Getting Paid: Attorney Fee Recovery in Oregon State Court

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When attorney fee recovery is litigated in Oregon state court, three areas are often involved. First, what is the legal basis for seeking fees? Second, has the correct procedure been followed? Third, is the amount sought reasonable? In this article, we'll examine all three. Although the focus is on Oregon state court, it is important to note that the substantive elements of fee recovery in federal diversity actions are also governed by state law.[1]

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Basis

Fee recovery is not automatic. Rather, a party seeking fees must demonstrate both legal grounds entitling it to fees and that it was the "prevailing party."

In Oregon, there are three primary alternative grounds for fees.[2]

First, many Oregon statutes direct or permit an award of attorney fees to litigants who successfully handled matters within the substantive purview of those statutes. Some statutes direct an award of fees to a successful litigant, using the affirmative term "shall award." *See, e.g.*, ORS 652.230(2) (statutory claim for unpaid wages); ORS 20.085 (inverse condemnation). Other statutes simply permit a fee award, using the discretionary term "may award." *See, e.g.*, ORS 646.638(3) (statutory claim for unlawful trade practices); ORS 30.075(2) (survivorship actions). Some statutes permit any prevailing party to recover, while others limit the recovery to a successful plaintiff (*see, e.g.*, ORS 652.230(2) (wage claims, subject to limited exceptions)) or defendant (*see, e.g.*, ORS 35.346(7) (condemnation actions, subject to specified conditions)).

Second, attorney fees are available when permitted by the contract at issue in a case. Under ORS 20.096(1), attorney fee recovery in contract cases is "reciprocal": they are available to the prevailing party even if the contract involved nominally provides fee recovery only to a particular contracting party. In 2003, the Legislature adopted and then in 2009 expanded ORS 20.083, which permits attorney fee recovery "even though the party prevails by reason of a claim or defense asserting that the contract is in whole or part void, a claim or defense asserting that the contract is unenforceable or a claim or defense asserting that the prevailing party was not a party to the contract." In *Dess Properties, LLC v. Sheridan Truck & Heavy Equipment, LLC*, 220 Or App 336, 344, 185 P3d 1113 (2008), the Court of Appeals found that "the word 'void' in the statute refers to agreements actually entered into that

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are unenforceable by reason of their failure to comply with some other legal requirement." As I write this, there are as yet no appellate decisions addressing whether rescinded contracts fall within the ambit of ORS 20.083. *See Bennett v. Baugh*, 329 Or 282, 985 P2d 1282 (1999) (discussing the traditional rule that a party who successfully rescinds a contract is not entitled to attorney fees).

Third, even in the absence of a statute or contract, attorney fees may be available—at the discretion of the court involved and under its equitable powers—in very limited circumstances when the prevailing party has conferred a significant benefit on others. For example, fees may be available when the prevailing party sought to "'vindicat[e] an important constitutional right applying to all citizens without any gain peculiar to himself.'" *Swett v. Bradbury*, 335 Or 378, 382, 67 P3d 391 (2003) (citation omitted); *accord Deras v. Myers*, 272 Or 47, 65-67, 535 P2d 541 (1975); *Vannnatta v. Oregon Government Ethics Com'n*, 348 Or 117, 228 P3d 574 (2010) (discussing the criteria for awards under this theory). Other examples include litigation that created a "common fund" (*see, e.g., Strunk v. Public Employees Retirement Bd.*, 341 Or 175, 139 P3d 956 (2006)) and shareholder derivative cases (*see, e.g., Crandon Capital Partners v. Shelk*, 342 Or 555, 157 P3d 176 (2007)).

ORS 20.077 generally controls the determination of who is the "prevailing party" for purposes of attorney fee recovery whether the basis for that recovery is statutory[3] or contractual. *See CMS Sheep Co. v. Russell*, 179 Or App 172, 177, 39 P3d 262 (2002) (applying the statutory term to contract-based fee recovery in the absence of evidence of contrary intention); *accord Carlson v. Blumenstein*, 293 Or 494, 500, 651 P2d 710 (1982) (equating the contractual term "successful party" with the statutory term "prevailing party"); *Rosekrans v. Class Harbor Ass'n, Inc.*, 228 Or App 621, 641-44, 209 P3d 411 (2009) (examining the contractual term "losing party"); *see also Asiatic Company (USA), Inc. v. Expeditors International*, 183 Or App 528, 529, 52 P3d 1112 (2002) (taking the same approach with costs).

Under ORS 20.077(2), the prevailing party is determined for each claim that includes an attorney fee remedy:

Under ORS 20.077(2), the prevailing party is determined for each claim that includes an attorney fee remedy:

> "For the purposes of making an award of attorney fees on a claim, the prevailing party is the party who receives a favorable judgment or arbitration award on the claim. If more than one claim is made in an action or suit for which an award of attorney fees is either authorized or required, the court or arbitrator shall:
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> "(a) Identify each party that prevails on a claim for which attorney fees could be awarded;
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> "(b) Decide whether to award attorney fees on claims for which the court or arbitrator is authorized to award attorney fees, and the amount of the award;
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> "(c) Decide the amount of the award of attorney fees on claims for which the court or arbitrator is required to award attorney fees; and
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> "(d) Enter a judgment that complies with the requirements of ORS 18.038 and 18.042 [which govern the form of money judgments]."[4]

Procedure

ORCP 68C governs the procedural aspects of attorney fee recovery from initial pleading through award by the trial court.

Pleading the right to attorney fees is controlled by ORCP 68C(2). ORCP 68C(2)(a) requires a party seeking fees to plead the "facts, statute or rule" in that party's complaint, answer, counter or cross claim or third party pleading. *See Lumberman's v. Dakota Ventures*, 157 Or App 370, 378, 971 P2d 430 (1998) (summarizing the law on this

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point and describing it as the "first appropriate opportunity"). If the party's first response is by way of a motion to dismiss or summary judgment, then ORCP 68C(2)(b) requires that the right to fees be included in the motion. *See Mulier v. Johnson*, 332 Or 344, 350-51, 29 P3d 1104 (2001). With both, ORCP 68C(2)(c) simply requires an assertion of the right to "reasonable attorney fees" rather than a specific amount. Again with both, the rationale is to put the other side on notice that the remedies sought include attorney fees. *See generally Swartsley v. Cal-Western Reconveyance Corp.*, 212 Or App 365, 157 P3d 1260 (2007) (discussing "notice" at length). Finally, under ORCP 68C(2)(d) an allegation of the right to fees is deemed denied by the adverse party without the need for a specific response.[5]

Proof of attorney fees, in turn, is governed by ORCP 68C(4). ORCP 68C (4)(a) requires a prevailing party to file and serve a "detailed" statement of fees (and costs) within 14 days of the entry of judgment. The level of detail required includes an itemization of the time spent and the activities undertaken so the court can determine whether the services involved were reasonable. *Thompson v. Long*, 103 Or App 644, 645, 798 P2d 729 (1990). Courts have the discretion to reduce fee statements that contain "block billing." *See, e.g., Rosekrans v. Class Harbor Ass'n, Inc.*, 228 Or App at 641. Under UTCR 5.080, the request for attorney fees must be filed "substantially in the form" set out in the UTCR Appendix of Forms. ORCP 68C(4)(b) requires "specific" objections to be filed and served within 14 days following service of the request. Both requests and objections may be amended in accord with ORCP 23.

Although fee awards may be included in a general judgment, they are more typically entered by supplemental judgment.

ORCP 68C(4)(c) controls hearings on fee requests and objections. Fee requests are heard and decided by the court. If no objections are timely filed, the court may award the fees sought or it may instead make an independent inquiry into their reasonableness. *See Fredrickson v. Ditmore*, 132 Or App 330, 334-35, 888 P2d 108 (1995), *abrogated on other grounds*, 170 Or App 305, 13 P3d 114 (2000). Hearings are evidentiary in character and the parties are permitted to submit testimony by affidavit (or declaration) or live, including expert testimony. If no fact issues are raised by an objection, however, the court need not hold an evidentiary hearing and, instead, may simply rely on the evidence already in the record. *Jimenez v. Ovchinikov*, 98 Or App 336, 339, 779 P2d 189 (1989). ORCP 68(C)(4)(e) requires the court to make findings of fact and conclusions of law if requested, or, absent a request, the court may (in its discretion) make them on its own.

Although fee awards may be included in a general judgment, they are more typically entered by supplemental judgment. ORCP 68(5)(a)-(b). Under ORS 20.220(1), an appeal from a judgment either allowing or denying fees (or costs) is only permitted on questions of law (including whether there was supporting evidence in the record). Review is for an abuse of discretion under ORS 20.075(3). If the underlying judgment in a case is reversed, then ORS 20.220(3)(a) also reverses the related fee award. Fees on appeal are governed by ORAP 13.10, not ORCP 68. *See McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 90, 957 P2d 1200 (1998).

Amount

If an underlying statute requires an attorney fee award to a prevailing party, then ORS 20.075 limits a reviewing court's discretion to the amount of the fees. *Petersen v. Farmers Ins. Co. of Oregon*, 162 Or App 462, 466, 986 P2d 659 (1999).[6] By contrast, if fee recovery is itself discretionary, then the reviewing court under ORS 20.075 will examine both "whether" and "how much."

ORS 20.075(1) addresses "whether":

> "(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:
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> "(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, includ-

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ing 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(2), in turn, addresses "how much":

Regardless of methodology, fee requests are examined primarily through the prism of "reasonableness" using the factors set out in ORS 20.075.

"(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."[7]

Although ORS 20.075 requires consideration of all of the factors listed, the relevance of particular factors is case-specific. See *Hale v. Kemp*, 220 Or App 27, 35-36, 184 P3d 1185 (2008); *accord McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or at 96-96. Although not routine in Oregon state court practice, courts may use a multiplier or "lodestar" in awarding fees. *See Strawn v. Farmers Ins. Co. of Oregon*, 233 Or App 401, 412-18, 226 P3d 86 (2010) (reviewing issue and so holding); *see also Strunk v. Public Employees Retirement Bd.*, 343 Or 226, 245-47, 169 P3d 1242 (2007). Regardless of methodology, fee requests are examined primarily through the prism of "reasonableness" using the factors set out in ORS 20.075.

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Strawn v. Farmers Ins. Co. of Oregon, 233 Or App at 416. From a practical perspective in a noncontingent fee setting, the hourly rates charged and the amount of time spent in relation to the outcome achieved are often the key factors. In this regard, the Oregon State Bar's Economic Survey provides an influential starting point for analysis of rates. *See, e.g., Valentine v. Equifax Information Services LLC*, 543 F Supp2d 1232, 1235 (D Or 2008); *Clark v. Capital Credit & Collection Services, Inc.*, 561 F Supp2d 1213, 1218 (D Or 2008). A court may base an award on rates beyond the immediate geographic venue depending on the complexity of the case and the availability of specialized expertise. *See, e.g, Hanna Ltd. Partnership v. Windmill Inns of America*, 223 Or App 151, 165-67, 194 P3d 874 (2008) (awarding Portland rates in a Douglas County case). In a contingent fee setting by contrast, the risk assumed is included in the factors assessed and can result in compensation at a higher effective rate than an hourly case. *See Tanner v. OHSU*, 161 Or App 129, 134, 980 P2d 186 (1999). With either, although denominated "attorney" fees, recoverable fees are construed more broadly to encompass "legal services" provided to achieve the result meriting the award. *See Robinowitz v. Pozzi*, 127 Or App 464, 470, 872 P2d 993 (1994).

Finally, fee awards may include both amounts incurred in prosecuting a successful fee request (*see Lekas v. Lekas*, 23 Or App 601, 609-10, 543 P2d 308 (1975)) and, upon appropriate evidence, for collection on the judgment (*see Johnson v. Jeppe*, 77 Or App 685, 688-89, 713 P2d 1090 (1986)). ❐

Federal law typically uses a "lodestar" approach as do some other states.

[1] *See Kabatoff v. Safeco Ins. Co. of America*, 627 F2d 207, 210 (9th Cir 1980) ("In a diversity action, the question of attorney's fees is governed by state law."); *accord Roberts v. Interstate Distributor Co.*, 242 F Supp2d 850, 852 (D Or 2002). In a diversity case, however, the procedural aspects of attorney fee recovery are controlled by federal law. *See* FRCP 54(d).

[2] Several court rules governing litigation conduct, as distinct from the substantive matters involved in the litigation, also provide attorney fee recovery as a form of sanction. *See, e.g.*, ORCP 17D, 45C, 46. Similarly, some statutes permit the award of attorney fees as a sanction for an opponent's improper litigation conduct. *See, e.g.*, ORS 20.105 (disobedience of court orders); ORS 20.125 (deliberate misconduct causing mistrial).

[3] Some statutes governing specialized proceedings, such as eminent domain, have their own prevailing party definitions. *See, e.g.*, ORS 35.346(7).

[4] For a discussion of the legislative history of ORS 20.077, *see Robert Camel Contracting, Inc. v. Krautscheid*, 205 Or App 498, 134 P3d 1065 (2006).

[5] A party can deny an opponent's right to fees (for example, the dispute at issue did not arise out of the contract under which fees are claimed) while pleading in the alternative that it is entitled to fees if the court finds the right but the party otherwise successfully defends the claim. *See, e.g., Associated Oregon Veterans v. Department of Veterans' Affairs*, 308 Or 476, 480-81, 782 P2d 418 (1989).

[6] Similarly, if a contract requires an attorney fee award to a prevailing party, then the court is required to select one. *Beggs v. Hart*, 221 Or App 528, 536, 191 P3d 747 (2008).

[7] These same factors are used in federal actions when Oregon substantive law applies. *See, e.g., Clausen v. M/V New Carissa*, 171 F Supp2d 1138, 1141-44 (D Or 2001). These factors mirror those found in RPC 1.5(b) governing the reasonableness of a fee. ORS 20.075(4) notes that nothing in the statute authorizes anything beyond a reasonable attorney fee.

[8] Federal law typically uses a "lodestar" approach as do some other states. *See, e.g., Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 588-89, 152 P3d 940 (2007) (applying federal law); *Bank of the West v. Burlingame*, 134 Or App 529, 539-40, 895 P2d 1367 (1995) (applying Washington law).

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