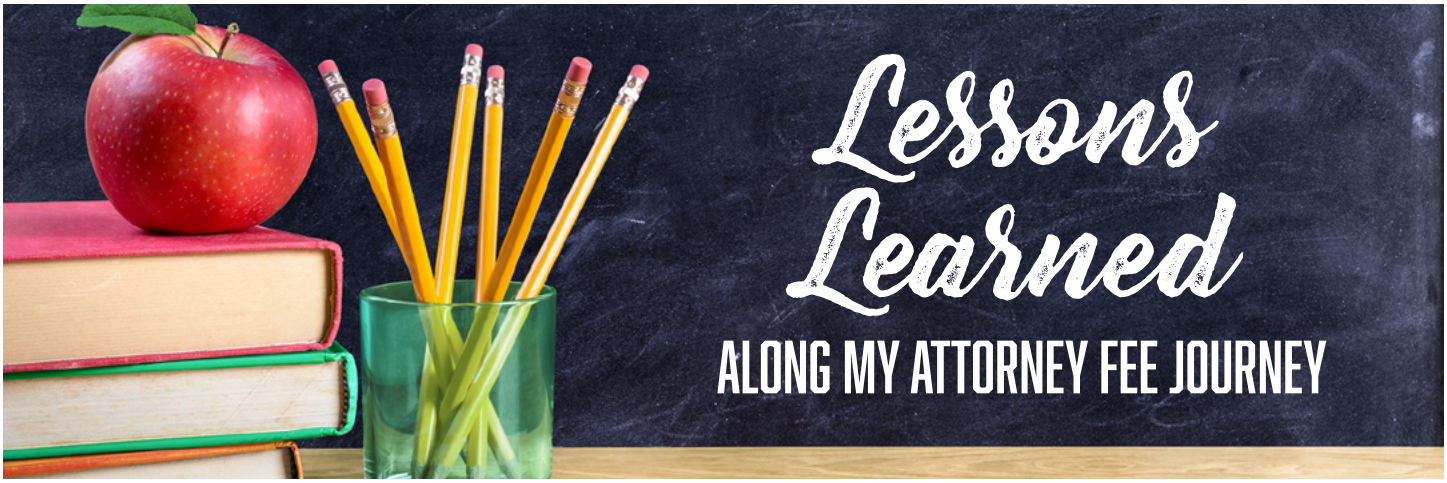

Lessons Learned

ALONG MY ATTORNEY FEE JOURNEY

Bob Bonaparte

By Bob Bonaparte
OTLA Guardian

In 1988, after practicing six years in New York City and Washington D.C., I joined the Portland firm of Tooze Shenker Duden Creamer Frank & Hutchison. The firm encouraged associates to bring in business and handle their own cases. In my first plaintiff's insurance coverage case, I represented a Northwest Airlines pilot named Michael Gerlicher, who lived in Minnesota. He owned a rental cabin in Rhododendron, which he rented for a long weekend to a nice couple. Without his knowledge, the "nice couple" sublet it to meth cooks. They cooked $600,000 of meth product in four days, and Gerlicher's cabin was trashed. He submitted the claim to his property insurer, Allstate, which denied his claim.

Gerlicher hired an attorney, who (due to unrelated time-management challenges) did nothing until the last couple of days before the expiration of the suit limitation period. The attorney then called his old law school buddy at the Tooze firm, Mike Gentry, and begged: "Help me out." Gentry agreed to take the case and filed it. The case bounced from attorney to attorney at the Tooze firm until it landed with a thud on my desk because I was the newest attorney at the firm.

Allstate had just filed a motion for summary judgment. However, Allstate's reasoning was odd. Allstate's expert stated that there was "no physical loss" arising from the mere vapors of the meth cooking. I argued that Allstate's expert's affidavit demonstrated the physical presence of particulates that caused noxious odors. *Pro tem* judge Jeff Spere of the Sussman Shank firm granted our cross motion for summary judgment. Having established liability, we proceeded to negotiate damages. At a judicial settlement conference, Allstate would not budge above $20,000. Our client would not go below $25,000. We went to trial. The jury awarded close to $30,000 in damages, and a judgment was entered.

Then we went to the second trial on attorney fees. I was the sole witness for plaintiff Michael Gerlicher. Allstate brought three experts to the attorney fee trial. The judge awarded most of the $50,000 in attorney fees requested.

I then called the legal editor of the Wall Street Journal and told him about this unusual case. The reporter made it his lead article, "Insurer Forced to Pay to Clean Drug House." That was the first of several hundred meth cases I have handled over the past 30 years, because Oregon had the distinction of leading the nation in the number of meth labs per capita.

Getting started

Filing an action is the key first step you need to take to get an award of attorney fees under my favorite one-way statute — ORS 742.061. The other rules (*e.g.*, "proof of loss" and failure to settle within six months of submission of proof of loss) are just details by comparison.

Small claims require suit too

I was a fairly experienced first party plaintiff's lawyer when I got a call from Andrew Stamp, a lawyer for the respected local firm of Martin Bischoff. In addition to being a land use lawyer, Stamp was also a proficient amateur photographer. A thief had broken into his car trunk and stolen $10,000 of his photographic equipment. Stamp's insurer, USAA, asserted the claim was fraudulent because "statistically," insureds generally do not keep $10,000 worth of property in their car trunk.

As I typically did, I agreed to handle the claim on a contingent fee basis. I was confident I could resolve the claim with

a short telephone call to USAA's Portland counsel Bullivant Houser. Wow, was I naïve. In my first call, I explained: "My client is a LAWYER! He cannot lie. He would be disbarred! And no lawyer is going to risk getting disbarred for $10,000! Please send me a check!"

No dice. USAA's counsel told me he intended thoroughly to investigate the claim. I, of course, supplied responses to all the information and documents requested by USAA's counsel establishing my client's ownership of the photographic equipment.

The claim remained unpaid one full year following the theft. Acting on my client's frustration and my own impatience, I finally filed suit in Multnomah County Circuit Court — for $10,000, plus reasonable attorney fees under ORS 742.061. Naturally, USAA's lawyer vigorously complained that I had filed prematurely. After a couple of months of skirmishing, I proceeded to a stipulated judgment. The client recovered the full amount of his loss, and I recovered all my attorney fees.

In first party insurance claims, the filing of the lawsuit is the essential "trigger" for entitlement to attorney fees. *See* ORS 742.061.

Examination under oath

Warning! I have blundered in the past by exercising an itchy trigger-finger. Many years ago I represented Yan and Tamara Batazhan, Russian immigrants who spoke limited English. They had suffered a burglary loss, and their homeowners insurer, Allstate, became suspicious and initiated an investigation. Allstate hired outside counsel to conduct an examination under oath (EUO) of Yan Batazhan. He (who was not represented at the time) was sufficiently uncomfortable with the tone and manner of Allstate's counsel's questioning that he eventually left the Allstate lawyer's office with his wife and daughter. The Batazhans hired me, and I promptly filed suit against Allstate. Even though I ultimately agreed to make the Batazhans available for a continued EUO, the district court held that the plaintiffs' initial curtailment of the EUO provided the defendant with a defense to liability for attorney fees under ORS 742.061. The Ninth Circuit affirmed. *See Batazhan v. Allstate Ins. Co.*, 256 F. App'x 904 (9th Cir. 2007).

The lesson here is clear. Among an insured's many enumerated duties under the policy, compliance with the duty to submit to an EUO, in particular, is an essential precondition of suit.

Reasonable opportunity

In *Rubin v. State Farm*, Multnomah County Circuit Court Case No. 0306-6448, I represented Len and Tammy Rubin, who moved to East Portland from the Bay Area and suffered a devastating fire loss. The Rubins, of course, promptly reported the claim, and spent hundreds of hours in responding to State Farm's requests for documents, and in photographing and cataloging their fire-damaged, smoke-damaged and water-damaged property. Nine months after the loss, when State Farm had paid just 5% of the claim and had stopped paying monthly rent on their substitute housing, the Rubins hired me, and I promptly filed suit. State Farm filed a motion for summary judgment based on breach of policy conditions, including "failure to cooperate."

The court rejected State Farm's motion for summary judgment, relying on *Sutton v. Fire Ins. Exch.*, 265 Or 322, 509 P.2d 418 (1973) ("substantial, as distinguished from strict, compliance of the proof of loss requirement is all that is required"). The case then proceeded to a judicial settlement conference with Judge Jean Maurer, who facilitated a favorable resolution that included attorney fees.

Defer

You should generally defer litigation

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until six months after notice of the loss.

ORS 742.061 allows attorney fees if the insurer did not settle the claim within six months of submission of proof of loss. Most homeowner policies contain long lists of "proof of loss" requirements in connection with the insured's submission of a claim, such as inventories, documents, receipts, reports, photographs, bank records, etc. Insurers continue (improperly) to insist on such submissions. However, over 20 years ago, the Oregon Supreme Court in *Dockins v. State Farm Ins. Co.*, 329 Or 20, 985 P.2d 796 (1999) did away with the policy's strict proof of loss requirement.

I represented Troy and Donna Dockins, whose basement was damaged by a leaky underground storage tank (UST). The Oregon DEQ ordered them to clean it up and remove the tank. Following State Farm's denial, we filed suit claiming both first party (property damage) and third party liability (defense of the DEQ administrative "action.").

State Farm sought to avoid attorney fees, claiming its payment was made within six months of the plaintiffs' proof of loss submissions. However the Oregon Supreme Court held that "proof of loss" has a functional meaning and applies to any "event or submission" that accomplishes the purpose of a proof of loss. 329 Or at 28. In *Dockins*, the court held that the plaintiffs' complaint satisfied the policy's proof of loss requirement, and awarded attorney fees because of the passage of more than six months from the complaint filing prior to State Farm's payment.

The Oregon Supreme Court further liberalized the proof of loss requirement in 2009. I represented Eric and Yolanda Parks, whose rental home was damaged by a meth lab. Ms. Parks called her Farmers agent and asked if Farmers could help her with her loss. In attempting to avoid attorney fees, Farmers argued that a proof of loss must be in writing and must contain sufficient information to allow an insurer to ascertain its liability.

The Oregon Supreme Court ruled that a telephone call to an insurance agent (not even the claim department) providing notice of the loss serves as a functional proof of loss (triggering the running of the six-month period). *Parks v. Farmers Ins. Co. of Oregon*, 347 Or 374, 227 P.3d 1127 (2009).

Mid-litigation "recovery"

It used to be unclear whether a claim had to be reduced to a judgment to give rise to entitlement to attorney fees. That has changed. Now, an insurer's mid-litigation payment will entitle the insureds to an award of attorney fees under ORS 742.061. *See Long v. Farmers Ins. Co.*, 360 Or 791, 388 P.3d 312 (2017) ("[T]he term 'recovery' must be read to include mid-litigation payments such as the ones that [the insurer] made in this case").

Beware the two-way statute

Giddy with the success of *Gerlicher*, I took on the personal injury case of a tenant who had allegedly been exposed to meth residue by a landlord who had failed to clean up a meth lab after the prior tenant. I took the case to a jury trial and lost 9-3.

The first lesson was not to expect sympathy from Washington County jurors for alleged neurological deficits arising from meth exposure. The second lesson was to beware of two-way attorney fee statutes. The landlord sought attorney fees under ORS 91.255 after prevailing, and the attorney fee judgment bankrupted my client. Ouch.

Cause of action

Evaluate the causes of action to include in the complaint because they will impact your attorney fee claim.

Early in my career, I took the "kitchen sink" approach, and added a slew of tort claims to my primary claim for breach of insurance policy: tortious interference with business relationships; negligence; negligent misrepresentation; intentional misrepresentation; bad faith and unfair dealing; intentional infliction of emotional distress; and conversion.

The tort claims naturally were attacked along the way by motions to dismiss and motions for summary judgment, and ultimately used by insurance defense attorneys to attack the plaintiff's claim for attorney fees under ORS 742.061. The insurer would argue to the court that fee-shifting only applied to the fee-bearing claim for breach of the insurance policy, and that the insured was required to allocate time spent on non-fee-bearing claims.

I would then 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 P.2d 773 (1989); *Sunset Fuel & Eng'g Co. v. Compton*, 97 Or App 244, 249, 775 P.2d 901, rev den, 308 Or 466 (1989); *see also Malot v. Hadley*, 102 Or App 336, 794 P.2d 833 (1990).

The January 2022 decision by the Court of Appeals in *Moody v. Oregon Community Credit Union*, 317 Or App 233 (2022), rev allowed 369 Or 855 (2022), has dramatically changed the first-party landscape. The benefits of *Moody* (allowing an insured to recover emotional distress damages and punitive damages) outweigh the detriments (possible attorney fee repercussions). The lesson here is that a *Moody* claim should be included in most first party complaints.

Record your time

It is, of course, "best practice" to contemporaneously and meticulously record your time in six-minute increments with copious descriptions that fully inform the reader of the billing entry regarding tasks performed.

Failure to record time is likely to lead to your time being reduced.

However, at least one federal decision awarded attorney fees to lawyers who simply did not keep time records. In *Turner v. Oregon*, 2006 US Dist Lexis 109212 (D Or 2006), lawyer Charles Merten brought a successful § 1983 claim, and estimated that he spent 400 hours. Defendant objected to the requested award on the ground that "plaintiff provided insufficient support." Judge Mike King stated that he was "familiar with the issues litigated" and ruled that "the number of hours reasonably spent is 300 hours."

Likewise, in *Page v. Muzyn*, 124 Or App 137, 861 P.2d 382 (1993), lawyer Mic Alexander brought a successful § 1983 claim, and used a percentage formula to support the requested fee, the defendant argued that the court was "restricted to consideration of a rate times hours formula." The Court of Appeals panel disagreed, and ruled that a reasonable fee may be based on a percentage formula. 124 Or App at 140.

Bifurcation

Consider bifurcating the attorney fee proceeding if entitlement is disputed.

I formerly served as co-chair of the American Bar Association Insurance Coverage Subcommittee on Practice and Procedure. I authored an article in the American Trial Lawyers Association monthly magazine on the scintillating topic of "bifurcation." I stated categorically in the opening paragraph that bifurcation of liability and damages is anathema.

However, there are exceptions to every rule. Some years ago, I represented Liz Babnick, who owned a rental home in Pacific City that had been used as a meth lab by a bad-apple tenant. After a stipulated judgment, the insurer disputed entitlement to attorney fees.

The defense counsel agreed to bifurcate the Rule 68 proceeding for the purpose of judicial efficiency and cost saving to the parties. There was no need to bring expensive attorney fee experts to the entitlement hearing. Judge Janice Wilson ruled the plaintiff was entitled to attorney fees, and the parties conducted a second Rule 68 proceeding to determine the amount of reasonable fees.

State trial

Enjoy the attorney fee trial if your case is in state court.

There is no right to an evidentiary hearing in federal court to establish the amount of reasonable attorney fees. *See* FRCP 54 (d). In state court, however, if the insurer (as the objecting party) requests a hearing (which it invariably does), the court will conduct an evidentiary hearing. *See* ORCP 68 C(4)(e)(i).

Court of Appeals Judge Rick Haselton, concurring in *Computer Concepts, Inc. v. Brandt*, 141 Or App 275, 280, 918 P.2d 430 (1996) (emphasis in original), issued a *cri de coeur* to present expert testimony, "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."

If you are like me, you may be somewhat apprehensive as a typical trial approaches. There is uncertainty whether your opponent may file a *Superbilt* motion to reverse or modify the court's pretrial decisions. There is uncertainty how the judge will rule on the parties' motions *in limine*. There is unpredictability as to how your client will hold up on cross examination. Some witnesses, despite being under subpoena, may fail to appear.

The attorney fee trial is a time for celebration! Every single witness is an expert. *See Colonial Plumbing & Heating Supply Co. v. Contemporary Constr. Co.*, 464 A.2d 741 (R.I. 1983) ("It is well settled that attorneys are competent to testify as experts in determining what is a reasonable charge for legal services rendered").

There are no surprises. You, as the

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prevailing lawyer, have prepared your own damage evidence in the form of a daily diary recording the services. Have fun!

Ask your expert to support a multiplier

One of my all-time favorite cases is a fire loss in Medford suffered by "Fabulous Mr. Thom," who used to do Ginger Rogers' hair. Thom had allowed his insurance to lapse by failing to pay his premiums. One day, while doing a customer's hair, he saw a flash of flame. He shrieked, grabbed the phone, and called his agent: "I NEED YOU TO REINSTATE MY FIRE INSURANCE!!!"

Thom's salon was destroyed and for obvious reasons his insurer declined to reestablish his insurance while the salon was burning down. Fortunately, however, there is a little-known Oregon statute that provides that a business is entitled to a written notice of termination that includes a right to a hearing. The insurer's termination notice was found ineffective because it failed to include the right to a hearing.

In the fee proceeding, we chose an expert we hoped would be familiar to Medford Judge Tim Gerking — former president of the Oregon State Bar Bill Crow, who had a statewide reputation. We asked for a 25% multiplier (based on risk and result) and the court awarded a 20% multiplier.

State courts allow multipliers (also called enhancements) to reflect various factors, including contingency risk, undesirability of case, obstruction by opposing counsel and result. *See, e.g.*, *Griffin By & Through Stanley v. Tri-Met Metro. Transp. Dist. of Oregon*, 112 Or App 575, 584, 831 P.2d 42 (1992), amended (June 2, 1992), aff'd in part, rev'd in part, 318 Or 500, 870 P.2d 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 F.3d 1470, 1479 (9th Cir. 1995).

Attorney fee applicants should always consider the potential application of a multiplier.

Conclusion

Oregon's one-way attorney fee statute is one of the most consumer-friendly in the nation. The statute provides an opportunity to make the insured whole while forcing the insurer to pay all of the attorney fees.

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