Nos. 14-35793 and 15-35101

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCHNITZER STEEL INDUSTRIES, INC., et al.
Plaintiff and Appellant,
v.
CONTINENTAL CASUALTY CO. and
TRANSPORTATION INS. CO.,
Defendants and Appellants.

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

APPELLANTS' PETITION FOR PANEL REHEARING OF THE FEES APPEAL, NO. 15-35101

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APPELLANTS' PETITION FOR PANEL REHEARING

OF THE FEES APPEAL, NO. 15-35101

The core issue in case No. 15-35101 was whether a party suing in federal court can recover attorneys' fees under a statute that limits fee-shifting to suits filed "in any court of this state." The Court's Memorandum Disposition (Dkt. 38-1) did not address that, or indeed any contested issue in case No. 15-35101. *See* Fed. R. App. P. 40(a)(2) (rehearing authorized where "petitioner believes the court has overlooked" points of law or fact).

In contrast with the disposition of Appellants' contentions in the Judgment appeal (no. 14-35793)—which, although not explicit, can reasonably be inferred from the abbreviated discussion of each—the paragraph devoted to appeal No. 15-35101 recites only propositions that Appellants' briefs acknowledged as basic premises. The following compares the Memorandum's whole discussion of the fees appeal (beyond stating the standard of review) with Appellants' acknowledgment of each point.

Appellants argued: "Continental has never disputed that ORS 742.061 supplies the rule of decision" (Reply Brief at 7), and: "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 …" (Opening Brief at 26).[1]

The Memorandum echoed at page 4:

> Because § 742.061 requires an award of fees to an insured when "recovery exceeds the amount of any tender made by the defendant in such an action," it constitutes substantive law. Or. Rev. Stat. § 742.061(1); *see Chambers v. NASCO, Inc*., 501 U.S. 32, 52 (1991) (states' fee-shifting rules constitute substantive law when they "embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees").

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[1] *See also* Opening Brief at 18:

> "[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 [1276,] 1281 [(9th Cir. 1999)] (emphasis added), quoting *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 259 n. 31 (1975).

Likewise, Appellants Opening Brief argued: "*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 25), and at page 27: "*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."

The Memorandum echoed at page 4: "[A]bsent conflict with federal rules, statutes, or policies, a federal court sitting in diversity is bound to apply state substantive law" (citing *In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d at 1120-21). From this alone, it concluded:

> Consequently, the district court was bound under the *Erie* doctrine to apply § 742.061.

That is all the Court said. It thus affirmed without addressing any contested "point of law or fact" presented to it (FRAP 40(a)(2))—and without even mentioning the language at issue in section 742.061, requiring that "an action [be] brought in any court of this state … ." This does not permit any reasonable inference that the Court in fact confronted any contested issue.

As Appellants' briefs explained, affirmance necessarily implies a conclusion that this Court *will not enforce* Oregon's statutory limitation on fee-shifting in insurance coverage disputes to suits filed in state courts. If that is the case, Appellants respectfully submit the Court should say so. If it is not willing to reach that conclusion explicitly, then the Court should reverse for the reasons Appellants have stated—at the very least, because Schnitzer acknowledged at oral argument its own strategic choice to file in federal court.

As required by Rule 40(a)(2), Appellants "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended," beginning with the two Issues Presented, since the Memorandum does not address them:

> 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?

To be more specific, the Court's decision overlooks all of the following points argued in Appellants' briefs:

a. The American Rule requires "explicit statutory authority" for attorney fees, and ORS 742.061 does not provide it in federal court.

b. The text of ORS 742.061 limits fee awards to state-filed actions—a point effectively *acknowledged* by the district court and all parties (but ignored in the Memorandum Disposition).

c. The Oregon Supreme Court would read ORS 742.061 literally according to its terms.

d. The Oregon Court of Appeals also requires strict satisfaction of fee-shifting statutes' technical filing requirements.

e. No *Erie* policy compels this Court to reform ORS 742.061 so as to authorize awards to insureds suing in federal court—and conflicting policy forecloses it.

f. *Erie* requires federal courts to apply state law as defined by the state.

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g. There is no need to "harmonize" outcomes between Oregon state court and federal district court because there is no forum-shopping concern in these circumstances.

(1) Schnitzer conceded at oral argument that *it* selected federal over state court when filing this case, to take advantage of the federal rules' more robust discovery, and other benefits it perceived.

(2) But even insureds whose state-court suit is removed to federal court would still be eligible for fees under ORS 742.061—another point Schnitzer did not dispute.

(3) Finally, an insurer cannot defeat the insured's choice of forum and right to fees by preemptively filing a declaratory relief action in federal court, because insureds—if correct on the merits of the declaration—remain free to seek any damages to which they may be entitled in a state court action.

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CONCLUSION

Appellants respectfully ask the Court to rehear appeal number 15-35101, and reverse the fee award for the reasons set forth in their briefs—*none* of which are accounted for in the May 31, 2016 decision.

DATED: June 13, 2016

GREINES, MARTIN, STEIN & RICHLAND LLP

By: /s/ Laurie J. Hepler

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ATTACHMENT

5/31/16
MEMORANDUM

FILED

MAY 31 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCHNITZER STEEL INDUSTRIES, INC., an Oregon corporation and MMGL CORP., a Washington corporation, Plaintiffs - Appellees, v. CONTINENTAL CASUALTY COMPANY, an Illinois corporation and TRANSPORTATION INSURANCE COMPANY, an Illinois corporation, Defendants - Appellants.	No. 14-35793 D.C. No. 3:10-cv-01174-MO MEMORANDUM*

SCHNITZER STEEL INDUSTRIES, INC., an Oregon corporation and MMGL CORP., a Washington corporation, Plaintiffs - Appellees, v. CONTINENTAL CASUALTY COMPANY, an Illinois corporation and TRANSPORTATION INSURANCE COMPANY, an Illinois corporation,	No. 15-35101 D.C. No. 3:10-cv-01174-MO

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Defendants - Appellants.

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief District Judge, Presiding

Argued and Submitted May 2, 2016
Portland, Oregon

Before: GOODWIN, TALLMAN, and HURWITZ, Circuit Judges.

Continental Casualty Co. and Transportation Insurance Co. (collectively, "Continental") appeal from the district court's denial of judgment as a matter of law and award of attorney fees in favor of Schnitzer Steel Industries, Inc. and MMGL Corp. (collectively, "Schnitzer"). In this diversity action, Schnitzer alleges that Continental breached its contractual obligation by failing to pay Schnitzer's reasonable and necessary defense costs in litigation concerning the Portland Harbor Superfund Site. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

The district court did not err by denying Continental's renewed motion for judgment as a matter of law because the jury could reasonably have found from the evidence that no reasonable effort to locate competent non-local counsel willing to represent Schnitzer at local rates could have been successful. *See Martin v. Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1046 (9th Cir. 2009) (standard of review; district court should grant a renewed motion for judgment as a matter of law only

"if the evidence permits only one conclusion and that conclusion is contrary to the jury's verdict").

The district court did not err by awarding prejudgment interest to Schnitzer under Oregon Revised Statutes § 82.010(1)(a) because the jury decided issues of fact establishing that Continental owed "sums certain at dates certain." *Strader v. Grange Mut. Ins. Co.*, 39 P.3d 903, 909 (Or. Ct. App. 2002) (citation and internal quotation marks omitted); *see also In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d 1116, 1119 (9th Cir. 1987) (standard of review). Damages therefore were "ascertainable" for purposes of calculating prejudgment interest, as required by *Public Market Co. of Portland v. City of Portland*, 138 P.2d 916, 918 (Or. 1943). *See Strader*, 39 P.3d at 909.

The district court did not err by awarding Schnitzer declaratory relief. *See Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1040 (9th Cir. 2004) (standard of review). First, even if Federal Rule of Civil Procedure 52(a) required the district court to make findings of fact, any error was harmless because the jury's findings supported the declaratory judgment. *See Fed. Trade Comm'n v. Enforma Nat. Prods. Inc.*, 362 F.3d 1204, 1212 (9th Cir. 2004) ("A failure to comply with Rule 52(a) does not require reversal unless a full understanding of the question is not possible without the aid of separate findings."). Second, the

judgment did not improperly deny Continental discretion over future costs; rather, it ordered Continental to pay reasonable defense costs consistent with the jury's findings. Finally, to the extent that the judgment had the practical effect of awarding injunctive relief, the district court may award such relief where, as here, a party was "aware of the possibility and had an opportunity to be heard." *Penthouse Int'l, Ltd. v. Barnes*, 792 F.2d 943, 950 (9th Cir. 1986).

The district court did not err in awarding attorney fees to Schnitzer under Oregon Revised Statutes § 742.061. *See In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d at 1119 (standard of review). Because § 742.061 requires an award of fees to an insured when "recovery exceeds the amount of any tender made by the defendant in such an action," it constitutes substantive law. Or. Rev. Stat. § 742.061(1); *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991) (states' fee-shifting rules constitute substantive law when they "embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees"). Consequently, the district court was bound under the *Erie* doctrine to apply § 742.061. *See In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d at 1120-21 (absent conflict with federal rules, statutes, or policies, a federal court sitting in diversity is bound to apply state substantive law).

AFFIRMED.

9th Circuit Case Number(s) 14-35793 & 15-35101

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