



Margaret Van
Valkenburg
Portland, Retired
Shareholder

Direct Dial:
Fax:
Email Attorney

Insurers Not Liable Under ORS 742.061 For Attorney Fees Awarded Against Non-Settling Co-Insurers

By Margaret Van Valkenburg

Last week, the Oregon Court of Appeals held that settling insurers were not liable in an action for equitable contribution under ORS 742.061 for attorney fees awarded against non-settling co-insurers.

Certain Underwriters v. Mass. Bonding and Ins. Co., 2011 WL 3596056 (Or. App., Aug. 17, 2011), arose out of a claim for equitable contribution between non-settling insurers and settling co-insurers in a coverage action. Plaintiffs and defendants issued insurance policies to Zidell, which operated a scrapping business along the Willamette River. Zidell became the subject of a Department of Environmental Quality environmental cleanup action and tendered to its insurers, all of which denied coverage. Zidell commenced the underlying coverage action against its insurers, including the plaintiffs and defendants in this case. The defendants eventually settled the case with Zidell, while the plaintiffs did not. Ultimately, judgment was obtained against the plaintiffs in the underlying coverage action, and the trial court awarded attorney fees under ORS 742.061. Following the entry of judgment, plaintiffs filed this contribution action against the settling insurers seeking pro rata contribution for attorney fees awarded in the coverage action. The trial court granted summary judgment in favor of defendants and dismissed plaintiffs' contribution claim for fees.

Both the underlying coverage action and the contribution action progressed through the Oregon appellate courts. In the process, the Court of Appeals declined to reach one of plaintiffs' assignments of error in the contribution case, which concerned plaintiffs' right to equitable contribution for attorney fees awarded to Zidell in the coverage action. The Court declined to address the issue because it had vacated the award of attorney fees in the underlying coverage action appeal. Eventually, the Supreme Court determined the Court of Appeals erred in vacating the attorney fee awards. The Court of Appeals then granted a motion to reconsider in the contribution action for the limited purpose of addressing the assignment of error regarding the question of whether the defendants must contribute to the attorney fees awarded against the non-settling plaintiffs.

On this issue, the Court of Appeals held that an attorney fee award under ORS 742.061 is not the type of common liability among insurers that gives rise to equitable contribution. The Court stated that unlike the duty to defend, which is a "shared obligation that arises independent of completed litigation," liability for attorney fees is a statutory obligation under ORS 742.061 that arises only if "(1) settlement is not made within six months from the date proof of loss is filed; (2) an action is brought on the policy; and (3) the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action." The Court reasoned that Zidell never satisfied the third statutory prerequisite for entitlement to attorney fees against the defendants. Specifically, the Court stated that by settling with the defendants, Zidell accepted the defendants' highest tenders and, consequently, the defendants never shared in plaintiffs' liability for attorney fees because "defendants were never liable for attorney fees in the first place."

The Court held that the plaintiffs' liability for the attorney fees was statutory and did not arise out of a common obligation shared with the defendants, as the plaintiffs had argued. Interestingly, the Court stated that even if plaintiffs could demonstrate a common obligation, the Court was not persuaded that equitable contribution would be available to the plaintiffs. The Court discussed the public policy behind ORS 742.061, which was designed to encourage settlement of insurance claims and reasoned that requiring contribution would create an additional burden on the settling insurers and would contravene public policy. Thus, the Court was not convinced



that the principles of equity would contravene the policy encouraging settlement of insurance claims.