attorney fees in claims for PIP benefits if, within six months from submission of the proof of loss, (1) "[t]he insurer has accepted coverage," (2) "the only issue is the amount of benefits due the insured," and (3) "[t]he insurer has consented to submit the case to binding arbitration." ORS 742.061(2).

The requirement that the only issue in the case is to be "the amount of benefits due the insured" is strictly limited to the calculation of the amount of benefits due, not issues that lead to the determination of the amount of benefits due. *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, 182–83, 166 P3d 519, *opinion adh'd to as modified on recons*, 343 Or 394, 171 P3d 352 (2007) ("an 'issue' as to the 'amount of benefits' in ORS 742.061(2)(a) refers to a dispute concerning the dollar level of a claim for services that a provider submits to an insurer, and not to an insurer's denial of a particular claim for services"). In *Grisby*, the insurer argued that a dispute over whether the accident caused the need for a particular treatment was a dispute about the "amount of benefits," because resolving the causation issue determined whether the insured would receive any benefits at all. *Grisby*, 343 Or at 182. The Oregon Supreme Court rejected that argument. *Grisby*, 343 Or at 182–83. The court reasoned that, by using the word "amount" in the phrase "amount of benefits," the legislature demonstrated an "intent to limit the attorney fee exception of ORS

742.061(2)(a) to disputes over the quantum of benefits and to exclude from the effect of that provision *other* disputes about the 'benefits due the insured.'" *Grisby*, 343 Or at 182 (emphasis in original). The court also explained that, even if the question of the "amount of benefits" involved a predicate determination such as causation to determine the "amount of benefits" due the insured, "it nevertheless would be inaccurate to say that the dispute is 'only' about the amount of benefits. Defendant here disputed not only the 'amount' of the claim . . .; it *also* disputed whether it should pay for those services *at all*." *Grisby*, 343 Or at 182–83 (emphasis in original). Consequently, the insurer did not reach the safe harbor of ORS 742.061(2).

Subsection (3) of the statute allows the insurance company to avoid responsibility for the claimant's attorney fees in claims for UM/UIM benefits if, within six months of submission of the proof of loss, (1) "[t]he insurer has accepted coverage," (2) "the only issues [in the claim] are the liability of the uninsured or underinsured motorist and the damages due the insured," and (3) the insurer has consented to resolve the claim through binding arbitration. ORS 742.061(3). Similar to the supreme court's conclusion in *Grisby*, the court of appeals has determined that the "only issue" requirement is specific, limiting the insurer's right to a "safe harbor." *Cardenas v. Farmers Ins. Co.*, 230 Or App 403, 215 P3d 919 (2009) (the injured party did not speak English and did not realize what she was signing). The court of appeals in *Cardenas* explained:

> The Supreme Court held in Grisby, "Only after the trier of fact had agreed with plaintiff on *that* preliminary issue [of causation] could it turn to the issue of the *amount* of benefits that plaintiff should receive under the policy." 343 Or. at 183, 166 P.3d 519. (Emphasis in original.) Similarly, we conclude that only after the court in this case had resolved the preliminary issue of the release's enforceability could it turn to the issue of the damages that plaintiff should receive under the policy. Damages, in other words, was not the only issue submitted to binding arbitration. Defendant was therefore not eligible for the attorney fee safe harbor in ORS 742.061(3), and the trial court did not err in so ruling.

Cardenas, 230 Or App at 412.

NOTE: In *Cardenas*, the parties stipulated to binding arbitration in the course of litigation. Had the case not been in litigation, ORS 742.061 would not have applied.

UM/UIM claims can involve other issues that would take the case out of the insurer's safe harbor. For example, if the insurer and the injured person do not agree how PIP benefits apply to UM/UIM benefits, the claim will be outside the safe harbor. In *Kiryuta v. Country Preferred Insurance*, 360 Or 1, 376 P3d 284 (2016), the insurer's "safe harbor" letter was held to be ineffective because the issues at arbitration went beyond liability and damages.

It is commonly assumed, perhaps incorrectly, that the "safe harbor" of subsection (3) is achieved when the insurer's letter recites that the only issues are the liability of the uninsured or underinsured driver and the damages due the insured. But the statute doesn't actually say this. Read it carefully: "(a) The insurer has accepted coverage and the only issues are the liability of the uninsured or underinsured motorist and the damages due the insured."

There is nothing in the language saying that the insurer has to acknowledge that the only issues are liability and damages. Rather, the statute says that the only issues in the claim are liability and damages. Under the direct language of the statute, the safe harbor is not achieved if the claim includes other issues. There is no language requiring or allowing a particular party to raise or limit the issues in the claim. Under the direct language of the statute, if either party asserts any "other issue," the claim would be outside the safe harbor.

There is no language requiring a party to prevail on the "other issues." The specific statutory language does not say whether the "other issues" must be raised in good faith. These items apparently have not yet been raised in the appellate courts, so they can be better addressed on another day.

§ 45.5 OFFERS OF JUDGMENT NO LONGER CAN CUT OFF ATTORNEY FEES UNDER ORS 742.061

The law has changed regarding the interplay of ORS 742.061 and offers of judgment. In the past, if an insurer made an offer of judgment under ORCP 54 more than six months after a proof of loss, the insurer potentially could terminate the plaintiff's right to later attorney fees.

In *Wilson v. Tri-Met Metro. Transp. Dist. of Oregon*, 234 Or App 615, 228 P3d 1225, *rev den*, 348 Or 669 (2010), the court held that an insurer could not use an ORCP 54 offer of judgment to avoid responsibility for attorney fees under ORS 742.061. The court explained:

> ORS 742.061(1)—which relates to attorney fees only on insurance claims—is the more specific statute. We therefore . . . conclude that ORS 742.061 is an exception to ORCP 54E. Because of that exception, an offer of judgment, made after six months from proof of loss, will not serve to limit a plaintiff's entitlement to attorney fees under ORS 742.061.

Wilson, 234 Or App at 628.

§ 45.6 INTERPLEADER DISTINGUISHED

In *Dockins v. State Farm Ins. Co.*, 329 Or 20, 985 P2d 796 (1999), the court preserved the ruling in *Gore v. Prudential Ins. Co. of Am.*, 265 Or 12, 507 P2d 20 (1973), as an exception to the six-month rule (*see* § 45.3-2). ORS 742.061 will not apply if an insurer is an innocent stakeholder who tenders its policy proceeds into court, seeking a declaration of which competing claims to pay. *Dockins*, 329 Or at 33–34.

§ 45.7 RULES AND PROCEDURES TO DETERMINE THE REASONABLE AMOUNT OF ATTORNEY FEES UNDER ORCP 68 AND ORS 20.075

§ 45.7-1 The Right to Attorney Fees Must Be Pleaded

A party seeking attorney fees must have previously alleged entitlement to attorney fees in a pleading (not just the prayer), setting forth the "facts, statute, or rule that provides a basis for the award of fees." ORCP 68 C(2)(a). A litigant should be vigilant in promptly moving to

strike any improper request for attorney fees. *See* ORCP 68 C(2)(d). The parties and their lawyers should be aware that attorney fees are recoverable on some claims, but not others. Before filing, if at all possible, the lawyer should select only the legal theory that automatically provides for fees (e.g., breach of contract in first-party insurance cases). The lawyer must allocate time spent on noncompensable claims.

If the lawyer alleges multiple theories, the lawyer may be able to fall back on the rule that attorney fees need not be apportioned when they are incurred for representation on issues common to a claim in which fees are proper and one in which they are not. *See Estate of Smith v. Ware*, 307 Or 478, 769 P2d 773 (1989); *Sunset Fuel & Eng'g Co. v. Compton*, 97 Or App 244, 249, 775 P2d 901, *rev den*, 308 Or 466 (1989); *see also Malot v. Hadley*, 102 Or App 336, 794 P2d 833 (1990).

§ 45.7-2 The Statement for Attorney Fees Must Be Filed within 14 Days from the Entry of Judgment

A party seeking attorney fees has 14 days from the date on which the judgment is entered to file a statement of the amount of attorney fees requested "that explains the application of any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees . . . , together with proof of service, if any, in accordance with Rule 9 C." ORCP 68 C(4)(a)(i). The 14-day rule is not jurisdictional and may be extended by agreement or motion. *See* ORCP 68 C(4)(d).

> NOTE: The nomenclature in state court is different from that in federal court. In federal court, the party seeking attorney fees must file a "motion" rather than a "statement." *See* FRCP 54(d)(2).

UTCR 5.080 provides that the statement for attorney fees "must be filed in substantially the form set forth in Form 5.080 in the UTCR Appendix of Forms."

Time records are the most important component of the attorney fee statement. Specific detail is the Holy Grail; for example, not "legal research," or even "legal research for motion," but "legal research on analogous federal authorities under 28 USC section 1404(a) for the plaintiff's opposition to the defendant's motion for change of venue." The

lawyer should recognize that "block-billing" (one time entry for multiple tasks) will subject the fees to attack. Under the federal standard, only "block-billing entries of three or more hours" with multiple tasks are subject to challenge.

Billing judgment should be exercised, and its exercise should be noted expressly, such as noting deletions of time or voluntarily proposing a 10 percent discount.

§ 45.7-3 Hearing on Attorney Fees

In state court, "the court may rule on the request for attorney fees based upon the statement, objection, response, and any accompanying affidavits or declarations unless a party has requested a hearing in the caption of the objection or response or unless the court sets a hearing on its own motion." ORCP 68 C(4)(e). If a hearing is held, "the court, without a jury, shall hear and determine all issues of law and fact raised by the objection." ORCP 68 C(4)(e)(i). There is no corresponding right to an evidentiary hearing in federal court. *See* FRCP 54(d).

Court of Appeals Judge Rick Haselton, concurring in *Computer Concepts, Inc. v. Brandt*, 141 Or App 275, 280, 918 P2d 430 (1996) (emphasis in original), provided useful guidance to an attorney fee applicant's presentation of evidence:

> In reviewing petitions for appellate attorney fees under ORAP 13.10, we function much like a trial court, at least with respect to issues of reasonableness. We receive evidence and, after considering the evidence, fix a fee. Just as trial courts benefit from expert opinions as to the reasonableness of fees, so do we. Just as trial courts are enlightened by *particularized* objections to fee petitions, so are we.
>
> . . .
>
> [W]here significant fees are sought and reasonableness is disputed, boilerplate submissions are self-defeating.
>
> In cases where the parties' evidence of reasonableness consists solely of opposing counsels' contending representations as to their own, or their adversaries', worth, the court is thrown back onto its own resources . . . .

The lesson: where there is "real" money at stake and reasonableness is disputed, help us out. Everyone will benefit.

§ 45.7-3(a) Discovery of the Opponent's Rate and Time Is within the Court's Discretion

Given the broad definition of "relevant" in the rules of evidence (*see* OEC 401), and the even broader scope of discovery, it is not surprising that some courts have determined the billing records of counsel for nonprevailing parties to be useful in fee litigation. *See, e.g.*, *Democratic Party of Washington State v. Reed*, 388 F3d 1281, 1287 (9th Cir 2004) ("But there is one particularly good indicator of how much time is necessary, . . . and that is how much time the other side's lawyers spent."); *Henson v. Columbus Bank & Tr. Co.*, 770 F2d 1566, 1575 (11th Cir 1985) (it was an abuse of discretion for the court to deny discovery of defense counsel's hours and fees); *Serricchio v. Wachovia Sec., LLC*, 258 FRD 43, 45–46 (D Conn 2009) (ordering discovery of the defendant's counsel's billing records because the defendant objected to hours claimed by the plaintiffs as excessive).

Trial court rulings in Oregon have both allowed and disallowed requests for discovery of an opponent's hours and fees. In *Dockins v. State Farm Ins. Co.*, 330 Or 1, 997 P2d 859 (2000), the insurer objected to the prevailing plaintiffs' application for attorney fees on appeal. The insurer submitted evidence that (1) its counsel spent only 25 percent of the time spent by the plaintiffs' counsel (54.8 hours versus 193.8 hours) and (2) insurance counsel billed at substantially lower rates. The Oregon Supreme Court noted: "We already have noted the potentially limited utility of comparing directly the respective tasks of appellant's and respondent's lawyers." *Dockins*, 330 Or at 8.

§ 45.7-3(b) Evidence at the Hearing Should at Least Include Testimony of the Primary Trial Lawyer and an Expert

At the hearing on attorney fees (*see* § 45.7-3), a separate lawyer should examine the primary lawyer who is seeking to recover attorney fees, and should elicit testimony regarding the nature of the case and the reasons for the amount of time spent. *See Willamette Prod. Credit Ass'n v.*

Borg-Warner Acceptance Corp., 75 Or App 154, 158, 706 P2d 577 (1985), *rev den*, 300 Or 477 (1986) ("many of plaintiff's attorney's hours were spent in response to defendant's defensive tactics and minimal cooperation regarding discovery"). *Accord Bayless v. Irv Leopold Imports, Inc.*, 659 F Supp 942, 943 (D Or 1987) ("[a] substantial amount of the complexity in resolving this case stems from the sizable amount of time plaintiff's attorneys had to devote to stubborn (to put it as charitably as I can) tactics by counsel for defendants").

The attorney fee applicant should consider engaging an expert to present live testimony to support the claim for attorney fees. The examining attorney should elicit testimony on (1) the rate; (2) the time; (3) a multiplier (discussed in § 45.7-3(c)); and (4) other pertinent considerations under ORS 20.075, such as opportunities to settle.

The rate is the heart of the lodestar. The lawyer must "produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates" reflect the "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 US 886, 895 & n 11, 104 S Ct 1541, 79 L Ed 2d 891 (1984). This may consist of an expert's opinion, or judicial opinions approving the applicant's rate. Courts will generally defer to the Oregon State Bar's most recent economic survey (*available at* <www.osbar.org/surveys_research/snrtoc.html#economicsurveys>), and may be persuaded by a recent Morones Survey of Commercial Litigation Fees.

§ 45.7-3(c) The Attorney Fee Applicant May Be Entitled to a Multiplier

Federal courts no longer allow enhanced rates to reflect the additional risk that lawyers face when taking a case involving federal law on a contingency basis. *City of Burlington v. Dague*, 505 US 557, 112 S Ct 2638, 120 L Ed 2d 449 (1992). State courts, however, have continued to allow enhanced rates to reflect contingency risks in some cases. *See, e.g., Griffin By & Through Stanley v. Tri-Met Metro. Transp. Dist. of Oregon*, 112 Or App 575, 584, 831 P2d 42 (1992), *amended* (June 2, 1992), *aff'd in part, rev'd in part*, 318 Or 500, 870 P2d 808 (1994). And in a diversity case, the federal court will apply state law in determining

entitlement to attorney fees (and a potential enhancement). *See Mangold v. California Pub. Utilities Comm'n*, 67 F3d 1470, 1479 (9th Cir 1995).

A recent decision in the United States District Court for the District of Oregon allowed a 1.75 multiplier in recognition of the undesirability of the case, the significant risk, and the result achieved. *See VanValkenburg v. Oregon Dep't of Corr.*, No. 3:14-CV-00916-MO, 2017 US Dist LEXIS 88955, 2017 WL 2495496 (D Or June 9, 2017).

§ 45.7-3(d) "Fees on Fees"

The law provides for the recovery of "fees on fees." "As a general rule, 'time spent in establishing entitlement to an amount of fees awardable . . . is compensable.'" *Guerrero v. Cummings*, 70 F3d 1111, 1113 (9th Cir 1995), *cert den*, 518 US 1018 (1996) (quoting *Clark v. City of Los Angeles*, 803 F2d 987, 992 (9th Cir 1986)). Under Oregon law, the plaintiff is entitled to be compensated for all time reasonably spent litigating the issues of entitlement to and amount of attorney fees. *Crandon Capital Partners v. Shelk*, 219 Or App 16, 43–44, 181 P3d 773, 789, *rev den*, 345 Or 158 (2008).

§ 45.7-3(e) Certain Litigation Expenses Are Recoverable

Litigation expenses that are billed directly to the client and that are not overhead expenses already reflected in the hourly rate are recoverable as part of an attorney fee award, such as charges for secretarial and legal assistant time, photocopying, telecopier expenses, computer research, long distance telephone, postage, and the like. *Willamette Prod. Credit Ass'n v. Borg-Warner Acceptance Corp.*, 75 Or App 154, 158, 706 P2d 577 (1985), *rev den*, 300 Or 477 (1986); *Robinowitz v. Pozzi*, 127 Or App 464, 470–71, 872 P2d 993, *rev den*, 320 Or 109 (1994).

§ 45.7-3(f) The Attorney Fee Applicant Should Discuss the Mandatory and Relevant Factors in ORS 20.075

ORS 20.075 provides as follows:

> (1) A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:

(a) The conduct of the parties in the transactions or occurrences that 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 [prevailing party fees].

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

(2) A court shall consider the factors specified in subsection (1) of this section 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.
>
> (3) In any appeal from the award or denial of an attorney fee subject to this section, the court reviewing the award may not modify the decision of the court in making or denying an award, or the decision of the court as to the amount of the award, except upon a finding of an abuse of discretion.
>
> (4) Nothing in this section authorizes the award of an attorney fee in excess of a reasonable attorney fee.

Note that subsection (2) expressly states that a court "shall consider the factors specified in subsection (1)" in addition to the factors set forth in subsection (2). In other words, all factors set forth in ORS 20.075(1) and (2) are to be considered. *See Precision Seed Cleaners v. Country Mut. Ins. Co.*, 976 F Supp 2d 1228, 1241 (D Or 2013) (the reasonableness of an award of attorney fees depends "on the totality of the criteria prescribed by ORS 20.075").

The litigants' settlement conduct may be one of the most important factors. ORS 20.075(1)(f). A plaintiff will need to demonstrate that the defendant's settlement efforts were not reasonable. Conversely, a defendant will need to show that the plaintiff's settlement efforts were not reasonable.

Appendix 45A Abbreviations

PIP .....personal injury protection

UM/UIM.....uninsured or underinsured motorist