No. 15-35101

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCHNITZER STEEL INDUSTRIES, INC., *ET AL.*,

Plaintiff and Appellee,

v.

CONTINENTAL CASUALTY CO.
AND TRANSPORTATION INS. CO.,
Defendants and Appellants.

On Appeal from the United States District Court for the
District of Oregon, Case No. 3:10-cv-01174-MO
Hon. Michael Mosman, Presiding

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

CNA Financial Corporation is the parent corporation of Appellants Continental Casualty Co. and Transportation Insurance Co. The Loews Corporation is the only publicly held company that owns 10% or more of the stock of CNA Financial Corp.

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT **1**

INTRODUCTION **2**

ISSUES PRESENTED FOR REVIEW **4**

STATEMENT OF THE CASE **4**

A. Schnitzer Filed This Insurance Action In Federal Court 5

B. After Prevailing At Trial, Schnitzer Sought Approximately $3.4 Million in Attorney Fees Pursuant to ORS 742.061, Which Applies to Lawsuits Filed "In Any Court *of* This State" 5

C. Despite Serious Reservations – And Its Total Rejection of Schnitzer's Procedural Arguments – the District Court Awarded Fees Under The Theory That *Erie* Compelled an Expansive Interpretation of the Statute to Include Federal Courts 6

SUMMARY OF ARGUMENT **8**

ARGUMENT **10**

I. ATTORNEY FEES WERE UNAUTHORIZED BECAUSE ORS 742.061 IMPOSES AN IN-STATE FILING REQUIREMENT **10**

A. The Text Of ORS 742.061 Limits Fee Awards to State-Filed Actions 11

B. The Oregon Supreme Court Would Read ORS 742.061's In-State Filing Requirement Literally According to Its Terms 13

C. Ninth Circuit Precedents and Other Authority Also Recognize That The Phrase "Courts of" A State Refers to State Courts 18

D. The Oregon Court Of Appeals Also Requires Strict Satisfaction Of Fee-Shifting Statutes' Technical Requirements 21

E. Prior Federal Cases Making or Affirming Fee Awards Under ORS 742.061 Have Not Meaningfully Analyzed The "Courts of This State" Limitation 24

II. *ERIE* DOES NOT COMPEL AN INTERPRETATION OF ORS 742.061 BROADER THAN ITS PLAIN TEXT 25

A. *Erie* Cannot Expand State Law or Create New Rights 27

B. Policy Cannot Trump Text, Whether It Comes from *Erie* or ORS 742.061 29

STATEMENT OF RELATED CASES 33

CERTIFICATE OF COMPLIANCE 33

TABLE OF AUTHORITIES

Page

Cases

Abrams v. Lightolier Inc.,
50 F.3d 1204 (3rd Cir. 1995) 10, 11

Alyeska Pipeline Serv. Co. v. Wilderness Society,
421 U.S. 240 (1975).....18, 27

American Universal Ins. Co. v. Pugh,
821 F.2d 1352 (9th Cir. 1987).....23

Bank of U.S. v. Deveaux,
5 Cranch 61 (1809) 31

Brecht v. Abrahamson,
507 U.S. 619 (1993).....24

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991).....26

Chaparral Resources, Inc., v. Monsanto Co.,
849 F.2d 1286 (10th Cir. 1988).....17

Clausen v. M/V NEW CARISSA,
339 F.3d 1049 (9th Cir. 2003).....20

Clemens v. DaimlerChrysler Corp.,
534 F.3d 1017 (9th Cir. 2008).....28, 29

Day & Zimmermann, Inc. v. Challoner,
423 U.S. 3 (1975).....28

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938).....*passim*

Fleming v. Asbill,
42 F.3d 886 (4th Cir. 1994).....27

Gasperini v. Ctr. for Humanities, Inc.,
518 U.S. 415 (1996).....28

Guaranty Trust Co. of N.Y. v. York,
326 U.S. 99 (1945).....26, 27, 28, 31

Hanna v. Plumer,
380 U.S. at 471-472 .....27, 30

Ileto v. Glock, Inc.,
565 F.3d 1126 (9th Cir. 2009).....10

In re Larry's Apartment, L.L.C.,
249 F.3d 832 (9th Cir. 2001).....25

In re Whitaker Const. Co., Inc.,
411 F.3d 197 (5th Cir. 2005).....28

Intel Corp. v. Terabyte Int'l, Inc.,
6 F.3d 614 (9th Cir. 1993)..... 1

Jacobs v. CBS Broadcasting, Inc.,
291 F.3d 1173 (9th Cir. 2002).....21

Johnson v. Riverside Healthcare Sys., LP,
534 F.3d 1116 (9th Cir. 2008).....13

Martin v. Martin,
2 Cal. 3d 752 (1970) 21

Morgan v. Amex Assur. Co.,
352 Or. 363 (2012).....12, 15, 16, 23

MRO Communications, Inc. v. American Tel. & Tel. Co.,
197 F.3d 1276 (9th Cir. 1999).....10, 18

Muniz v. United Parcel Serv., Inc.,
738 F.3d 214 (9th Cir. 2013).....15, 27

Nationwide Mutual Ins. Co. v. Buffetta,
230 F.3d 634 (3d Cir. 2000).....28

Portland Gen. Elec. Co. v. Bureau of Labor & Ind.,
317 Or. 606 (1993).....11

Rodriguez v. Disner,
688 F.3d 645 (9th Cir. 2012).....10

Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London,
197 Or. App. 147 (2005).....22, 23

Shakey's Inc. v. Covalt,
704 F.2d 426 (9th Cir. 1983).....10

Shumway v. Payne,
136 Wash. 2d 383 (1998).....21

Simonoff v. Expedia, Inc.,
643 F.3d 1202 (9th Cir. 2011).....18, 19, 20

State ex rel. Layman v. Landmark-Townes, Inc.,
15 Or. App. 517 (1973).....20

State v. Gaines,
346 Or. 160 (2009).....11

Strawn v. Farmers Ins. Co. of Oregon,
353 Or. 210 (2013).....*passim*

Tobeler v. Colvin,
749 F.3d 830 (9th Cir. 2014)..... 1

Vandenbark v. Owens-Illinois Glass Co.,
311 U.S. 538 (1941).....27

Webster v. Tall,
266 U.S. 507 (1925).....24

Wheeler v. Intl Woodworkers of Am.,
274 Or. 373 (1976).....20

Statutes

28 U.S.C.
Section 1291 1

28 U.S.C.
Section 1332 1

California Commercial Code
Section 2314 29

Oregon Revised Statutes
742.061 .....*passim*

Other Authorities

Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION
2d § 4507 27

Rules

Federal Rules of Civil Procedure
Rule 54(d).....17

JURISDICTIONAL STATEMENT

Basis for the district court's subject-matter jurisdiction: The Plaintiff corporations filed this action in the District of Oregon, invoking diversity jurisdiction. 28 U.S.C. § 1332. ER 1-3. Plaintiffs' principal place of business is Oregon, and both companies were originally incorporated there. *See* ER 2; Dkt. 1 at 2.[1] (One later shifted its incorporation to Washington. *Id.*) Defendants' principal place of business is Illinois (ER 19), and the amount in controversy has always exceeded $75,000.

Basis for this Court's jurisdiction: This Court has jurisdiction under 28 U.S.C. § 1291 because the orders granting Plaintiffs' fee petition and awarding attorney fees are both appealable postjudgment orders. *See Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 617 (9th Cir. 1993); *Tobeler v. Colvin*, 749 F.3d 830, 832 (9th Cir. 2014).

On November 12, 2014, the district court granted Plaintiffs' fee petition and directed the parties to recalculate the amount of attorney fees. ER 36. On December 11, 2014, the district court awarded Plaintiffs approximately $3.4 million in attorney fees. ER 106 (Dkt. 483). Defendants noticed their appeal from both postjudgment orders on December 12, 2014. ER 54.

[1] Continental refers to filings in the district court as "Dkt. __" or "Dkt. __ at __"; pages cited refer to the pagination in the header.

INTRODUCTION

Defendants Continental Insurance Company and Transportation Insurance Company ("Continental" or "CNA") appeal from a $3.4 million attorney fee award in favor of their insureds, Schnitzer Steel Industries, Inc., and its affiliate MMGL Corp. ("Schnitzer").

Schnitzer sued Continental in the district court on insurance policy contracts between them (ER 1-17), winning a judgment for more defense expenses than Continental had already paid on a long-running environmental claim (ER 8-9, 30-35). The district court then determined that Oregon Revised Statutes ("ORS") 742.061 authorized a fee award. The statute provides, in relevant part:

> [I]f settlement is not made within six months from the date proof of loss is filed with an insurer and ***an action is brought in any court of this state*** [*i.e.*, Oregon] upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender … a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon.

(emphasis added).

The district court appeared to agree with Continental that the statute expressly limited fee awards to lawsuits commenced in Oregon state court. *See* ER 39. But it decided that "the *Erie* doctrine together with good public policy" required it to disregard the statute's textual limits. ER 42-43; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In doing so, the court adopted an interpretation

of ORS 742.061 broader than Oregon law permits, effectively creating a new right to attorney fees in actions brought in *federal* court that Oregon law does not authorize. That was error.

ORS 742.061's in-state filing requirement, which mandates that insureds bring their lawsuits in Oregon state court to perfect their right to attorney fees, has been a feature of the statute since its predecessor was enacted in 1919. Even when the Oregon Legislature expanded the substantive reach of Oregon insurance law to include out-of-state insurers, it left intact ORS 742.061's in-state filing requirement. And the Oregon Supreme Court has recently indicated it would enforce ORS 742.061 strictly according to its limits. Moreover, this Court has interpreted almost identical language to exclude federal courts.

Erie does not compel a broader reading of ORS 742.061. The parties do not dispute that this statute is the correct rule of decision in federal court. Instead, they dispute the *scope* of that statute, which federal courts are not free to alter by reading in terms that contradict the actual language. The Oregon Legislature was free to and did limit the statute's reach to actions filed in state courts.

The insureds here elected to sue in federal court. Because state law did not authorize the attorney fee award in this case (and no other authority for it existed or was claimed), this Court should reverse the order awarding fees.[2]

ISSUES PRESENTED FOR REVIEW

1. Does Oregon Revised Statute 742.061, which limits fee-shifting to actions filed "in a court of this state," authorize a fee award to an insured suing in federal court?

2. If it does not, does any federal principle or policy justify broadening the right to fees beyond the limit Oregon imposed?

The answer to both questions is "no."

STATEMENT OF THE CASE

The parties' dispute over defense costs for an environmental claim is discussed in Continental's Opening Brief in the related appeal, 9th Circuit case no. 14-35793. Here Continental summarizes only the key facts relevant to the district court's two postjudgment orders awarding Schnitzer approximately $3.4 million in attorney fees.

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[2] Focusing this appeal on the statutory question, Continental lays aside its disagreements over the "reasonableness" of the fee amount awarded.

And as for the statutory question: it will remain live regardless of the outcome of the related judgment appeal (Ninth Circuit Docket no. 14-35793). This is because the portion of the money judgment unchallenged in 14-35793 (and indeed, already satisfied) would meet the conditions of ORS 742.061 ("plaintiff's recovery exceeds the amount of any tender"), ***if*** that statute otherwise applied to this case. But it does not.

A. Schnitzer Filed This Insurance Action In Federal Court

In 2010, Schnitzer sued Continental in U.S. District Court, District of Oregon. ER 1-3, 61; Dkt. 1. After several years of litigation and a trial, the federal jury returned a verdict in Schnitzer's favor in April 2014. ER 30-32.

B. After Prevailing At Trial, Schnitzer Sought Approximately $3.4 Million in Attorney Fees Pursuant to ORS 742.061, Which Applies to Lawsuits Filed "In Any Court *of* This State"

The district court entered judgment in Schnitzer's favor based on the jury verdict (ER 30-35), and Schnitzer thereafter filed a petition seeking over $3 million in attorney fees. *See* Dkt. 449.

Although Schnitzer was the moving party and had the burden of proving legal entitlement to attorney fees, its petition merely *presumed* that such fees were authorized by ORS 742.061. *See id*. at 4. That statute, however, authorizes attorney fees only when "an action is brought in any court of this state…." ORS 742.061(1). Ignoring that statutory limitation, the bulk of Schnitzer's petition instead endeavored to justify the "reasonableness" of the hourly rates and hours billed by its counsel. *See* Dkt. 449 at 5-12.

Continental opposed the fees petition arguing, among other things, that attorney fees were unauthorized under the plain language of ORS 742.061 because Schnitzer originally filed its case in federal court. *See* Dkt. 464 at 1, 6-11.

Schnitzer filed a lengthy reply, including an appendix of cases it asserted demonstrated "decades of federal court precedent awarding attorney fees under ORS 742.061." Dkt. 471 at 6 (emphasis and initial capitalization omitted); Dkt. 471-1 . It also argued that Continental had waived any right to challenge the fees petition, that judicial estoppel precluded Continental from challenging the applicability of ORS 742.061, and that the *Erie* doctrine compelled the district court to award fees under the statute. *See* Dkt. 471 at 3-6.

Continental sought to file a sur-reply addressing these arguments, which Schnitzer opposed with several more pages of substantive briefing. *See* Dkt. 477, 477-1, 478. By docket entry the district court declined to consider additional briefing. *See* Dkt. 479. It held no hearing.

C. Despite Serious Reservations – And Its Total Rejection of Schnitzer's Procedural Arguments – the District Court Awarded Fees Under The Theory That *Erie* Compelled an Expansive Interpretation of the Statute to Include Federal Courts

The district court struggled with whether ORS 742.061 authorized attorney fees for Schnitzer's federal lawsuit. ER 39, 43 ("I disagree with Schnitzer that this is a clear cut decision"; "I do not believe that this is an easy argument to deal with"); *see also* ER 39-40 (acknowledging good support for Continental's position in a 2011 decision of this Court, without further discussion of it). The court characterized Continental's textual argument as "interesting and compelling" (ER

43), and rejected virtually all of Schnitzer's "unconvincing counter arguments" (ER 39-40).

Despite all this, the district court decided that "the *Erie* doctrine together with good public policy" required it to award fees under ORS 742.061. ER 42-43. The court reasoned as follows:

- If ORS 742.061 is read according to its plain terms, all federal courts nationwide would have to read the statute similarly to deny fees. The district court believed this was untenable because Oregon state courts and Oregon federal courts would apply the same statute to reach different results. *See* ER 42.
- But if the statute is interpreted broadly and "a federal court in Oregon [is deemed] a court 'of' Oregon," Oregon state courts and Oregon federal courts would both interpret the statute to award fees, even if non-Oregon federal courts could not. *See* ER 43.

Citing no authority, it chose the latter outcome because it "seem[ed] like the proper result" under *Erie*. *See id.* In the district court's estimation, that interpretation also fulfilled the "stated purpose" of ORS 742.061 to "encourage the settlement of claims." *See id.*

After ordering the parties to recalculate the amount (ER 53), the court awarded Schnitzer approximately $3.4 million in attorney fees by docket entry. *See* ER 106 (Dkt. 483). This timely appeal followed. ER 54.

SUMMARY OF ARGUMENT

The district court erred by interpreting ORS 742.061 more broadly than it was written by the Oregon Legislature. In a 2013 decision, the Oregon Supreme Court read the statute according to its plain text and strongly suggested that ORS 742.061 would not extend to the U.S. Supreme Court. And in a 2012 decision, the high court traced almost a century of legislative history, confirming the Oregon Legislature has long imposed an in-state filing requirement and that it left that requirement intact even when it expanded Oregon substantive law to regulate out-of-state insurers. The only reasonable inference from this history is that even when federal diversity jurisdiction became far likelier in insurance disputes subject to Oregon law, the Legislature intended to limit fee-shifting to insureds suing in state courts.

Relatedly, this Court's precedents and other authority recognize that "courts of" a state refers to courts established by the state, confirming Continental's common sense interpretation of that language in ORS 742.061. Oregon's intermediate courts have also strictly enforced the technical filing requirements in analogous fee-shifting statutes.

Erie does not compel an interpretation of ORS 742.061 beyond its text. That doctrine does not even apply to the parties' dispute because there is no dispute ORS 742.061 is the correct rule of decision. That should have foreclosed the district court from using *Erie* to broaden the statute's scope to award Schnitzer its fees in this case. As this Court previously recognized when asked by plaintiffs to stretch the bounds of state statutory law, federal courts are not free to create new rights denied by the State, or to craft new exceptions to state law. That is because *Erie* commands that federal courts are bound by state law as defined by the State itself.

Moreover, where the insured chooses to sue in federal court – taking the case outside the reach of ORS 742.061's plain language – no "policy" concerns can or should trump the court's duty to apply state law as written. There is no forum-shopping problem under *Erie*, nor any inequitable administration of the laws. Had Schnitzer filed in Oregon state court, as ORS 742.061 mandates, that statute would have authorized fee-shifting (even if Continental had later removed that state-filed suit to federal court).

Finally, the district court usurped the Oregon Legislature's role by using the settlement rationale of ORS 742.061 to expand that statute's plain text. When a district court exercises diversity jurisdiction in our federal system, it must respect (within constitutional limits) the extent to which *the State* decides to seek social

ends. Because Oregon law does not authorize fee-shifting in this case, this Court should reverse the challenged orders.

ARGUMENT

The standard of review is *de novo*. This Court typically reviews an award of attorney fees for abuse of discretion. *See, e.g.*, *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012). But this appeal does not challenge any factual or discretionary aspect of the fee award; instead it challenges the district court's purely legal determination that ORS 742.061 authorized the attorney fee award. That issue of statutory interpretation is reviewed *de novo*. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009).

I.
ATTORNEY FEES WERE UNAUTHORIZED BECAUSE ORS 742.061 IMPOSES AN IN-STATE FILING REQUIREMENT

"State law governs the award of attorney's fees in diversity actions." *Shakey's Inc. v. Covalt*, 704 F.2d 426, 435 (9th Cir. 1983). While Federal Rule of Civil Procedure 54 "establishes a procedure for asserting a right to such an award," it "does not provide a rule of decision …. Rather ... there must be another source of authority…." *MRO Communications, Inc. v. American Tel. & Tel. Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999) (*quoting Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1224 (3rd Cir. 1995) (internal quotations omitted). This requirement "gives effect

to the 'American Rule' that each party must bear its own attorneys' fees in the absence of a rule, statute or contract authorizing such an award." *Id.*

The only authority for a fee award that Schnitzer proposed was ORS 742.061. *See* Dkt. 449 at 4. Because the parties' insurance contracts did not contain a fee-shifting provision, Schnitzer did not advance that as a source. *See id.*; *cf.* ORS 20.096(1) (fees "based on a contract" allowed only when contract itself "specifically provides" for fees).

A. The Text Of ORS 742.061 Limits Fee Awards to State-Filed Actions

The Oregon Supreme Court directs that "the text of the statutory provision itself is … the starting point for interpretation and is the best evidence of the legislature's intent." *Portland Gen. Elec. Co. v. Bureau of Labor & Ind.*, 317 Or. 606, 610 (1993); *accord State v. Gaines*, 346 Or. 160, 171-72 (2009). A court may then examine legislative history if useful to the court's analysis, even if there is no ambiguity in the statute. *Gaines*, 346 Or. at 171-72.

ORS 742.061(1) provides, in relevant part, as follows:

> [I]f settlement is not made within six months from the date proof of loss is filed with an insurer and ***an action is brought in any court of this state*** [*i.e.*, Oregon] upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be ***taxed as part of the costs of the action*** and any appeal thereon.

(emphasis added). In accord with *Gaines* and *Portland General Electric*, the Oregon Supreme Court reads ORS 742.061's requirement that "an action [be] brought in any court of this state" according to its plain text. *See Morgan v. Amex Assur. Co.*, 352 Or. 363, 373 (2012), and *Strawn v. Farmers Ins. Co. of Oregon*, 353 Or. 210, 236 (2013), both discussed *infra*.

ORS 742.061 specifically grants fee-shifting as an item of costs to insureds who sue in state courts. Unless an action is filed in state court, ORS 742.061 provides no authority for a fee award.

Statutes with similar language in Chapter 742 of the Oregon Insurance Code likewise use this language to refer to Oregon only. *See, e.g.*, ORS 742.426(1)(k) (licensing requirement for discount medical plan requires applicant to "submit to the personal jurisdiction of the courts of this state"); ORS 742.440(1) (authorizing suit "in a circuit court of this state against" unlicensed discount medical plan organization); ORS 742.526(2) (distinguishing between insurance benefits authorized "under the laws of this state or any other state or the United States").[3]

[3] The same is true for Oregon Insurance Code provisions outside of Chapter 742. *See, e.g.*, ORS 731.258(2)(b) (defining "'[f]oreign decree'" as "any decree or order … of a court located in a reciprocal state, including a court of the United States located therein, against any insurer incorporated or authorized to do business in this state"); ORS 735.355 (making federal district court orders "enforceable in the courts of this state" when they enjoin "a risk retention group from … operating in any state or in all states … upon a finding that such a group is in a hazardous financial condition"); ORS 732.541 ("The courts of this state are vested with jurisdiction over every person not resident, domiciled or authorized to do business

But Schnitzer did not bring this action in a court *of* the State of Oregon, *i.e.*, a state court. Instead, it chose to sue in federal court. ER 1; Dkt. 1. ORS 742.061 does not reach this federally-filed action and did not authorize the district court's award of attorney fees.

B. The Oregon Supreme Court Would Read ORS 742.061's In-State Filing Requirement Literally According to Its Terms

"In interpreting state law, [this Court is] bound to follow the decisions of the state's highest court." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1125 (9th Cir. 2008). Two recent, unanimous decisions from Oregon's highest court have construed ORS 742.061 literally according to its terms.

The Oregon Supreme Court has construed the statute as *excluding* the U.S. Supreme Court, in a manner suggesting it would also exclude the USDC/Portland. In *Strawn v. Farmers Ins. Co. of Oregon*, 353 Or. 210, 236 (2013), Oregon's high court took the unusual step of issuing a written opinion on a fee request, in part to address "whether this court has authority to award attorney fees for work done in opposing a petition for writ of certiorari to the United States Supreme Court." *Id*. at 212-213 (one of six issues identified). Farmers had lost on

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in this state [that are registered] with the Director of the Department of Consumer and Business Services"); ORS 734.150(7) (authorizing rehabilitation of Oregon insurer if "[t]he insurer or its property … is the subject of an application for the appointment of a receiver … other than as authorized under the Insurance Code, … and the appointment might deprive the courts of this state of jurisdiction or might prejudice orderly delinquency proceedings").

the merits before the Oregon Supreme Court, and petitioned for writ of certiorari in the U.S. Supreme Court. Plaintiffs incurred fees defending against that petition. Following its denial, they asked the Oregon high court to make Farmers pay those fees. Farmers objected, arguing that the Court "lack[ed] authority to award fees incurred before the United States Supreme Court." *Id.* at 212-213.

The Oregon Supreme Court, while holding that it could award the requested fees from a punitive damages award under the common-fund doctrine, *agreed* that "[i]f Strawn were seeking to recover for that work through the fee-shifting award authorized by ORS 742.061(1), Farmers's arguments might be well taken because the statute authorizes a fee award ***only*** on an action brought 'in any court in this state.'" *Id.* at 236. (emphasis added).[4]

Although *Strawn* misquoted the statute (substituting "in this state" for "of this state"), that does not change the import of *Strawn* for present purposes:

- At a minimum, taking the passage at face value, the Oregon Supreme Court would literally apply the wording "courts in this state" (if the

[4] The common fund doctrine "applies when a party has litigated to create or preserve a monetary fund on behalf of others, as occurs in a successful class action for damages…. [It]… allow[s] plaintiff's lawyers to be paid from the common fund created or preserved by the litigation." 353 Or. at 216. That doctrine has no application here because Schnitzer seeks attorney fees *in addition to* the substantial judgment the district court awarded.

statute said that), to exclude a court not physically in the state, *i.e.*, the U.S. Supreme Court.

- Given this, it is evident that if *Strawn* had correctly quoted the statute ("court of this state") it *still* would have excluded the U.S. Supreme Court, since that court is no more a court *of* the State of Oregon than it is a court *in* the State of Oregon.

Strawn indicates, at a minimum, that the Oregon Supreme Court *would enforce this phrase of the statute*. That it got the exact phrase wrong does not alter that modest proposition. This Court must predict what the Oregon Supreme Court would say if asked whether ORS 742.061 is indeed limited – per its correct words – to "an action … brought in any court of this state." *Strawn* indicates that Court would say "yes" – and as explained above (and further in §C below), the USDC/Portland is not such a court. Decisions of a state Supreme Court, "including reasoned dicta," are binding on this Court as to that state's law. *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 219 (9th Cir. 2013).

The Oregon Supreme Court has enforced the exact language of ORS 742.061 to award fees to a non-Oregon resident suing on a non-Oregon policy.

In *Morgan v. Amex Assur. Co.*, 352 Or. 363, 365 (2012), the Court traced almost a century of ORS 742.061's legislative history to determine whether that statute should be interpreted literally according to its terms. The issue in *Morgan*

was whether ORS 742.061 applied to a non-Oregon policy issued to a non-Oregon resident – who *did* sue in an Oregon state court. 352 Or. at 365 and n.1. Because the plain terms of ORS 742.061 reach lawsuits on "any policy of insurance," the high court held it did apply, reversing the appellate court's ruling that a later-enacted statute had limited the reach of ORS 742.061 by declaring that chapter 742 "'appl[ies] to all insurance policies delivered or issued for delivery in this state'." *See* 352 Or. at 365, quoting ORS 742.001.

Morgan matters here not only for the Oregon Supreme Court's enforcement of the exact words of ORS 742.061, but also for its historical analysis. The Oregon Legislature has imposed the in-state filing requirement for fee-shifting under ORS 742.061, even as its Insurance Code expanded to regulate non-Oregon insurers. The only reasonable inference from this history is that even once federal diversity jurisdiction became far likelier in insurance disputes subject to Oregon law, the Legislature intended to limit fee-shifting to insureds suing in state courts.

As *Morgan* explained:

- ORS 742.061's predecessor was originally enacted in 1919 and "did not prescribe either the prerequisites for or the manner of engaging in the business of insurance in Oregon. Rather, [when originally enacted] it provided that, 'whenever any suit or action is brought in any of the courts of this state upon any policy of insurance of any kind

or nature whatsoever,' the plaintiff may recover attorney fees.…" 352 Or. at 368 (most internal citations and brackets omitted).

- In 1967, the Legislature enacted the "first comprehensive revision of the Insurance Code," in part to regulate *out-of-state insurers*. *See id.* at 374-376. But it left ORS 742.061's predecessor "in essentially the same form … as it was when it was first enacted in 1919 and as it is today." *Id.* at 369-371.

Thus, even though the Oregon Legislature intended to expand the substantive reach of its insurance laws to regulate non-Oregon insurers – which could be expected to generate far more cases in which insureds could choose to invoke federal diversity jurisdiction – it left the existing language in ORS 742.061's predecessor limiting fee awards to state-filed actions only. *See id.* at 367-371.

Moreover, by the time of this transition in Oregon law, it was clear that costs of suit in federal court were generally controlled by federal rule: Fed. R. Civ. P. 54(d) for trial court costs and Fed. R. App. P. 38-39 for appeals. *See generally Chaparral Resources, Inc., v. Monsanto Co.*, 849 F.2d 1286, 1291-92 (10th Cir. 1988) ("In a diversity case, *federal law* controls in regard to the assessment of costs. [Citations]") (emphasis added). Thus it made sense for ORS 742.061—a

statute the Oregon Legislature framed to address costs—would not presume to extend its reach to federal courts.

There can be no serious question that as a sovereign in our federal system, Oregon has the right to determine the scope of its own laws, including the circumstances under which state law authorizes fee shifting in insurance disputes. "[S]tate law *denying* the right to attorney's fees or *giving* a right thereto, which reflects a substantial policy of the state, [must] be followed." *MRO Communications, Inc. v. American Tel. & Tel. Co.*, 197 F.3d at 1281 (emphasis added), *quoting Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 259 n.31 (1975).

C. Ninth Circuit Precedents and Other Authority Also Recognize That The Phrase "Courts of" A State Refers to State Courts

This Court has recognized that "the phrase 'the courts of' a state refers to courts that derive their power from the state—*i.e.*, *only state courts*…." *Simonoff v. Expedia, Inc.*, 643 F.3d 1202, 1205 (9th Cir. 2011) (emphasis added). Applying contract-interpretation rules similar to Oregon's statutory interpretation approach, *Simonoff* reaffirmed Ninth Circuit precedent holding that federal courts are not "courts of this state":

> Our recent decision in *Doe 1* [*v. AOL LLC*, 552 F.3d 1077 (9th Cir. 2009)] is central to our analysis. There we considered a forum selection clause in AOL's website user agreement that provided for "exclusive jurisdiction for any claim or dispute ... in the courts of Virginia." We

> concluded that the choice of the preposition "of" in the phrase "the courts of Virginia" was determinative—"of" is a term "'denoting that from which anything proceeds; indicating origin, source, descent, and the like.'" Thus, the phrase "the courts" of a state refers to courts that derive their power from the state—*i.e.* only state court—and the forum selection clause, which vested exclusive jurisdiction in the courts "of" Virginia, limited jurisdiction to the Virginia state courts.
>
> By way of contrast, however, we observed in *Doe 1* that a forum selection clause referring to "courts in" a state imposes a geographic limitation, not one of sovereignty. The word "in" means to "'express[ ] relation of presence, existence, situation, inclusion ...; enclosed or surround by limits, as in a room.'" Hence the phrase "courts in" a state includes any court within the physical boundaries of the state, even if the court does not derive its power and authority from the sovereignty of the state. ***In short, the rule we adopted in Doe 1 is that a forum selection clause that specifies "courts of" a state limits jurisdiction to state courts, but specification of "courts in" a state includes both state and federal courts.***

643 F.3d at 1205-06 (emphasis added; citations omitted). *Simonoff* went on to hold that because Expedia's user agreement vested jurisdiction over disputes in "'the courts *in* King County' (emphasis added) ... [it] contemplate[d] federal as well as state courts as proper courts for adjudication." *Id.* at 1206.

Interpreting the analogous phrase "laws of this state," this Court has likewise concluded that the Oregon Legislature meant to exclude federal law:

> While the damages provision in the Oregon Oil Spill Act is not exactly a model of clarity, we agree with the learned trial judge that the phrase "for which liability may exist under the laws of this state" refers to the fact

> that attorney fees "can only be charged to the purported polluter upon a finding of liability under the Oregon Oil Spill Act or other Oregon statute...."

Clausen v. M/V NEW CARISSA, 339 F.3d 1049, 1062-63 (9th Cir. 2003) (fees awardable against the defendant ship owners *as damages* under the Spill Act).

Consonant with *Simonoff*, *Doe 1* and *Clausen*, judicial opinions routinely use "court[s] of this state" to designate state courts exclusively, as expressly distinguished from federal courts. Typical examples follow, with emphasis added:

- The Oregon Supreme Court: "Defendant next contends that even if the Oregon courts have jurisdiction in this case they must apply federal substantive law; .... [¶] We agree that the ***courts of this state*** must apply federal substantive law in such a case and that in doing so they are bound by the decisions of the federal courts on this subject." *Wheeler v. Intl Woodworkers of Am.*, 274 Or. 373, 379 (1976) (emphasis added).
- The Court of Appeals of Oregon: "As far as we can determine there are no cases in which the appellate ***courts of this state*** have considered the above issues; however, the federal District Court for the District of Oregon has held ...." *State ex rel. Layman v. Landmark-Townes, Inc.*, 15 Or. App. 517, 519 (1973) (emphasis added).
- The Supreme Court of California: "A federal court judgment has the same effect in the ***courts of this state*** as it would in a federal court." *Martin v.*

Martin, 2 Cal. 3d 752, 761 (1970) (*quoted in Jacobs v. CBS Broadcasting, Inc.*, 291 F.3d 1173 (9th Cir. 2002)) (emphasis added).

- The Supreme Court of Washington: "[Defendant] has taken advantage of her right to pursue appellate review and to collaterally attack her conviction in the ***courts of this state***, as well as in federal court." *Shumway v. Payne*, 136 Wash. 2d 383, 386-387 (1998) (emphasis added).

Schnitzer's fee petition impliedly asked the district court to treat "court of this state" in ORS 742.061 differently, without offering any reason why it should. Indeed, while no Oregon statute defines "court of this state," the one coming closest says what one would expect, given the uncomplicated, natural meaning of those words. For purposes of the Uniform Law on Notarial Acts, "Clerk of a court of this state" includes only officials of courts established by state law. *See* ORS 194.215 ("The clerk, deputy clerk or court administrator of the Supreme Court, the Court of Appeals or the Oregon Tax Court" and so on).

D. The Oregon Court Of Appeals Also Requires Strict Satisfaction Of Fee-Shifting Statutes' Technical Requirements.

Oregon courts interpret the technical requirements of fee-shifting statutes literally. Schnitzer successfully urged that approach in *Schnitzer Investment Corp.*

v. Certain Underwriters at Lloyd's of London, 197 Or. App. 147 (2005), avoiding payment of an opponent's fees under an analogous fee-shifting statute.[5]

In that case, Lloyds prevailed on summary judgment against Schnitzer and sought attorney fees pursuant to ORS 746.350 and 746.320, which apply to "unauthorized" or unadmitted insurers. 197 Or. App. at 154, 164. "[T]o award attorney fees under ORS 746.350 a court must find … that the insurer [Lloyds] was served [by the insured: Schnitzer] in the manner provided in ORS 746.320." *Id.* at 164. The court strictly read the statute, reaching a holding more extreme than any Continental urges here: that because *the insured (Schnitzer)* did not serve the insurer exactly as the statute prescribed, *the insurer* could not recover fees.

ORS 746.320(3) required service of process on the Director of the Oregon Department of Consumer and Business Services. ORS 746.320(5), however, appeared to permit service of process "upon an insurer in any other manner then permitted by law." Schnitzer did not follow ORS 746.320(3), and instead served Lloyds' agents for service of process designated in certain insurance policies. *Id.* at 166. Lloyds argued that service complied with ORS 746.320(5), even if it did not comply with "the specific method that ORS 746.320[(3)] creates," *i.e.*, the

[5] Continental was a nominal party in this case, but not for the point argued above. *See id.*

insurer argued for an expanded interpretation of that fee shifting statute beyond its literal words. *See id.*

At Schnitzer's urging, the Oregon Court of Appeal declined to interpret the statute broadly, and affirmed an order absolving Schnitzer of any obligation to pay its opponent's fees. The court held that "ORS 746.350 is specific as to its grant of authority; it limits the award of attorney fees against an unauthorized insurer to when service of process is made 'in the manner provided in ORS 746.320.' Unless … service of process is made as provided under ORS 746.320, there is no authority to grant attorney fees under ORS 746.350." *Id.* at 166-167. It rejected Lloyd's argument that ORS 746.320(5) was a method of service that ORS 746.320 contemplated, and insisted on strict compliance: "ORS 746.320 provides for only one method of service, and ORS 746.350 refers only to that method of service." *Id.* at 167-168.

Oregon thus reads its fee shifting statutes very literally, with no willingness to expand or flex its statutes' technical filing and service requirements. *See id.*; *Morgan*, 352 Or. at 373; *Strawn*, 353 Or. at 236; *see also American Universal Ins. Co. v. Pugh*, 821 F.2d 1352, 1357 (9th Cir. 1987) (denying fees under ORS 742.061's predecessor because "[t]wo of the three pre-requisites to recovering attorney's fees under [the statute] are missing").

By analogy, unless an insured follows ORS 742.061's mandate by filing suit "in any court of this state," there is no authority to grant attorney fees. There is no unfairness in this result because it is the *insured* that has control over whether fees can be shifted.[6] *See* ORS 746.320, 742.061.

E. Prior Federal Cases Making or Affirming Fee Awards Under ORS 742.061 Have Not Meaningfully Analyzed The "Courts of This State" Limitation

Various federal courts including this Court have made or affirmed attorney fee awards under ORS 742.061. *See, e.g.*, Dkt. 471-1 (Appendix with 9th Circuit appellate and district court authority). None is authority against Appellants' position, because cases are not binding precedent on points "never squarely addressed" and "at most assumed." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993).

Indeed, "in none of [those cases] was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it." *Webster v. Tall*, 266 U.S. 507, 511 (1925) (reversing for failure to serve the necessary cabinet official, despite similar cases that had not done so because argument was not raised); *In re Larry's Apartment, L.L.C.*, 249

[6] Indeed, had Schnitzer filed this case in state court and Continental thereafter removed it to federal court, ORS 742.061 would still be satisfied. The removal would not make the case any less an "action … *brought* in any court of this state" (emphasis added); the Legislature's requirement that the insured select a state tribunal would remain fulfilled.

F.3d 832, 839 (9th Cir. 2001) (relying on *Webster*). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Id.*

* * *

All of these state and federal authorities support Continental's position that this state law means what it says: an insured must bring suit against the insurer in an Oregon state court to qualify for fee-shifting.

It was Schnitzer's burden in its fee petition to demonstrate a proper state-law basis for fee-shifting – itself an exception to the American Rule. Schnitzer instead strove to secure what amounts to an exception or excuse from state-law authority for this $3.4 million supplemental remedy – on top of the excessive remedies it had already obtained (as explained in the judgment-appeal Opening Brief). We turn now to why *Erie* doctrine did not and does not excuse Schnitzer's burden.

II.
ERIE DOES NOT COMPEL AN INTERPRETATION OF ORS 742.061 BROADER THAN ITS PLAIN TEXT

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938), requires federal courts to apply state substantive law and federal procedural law in diversity cases.

At a fundamental level, the *Erie* doctrine does not even apply to this case. *Erie* principles apply when deciding *whether* to apply state law, not to determine its substantive content:

> The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court….

Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 112 (1945) ("*York*"); *cf. Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991) ("Only when there is a conflict between state and federal substantive law are the concerns of *Erie* at issue").[7]

Here, there is no dispute that ORS 742.061 is the correct rule of substantive law, in the sense that it states the law of the forum on fee-shifting in insurance cases. The parties' actual dispute concerns the *scope* of that state statute—and *Erie* cannot alter that limited scope. Although the district court seemed to agree that ORS 742.061's text limits it to state-filed actions, it ruled that *Erie* compelled a broader interpretation to include federal courts. That was error.

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[7] This Court should not be misled by dicta in *York* that, under *Erie,* federal courts are "in effect, only another court of the State." Properly understood, all *York* was saying was that a federal court applies state law *as would* a state court:

> [S]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is *for that purpose*, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

(emphasis added). That sentence of *York* reaffirmed why the district court here was not free to broaden ORS 742.061's fee-shifting right beyond its state-established limit. *See id.*

A. *Erie* Cannot Expand State Law or Create New Rights

Erie requires a federal court to apply state substantive law as "declared by its Legislature in a statute or by its highest court in a decision." 304 U.S. at 78. As noted above, when a state statute has been interpreted by a state's highest court, that construction is binding upon federal courts. *See*, *e.g.*, *Muniz v. United Parcel Serv., Inc.*, 738 F.3d at 219.

Erie does *not* allow, let alone require, a more expansive interpretation of state law: federal courts "cannot afford recovery if the right to recover is made unavailable by the State nor can [they] substantially affect the enforcement of the right as given by the State." *York*, 326 U.S. at 108-09; *Alyeska Pipeline*, 421 U.S. at 259 n.31.

That is because it is federal courts' "duty in a diversity case to apply state law as we find it." *Fleming v. Asbill*, 42 F.3d 886, 890 (4th Cir. 1994); Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2d § 4507 ("Nor is it the function of the federal court to expand the scope of state law") (collecting numerous cases); *see also Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) ("the duty rests upon federal courts to apply state law … in accordance with the … controlling decision[s] of the highest state court"); *cf. Hanna v. Plumer*, 380 U.S. at 471-472 ("We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of

decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law").

Indeed, "[i]t is incumbent upon us *to avoid creating new rights and remedies* in … state law where we lack express statutory authority or clear directive from the [state] Supreme Court." *In re Whitaker Const. Co., Inc.*, 411 F.3d 197, 209 n.4 (5th Cir. 2005) (emphasis added); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996) ("Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it *generation* of rules of substantive law") (emphasis added); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (federal courts are not free to "engraft onto … state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits"); *Nationwide Mutual Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000) (federal courts "should be especially reluctant to create new rights that neither the state legislature nor the state courts have seen fit to recognize"); *York*, 326 U.S. at 112 ("Congress afforded out-of-State litigants another tribunal, not another body of law").

Heeding that principle, in *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008), this Court "decline[d]" class plaintiff's "invitation to

create a new exception" to a California statute requiring contractual privity with a manufacturer for implied warranty claims. *Clemens* reasoned that state courts had already "established the scope of the privity requirement under California Commercial Code section 2314, and a federal court sitting in diversity is not free to create new exceptions to it." *Id.* (rejecting plaintiffs' argument that the state-court created exceptions were "exemplary rather than exhaustive, and that similar equities support an exception for his case" that should be created by the federal courts). It did so even though it recognized that it might have decided the issue differently because California's privity requirement "may be an archaism in the modern consumer marketplace." *Id.*

Oregon law is that insureds must bring their actions in state court to qualify for fee-shifting. *See* ORS 742.061 and Part I, *supra*. By stretching ORS 742.061 beyond its text to award the attorney fees here, the district court created a ***new right*** to attorney fees in federal court that does not exist under Oregon law, or created a ***new exception*** to ORS 742.061's in-state filing requirement. *Erie* forbids either invention.

B. Policy Cannot Trump Text, Whether It Comes from *Erie* or ORS 742.061

The district court decided that two sets of policy rationales justified reading ORS 742.061 beyond its terms. Neither actually supports that determination.

***Erie's* Core Policies Do Not Apply.** *Erie*'s "twin policies" of avoiding forum shopping and inequitable administration of laws (*Hanna v. Plumer*, 380 U.S. at 468) do not apply here. These policies were largely developed to assist federal courts in determining whether state law should apply as the rule of decision in federal courts. *See id.* But there is no question that ORS 742.061 supplies the rule of decision for disputes like this – when the insured satisfies its requirements, which they do not always do given its complex terms. The issue presented here is whether cases that insureds choose to file in federal court fall within the reach of that statute, so as to be eligible for fee-shifting (assuming the remaining criteria are met). And they do not.

In any event, because Schnitzer controlled where it originally filed the underlying litigation, forum shopping and equitable administration of the laws are not at issue here. Under Continental's interpretation of ORS 742.061, the insured ***always*** controls whether the filing requirement is satisfied.

- If the insured files suit in Oregon state court, the in-state filing requirement is plainly satisfied. ORS 742.061(1).
- That is true even if a defendant later removes the case to federal court. *See id.* (merely requiring original filing of "an action … in any court of this state"). (The district court here failed to appreciate this fact,

> mistakenly perceiving removal to pose some incongruity in the statute's application. ER 42.

The purpose of diversity jurisdiction, and of the *Erie* doctrine, is to protect out-of-state defendants against discrimination that local plaintiffs may enjoy before state courts. *See York*, 326 U.S. at 111 ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias") (*citing Bank of U.S. v. Deveaux*, 5 Cranch 61, 87 (1809)). But here, Schnitzer—an *Oregon resident*—decided to forgo whatever protections an Oregon state court forum afforded and file its lawsuit in federal court. Schnitzer is a sophisticated party with strong legal representation, and there is no unfairness in enforcing this result of its decision to file suit in federal court. Thus, while the district court was correct that applying ORS 742.061 according to its plain terms results in different outcomes depending on whether an insured files suit in Oregon state court or federal court, that cannot supply a reason to read the statute beyond its text.

ORS 742.061's Policy Cannot Trump Its Text, Even in the *Erie* Context.

The district court further reasoned that the policy rationales of ORS 742.061 trumped its actual text. *See* ER 42-43, 37 (plain text interpretation would purportedly "stifle the stated purpose" of "encourag[ing] the settlement of claims and … discourag[ing] the unreasonable rejection of claims by insurers"). This

amounts, candidly, to usurping the Legislature's role. The statute calibrates the extent to which Oregon chose to encourage settlement. Not even an Oregon court would be authorized to re-calibrate it. *See* ORS 174.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted.") And federal courts are even more constrained from doing so under *Erie* principles. *See* Part II.A, *supra*.

CONCLUSION

For all these reasons, this Court should reverse the award of attorney fees in its entirety.

Respectfully submitted:

Dated: April 30, 2015

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STATEMENT OF RELATED CASES

Ninth Circuit Docket No. 14-35793, an appeal from the Judgment in the same insurance coverage lawsuit, relates to this case.

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