Spotlight on Attorney Fees
Recent Trends in Oregon Attorney Fee Case Law

by Stephen Leggatt
Bonaparte & Bonaparte

Attorneys who frequently litigate fee petitions in Oregon's state or federal courts - whether in support or in opposition - are well advised to keep up with developments and trends in attorney fee jurisprudence. Forewarned is forearmed, and - *pace* Walt Kelly - that's not just half an octopus. Knowing how the courts are handling questions about reasonable rates, lodestar enhancements, good billing judgment and the like can help petitioners avoid leaving money on the table (or help respondents keep it there).

Three recent decisions strike me as illustrative and illuminating as to the way things are trending right now in the world of attorney fees. Spoiler alert: the courts seem to be becoming increasingly comfortable with large fee awards, and lodestar enhancements appear to be increasingly common, particularly in the state courts. The recent decisions are:

- Multnomah County Judge Celia Howes' June 8, 2023 decision awarding fees in the amount of $276,380.88 in *Whitman v. USAA Casualty Insurance Company*, Case No. 19CV16005;
- Multnomah County Judge Melvin Oden-Orr's August 8, 2023 decision awarding fees in the amount of $234,835.00 in *Ciferri v. State Farm Fire and Casualty Company*, Case No. 21CV14243; and
- United States District Judge Marco Hernández' September 24, 2023 decision awarding fees in the amount of $699,629.02 in *Don't Shoot Portland v. City of Portland*, Case No. 30:20-cv-917-HZ.

Who Opposes My Motions is My Friend

Whitman was an Underinsured Motorist (UIM)/Personal Injury Protection (PIP) claim arising out of a 2017 motor vehicle collision. Each of the two plaintiffs brought a separate UIM claim and a separate PIP claim, for a total of four claims. Plaintiffs' counsel represented the plaintiffs on a statutory contingency basis, meaning counsel would recover their fees from the defendant pursuant to the governing fee-shifting statute (ORS 742.061) in the event their clients prevailed, and otherwise would not be compensated for their time or efforts.

Plaintiffs and their counsel litigated for over two years before the defendant agreed to settle the PIP claims for the full amounts sought by the plaintiffs, namely $16,207.62 and $2,291.25. The parties took the UIM claims to trial, where one plaintiff prevailed to the tune of $375,000, and the other plaintiff received no recovery. Plaintiffs' fee petition followed, seeking a total of $445,285 in fees, reflecting lodestar fees (reasonable rate times time reasonably expended) of $222,642.50 and a requested 2x multiplier. Full disclosure: I served as plaintiffs' attorney fee expert, offering opinion testimony in support of their petition.

The court and the parties had a complex knot to untangle. All four claims arose out of broadly overlapping facts, two arose under one body of law and two out of a related but distinct body of law, and plaintiffs were unsuccessful as to one of the claims. In advance of the Rule 68 evidentiary hearing to which fee litigants are entitled in state court (no such entitlement to a hearing exists in federal court), Judge Celia Howes had indicated her inclination to consider a multiplier for time spent on PIP claims, and to award no fees at all in connection with the unsuccessful UIM claim. In consequence, the parties needed to either reach a consensus as to which attorney tasks were reasonably related to which claims, or submit their positions to the court for it to make its own determination. It took two hearings, three rounds of briefing, and several express directions from the court, but the parties were able to agree to reasonable lodestar amounts for the PIP claims and the successful UIM claim. It remained for the court to determine whether a lodestar multiplier was appropriate.

Noting that "[t]he risk of nonpayment on a contingency-fee arrangement" could alone be sufficient to justify a multiplier in some cases, Judge Howes determined that, in this case, the factor that made a multiplier appropriate was the defendant's unreasonable delay in conceding plaintiffs' entitlement to PIP coverage. Although the facts giving rise to plaintiffs' PIP entitlement were known to defendant more than a year before litigation commenced, the defendant unreasonably opposed the plaintiffs' claims for over two additional years before agreeing to settle plaintiffs' PIP claims in full. Based on the defendant's decision to oppose plaintiffs' meritorious claims unreasonably, the court applied a 1.5x multiplier to the plaintiffs' PIP lodestar product, and awarded fees in the total amount of $276,380.88.

The lesson for plaintiffs' attorneys in fee-shifting cases is clear: frustrating as it may be to have a defendant oppose your every motion and refuse to concede your client's clear rights... be patient. The more unreasonable your opponent's legal positions, the more likely it is that the court will enhance your compensation as a result. And the lesson is equally clear for defense attorneys: when you can read the writing on the wall that your opponent's position has merit, you keep up the fight at your client's peril. Defending a lost cause to the bitter end can make an anticipated bad outcome much worse.

The Devil is in the Details: Take Care with Your Jots and Tittles

The *Ciferri* plaintiff was a tattoo artist who suffered a theft loss of an estimated $55,000 in vintage tattoo machines from the trunk of his car. The insurer defendant characterized the stolen items as business property rather than as collectibles and applied a $1,500 business property limitation to the loss. The case went to court-annexed arbitration, where the defendant prevailed on its business property theory. At that point, plaintiff's counsel associated with my firm to help pull the fat from the fire it had unexpectedly fallen into. We prepared and circulated a draft motion for partial summary judgment as to the limited legal question of whether the stolen items were indeed business property. After reviewing the draft motion, the defendant conceded that the business property limitation was inapplicable, and agreed to pay the plaintiff the full amount of his estimate of the stolen items' value as collectibles. However, the defendant refused to pay the plaintiff's attorney fees in the amount we requested - at that time we sought fees in the lodestar amount of approximately $120,000 - contending that the lodestar product was disproportionate to the client's recovery. In consequence, we submitted a fee petition to the court.

For many attorneys in the fee-shifting arena, the fight to vindicate a client's rights is the main event, and the post-victory battle over attorney fees may seem like an afterthought. But

Continued on page 13

Spotlight on Attorney Fees

Continued from page 12

while vindication of the client's rights absolutely is of paramount importance, it is an error not to put the same care into supporting a fee petition as you put into litigating your client's claims. A plaintiff's attorney has two goals: to make the client whole, and to get paid for doing it. We prepared a careful fee petition seeking not $120,000 but, following application of a requested 1.25x lodestar multiplier and addition of "fees on fees" (that is, time spent preparing and litigating the fee petition itself), a total of $234,835.00. We retained a fees expert with a sterling reputation in the legal community who opined with detailed particularity that all of our time expenditures were reasonably necessary to achieving our client's recovery - including time spent developing the statutory tort claim we had brought in parallel with the breach of contract claim that triggered our right to tax the defendant with plaintiff's fees - and that in light of the contingent nature of the representation, the risk of an unsuccessful result justified application of the requested multiplier. By contrast, the defendant opposed our fee petition from the proverbial "30,000 foot" perspective, arguing broadly that our fees were disproportionate to the result and asserting without particularity that some of the time expenditures were excessive. Following a hearing, Judge Melvin Oden-Orr rejected defendant's arguments and awarded plaintiff's fees in the full requested amount.

Again, the lesson is clear: the work you put into litigating a fee petition is likely to pay off. The more evidence you provide to the court to establish the merit of your position, and the more specifically tailored that evidence is to your case, the easier it is for a judge to agree with your client. An argument couched in general terms, untethered to the particulars of the petition, is easy to disregard.

Rate Expectations: A Minor Crisis May Be in the Offing

Don't Shoot Portland was a complex civil rights action arising out of the Portland Police Bureau's use of chemical agents to disperse crowds gathered to protest the May 25, 2020 death of George Floyd at the hands of officers of the Minneapolis Police Department. Following nearly three years of litigation and the efforts of multiple law firms working on behalf of the plaintiffs, the plaintiffs obtained significant injunctive relief limiting the PPB's use of chemical agents and other methods of crowd dispersal, as well as a money judgment. The plaintiffs then moved for award of their attorney fees in the lodestar amount of $1,057,861.50 and invited the court to apply an unspecified multiplier to the lodestar, but did not expressly request award of fees in any specific enhanced amount.

The plaintiffs sought compensation for their attorneys' time expenditures at rates that exceeded the inflation-adjusted 90th percentile rates reported in the Oregon State Bar's 2017 Economic Survey. Judge Marco Hernández found the requested rates to be unreasonably high, and determined that the reasonable rates were, depending on the attorney in question, either the 75th percentile rate or somewhat above that rate as adjusted for inflation to February 2023 (the month in which plaintiffs filed their petition). Judge Hernández noted that, after plaintiffs filed their petition, the OSB released its 2022 Economic Survey. However, he declined to rely on the more recent survey in determining reasonable 2023 rates on the express ground that the 2022 Economic Survey omitted to report prevailing 75th percentile rates.

As I observed in a recent article in the July/August issue of this publication, that omission can be expected to have unfortunate consequences, because many Oregon judges have treated the 75th percentile rates as more important than any others in crafting reasonable fee awards, *see*, *e.g.*, *Garcia v. Waterfall Cmty. Health Ctr., Inc.*, No. 6:20-cv-1800-MC, 2022 U.S. Dist. LEXIS 160119, at *3 (D. Or. Sep. 6, 2022). Judge Hernández found an appropriate way of avoiding the problem in *Don't Shoot Portland*, but in future cases more squarely governed by the 2022 survey, judges may face greater challenges in determining reasonable rates.

Judge Hernández' opinion is also notable for the extent to which it continues the recent trend for courts to recognize that it can be efficient for multiple attorneys to bill for the same work. Plaintiffs were represented by counsel from multiple law firms, and often sent multiple attorneys to hearings and conferences. Judge Hernández expressly rejected defendant's argument that plaintiffs' "staffing model" justifies across-the-board lodestar reductions, and declined to exclude time expenditures on grounds of duplicativeness where no more than three to five attorneys billed for reviewing documents or attending oral argument.

Using rates at or slightly above the 75th percentile, and following reductions in and exclusions of specific time expenditures for block billing, excessively duplicative representation, clerical tasks, and tasks unrelated to the plaintiffs' successful outcome, Judge Hernández awarded the plaintiffs their fees in the lodestar amount of $699,629.02, declining the plaintiffs' invitation to apply a multiplier.

The plaintiffs' fee award was substantial and constituted an excellent result by any standard. But if we were to play armchair quarterback with the benefit of hindsight, we might speculate as to whether the plaintiffs might have achieved a still better outcome had they retained an independent attorney fee expert to offer an opinion that their requested rates were reasonable, and to justify that opinion by specific reference to the attorneys' qualifications, skills, and reputations in the legal community. We might also speculate whether the plaintiffs' invitation for the court to apply a discretionary lodestar enhancement might have been more persuasive had the plaintiffs requested a specific multiplier and justified it through expert opinion as to the risk of an unfavorable result.

To be sure, the federal courts are accustomed to deciding fee petitions without the benefit of expert opinion, and such opinion is not required when filing a fee petition in federal court. But the "best practice" is arguably to offer a supporting expert opinion as to every element of a fee petition whether in state or federal court. Is there a guarantee that Judge Hernández would have issued a higher fee award if plaintiffs had done something differently? Of course not; far from it. But for attorneys who live by fee-shifting statutes, any measure calculated to improve the odds of an optimal result is worth the investment.