A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

Volume XVI, No. 1 *Spring 2012*

IN THIS ISSUE

AMENDMENTS TO THE DISTRICT OF OREGON LOCAL RULES OF CIVIL PROCEDURE (PART 1 OF 2)

By: Melissa Aubin, U.S. District Court Attorney Advisor, and Johnathan Mansfield, Schwabe Williamson & Wyatt

Effective March 1, 2012, the District Court of Oregon amended several Local Rules of Civil Procedure and adopted new Local Rule of Civil Procedure 5.2 and Local Rule of Criminal Procedure 3002. The Local Rules Advisory Committee, chaired by **Susan Marmaduke** and comprised of federal practitioners and representatives from the Court, proposed a number of changes to the Local Rules stemming from practice issues raised by the Court, the bar, and the Clerk's Office. After public notice, comment, and certain modifications introduced by the Court, the revised local rules (LRs) have been approved and published on the Oregon District Court website, http://ord-pdx-web/en/local-rules-of-civil-procedure-2012/.

This two-part article summarizes the substantive amendments and new rules. Because the variety of changes defies categorization by topic or theme, each part will proceed numerically through the rules. What follows is a review of changes through LR 67; the next part, to be published in the next issue of this newsletter, will continue through LR 100 and address Criminal LR 3002, Bankruptcy LR 2200, and Social Security LR 4000-8.

Readers are encouraged to consult the Court's website for the full text and amendment history of the rules discussed here. In addition, a review of all amendment histories will alert the reader to minor corrections, format changes, and renumbering in rules that are not listed here. Because many of the changes concern preparation and filing of documents, the amendments have immediate relevance for paralegals and support staff. For additional information and annotations to the Local Rules generally, see District of Oregon Local Rules of Civil Procedure Annotated, by **Kathryn Mary Pratt**.

LR 3-2

Amendments to LR 3-2(a) provide the Court's numerical codes for the District divisions in which cases are filed: 1 for Medford, 2 for Pendleton, 3 for Portland, and 6 for Eugene. Pursuant to the Court's current practice, the division code is the initial digit in a case number.

As amended, LR 3-2(b) now relieves filers from indicating divisional venue in the

Continued on page 4

THE PRESIDENT'S COLUMN

By: Susan Pitchford,
Federal Bar Association President

Welcome to the Oregon Chapter of the Federal Bar Association!

The Federal Bar Association has been dedicated to the practice of federal law and the advancement of the professionalism of the federal legal profession for over 80 years. The Oregon Chapter of the FBA has a proud history of promoting unmatched interaction between attorneys and the federal judiciary, offering programs that enhance high standards of professional competence and ethical practice, and keeping our members informed of developments in their fields of interest. If you are not already a member of the Oregon FBA, I hope that you join us!

2011 saw some dramatic turns for our Oregon legal community. In a six-month period, we suffered the losses of **Judge Albert Radcliffe**, **Judge Helen Frye** (Ret.), and **Magistrate Judge Donald Ashmanskas**. Additionally, after years of waiting, the nominations of **Judge Marco Hernandez** and **Judge Michael Simon** were confirmed.

It seemed only appropriate for our annual holiday social that we gathered not only in a spirit of holiday festivities, but also to celebrate the more senior members of our Court. It's never easy to lose one friend, much less three. Friendships are hard to come by; they take years to develop and nurture and are irreplaceable.

The Oregon FBA is a place where those friendships are made, nurtured and last a lifetime. Many of you joined our wonderful organization to make professional connections; to stay abreast of legal developements; to serve our communities through volunteer service; or to catch up with friends at our lunch and social events. Just think of the investment in dues as a great value in making new friends and fostering relationships.

This year, the Oregon FBA builds on the successful programs that our members have developed in the past, and we look forward to strengthening our commitment to service. We completed our third annual Toys-For-Tots drive. We took the next steps in offering practical skills training to new lawyers: last year, we offered job-hunting skills, and this year, we offer training on how to represent applicants, who would otherwise be pro se, in social security cases. We continue to offer CLEs at some of the most reasonable rates in town!

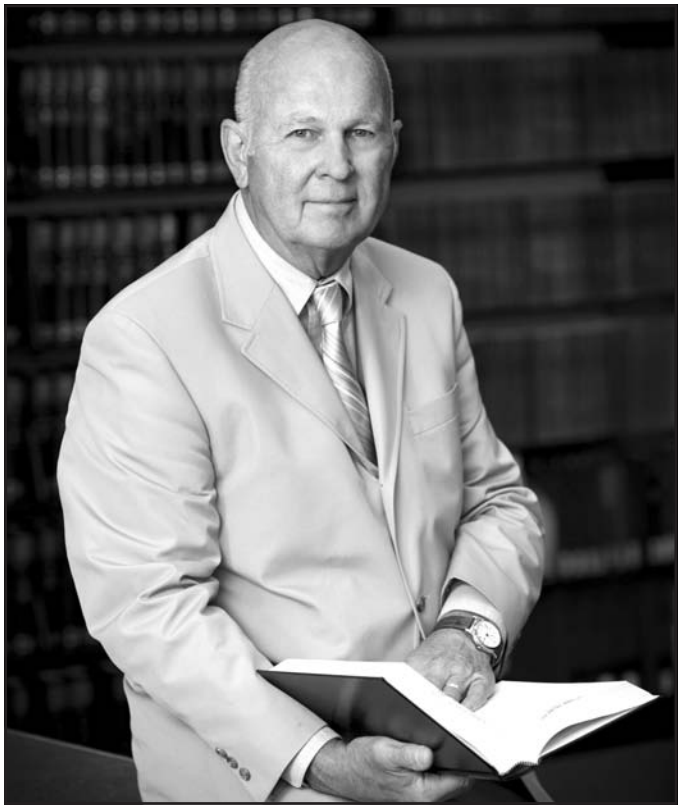
After a brief hiatus, we are back to publishing our award-winning newsletter. We gratefully acknowledge the work of **Timothy Snider** for his seven-year tenure as editor, and we welcome **Nadine Gartner** as she takes over this important work. Members are encouraged to contact Nadine (ngartner@stollberne.com) with ideas for future articles.

In all of our activities, the Oregon FBA works to serve our judges, create opportunities for our members to become more involved with the court, and network with their fellow lawyers. Please take advantage of the benefits membership provides, and reach out to one of our trustees or me to get involved.

I am feeling very honored and privileged to have been selected as the 2011-2012 Oregon FBA president.

THE ASHMANSKAS TRIVIA BOX

An FBA tribute to the memory and humor of Magistrate Judge Donald C. Ashmanskas



Judge Ash was an enthusiastic consumer of Folger's instant crystals. Not everyone on the federal bench shares this view. A certain justice of the United States Supreme Court is so fond of fine coffee that a regional coffee roaster actually named a special blend of Celebes, New Guinea, and Java in his or her honor. Name the gourmet coffee swilling Supreme Court justice. Bonus points if you identify the name of the coffee blend!

Answer on page 11.

CHIEF JUDGE AIKEN DELIVERS THE STATE OF THE COURTS ADDRESS

By: Laura Horton and Elisabeth Waner, Judicial Externs to the Hon. Ann L. Aiken

On March 15, 2012, **Chief Judge Ann Aiken** delivered the annual State of the Courts Address to members of the Federal Bar Association.

The theme of Judge Aiken's address was "The Year of Possibilities," or, how to make Oregon better. Recognizing that Oregon is facing significant cost constraints, budget shortfalls, and exhaustion of legal resources, Judge Aiken announced that now is the time when Oregon legal practitioners must get creative. Members of the Federal Bar, on both the civil and criminal sides, must learn to collaborate in order to help strategize for the future: a future where we all learn to do a lot more with a lot less.

To show what is possible when legal practitioners collaborate and get creative with limited resources, Judge Aiken presented a brief video documentary of Oregon's Reentry Court project. Reentry Court is a program designed for persons who have been sentenced to federal probationary periods but must overcome serious drug and alcohol addictions in order to successfully complete their probation sentences. A dedicated team of assistant U.S. Attorneys, federal public defenders, cognitive therapists, probation officers, and federal judges all collaborate to help the members of Reentry Court overcome their addictions and transition back into society. The Reentry Court team leverages what limited resources exist and makes a tremendous effort to do something different and creative in order to help these individuals. The Reentry Court team has demonstrated remarkable success in their efforts to effect positive change, as was evident by the video testimonials from the participants of the program who expressed hope for a more positive future.

After the video, Judge Aiken reminded her audience that Oregon has always been at the forefront of community-led efforts to promote positive change. But, because Oregon is experiencing such dire budget restraints, Judge Aiken posed the question: "What can we do in the State of Oregon to continue to make positive changes in the law, but also in such a way that we are making changes more efficiently…what can we do to make smarter changes?" She urged both civil and criminal practitioners to begin an open dialogue in order to start exchanging ideas for what we need to do, and how we can do it better.

As a glaring example for where such an exchange between practitioners needs to begin, Judge Aiken read the figures and statistics that represent the amount of cases that actually go to trial here in Oregon. Across both the civil and criminal lines, about one percent of cases go to trial. Judge Aiken remarked on the amount of wasted discovery, wasted court costs, wasted time, and wasted efforts on cases that have little to no chance of ever going to trial. Attorneys could make more concerted efforts to reduce such waste and could develop methods to manage cases in smarter and more efficient ways. Judge Aiken urged us all to figure out creative possibilities for expanding Oregon's legal programs and services without expanding costs.

Keeping with the theme of expanding costs, Judge Aiken then turned her focus to the rising cost of law school education. Judge Aiken recited recent figures indicating that the average graduate from one of the three law schools in Oregon amasses a debt in excess of $90,000. The figures also indicated that, while the cost of legal education has reached staggering heights, the legal job placement rate for recent graduates in Oregon has reached an incredibly discouraging low. Emphasizing her point, she referred to an opinion that was just issued in her own Court. The case, *Hedlund v. The Educational Resources Institute, Inc. and Pennsylvania Higher Education Assistance Agency*, 2012 WL 787250 (D. Or. March 05, 2012), involved a recent graduate from Willamette University School of Law who was forced to file for bankruptcy after he was unable to secure employment in the legal profession and his repayments on his law school debt became insurmountable. The bankruptcy court held that the law school debt could be discharged, but Judge Aiken stated that it was with a heavy heart that she was forced to reverse the bankruptcy court's decision and find that the law requires that the plaintiff's law school debt cannot be discharged.

In order to prevent such cases like *Hedlund*, Judge Aiken encouraged the Federal Bar to make more efforts to mentor law students. She referred to a recent Time Magazine article featuring Warren Buffet, where Buffet stresses the need for our nation to begin making "shared sacrifices." Law students and recent graduates now more than ever need established attorneys to help them make the critical connections to the legal professional community. Established attorneys should spend time mentoring and guiding these struggling students with the hope of eventually placing more graduates into jobs here in Oregon. The FBA is positioned to help these law students and to help create a new legal legacy here in Oregon. This new legacy must include a recognition that the budget shortfalls affect us all but that, in light of our hardships, we are in the best position to get creative and explore possibilities for making Oregon better.

AMENDMENTS TO THE DISTRICT OF OREGON LOCAL RULES OF CIVIL PROCEDURE (PART 1 OF 2)

Continued from page 1

caption for filings other than case-initiating documents. Former LR 3-3 has been deleted and subsequent sections are renumbered accordingly.

LR 5-1

Revised LR 5-1 alters filing requirements based on internal Clerk's Office practices. When a document is filed on paper rather than electronically, the Clerk's Office now forwards the paper copy to the applicable judge after scanning the document and entering it into CM/ECF. Thus, for documents filed on paper, the filer need not provide a second copy for the judge unless otherwise required.

Registered Users are still required to submit judges' copies as required by LR 100. Note, however, that LR 100-7 now provides that documents 10 pages or less are exempt from this requirement, unless otherwise ordered by the Court. Former LR 5-1(b) and (c) have been deleted and subsequent sections are renumbered accordingly.

New LR 5-1(f) requires parties to submit proposed forms of orders or judgments to which the parties have stipulated. The amended rule also describes a new procedure for submitting proposed forms of order or judgments that have been requested by the Court. The proposed document is simply e-mailed as an MS Word or WP document to an address for the applicable judge, as specified in the Practice Tip to LR 5-1. See also LR 16-5 (updated to reflect the submission procedure). The party submitting the proposed form of order or judgment must include the words "SUBMITTED BY" and a signature line, per former LR 79-1 (the text of which is now consolidated with the Practice Tip for LR 5-1).

New LR 5.2

New LR 5.2 restates a cautionary point recited in the Advisory Committee Notes for the 2007 adoption for Fed. R. Civ. P. 5.2: the responsibility to redact filings pursuant to Fed. R. Civ. P. 5.2 rests with counsel and the party or non-party making the filing. The new rule explicitly states that the Clerk's Office is not required to review filed documents for compliance with the redaction requirement.

LR 7 (and corresponding amendments in LR 10-6, LR 26-3(b), LR 54-1(c), LR 54-3(e), and LR 100-7)

Throughout the Local Rules, page limits have been alternatively restated as word-counts. The changes are designed to discourage attorneys from sacrificing the readability of a document to comply with a page limit. Word-count limits, in conjunction with page limits, are also used in the rules of practice for the Ninth Circuit and Oregon appellate courts.

Headings, footnotes, and quotations are included in the word-count limitation, but the caption, table of authorities, signature block, and certificates of counsel are not. LR 10-6 summarizes word-count limits for page-limited filings indicated in the Local Rules. Where a word-count limit exceeds a page limit, the attorney is required to certify the word count.

LR 16-4

LR 16-4, which sets forth procedures for alternative dispute resolution options available in the District, is now amended to provide that a judge assigned to a case may serve as a settlement judge in the same controversy only upon a request that is jointly initiated by all parties in the action. LR 16-4(e)(2).

LR 16-4 was also amended to clarify the application of the privilege for ADR proceedings. As amended, statements made in preparation for or in the course of settlement or mediation proceedings may not be made known to the assigned judge unless otherwise authorized by law. LR 16-4(g).

LR 26-4

The Court adopted two forms of court-approved protective orders, fashioned for consistency with Ninth Circuit law. The two forms are identical, except that one includes only a single "confidential" designation (single tier order), while the other adds an "attorneys' eyes only" designation as well (double tier order). A new Practice Tip to LR 26-4 states that parties may amend or supplement the forms as needed, such as to address issues regarding the Privacy Act, 5 U.S.C. Sec. 552a. Note that both forms of order require counsel to add specific language setting out the good cause supporting the entry of the order.

LR 56-1

As amended, LR 56-1(b) clarifies that evidentiary

objections in a response or reply memorandum must, like other motions (apart from temporary restraining order motions), comply with the certification requirement of LR 7-1(a).

LR 67

Amendments throughout LR 67 clarify procedures for the deposit and disbursement of various types of funds. Revised LR 67-1 indicates that the Clerk will deposit funds in an interest-bearing account when ordered by the Court and includes a new provision allowing the Clerk to assess a registry fee on income earned on deposited funds. Because this provision applies to qualified settlement funds, former LR 67-5 has been deleted.

LR 67-2 now specifies that the Clerk's Office financial administrator must approve all proposed orders to deposit funds with the Court, rather than only registry funds. Revised LR 67-3 requires an attorney moving to withdraw funds to state the amount of funds on deposit at the time of the motion and the method for delivery of funds, as well as the name of the payee (as an alternative to an attorney of record). LR 67-4 was amended to state that all payments from the registry fund will be paid "as directed by the Court," rather than jointly to the party and attorney of record.

Please look for Part 2 of this article in the next edition of this newsletter.

SUCCESSFUL INSURED CANNOT RECOVER ATTORNEY FEES IN OREGON ACTION ON MARINE INSURANCE POLICY

By: Carl R. Neil

Since the major revision of its insurance code in 1967, Oregon has been the only state whose statutes expressly exclude litigation on marine insurance policies from the attorney fee-shifting statutes providing for recovery of attorney fees by prevailing insureds in lawsuits on any other kind of insurance policy. See ORS 742.001, excluding provisions of ORS Ch. 742, including the fee-shifting provisions of ORS 742.061, from application to "wet marine and transportation insurance."

U.S. substantive admiralty law governs actions on marine insurance policies. New England M. Ins. Co. v. Dunham, 78 US 1, 20 L.Ed. 90 (1870). The most common types of marine insurance are those insuring vessels (first party hull insurance), liability of vessel operators (P&I, or protection and indemnity insurance) and cargo insurance on property carried aboard vessels. Historically, forms for marine insurance, the oldest type of insurance, were used as models for other types of coverage, referred to as "inland marine" insurance. In the insurance industry, the term "inland marine" insurance is usually meant to distinguish various types of insurance from marine insurance.

The concept of marine insurance is not limited to coverage for commercial vessels and cargo damage. Since admiralty law governs pleasure boat casualties on navigable waters like the Columbia and Willamette Rivers (*Foremost Ins. Co. v. Richardson*, 457 US 668, 73 L.Ed.2d 300 (1982), marine insurance includes insurance on pleasure boats, which are operated on such waters. Insurance on pleasure craft may be written on a so-called "yacht policy," as part of a homeowner's insurance package or as part of a policy insuring more than one kind of vehicle.

Admiralty case law, like the law of most states, has followed, with certain exceptions, the so-called "American Rule," to the effect that attorney fees are not recoverable from the opponent by the successful party in litigation unless a statute or contract provides for them. See generally Robertson, "Court-Awarded Attorneys' Fees In Maritime Cases: The 'American Rule' in Admiralty," 27 J. Mar. L. & Com. 507 (1996).

There is no general federal statute providing for recovery of attorney fees by a prevailing party, either in admiralty Since the major revision of its insurance code in 1967, Oregon has been the only state whose statutes expressly exclude litigation on marine insurance policies from the attorney fee-shifting statutes providing for recovery of attorney fees by prevailing insureds in lawsuits on any other kind of insurance policy. See ORS 742.001, excluding provisions of ORS Ch. 742, including the fee-shifting provisions of ORS 742.061, from application to "wet marine and transportation insurance."

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There is no general federal statute providing for recovery of attorney fees by a prevailing party, either in admiralty cases or otherwise. This situation has led attorneys for prevailing parties in maritime litigation to seek recovery of attorney fees under state fee-shifting statutes. I found in a quick overview that such statutes applicable to litigation on insurance policies now exist in fifteen states. Seven of those states, including Oregon, allow recovery of attorney fees by the prevailing insured in litigation on an insurance policy against the insurer.[1] Eight other states allow recovery of fees by the prevailing insured in litigation against the insurer if some further showing is made, such as that the insurer's position in denying the claim was unreasonable or without cause.[2] The remaining thirty-five states and the District of Columbia appear to have no statute providing for recovery of attorney fees by prevailing insureds in actions on policies against insurers.

Of the fifteen states providing attorney fee-shifting in litigation on insurance policies, the statutes of two (Arkansas and Missouri) apply expressly to marine insurance policies, as well as other types of insurance. Only Oregon excludes fee-shifting in marine insurance litigation, which results from ORS 742.001 excluding from the application of ORS 742.061 litigation on "wet marine and transportation insurance policies," defined in ORS 731.194 as including insurance on vessels "and matters related thereto" and on cargo carried by water. The fee-shifting statutes of the other fourteen states appear to apply to an action on any kind of insurance policy, marine or otherwise, except Kentucky, whose statute applies to actions on motor vehicle insurance policies, only.

There is a split of case law authority as to whether a court hearing an action on a marine insurance policy, governed by U.S. admiralty law, will or will not allow recovery of attorney fees by a successful insured from the insurer under a state fee-shifting statute. Holding that the admiralty case law applying the American Rule does not preclude recovery of attorney fees under a state statute by the prevailing insured in litigation on a marine insurance policy are Fifth and Eleventh Circuit cases. *All Underwriters v. Weisberg*, 222 F.3d 1309 (11th Cir. 2000); *Steelmet, Inc. v. Caribe Towing Corp.*, 842 F.2d 1237 (11th Cir. 1988); *INA v. Richard*, 800 F.2d 1379 (5th Cir. 1986); *Blasser Bros., Inc. v. Northern Pan-American Line*, 628 F.2d 376 (5th Cir. 1980). Cases in the Eleventh Circuit and the First Circuit find no conflict in admiralty case law awarding attorney fees to prevailing insureds for insurer bad faith and state attorney fee statutes based on the same ground. *Pace v. INA*, 838 F.2d 572 (1st Cir. 1988); *Kilpatrick Marine Piling v. Fireman's Fund Ins. Co.*, 795 F.2d 940 (11th Cir. 1986).

Holding that admiralty case law applying the American Rule preempts recovery of attorney fees under a state statute by a prevailing insured in a marine insurance case is *American Nat. F. Ins. Co. v. Kenealy*, 72 F.3d 264 (2d Cir. 1995). The decision is criticized extensively in *Robertson, supra*, 27 J. Mar. L & Com. at 563-567. Other cases holding that admiralty case law's American Rule preempts state statute attorney fee awards in maritime cases, not involving marine insurance litigation, are *Misener Marine Const., Inc. v. Norfolk Dredging Co.*, 594 F.3d 832 (11th Cir. 2010); *Texas A&M Research Foundation v. Magna Transportation, Inc.*, 338 F.3d 394 (5th Cir. 2003); *Southworth Mach. Co. v. F/V COREY PRIDE*, 994 F.2d 37 (1st Cir. 1993); *Sosebee v. Rath*, 893 F.2d 54 (3d Cir. 1990).

The Oregon Situation

Until the major revision of the Oregon insurance code in 1967, a statute providing for recovery of attorney fees by the prevailing insured in an action on an insurance policy had been in effect since at least 1919. See *Dolan v. Continental Cas. Co.*, 133 Or. 252 (1939), applying L.

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[1] Arkansas (Ark. Code of 1987 Anno. § 23-79-208); Florida (Fla. Stats. Anno. § 627.428); Idaho (Idaho Code 41-1839); Kentucky (Michies's Ky. Rev. Stats. 304.039-220, applies to motor vehicle insurance, only); Maine (Maine Rev. Stats. 24-A § 2436); Nebraska (Rev. Stats. of Neb. 44-359); Oregon (Or. Rev. Stats. 742.061, excludes actions on marine insurance).

[2] Colorado (Colo. Rev. Stats. 10-3-2005); Illinois (Smith-Hurd Ill. Comp. Stats. Anno. 215 5/155); Kansas (Ks. Stats. Anno. § 40-256); Missouri (Vernon's Anno. Missouri Stats. 375.420); New Mexico (N.Mex. Stats. 1978 Anno. 39-2-1); North Carolina (Gen. Stats. of NC Anno. § 6-21.1, applies if recovery is $10,000 or less); South Carolina (Code of Laws of SC § 38-59-40); South Dakota (S.Dak. Codified Laws 58-12-3).

1919, c. 110 § 1 as amended and codified in OL 6355 (1920); OC 1930 § 46 134; OCLA § 101-134; ORS 736.325 (1953). The statute applied to suit or action on a policy of insurance "of any kind or nature." The court in *Dolan* had this to say about the purpose of the statute, 133 Or. at 255:

> "The purpose of [the statute] was to discourage expensive and lengthy litigation. Oftentimes insurance companies had contested their obligation to pay a loss with such persistence and vigor that the benefit of an insurance policy was either largely diminished or entirely lost. It is not the intention of the writer to question the good faith of insurance companies. They have all the rights other citizens have to defend when haled into court. That the contest of insurance losses on doubtful and technical defenses has often caused distress and unnecessary loss to the insurance beneficiaries cannot be denied. For that reason and in the same spirit that a contract for the payment of attorneys' fees in a promissory note is upheld with the maker refuses to pay, insurance companies are required to pay reasonable attorneys' fees where they have wrongfully defended an action to recover or refused to pay the loss within a reasonable time."

The Oregon statutes from at least 1921 until 1967 also had a chapter regulating marine insurance in great detail. L. 1921, c. 354, as amended and codified in OCLA § 101-1101 *et seq.* and ORS Ch. 745 (1953). A section of that marine insurance chapter provided that statutes in the general insurance code regarding "legal process" and "other requirements pertaining to insurance in general" shall apply to marine insurance companies. OCLA § 101-1102; ORS 745.015 (1953).

In the Legislature's 1967 comprehensive revision of the insurance code, the detailed regulation of marine insurance in ORS Ch. 745 (1953) was mostly repealed, although the tax imposed on marine insurance policies was retained (present ORS 731.824 and 731.828). The 1967 revisions included modification of the former statute defining "marine insurance" by replacing it with provisions defining "marine and transportation insurance" and stating that "wet marine and transportation" is a part of "marine and transportation insurance." L. 1967, c. 359, §§ 38 and 43 (present ORS 731.174 and 731.194). The 1967 revision also added a new provision (L. 1967, c. 359, § 335) which is now ORS 742.001 (formerly 743.003), excluding "wet marine and transportation insurance policies" from present ORS Ch. 742.

The late Alex Parks, who was an internationally recognized authority on marine insurance law, in an Oregon State Bar CLE chapter on Marine Insurance regarded the exclusion of actions on traditional marine insurance policies from the authorization for recovery of attorneys' fees as an "anomaly" that came about "probably as a result of inadvertence when the Insurance Code was amended." He added:

> "No logical reason can be divined for excluding the attorney fee provision in ORS 743.114 [now 742.061] from application to 'wet marine' insurance. One can only assume there was an oversight."

The anomaly is even more peculiar in the light of the clear intent of Congress in the 1945 McCarran-Ferguson Act, 15 USC §§ 1011 *et. seq.*, that states were free to regulate and tax the business of insurance, without any exception for marine insurance. U.S. Supreme Court had previously noted expressly that states are free to regulate marine insurance, absent any Congressional restrictions, and that states have historically done so. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 US 310, 313-314, 316-321, 99 L.Ed. 337 (1955). Moreover, the 1967 revision of the insurance code announces the intent of the Legislature to regulate insurance to the extent permitted by McCarran-Ferguson Act. L. 1967, c. 359 § 3 (present ORS 731.012) provides:

> "The Insurance Code shall regulate the business of insurance and every person engaged therein in accordance with the intent of Congress as expressed in the Act of March 9, 1945, as amended (Public Law 15, 79th Congress, 15 USC 1011 to 1014) which states in part that no Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."

Further confusion about recovery of attorney fees by a successful insured in marine insurance litigation was introduced by a decision in the 9th Circuit, *Port of Portland v. Water Quality Insurance Syndicate*, 796 F.2d 1188 (9th Cir. 1986). There, the court was called upon to determine whether a policy insuring water pollution liability covered liability incurred by the Port resulting from sinking of the Port's dredge. After affirming the recovery on the policy awarded by the District Court, Judge Skopil, writing for the Court of Appeals, also affirmed the District Court's award of attorney fees under present ORS 742.061 by finding the subject policy terms closer to the definition of what the court called general marine insurance in ORS 731.174 than the definition of "wet marine" insurance in ORS 742.194. Thus, the exclusion in the present ORS

742.001 of "wet marine" policies in present ORS 742.061 for recovery of attorney fees in actions on an insurance policy did not apply because the subject policy was "general marine" insurance. 796 F.2d at 1195-1196.

Thus, under the analysis in the *Port of Portland* case, there is a further distinction to be made between "general" marine insurance policies and "wet marine" insurance policies, in determining whether attorney fees are recoverable under ORS 742.061 in litigation on a marine insurance policy. That distinction would appear to have no rational basis. Are insureds under "wet" marine insurance policies any less likely to need the attorney fee sanction of ORS 742.061 to get insurers to pay claims than insureds under "general" marine insurance policies? More broadly considered, are "wet marine" insureds any less likely to need the attorney fee sanction to obtain payment from insurers than insureds under other types of insurance? In my 52 years of admiralty litigation, I have seen no evidence of any such difference in practices of "wet marine" insurers from those of other marine insurers or from those of non-marine insurers. All insurers resist paying losses to the extent they can rationally and economically do so.

Conclusion

From the foregoing, it is apparent that unless an insurance policy falls within the narrow concept of "general marine" insurance in the *Port of Portland* case, a prevailing insured on a marine insurance policy is precluded by ORS 742.001 from recovery of attorney fees under ORS 742.061. That result applies to actions on insurance for most commercial vessels as well as pleasure craft used on navigable waters.

If that statute were amended by the Legislature to permit the application of ORS 742.061 to litigation on marine insurance,[3] the question would remain whether the Ninth Circuit, the U.S. District Court for Oregon and/or Oregon state courts would join the Eleventh and Fifth Circuits in allowing recovery of attorney fees pursuant to state statutes in marine insurance litigation, or would, instead, follow the Second Circuit's *Kenealy* decision that such attorney fee recoveries are preempted by maritime case law.

[3] The author proposed to the Law Revision Commission in 2006 that it recommend to the Legislature an amendment of ORS 742.061 by adding a new subsection (4) reading as follows:

> "(4) Notwithstanding ORS 742.001, this section applies to any action on an insurance contract of any type, including all types of marine insurance."

The Commission made no recommendation to the Legislature on the proposal.

FEDERAL BAR ASSOCIATION, OREGON DEPARTMENT OF JUSTICE, AND OREGON NEW LAWYERS DIVISION SUPPORT NEW LAWYERS WITH TARGETED TRAININGS

By: Karen Clevering, Law Clerk to the Honorable Janice M. Stewart

As national newspapers, the ABA Journal, and the Oregon Bar Bulletin have all reported, the newest generation of lawyers faces unique challenges in these tough economic times – graduation with few job prospects and with unmanageable debt from educational loans. New attorneys find themselves with a law degree, bar admission, and no job to teach them how to be lawyers. A variety of new programs were created to support these recent graduates: the Practical Skills Through Public Service Program of the Oregon New Lawyers Division ("ONLD"), the Career Building and Networking Event in April 2011 by the FBA and Oregon Attorney Assistance Program, and several mentoring and pro bono opportunities. These programs were designed to help attorneys look for work or gain meaningful legal experiences.

Feeling that we could still do more, **Laura Salerno Owens** and I, as leaders from the FBA-YLD and the ONLD respectively, met with **Chief Judge Aiken** to discuss how we could complement and enhance these programs. It was Judge Aiken, however, who suggested we approach the challenge from another angle. Rather than provide opportunities to "learn on the job" as the practical skills and mentoring programs do, why not focus on providing specific training in areas of law that are in need but are not directly or often taught in law school? Depending on the experiences of the attorney, such trainings could help one get started in the field or get a comprehensive overview to build their professional skills.

The FBA-YLD and ONLD together identified several areas of law that are often overlooked but would serve those most vulnerable. Among those at the top of the list were Social Security Disability Law and Foreclosure Defense. We reached out to leaders in the field to help create a thorough curriculum for each area and to present at the trainings.

I coordinated Social Security Disability Law, the first of these trainings, and it was held at the U.S. District Courthouse in Portland, Oregon on February 8-9, 2012. The training was provided free of charge to any attorney interested and accredited for 13.5 CLE hours. Topics included the disability process and representation and concluded with a mock hearing. Over 70 attorneys participated during the two day training. Experienced attorneys in the field enthusiastically agreed to help, giving countless hours to develop materials and teach, including plaintiffs' attorneys **Sharon Maynard, Nicole Schneider**, and **George Wall**, claimant advocate **Mellani Calvin**, and Administrative Law Judges **Eleanor Laws** and **Sue Leise**. **Laura Brennan** and **Nicole Munoz** from the clerk's office at the district court were also on hand to instruct on court procedures.

Laura Salerno Owens (FBA) and **Simon Whang** (Oregon DOJ) are currently coordinating the Foreclosure Prevention Project, which will be the second training in this series to be held May 17-18 at the Oregon State Bar Center in Tigard. Based on the same format, it will offer CLE credits, and participants will have an opportunity to learn from local experts in the field. Presenters include: **John Bowles, Hope Del Carlo, Joseph Dunne, Richard Fernandez, Phil Goldsmith, Kelly Harpster, Keith Karnes, David Koen, Phil Querin, Nanina Takla,** and Simon Whang. A judges' panel and more presenters are being confirmed currently.

Until the problems in the economy are resolved, the FBA-YLD and ONLD will continue to support new lawyers. Opportunities in the ONLD's Practical Skills Through Public Service Program are ongoing. In this program, volunteer attorneys are placed with non-profits for a period of several months, providing assistance to agencies financially strained but also gaining practical experience. If you are interesting in supporting this program, have ideas for volunteer opportunities, or want to volunteer, please contact ONLD@osbar.org.

Special thanks to presenters from both programs:

Young Lawyers Division of the Federal Bar Association, the Oregon New Lawyers Division, and Oregon Department of Justice, Financial Fraud/Consumer Protection Section

Federal District Courthouse: Chief Judge Ann Aiken, **Judge Marco Hernandez, Judge Michael Simon,** and **Jolie Russo**

Organizers: **Karen Clevering, Liz Holsapple,** Laura Salerno Owens, and Simon Whang

Oregon State Bar Support Staff: **Danielle Edwards, Michelle Lane,** and **Karen Lee**

ANNOUNCEMENTS

Upcoming FBA Luncheons

The FBA monthly lunches take place on the third Thursday of each month at the University Club, 1225 SW Sixth Avenue, Portland, Oregon. We are pleased to host members of our federal bench at upcoming lunches:

April 19 **U.S. District Judge Anna Brown**

May 17 Presentation of the Judge Burns Award to **Dwight Holton** and **Susan Marmaduke**

Cost is $18 for FBA members and $20 for non-members. Please make reservations for either a vegetarian or meat lunch entrée by emailing Connie.VanCleave@MillerNash.com. The RSVP deadline is the Tuesday before each lunch.

2012 Federal Bar Association Spring Reception

Please join your friends and colleagues for an open house to enjoy good food and company at the Mark O. Hatfield U.S. Courthouse, April 12, 2012, from 5:30 to 7:30 p.m. We will be celebrating the return of spring to Oregon and kicking off the University of Oregon Law School's symposium on the work of **Professor Arthur R. Miller.** Professor Miller will join us, as will **Chief Judge Kozinski** and **Judge O'Scannlain** of the Ninth Circuit, **Chief Judge Aiken** of the District of Oregon, **Justice Kistler** of the Oregon Supreme Court, Ninth Circuit Executive **Cathy Catterson**, and many others. For more information, please visit www.oregonfba.org/content/fba-spring-social or contact Alexis Collins at ACollins@perkinscoie.com or 503.727.2216.

Miller Symposium: Media, Rules, Policy and the Future of Access to Justice

Professor Arthur P. Miller is famous for his theatrical style, his quick wit, and his seemingly inexhaustible knowledge of civil procedure and copyright law. The Miller Symposium will address access to justice in civil law and focus on the areas in which Professor Miller has worked throughout his career: rulemaking, class actions, media and the law, technology and privacy, legal pedagogy, and procedural policy. The Symposium will include a panel discussion featuring some of the nation's most distinguished scholars, judges, and practitioners. The Symposium will take place at the University of Oregon White Stag Building, 70 NW Couch Street, April 13, 2012, from 8:00 a.m. to 5:00 p.m. For more information, please visit www.oregonfba.org/content/arthur-miller's-courts-media-rules-policy-and-future-access-justice or contact Nadia Dahab at ndahab@uoregon.edu.

The Foreclosure Prevention Project

Are you looking to represent clients, or work on foreclosure cases, but lack practical training? The Foreclosure Prevent Project can help. Conceived by **Chief Judge Ann Aiken**, the project aims to train new and un/under-employed lawyers in basic foreclosure defense to serve consumers on a low or sliding-scale fee basis.

The Foreclosure Prevention Project is a two-day CLE on May 17-18, 2012, at the OSB Center in Tigard. The Project features:

- Strategies from Oregon's Foreclosure Prevention Dream Team, including **Phil Querin, Keith Karnes, Hope Del Carlo, David Koen, Phil Goldsmith, Nanina Takla, Kelly Harpster,** and **Bowles & Fernandez**;
- Viewpoints and tips from experienced servicers' counsel, including **Cody Hoesly (Larkins Vacura), Bruce Hamlin (Martin Bischoff),** and **Pilar French (Lane Powell)**;
- Insight from judges and Oregon Department of Justice;
- Civil procedure and case/client management basics;
- All materials, plus breakfasts, lunches, coffee, snacks, and a networking social on Thursday, May 17, 2012;
- Optional participation by webcast;
- Low CLE fee.

The Project is sponsored by the Federal Bar Association, OSB New Lawyers Division, OSB CLE Seminars, and Oregon Department of Justice. Watch for details and registration information.

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Missing Electronic Notices?

Change of Address? We have been sending the electronic notices via our listserv. Although we have made every effort to obtain our members' email addresses, we need your help to keep our list accurate and current. For those members without email, we are providing the electronic notices by fax. If you have an email address or fax number and have not been receiving electronic notices, or if your email address changes, please contact our listmaster: **Chelsea Grimmius**, chelseagrimmius@yahoo.com. For a change in physical address, please notify **Nadine Gartner**, ngartner@stollberne.com, to ensure you continue to receive mailings from the Oregon Chapter of the Federal Bar Association. All address changes will be forwarded to the national Federal Bar Association.

The Ashmanskas Trivia Answer

Justice Samuel Alito. The coffee named in his honor is called "Bold Justice Blend".

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New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join Now" link.

Call for Submissions/Publication Schedule

For the District of Oregon **welcomes submissions from everyone. The deadlines are June 15, 2012, September 15, 2012, December 1, 2012 and March 15, 2013. We ask only that you inform us in advance if you are preparing a submission. Please direct inquiries to Nadine Gartner at 503-227-1600 or ngartner@stollberne.com.**