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Oregon

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

Oregon's Unfair Claim Settlement Practices Act, Oregon Revised Statute (ORS) 746.230 (the Act), sets forth general timing guidelines for responding and determining claims. It prohibits insurers from:

> (1)(b) Failing to acknowledge and act promptly upon communications relating to claims;
>
> (c) Failing to adopt and implement reasonable standards for the prompt investigation of claims;
>
> . . .
>
> (e) Failing to affirm or deny coverage of claims within a reasonable time after completed proof of loss statements have been submitted;
>
> (f) Not attempting, in good faith, to promptly and equitably settle claims in which liability has become reasonably clear;
>
> . . .
>
> (k) Delaying investigation or payment of claims by requiring a claimant or the claimant's physician, naturopathic physician, physician assistant or nurse practitioner to submit a preliminary claim report and then requiring subsequent submission of loss forms when both require essentially the same information;
>
> (l) Failing to promptly settle claims under one coverage of a policy where liability has become reasonably clear in order to influence settlements under other coverages of the policy; [and]
>
> (m) Failing to promptly provide the proper explanation of the basis relied on in the insurance policy in relation to the facts or applicable law for the denial of a claim.

A violation of the Act generally does not give rise to a private cause of action. *Richardson v. Guardian Life Ins. Co.*, 161 Or App 615, 623-24, 984 P2d 917, *rev den*, 329 Or 553 (1999). *But see* ORS 465.484(4) (providing a private right of action for certain insurance practices barred by the Oregon Environmental Cleanup Assistance Act). Instead, it subjects the insurer to civil penalties enforced by the state. ORS 731.988; *Farris v. U.S. Fidelity and Guaranty Co.*, 284 Or 453, 458, 587 P2d 1015 (1978). The penalty for each violation is $10,000 ($1,000 for individual insurance producers, adjusters or insurance consultants). ORS 731.988(1). In addition to that penalty, an

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insurer who violates the code may also be required to forfeit to the state an amount not exceeding the amount by which the person profited as a result of the violation. ORS 731.988(2).

Recently, however, in *Moody v. Oregon Community Credit Union*, 317 Or App 233, 505 P3d 1047 (2022), the Oregon Court of Appeals allowed a first-party bad faith claim against an insurer based on violations of the Act. As discussed later in this compendium, Oregon had previously not recognized first party bad faith under *Farris*, 284 Or at 453. *Moody* is currently pending before the Oregon Supreme Court. The Court heard oral argument in November 2022, and a decision could be released at any time. There is also legislation pending in the Oregon State Legislature which would allow first party damages for violations of the Act in various situations.

Additionally, under ORS 742.061(1), an insurer is liable for attorney fees if it fails to settle a claim within six months from the date the proof of loss is filed if the insured brings an action and recovers an amount exceeding the amount of any tender made by the insurer. These provisions do not apply, however, in actions to recover personal injury protection benefits, uninsured motorist benefits, or underinsured motorist benefits if, no later than six months from the date proof of loss is filed, the insurer, in writing (a) accepts coverage, and the only issue is the amount of benefits owed; and (b) consents to submit the case to binding arbitration. ORS 742.061(2), (3); *McClain v. Safeco Ins. Co. of Oregon*, 284 Or App 410, 392 P3d 829 (2017).

ORS 742.061 has been the subject of several published opinions. In *Long v. Farmers Ins. Co. of Oregon*, 360 Or 791, 803-04, 388 P3d 312 (2017), the Oregon Supreme Court recently clarified what constitutes the amount recovered by the plaintiff in order to determine whether that recovery exceeds the insurer's tender. The court held that "recovery" is not limited to judgments or awards and includes the insurer's mid-litigation payments and settlement payments. *Id.* If the aggregate of the insurer's post-filing payments exceeds the amount of pre-suit tender, then the insurer is liable for attorney fees under ORS 742.061(1). *Id.*

Oregon courts have also held that a "proof of loss" (the trigger of the six-month period in ORS 742.061) is "[a]ny event or submission that would permit an insurer to estimate its obligations (taking into account the insurer's obligation to investigate and clarify uncertain claims)." *See Dockins v. State Farm Ins. Co.*, 329 Or 20, 29, 985 P2d 796 (1999). This is a "pragmatic and functional" inquiry that "depends on the nature of the insurance coverage at issue." *Zimmerman v. Allstate Prop. & Cas. Ins. Co.*, 354 Or 271, 286-91, 311 P3d 497 (2013). A "proof of loss," however, need not enable the insurer to precisely determine its obligations. *Id.* at 291. *Zimmerman* involved a first-party claim for underinsured motorist (UIM) insurance coverage. *Id.* at 273-74. The court found that a report notifying a UIM insurer that an accident had occurred – without information as to the tortfeasor's policy limits – did not constitute "proof of loss" under the statute, because, under Oregon law, an insurer has no UIM liability until its insured exhausts the limits of the underinsured tortfeasor's insurance coverage. *Id.* at 288, 291.

Standards for Determination and Settlements

ORS 746.230 also sets forth general standards for determining and settling claims. It prohibits insurers from, among other things:

> (1)(a) Misrepresenting facts or policy provisions in settling claims;
>
> . . .
>
> (d) Refusing to pay claims without conducting a reasonable investigation based on all available information;
>
> . . .

> (g) Compelling claimants to initiate litigation to recover amounts due by offering substantially less than amounts ultimately recovered in actions brought by such claimants;
>
> (h) Attempting to settle claims for less than the amount to which a reasonable person would believe a reasonable person was entitled after referring to written or printed advertising material accompanying or made part of an application;
>
> (i) Attempting to settle claims on the basis of an application altered without notice to or consent of the applicant; [and]
>
> (j) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made[.]

As noted above, a violation of the Act subjects an insurer to civil penalties enforced by the state. ORS 731.988. the availability of a private right of action or a claim for damages for violations of the Act in a first-party situation is evolving.

PRINCIPLES OF CONTRACT INTERPRETATION

"The primary governing rule of the construction of insurance contracts is to ascertain the intention of the parties." *Totten v. New York Life Ins. Co.*, 298 Or 765, 770, 696 P2d 1082 (1985). An Oregon court determines that intent based on the terms and conditions of the entire insurance contract. ORS 742.016; *Hoffman Constr. Co. v. Fred S. James & Co.*, 313 Or 464, 469, 836 P2d 703 (1992). Defined terms are given their defined meaning. *Groshong v. Mutual of Enumclaw Ins. Co.*, 329 Or 303, 307-08, 985 P2d 1284 (1999). Words of common understanding used in a manner susceptible to a single reasonable meaning are taken in their plain, ordinary and popular sense. *Mortgage Bancorp. v. New Hampshire Ins. Co.*, 67 Or App 261, 264, 677 P2d 726, *rev den*, 297 Or 339 (1984). Undefined terms are construed using various interpretive aids, including plain meaning, context used, or other policy provisions. *Hoffman Constr.*, 313 Or at 474-75. Finally, all terms are read in a way which is logical and reasonable – not in a way which "reduce[s] them to nonsense." *Jarrard v. Cont'l Cas.*, 250 Or 119, 127, 440 P2d 858 (1968). Truly ambiguous terms – terms which have two reasonable possible meanings after consideration of all construction aids – are construed against the insurer. *Hoffman Constr.*, 313 Or at 469-70.

Oregon has several laws applicable to the interpretation of specific insurance policies and provisions. One of the most litigated is Oregon's anti-indemnity statute, ORS 30.140. Under that statute, with respect to insurance applying to a construction project, an Oregon court will not enforce an additional insured endorsement on the policy to cover the purported additional insured's own negligence. *See* ORS 30.140; *Walsh Const. v. Mutual of Enumclaw*, 338 Or 1, 10, 104 P3d 1146 (2005). Instead, regardless of the terms of the additional insured endorsement or the subcontract requiring the additional insured coverage, Oregon courts will construe the coverage to include coverage for the indemnitor's (typically the subcontractor's) negligence only, not the indemnitee's (typically the general contractor's) own negligence. *Security National Ins. Co. v. Sunset Presbyterian Church*, 289 Or App 193, 237, 408 P3d 233 (2017).

CONTRACT INTERPRETATION

Common Issues

1. **Faulty Workmanship as an "Occurrence" [What is the state of the common law in your state on this subject?]**

   In some circumstances, it can be. The Oregon Court of Appeals recently said, for example, that "[t]here is no doubt that a repair contractor's negligent work that accidentally caused damage to

physical property could give rise to an occurrence under the policy, namely 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" *Twigg v. Admiral Insurance Company*, 324 Or App 259, 270, 525 P3d 478, *rev allowed*, 371 Or 308, 532 P3d 1257 (2023). For example, in *Fountaincourt Homeowners' Association v. Fountaincourt Development, LLC*, 360 Or 341, 348, 361-65, 380 P3d 916 (2016), the Oregon Supreme Court concluded that a jury's finding that an insured subcontractor negligently damaged physical property gave rise to coverage under a policy that required proof of an "occurrence." That policy, like the one at issue in *Twigg*, defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*

At the same time, as a result of the "your work" exclusion, there must be property damage to property other than the insured's own work in order for there to be any coverage (even if caused by an occurrence), and, even then, damage to the insured's own work is not covered. *Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co.*, 864 F2d 648, 649 (9th Cir 1988) ("Thus, the general contractor is covered only for damage to property he or she did not construct. The idea behind this exclusion is that liability insurance should not be a warranty or performance bond for general contractors, because they control their work.") (internal quotations omitted).

2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

Yes. Oregon's anti-indemnity statute is codified as ORS 30.140. The first two sections prohibit any provision in a "construction agreement" that requires a party or that party's insurer to indemnify another against liability for property damage caused in whole or in part by the negligence of the indemnitee. The provisions read as follows:

> (1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.
>
> (2) This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors.

The statute defines the term "construction agreement" very broadly to mean "any written agreement for the planning, design, construction, alteration, repair, improvement or maintenance of any building, highway, road excavation or other structure, project, development or improvement attached to real estate including moving, demolition or tunneling in connection therewith." ORS 30.140(3). The statute excepts certain lease agreements from its scope, and it doesn't apply by its terms to railroads. ORS 30.140(4)-(5).

Oregon courts have observed that the statute was "designed to prevent parties with greater leverage in construction agreements (generally, owners and contractors) from shifting exposure

for their own negligence to other parties (generally subcontractors) on a take it or leave it basis." *Walsh v. Mutual of Enumclaw*, 189 Or App 400, 410, 76 P3d 164 (2003), *aff'd*, 338 Or 1, 104 P3d 1146 (2005). Oregon courts have made clear that this statute applies to agreements to purchase insurance. *Walsh Const. v. Mutual of Enumclaw*, 338 Or 1 (2005). They have also made clear that the statute voids construction agreements only *to the extent* they contravene its terms. *Security National Ins. Co. v. Sunset Presbyterian Church*, 289 Or App 193, 201, 408 P3d 233 (2017) ("[S]uch a clause in a subcontract can be enforced to the extent that it does not contravene ORS 30.140. The unlawful potential of such an insurance or indemnity provision can be excised, while the lawful portion can be enforced."). Finally, the statute creates an exception to the traditional "defend one/defend all rule." An insurer need not defend claims for damage caused by the additional insured's own negligence. *Sunset Presbyterian Church v. Andersen Const. Co.*, 268 Or App 309, 319-20, 341 P3d 192 (2014) ("[R]equiring the subcontractor to pay the cost of defending the contractor against allegations of the contractor's own negligence would cause a problem similar to the one caused by requiring the subcontractor to pay the resulting judgment against the contractor: it would shift the contractor's exposure for its own negligence to the subcontractor.")

Several Oregon opinions have taken an expansive view of the duty to defend where ORS 30.140 is involved. In this context, these courts have repeatedly rejected the argument that the complaint must affirmatively plead a covered claim. Instead, the question is whether, regardless of the presence of ambiguity or clarity in the complaint, the court can reasonably interpret the allegations to include an incident or injury that falls within coverage. *West Hills*, 360 Or at 665. For example, where an additional insured endorsement applies only to claims arising out of the indemnitor's "ongoing operations," insurers are required to defend if the complaint "leave[s] open the possibility" that the damage occurred during the indemnitor's "ongoing operations." *PIH Beaverton LLC v. Red Shield Insurance Co.*, 289 Or App 788, 803, 412 P3d 234 (2016). The complaint need not even mention the indemnitor's negligence. *West Hills Dev. Co.*, 360 Or at 665 ("L&T may not have been identified by name in the complaint, but that is not the issue. The allegations of the complaint reasonably could be interpreted to result in West Hills being held liable for conduct covered by the policy: L&T's operations for West Hills."); *Security National*, 289 Or App at 201-02 ("[T]he subcontractor need not be identified by name in the complaint, nor must the general contractor's liability be expressly attributed to the fault of the subcontractor."). Said another way, if the complaint leaves a coverage-dependent question either unanswered or ambiguous, the insurer has a duty to defend.

CHOICE OF LAW

Choice of law issues for contract claims are controlled by ORS 15.300 to 15.380. To the extent not specifically excluded by ORS 15.320, 15.325, 15.330, 15.335 or 15.355, if a contract includes a clear, express, and conspicuous choice of law provision, that choice will generally govern. When the parties' choice is not controlling, the applicable law is determined by a series of analytical steps based on *Restatement (Second) Conflict of Laws* (1971) to contract claims. *See also* ORS 15.360 (relating to choice of law applicable to contracts).

Choice of law for tort and other non-contractual claims are controlled by ORS 15.400 to 15.460. Generally, the choice of law depends on the location of four contacts: (1) the place where the injurious conduct occurred; (2) the place of the resulting injury; (3) the domicile of the person or persons injured; and (4) the domicile of the person or persons whose conduct caused the injury. ORS 15.440. No Oregon appellate court has applied ORS 15.400 to 15.460 in a choice of law context. Given their content, it is likely that they will be applied similarly to Oregon's common law rules based on the "most significant relationship" approach of the *Restatement (Second) of*

Conflict of Laws (1971) to tort claims. *See Erwin v. Thomas*, 264 Or 454, 456 n 2, 506 P2d 494 (1973) (quoting *Restatement (Second) of Conflict of Laws* at §§ 6, 145); *Portland Trailer & Equip. Inc. v. A–1 Freeman Moving & Storage, Inc.*, 182 Or App 347, 358, 49 P3d 803 (2002) (same). That approach requires the court to consider "which state ha[s] the most significant relationship to the parties and the transaction, and [to determine] whether the interests of Oregon are so important that we should not apply [another state's] law, despite its significant connection with the transaction." *Stricklin v. Soued*, 147 Or App 399, 404, 936 P2d 398, *rev den*, 326 Or 58, 944 P2d 948 (1997) (citing *Lilienthal v. Kaufman*, 239 Or 1, 395 P2d 543 (1964); further citation omitted); *see also Frost v. Lotspeich*, 175 Or App 163, 188-90, 30 P3d 1185 (2001) (applying *Lilienthal* and *Stricklin*).

The first question is whether the laws of Oregon and the other jurisdiction are actually in conflict. *Lilienthal*, 239 Or at 5. If there is no conflict between the relevant principles of law in the two jurisdictions, Oregon law may be applied. *Official Airline Guides v. Churchfield Pub.*, 756 F Supp 1393, 1407 (D Or 1990), *aff'd*, 6 F3d 1385 (9th Cir 1993); *Biomass One, L.P. v. S-P Const.*, 120 Or App 203, 208 n 2, 852 P2d 844 (1993). If they are in conflict, Oregon courts ask which state has the "most significant" relationship to the dispute. *Straight Grain Builders v. Track N' Trail*, 93 Or App 86, 90, 760 P2d 1350, *rev den*, 307 Or 246 (1988); *see also* ORS 15.360(1) (with respect to choice of law as to the "the rights and duties of the parties with regard to an issue in a contract," relevant connections include "place of negotiation, making, performance or subject matter of the contract, or the domicile, habitual residence or pertinent place of business of a party").

In the insurance context, the general rule that the parties may choose the law governing their contractual rights is preempted to some extent by ORS 742.018, which provides that "[n]o policy of insurance shall contain any condition, stipulation or agreement requiring such policy to be construed according to the laws of any other state or country. Any such condition, stipulation or agreement shall be invalid." Thus, although the parties to an insurance contract governed by ORS 742.018 cannot choose the law governing their contractual rights, the statute leaves open the question of which state's law in fact applies to the construction of the insurance contract. And that results in the utilization of Oregon's common law and statutory choice of law principles – which, for insurance policies, usually turns on where the insurance policy was obtained or issued, and, to a lesser extent, where the risks covered by the policy are principally located.

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

An insurer's duty to defend an insured is determined by comparing the "four corners" of the complaint to the "four corners" of the insurance policy. *West Hills Development Co. v. Chartis Claims*, 360 Or 650, 652-53, 385 P3d 1053 (2016). Under that so-called four- or eight-corners rule, one compares the allegations in the complaint to the terms of the insurance policy to determine whether the insurer must defend the alleged conduct of the insured. If the allegations in the complaint assert a claim covered by the policy – even if it does so alongside claims that are not covered or does so ambiguously – the insurer has a duty to defend. *Id.* at 653; *see also Bresee Homes, Inc. v. Farmers Ins. Exchange*, 353 Or 112, 117, 293 P3d 1036 (2012) ("The inclusion in the complaint of other allegations describing claims that fall outside the policy's coverage is immaterial. Any ambiguity concerning potential coverage is resolved in favor of the insured."). Put differently, "the insurer has a duty to defend if the complaint provides *any* basis for which the insurer provides coverage," i.e., if the facts in the complaint "may reasonably be interpreted to include conduct within the coverage of [the insurance] policy." *Ledford v. Gutoski*, 319 Or 397, 400, 877 P 2d 80 (1994) (emphasis in original).

The allegations in the complaint may fail to describe a claim covered by the insurance policy either because the allegations do not involve insured conduct or because one or more coverage exclusions in the policy absolve the insurer of its duty to defend. *Bighorn Logging Corp. v. Truck Ins. Exchange*, 295 Or App 819, 828, 437 P3d 819 (2019). If the insured proves that the allegations in the complaint trigger the insurer's duty to defend, the insurer may still avoid liability by meeting its burden to show that one or more exclusions in the insurance policy absolve it of that duty. *Ledford*, 319 Or at 400.

There are two limited exceptions to the four-corners rule. The first is that whatever the complaint might say, there is no duty to defend if some coverage-defeating fact has been conclusively established by a prior court ruling. If, for example, a prior judgment establishes that the insured acted with the intent to cause harm, the insurer may rely on that extrinsic evidence, i.e., on the judgment, to deny coverage. *Casey v. Northwestern Sec. Ins. Co.*, 260 Or 485, 491 P2d 208 (1971). The prior judgment, however, must conclusively establish the coverage defeating fact. If, for example, the insured is found guilty of a crime involving a level of culpability other than intentional conduct, the insurer cannot decline to defend. *See American Cas. Co. v. Corum*, 139 Or App 58, 910 P2d 1151, *adh'd to on recons*, 141 Or App 92, 917 P2d 39 (1996) (finding a duty to defend where insured was convicted of the crime of "unlawfully and knowingly" subjected the victim to sexual contact and noting that "intent" and "knowledge" are distinct standards in Oregon).

The second is that putative additional insureds are allowed to rely on evidence outside the policy and the complaint in order to show that they qualify as additional insureds. *Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or App 468, 240 P3d 67 (2010), *rev den*, 349 Or 602, 249 P3d 123 (2011). The Oregon Supreme Court has made clear that the exception does not apply where the applicable additional insured endorsement does not create an "open class" of additional insureds, and instead names a specific additional insured. *West Hills Dev. Co.*, 360 Or at 666-67.

2. Issues with Reserving Rights

An insurer assuming the duty to defend, even if under a reservation of rights, must defend in a manner that reasonably protects both its insured's interests as well as its own. *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 298 Or 514, 519, 693 P2d 1296 (1985); *Safeco Ins. Co. v. Barnes*, 133 Or App 390, 395, 891 P2d 682, *rev den*, 321 Or 560 (1995). Failure to do so subjects the insurer to tort liability, including punitive damages if appropriate. *Georgetown Realty, Inc. v. Home Ins. Co.*, 313 Or 97, 110-11, 831 P2d 7 (1992).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

Making a false statement in connection with a claim for a payment under a health insurance policy is a Class C felony. ORS 165.690; ORS 165.692; ORS 165.694. Similarly, making a false statement to the Workers Compensation Board for the purposes of obtaining Workers Compensation Benefits is a Class A misdemeanor. ORS 656.990.

2. The Standards for Compensatory and Punitive Damages

Punitive damages are recoverable in certain civil actions if the plaintiff proves by clear and convincing

evidence that the defendant "acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730(1). Awards of punitive damages are not subject to a statutory cap. However, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, in general, "few awards exceeding a single-digit ratio between punitive and compensatory damages" will satisfy due process. *Goddard v. Farmers Ins. Co. of Oregon*, 344 Or 232, 255, 179 P3d 645 (2008) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 425 (2003)). By statute, punitive damages are allocated: (1) 30% to the prevailing party; (2) 60% to the Criminal Injuries Compensation Account; and (3) 10% to the State Court Facilities and Security Account. ORS 31.735(1).

An insurer may expressly exclude coverage for punitive damages. *Harrell v. Travelers Indemnity Co.*, 279 Or 199, 203-04, 567 P2d 1013 (1977). Otherwise, directly assessed and vicariously assessed punitive damages may be insurable. *See A-1 Sandblasting & Steamcleaning Co., Inc. v. Baiden*, 293 Or 17, 25-26, 643 P2d 1260 (1982).

3. Insurance Regulations to Watch

Regulations applicable to insurance companies can be found in Oregon Administrative Rules (OAR) Chapter 836. The chapter contains provisions regarding required annual reports (Division 011), organization and corporate procedures (Divisions 020 and 027), rates and ratemaking (Division 042), licensing (Division 071), and trade practices (Divisions 080 and 081), among others.

4. State Arbitration and Mediation Procedures

In Oregon, some claims for damages under $50,000 are subject to mandatory arbitration. *See* ORS 36.400; ORS 36.405. Mediation of private claims and claims involving public bodies are extensively regulated, particularly as to mediation communication confidentiality. ORS 36.100 to ORS 36.238. *See also Alfieri v Solomon,* 358 Or 383, 365 P3d 99 (2015) (defining "mediation" and "confidential mediation communication").

5. State Administrative Entity Rule-Making Authority

In general, an Oregon administrative agency has "only those powers that the legislature grants and cannot exercise authority that it does not have." *Examolotis v. Department of State Lands*, 239 Or App 522, 533, 244 P3d 880 (2010) (internal quotation omitted). "In the absence of a statute which grants a presumption of validity to administrative regulations, an administrative agency must, when its rule-making power is challenged, show that its regulation falls within a clearly defined statutory grant of authority." *Id.* (internal quotation omitted).

In the context of the Oregon Insurance Code, such authority is delegated to the Oregon Department of Consumer and Business Services. *See, e.g.,* ORS 731.216.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

3. First Party

Until recently, it was clear that an insurer's bad faith refusal to pay policy benefits to its insured

sounded in contract and was not an actionable tort in Oregon. *Employers' Fire Ins. v. Love It Ice Cream*, 64 Or App 784, 791, 670 P2d 160 (1983); *Georgetown Realty*, 313 Or at 97; *Farris*, 284 Or at 453. Then, the Oregon Court of Appeals allowed recovery on a first party basis in *Moody*, 317 Or App at 248.

In *Moody*, the insurer declined to pay benefits under a life insurance policy. So, the policy's beneficiary sued the insurer, alleging that in denying the claim, the insurer failed to conduct a reasonable investigation into the insured's death and settle the insurance claim in good faith. The beneficiary brought claims for breach of contract, negligence per se (based on Oregon's Unfair Claim Practices Act), and emotional distress. The court allowed the insured to pursue the negligence per se theory, determining that the Unfair Claim Practices Act sets a legal standard of care for an insurer's settlement of claims, the breach of which gives rise to tort remedies. Emotional distress damages, the Court of Appeals held, are potentially recoverable.

Moody is currently on appeal with the Oregon Supreme Court, and a decision could be released at any time. There are also several bills pending in the Oregon State Legislature that would impose liability for first-party bad faith in various situations. While there has always been some kind of effort to pass this type of legislation, legislative activity has increased in light of *Moody*.

Even before *Moody*, however, an insurer's conduct in a first-party dispute supported tort recovery under a separate recognized tort theory, such as intentional infliction of emotional distress or wrongful interference with business relationships. *Employers' Fire Ins.*, 64 Or App at 791; *see also Green v. State Farm Fire & Cas. Co.*, 667 F2d 22, 24 (9th Cir 1982) (applying Oregon law).

4. Third-Party

When a liability insurer undertakes the duty to defend its insured, it owes the insured a duty to exercise due care under the circumstances. *Georgetown Realty, Inc.*, 313 Or at 110-11; *Maine Bonding*, 298 Or at 517-19 (rejecting the terms "good faith" and "bad faith" because they tend to inappropriately inject subjective element into analysis). A breach of that duty gives rise to tort liability, including punitive damages, if appropriate. *See Georgetown Realty*, *Inc.*, 313 Or at 110-11 (negligence claim); *Employers' Fire Ins.*, 64 Or App at 791 (insurer's breach of fiduciary duty to insured is present in third-party claims).

Fraud

The elements of fraud are:

- A material misrepresentation that was false;
- Knowledge of falsity at the time of the misrepresentation;
- Intent that plaintiff rely on the misrepresentation;
- Justifiable reliance on the misrepresentation; and
- Damages proximately caused by the reliance.

Strawn v. Farmers Ins. Co. of Oregon, 350 Or 336, 351-52, 258 P3d 1199 (2011), *adh'd to on recons*, 350 Or 521 (2011); *see also Knepper v. Brown*, 345 Or 320, 329-30, 195 P3d 383 (2008) (noting older cases listing nine

elements of common-law fraud, and more recent cases using a more abbreviated list of elements). A plaintiff must prove each of these elements by clear and convincing evidence. *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 402, 737 P2d 595 (1987). "To be 'clear and convincing,' evidence must establish that the truth of the facts asserted is 'highly probable.'" *Id. See also Rubicon Global Ventures, Inc. v. Chongqing Zongshen Group Import/Export Corp.*, 226 F Supp 1141, 1154 n 9 (D Or 2016) (noting that despite the arguably ambiguous language in *Riley Hill Gen. Contractor*, the amount of damages needs to be proven by clear and convincing evidence, not only by a preponderance of the evidence).

Intentional or Negligent Infliction of Emotional Distress

"To state a claim for intentional infliction of emotional distress, a plaintiff must plead that (1) the defendant intended to inflict severe emotional distress on the plaintiff, (2) the defendant's acts were the cause of the plaintiff's severe emotional distress, and (3) the defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct." *McGanty v. Staudenraus*, 321 Or 532, 543, 901 P2d 841 (1995).

The intent element requires that the defendant desired to inflict severe emotional distress or knew that such distress was certain, or substantially certain, to result from its conduct. *Id.* at 550-51 (adopting the definition of "intent" from the *Restatement (Second) of Torts*). Although "socially intolerable" conduct generally requires a fact-specific inquiry on a case-by-case basis, the conduct must rise to the level of "outrageous in the extreme." *Williams v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 153 Or App 686, 689, 958 P2d 202 (1998), *rev den*, 327 Or 431 (1998); *Watte v. Edgar Maeyens, Jr., M.D., P.C.*, 112 Or App 234, 239, 828 P2d 479, *rev den*, 314 Or 176 (1992).

A typical disagreement between an insurer and an insured over the existence of compensable events and the amount of compensation does not rise to the level of social intolerance. *Rossi v. State Farm Mut. Auto. Ins. Co.*, 90 Or App 589, 591-92, 752 P2d 1298, *rev den*, 306 Or 414 (1988). Similarly, a difference in opinion as to the meaning and application of first-party coverage terms of an automobile policy "could rarely, if ever, amount to outrageous conduct." *State Farm Mut. Auto. Ins. Co. v. Berg*, 70 Or App 410, 418, 689 P2d 959 (1984), *rev den*, 298 Or 553 (1985). Nor is an insurer's conduct "outrageous or extreme" when it lies to an insured's attorney about the existence of evidence in order to pressure the insured to accept a settlement and to postpone an administrative hearing. *Pittman v. Travelers Indem. Co.*, 2006 WL 1643655, at *7 (D Or June 7, 2006), *aff'd*, 286 Fed Appx 449 (9th Cir 2008); *cf. Green*, 667 F2d at 24 (affirming award of compensatory and punitive damages against insurer who had reasonable basis to deny claim but acted in outrageous manner in investigating loss, including trying to have insured indicted for arson).

In Oregon, a person generally cannot recover for negligent infliction of emotional distress unless the person is physically injured, threatened with physical injury, physically impacted by the tortious conduct, or contemporaneously witnesses a close family member's physical injury. *Philibert v. Kluser*, 360 Or 698, 711-13, 385 P3d 1038 (2016); *Lockett v. Hill*, 182 Or App 377, 380, 51 P3d 5 (2002); *see also Hammond v. Central Lane Commc'ns Ctr.*, 312 Or 17, 22-23, 816 P2d 593 (1991). An exception to that rule is when "the defendant's conduct infringe[s] on some legally protected interest apart from causing the claimed distress . . . ." *Philibert*, 360 Or at 704; *Lockett*, 182 Or App at 380 (citation omitted). A "legally protected interest" is an "independent basis of liability separate from the general duty to avoid foreseeable risk of harm." *Lockett*, 182 Or App at 380 (citation omitted). It must be "of sufficient importance as a matter of public policy to merit protection from emotional impact." *Id.* at 380. The infringement of a chiefly economic interest, such as loss of money or assets, is not sufficiently important to warrant protection from emotional impact. *See, e.g., Hilt v. Bernstein*, 75 Or App 502, 515, 707 P2d 88 (1985), *rev den*, 300 Or 545 (1986) (loss of home). The Oregon Court of Appeals recently recognized a legally protected interest in being free from the emotional distress of being secretly video recorded while using a private restroom. *I.K. v. Banana Republic, LLC*, 317 Or App 249, 505 P3d 1078 (2022). *See also*

Philibert, 360 Or at 716 (NIED damages allowed where two brothers watched third brother die from being hit by pickup truck).

State Consumer Protection Laws, Rules and Regulations

ORS 746.230 prohibits insurers from engaging in certain claim and business practices. Again, however, a violation of the statute does not give rise to a private cause of action. *Richardson*, 161 Or App at 623-24. Instead, it subjects the insurer to civil penalties enforced by the state. ORS 731.988; *Farris*, 284 Or at 458.

Among Oregon's other consumer protection laws are: (1) the Unlawful Trade Practices Act, ORS 646.605 to 646.656 (prohibiting sellers from engaging in certain types of conduct in consumer transactions); (2) the odometer tampering section of the Oregon Vehicle Code, ORS 815.410; (3) ORS 83.010 to 83.680 (requiring certain disclosures in consumer credit contracts); (4) the Consumer Warranty Act, ORS 72.8010 to 72.8200 (enforcement of U.C.C. warranty provisions); (5) Oregon's "lemon law," ORS 646A.400 to 646A.418 (allowing return or replacement of new motor vehicle with uncorrectable defect covered by manufacturer's express warranty); (6) ORS 83.710 to 83.750 (requiring certain disclosures from sellers who solicit sales of over $25 at residences); and (7) the Unlawful Debt Collection Practices Act, ORS 646.639 to 646.041 (prohibiting certain practices in the collection of consumer debts).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

Oregon appellate courts have not addressed the general discoverability of an insurer's claim files. Oregon Rule of Civil Procedure (ORCP) 36 B(1) provides that any documents are discoverable depending on whether: (1) the documents are relevant to the claims or defenses at issue, and (2) are not privileged. The documents need not be admissible at trial so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* Investigation reports prepared by or for an insurer may be documents prepared either (1) in anticipation of litigation and, therefore, work product that is discoverable only upon the requisite showing under ORCP 36 B(3) that the party seeking production has substantial need for the claim file, and cannot obtain equivalent materials by other means without undue hardship; or (2) in the regular course of business and, therefore, discoverable. *United Pac. Ins. Co. v. Trachsel*, 83 Or App 401, 404, 731 P2d 1059, *rev den*, 303 Or 332 (1987).

Discoverability of Reserves

Oregon appellate courts have not addressed the discoverability of an insurer's reserves. In an action on a policy, those reserves rarely (if ever) are relevant or reasonably calculated to lead to the discovery of admissible evidence. *See* ORCP 36 B(1) (stating general discoverability standards).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

Oregon appellate courts have not addressed the discoverability of the existence of reinsurance and communications with reinsurers. Again, discovery of that information must meet the general standards in ORCP 36 B(1).

Attorney/Client Communications

As a general rule, a lawyer who represents an insured in an insurance defense case has two clients: the insurer and the insured. Formal Op. No. 2005-30 (Or. State Bar Aug. 2005) (regarding the simultaneous representation of insurer and insured); *accord* Formal Op. No. 2005-77 (Or. State Bar Aug. 2005) (regarding representation of the insured after investigation for the insurer); Formal Op. No. 2005-121 (Or. State Bar Aug. 2005) (regarding insurance defense); Formal Op. No. 2005-157 (Or. State Bar Aug. 2005) (regarding submission of bills to the

insurer's third-party audit service). Although a lawyer in that situation may represent both clients without special disclosure and consent, the lawyer must be mindful of the risk of current-client conflicts of interest. Formal Op. No. 2005-30 (Or. State Bar Aug. 2005); Formal Op. No. 2005-77 (Or. State Bar Aug. 2005); Formal Op. No. 2005-121 (Or. State Bar Aug. 2005).

A risk of conflict is high, for example, when the insurer defends subject to a reservation of rights. Formal Op. No. 2005-121 (Or. State Bar Aug. 2005). "To minimize this risk and to permit joint representation in such cases, both the ethics rules and insurance law require that the lawyer hired by the insurer to defend an insured must treat the insured as 'the primary client' whose protection must be the lawyer's 'dominant' concern." *Id.* Additionally, because the insurer will be paying the lawyer's fee, the lawyer must take care to avoid improper influence and to maintain client confidences. *See generally* Formal Op. No. 2005-30 (Or. State Bar Aug. 2005) (because insurer pays lawyer's fee, lawyer must take care not to "permit improper influence"); Formal Op. No. 2005-166 (Or. State Bar Aug. 2005) (insurance defense lawyer may not agree to comply with insurer's billing guidelines if to do so requires lawyer to materially compromise his or her ability to exercise independent judgment on behalf of a client in violation of the rules of professional conduct); Formal Op. No. 2005-115 (Or. State Bar Aug. 2005) (lawyer may not ethically permit representation of client to be controlled by others); Formal Op. No. 2005-157 (Or. State Bar Aug. 2005) (lawyer must maintain client confidences in complying with insurer's litigation management and billing guidelines, particularly when submitting detailed billing statements to third-party auditors).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Under ORS 742.013(1), misrepresentations or omissions in applications preclude recovery if they:

> (a) Are contained in a written application for the insurance policy, and a copy of the application is indorsed upon or attached to the insurance policy when issued;
>
> (b) Are shown by the insurer to be material, and the insurer also shows reliance thereon; and
>
> (c) Are either:
>
> > (A) Fraudulent; or
> >
> > (B) Material either to the acceptance of the risk or to the hazard assumed by the insurer.

The phrase "indorsed upon" in subsection (a) means the insurer must reproduce on the policy itself the misrepresentations contained in the application. *Brock v. State Farm Mutual Auto. Ins. Co.*, 195 Or App 519, 526-28, 98 P3d 759 (2004); *see also* ORS 742.016(1) (stating that an application that has not been delivered to the insured with the policy is not part of the policy, and precluding the insurer from introducing the undelivered application into evidence in an action based upon that policy).

Oregon's appellate courts have elaborated on this test. Under *Progressive Specialty*, an insurer must prove that (1) it issued the policy in reliance on the misrepresentations; (2) the misrepresentations were material to the insurer's decision to accept the risk; and (3) the applicant either knowingly or recklessly made the misrepresentations. *Progressive Specialty Ins. Co. v. Carter*, 126 Or App 236, 241-42, 868 P2d 32 (1994); *accord Story v. Safeco Life Ins. Co.*, 179 Or App 688, 693, 40 P3d 1112 (2002). The insurer's reliance on the misrepresentations must be, among other things, justifiable. *Story*, 179 Or App at 693-95. Absent information giving the insurer notice that the applicant has misrepresented facts, the insurer has no obligation to investigate the applicant's misrepresentations. *Id.* at 696; *Cf. Seidel v. Time Ins. Co.*, 157 Or App 556, 561-62, 970 P2d 255

(1998) ("An insurer is charged with the knowledge of its agent and may not rescind a policy based on a false application if the agent has knowledge of the misrepresentation.").

Most reported Oregon cases on this topic address misrepresentations in applications for insurance policies. However, Oregon courts also have enforced policy provisions that void coverage when an insured makes a fraudulent claim. *See Callaway v. Sublimity Ins. Co.*, 123 Or App 18, 20, 858 P2d 888 (1993) (fraudulent claim); ORS 742.208 (insured's willful concealment or misrepresentation of material fact, before or after a loss, voids entire fire policy).

Failure to Comply with Conditions

To prevail on an insured's noncompliance with a condition of forfeiture, a provision that takes away existing coverage based on an insured's acts, the insurer must show: (1) the insured failed to comply with the condition; and (2) the insurer was prejudiced. *See Workman v. Valley Ins. Co.*, 147 Or App 667, 672-73, 938 P2d 219 (1997). Even then, an insured may still prevail if he or she acted reasonably in breaching the condition. *Id.*; *Federated Serv. Ins. Co. v. Granados*, 133 Or App 5, 9, 889 P2d 1312 (1995).

Challenging Stipulated Judgments: Consent and/or No-Action Clause

An insurer may rely on a "no-action" clause to deny indemnity, unless the insurer previously breached some duty it owed under the policy. *See Lamb-Weston v. Oregon Auto. Ins. Co.*, 219 Or 110, 115-16, 341 P2d 110, *reh'g den*, 346 P2d 643 (1959). This is a particular application of the general rule that when a party to a contract fails to perform its contractual obligations, the other party is excused from performing. *See Davidson v. Wyatt*, 289 Or 47, 60-61, 609 P2d 1298 (1980) (discussing the doctrine of excuse); *see also Holloway v. Republic Indem. Co. of America*, 341 Or 642, 147 P3d 329 (2006) (invalidating insured-defendant's purported assignment of rights under policy to plaintiff, based on policy's anti-assignment provision).

Under Oregon law, an insured that is being defended under a reservation of rights may, without approval from the insurer, enter into a stipulated judgment with the plaintiff and execute a covenant not to execute without extinguishing the insurer's liability. *Brownstone Homes Condo Assn. v. Brownstone Forest Heights, LLC*, 358 Or 223, 246-47, 363 P3d 467 (2015) (expressly overruling prior precedent to the contrary). The judgment creditor can then seek to recover from the insured's policies through a separate action following an assignment of the insured's claims against the insurer, or through a garnishment proceeding.

Stipulated judgments have the same effect as a judgment that is entered after a trial on the merits of a claim. *Webber v. Olsen*, 330 Or 189, 196, 998 P2d 666 (2000). The duty to indemnify is established by proof of the "actual facts." *Northwest Pump & Equipment Co. v. American States Ins. Co.*, 144 Or App 222, 227, 925 P2d 1241 (1996). And an insurer is not precluded by the judgment in the underlying action from taking a position in a later coverage proceeding that the damages awarded in the underlying action are not covered by the insurance policy. *Fountaincourt Homeowners' Assn v. Fountaincourt Development, LLC*, 360 Or 341, 356, 380 P3d 916 (2016). The exact contours of what, exactly, an insurer is allowed to challenge are somewhat amorphous.

A subsequent coverage proceeding "requires the court to evaluate – as a matter of contract law – what, precisely, the insured has become legally obligated to pay as damages in the prior proceeding, in order to determine whether the policy covers those damages." *Fountaincourt*, 360 Or at 357. What the insured became legally obligated to pay as damages, and whether the insurer ultimately is liable under its policy is a "question of law for the court to determine by reference to (a) the contract and (b) the judgment and record in the underlying proceeding." *Id*. at 358. The insurer cannot "retry its insured's liability, or alter the nature of the damages awarded in that proceeding." *Id*. The insured has the burden to prove coverage while the insurer has the burden to prove an exclusion from coverage. *Id.* at 360 (*quoting ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co.*, 349 Or

117, 241 P3d 710 (2010)).

In the context of a settlement, the duty to indemnify is determined on the basis of "the facts that formed the basis for the settlement." *Bresee Homes, Inc.*, 353 Or at 126. To make that determination, courts have looked to "allegations in the underlying lawsuit and any evidence developed in defending or supporting those allegations." *Probuilders Specialty Ins. Co. v. Phoenix Contracting, Inc*., 2017 WL 11536056, at *2 (D Or Jan 2, 2017) (quoting *Chartis Specialty Ins. Co. v. Am. Contractors Ins. Co. Risk Retention Grp*., 2014 WL 3943722, *5 (D Or Aug 12, 2014)). The facts that formed the basis for the settlement can also be supported by the submission of subsequent evidence, so long as it does not challenge the insured's liability, or alter the nature of the damages. *See Fountaincourt*, 360 Or at 359 (stating that garnishment statutes allow for the calling of witnesses at the hearing); *Tom Moyer Theatres, LLC v. Coast Sweeping Service, Inc.,* Multnomah County Circuit Court Case No. 19CV30159 (Garnishment hearing memoranda discussing evidence presented through briefing, documents, and fact and expert witness testimony).

Preexisting Illness or Disease Clauses

Insurers may also avoid liability for injuries caused or contributed to by preexisting conditions using an exclusionary clause. *See Stanford v. American Guaranty Life Ins. Co.*, 280 Or 525, 527, 571 P2d 909 (1977) (clause at issue provided that the insurer could not be held liable for injuries resulting from any condition "for which medical advice, consultation or treatment was required or recommended" 6 months before and after the effective date of the policy). In that instance, the insurer has the burden of proof that the loss is excluded. *Smith v. Industrial Hospital Ass'n*, 194 Or 525, 532, 242 P2d 592 (1952). Additionally, any ambiguity in an exclusionary clause is strictly construed against the insurer. *United Pac. Ins. Co. v. Truck Ins. Exchange*, 273 Or 283, 293, 541 P2d 448 (1975).

Statutes of Limitations and Repose

An action on an insurance policy is subject to the six-year limitations period generally applicable to actions on contract unless a different period is specified in the policy. ORS 12.080(1). However, in the limited instances when an Oregon insurer has tort liability (such as, when the insurer fails to use reasonable care in discharging its duty to defend), a two-year limitations period applies. ORS 12.110(1).

In Oregon, there is no specific statute of ultimate repose applicable to actions on insurance policies.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

Generally, trigger of coverage depends upon the language used in a particular policy. *See St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 324 Or 184, 923 P2d 1200 (1996) (examining the language of several insurance policies to determine when coverage was triggered; rejecting insurers' argument that property damage "occurs" only when it manifests itself or is discovered). The Oregon Supreme Court recently reiterated that, consistent with policy language, a policy is triggered because "the damage was ongoing during the policy periods," even though the damage continued and was not discovered until after the expiration of the policy period. *Fountaincourt*, 360 Or at 364.

Allocation Among Insurers

When multiple sequential insurers are not involved, Oregon courts enforce compatible "other insurance" provisions, and follow a pro-rata approach where the "other insurance" provisions are repugnant. *Lamb-Weston*, 219 Or at 129. *But see Cascade Corp. v. American Home Assurance Co.*, 206 Or App 1, 135 P3d 450, *rev dismissed*, 342 Or 645 (2007) (payment by settling insurers does not reduce non-settling insurers' liability for up to full

amount of their policy limits). On the other hand, Oregon appellate courts have not addressed allocating indemnity coverage among multiple sequential insurers. *Compare St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 126 Or App 689, 699-700, 870 P2d 260, *modified on recons*, 128 Or App 234 (1994), *rev'd on other grounds*, 324 Or 184 (1996) (noting that allocation issue is separate from coverage trigger issue). *See also Fountaincourt*, 360 Or at 367-68 (recognizing jurisdictions adopt an "all sums" or "pro rata" approach, the trial court appeared to apply an "all sums" approach consistent with *Cascade Corp.*, but found the issue not adequately preserved for appeal).

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

In Oregon, the right to contribution between insurers is not statutory. *Farmers Ins. Co. of Oregon v. St. Paul Fire & Marine Ins. Co.*, 305 Or 488, 491, 752 P2d 1212 (1988) (citing *Lamb-Weston*, 219 Or at 110). Rather, it derives from "an insurer's contractual subrogation to claims of its insured or payee for a loss that the insurer has paid, or it might be imposed by equity." *Id.* There is one narrow exception: the statutory claim for contribution between insurers under the Oregon Environmental Cleanup Assistance Act. ORS 465.480(4).

Elements

Oregon courts discuss an insurer's equitable right to contribution in terms of the principle that underpins the action: "An insurer's rights against its co-insurer for contribution arises out of the equitable doctrine which holds that one who pays money for the benefit of another is entitled to be reimburse[d]." *Carolina Cas. Ins. Co. v. Oregon Auto. Ins. Co.*, 242 Or 407, 417, 408 P2d 198 (1965). Unlike in statutory contribution claims between tortfeasors, there are no clearly delineated elements. *Cf.* ORS 31.800 (delineating four elements to a statutory contribution claim between tortfeasors). Once an insurer's equitable right to contribution is established, each insurer's proportional share is determined using the *Lamb-Weston* pro-rata apportionment scheme described above. 219 Or at 129.

In a statutory claim for contribution between insurers under the Oregon Environmental Cleanup Assistance Act, an insurer may seek contribution against another insurer (1) that is liable or potentially liable to the insured, and (2) that has not entered into a good-faith settlement agreement with the insured regarding the environmental claim. ORS 465.480(4)(a). Once an insurer's right to statutory contribution is established, damages are apportioned based on five factors set out in statute:

> (a) The total period of time that each solvent insurer issued a general liability insurance policy to the insured applicable to the environmental claim;
>
> (b) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable;
>
> (c) The policy that provides the most appropriate type of coverage for the type of environmental claim;
>
> (d) The terms of the policies that related to the equitable allocation between insurers; and
>
> (e) If the insured is an uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for purposes of allocation.

ORS 465.480(5).

DUTY TO SETTLE

An insurer's duty to exercise reasonable care in undertaking the defense of its insured includes the duty to settle when a reasonable opportunity exists to do so. *See Georgetown Realty*, 313 Or at 106-11; *Maine Bonding*, 298 Or at 519; *see also Goddard ex rel. Estate of Goddard v. Farmers Ins. Co. of Oregon*, 173 Or App 633, 637, 22 P3d 1224, *rev den*, 332 Or 631 (2001) (duty to settle may include duty to initiate settlement discussions). A primary insurer also has a duty to excess insurers and the insured to exercise reasonable care to settle third-party claims within policy limits. *Maine Bonding*, 298 Or at 518-19. Oregon appellate courts, however, have not clearly resolved the issue of whether an insurer may consider coverage in dealing with settlement opportunities, or what happens if it considers coverage but guesses wrong. *Compare Kuzmanich v. United Fire & Cas. Co.*, 242 Or 529, 533-34, 410 P2d 812 (1966) (insurer not liable for failing to settle case defended under reservation of rights where insurer had coverage and related liability concerns) *with Safeco Ins. Co.*, 133 Or App at 395-97 (insurer may have tort liability for failing to settle case defended under reservation of rights even where insurer later showed that claim was not covered).

LH&D BENEFICIARY ISSUES

Change of Beneficiary

Once the insured has designated the beneficiary, he or she may change that designation only under a policy that reserves the right to change the beneficiary. ORS 743.046(5) (governing change of beneficiaries for life insurance policies); ORS 743.444 (governing change of beneficiaries for individual health insurance policies).

A change of beneficiary of a life insurance policy is not necessarily defeated by a failure to conform to the requirements of the policy. The key question is whether the decedent intended to accomplish such a change. *Sackos v. Great-West Life Assur. Co.,* 213 Or App 298, 305, 160 P3d 1026 (2007). As long as there is "at least some attempt made on the part of the insured to change a beneficiary," courts will typically find that the change in the beneficiary designation was effective. *Edwards v. Wolf*, 278 Or 255, 262, 563 P2d 717 (1977); *see also Webber v. Olsen*, 157 Or App 585, 592, 971 P2d 448 (1999), *rev'd on other grounds*, 330 Or 189 (2000) (discussing Oregon's "lenient" view concerning the failure to comply with requirements to change beneficiaries).

The insurer may waive its own procedural requirements for a change of beneficiary by paying the insurance proceeds into court. *N. Life Ins. Co. v. Burkholder*, 131 Or 537, 550-51, 283 P 739 (1930) (when insured intended fiancée to be new beneficiary but carried out intent in manner different from requirement in life insurance policy, insurer waived those requirements by paying proceeds of policy into court).

Effect of Divorce on Beneficiary Designation

Divorce can, but does not necessarily, revoke a designation of beneficiary made in favor of the former spouse – depending on the terms of the policy. *See* ORS 107.121 ("[r]evocation of designation of beneficiary"); *Sackos,* 213 Or App at 298 (referring to the policy's terms to determine if a man's attempt to designate his girlfriend as his beneficiary, rather than his former wife, was effective). In short, the right of the insured to change beneficiaries depends on the policy's terms.

INTERPLEADER ACTIONS

Availability of Fee Recovery

Attorney fees are available in interpleader actions so long as the court orders that (1) the funds or property interpled (Property) are deposited with the court, or otherwise secured, and (2) the party that filed the interpleader action is discharged from liability as to the Property. *See* OR. R. CIV. P. 31 C. Reasonable attorney

fees are assessed against the Property. Such an award of attorney fees is not available to a party who has been compensated for acting as a surety with respect to the Property. *Id.*

Differences in State vs. Federal

There is no Federal Rule of Civil Procedure that explicitly provides for a right to an award of attorney fees in interpleader actions. *See* FED. R. CIV. P. 22 (providing for an interpleader action without mention of attorney fees). Instead, federal courts make such awards pursuant to their broad equitable powers. *Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp.*, 306 F2d 188, 193 (9th Cir 1962) ("federal courts have continued the former equity practice of allowing attorney fees to interpleading plaintiffs in strict actions of interpleader"); *see also* 28 U.S.C. § 2361 (allowing courts to "make all appropriate orders to enforce" judgments in interpleader actions).