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**I. Regulatory Limits on Claims Handling**

**A. Timing for Responses and Determinations**

Oregon's Unfair Claim Settlement Practices Act, Oregon Revised Statute (O.R.S.) 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, 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 P.2d 917, 922-23, review denied, 329 Or. 553 (1999). But see OR. REV. STAT. § 465.484(4) (providing a private right of action for certain insurance practices barred by the Oregon Environmental Cleanup Assistance Act).<sup>1</sup> Instead, it subjects the insurer to civil penalties enforced by the state. OR. REV. STAT. § 731.988; Farris v. U.S. Fid. and Guar. Co., 284 Or. 453, 458, 587 P.2d 1015, 1017-18 (1978). The maximum penalty for each violation is \$10,000 (\$1,000 for individual insurance producers, adjusters or insurance consultants). OR. REV. STAT. § 731.988(1).

Additionally, under O.R.S. 742.061(1), an insurer is liable for attorney fees if it fails to settle a claim "within six months from the date proof of loss is filed[;] . . . an action is brought in any court of this state . . . [;] and the plaintiff's recovery exceeds the amount of any tender made by the [insurer] in such action . . . ." 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. OR. REV. STAT. § 742.061(2) & (3).

A "proof of loss," which starts the six-month period in O.R.S. 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)." Dockins v. State Farm Ins. Co., 329 Or. 20, 29, 985 P.2d 796, 801 (1999). The Supreme Court recently clarified that this is a "pragmatic and functional" inquiry that "depends on the nature of the insurance coverage at issue." Zimmerman v. Allstate Prop. and Cas. Ins. Co., 354 Or. 271, 286-91, 311 P.3d 497, 505-08 (2013). It emphasized the importance of the insurer's duty to investigate. Id. Zimmerman involved a first-party claim for underinsured motorist (UIM) insurance coverage. Id. at 273-74. The court found that a report notifying the insurer that an accident had occurred - without information as to the tortfeasor's policy limits - was insufficient "proof of loss" and thus insufficient to trigger the insurer's duty to investigate a UIM claim, because an insurer has no UIM liability until its insured exhausts the limits of the underinsured tortfeasor's insurance coverage. Id. at 288, 291.

#### **B. Standards for Determinations and Settlements**

O.R.S. 746.230 also sets forth general standards for determining and settling claims. It prohibits insurers from:

(1)(a) Misrepresenting facts or policy provisions in settling claims;

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<sup>1</sup> In recent years there have been efforts to provide a private cause of action for consumers of insurance services. See S.B. 313, 78th Leg., Reg. Sess. (Or. 2015) (permitting a person to bring a cause of action against an insurer for certain unlawful insurance practices); S.B. 314, 78th Leg., Reg. Sess. (Or. 2015) (subjecting insurers to the private cause of action provided by the Oregon Unlawful Trade Practices Act).

(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, however, a violation of the Act subjects an insurer to civil penalties enforced by the state but not to a private cause of action. OR. REV. STAT. § 731.988; Farris, 284 Or. at 458, 587 P.2d at 1017-18; Richardson, 161 Or. App. at 623-24, 984 P.2d at 922-23.

**C. Privacy Protections (In addition to Federal Gramm-Leach-Bliley Act)**

The use and disclosure of personal information by insurers are governed by O.R.S. 746.600 to 746.690, and by regulations enacted by the Director of the Oregon Department of Consumer and Business Services (the Director). Those regulations include OR. ADMIN. R. 836-080-0425 to 836-080-0440 (Use of Insurance Scores and Credit History), OR. ADMIN. R. 836-080-0501 to 836-080-0551 (Privacy of Personal Information), OR. ADMIN. R. 836-080-0600 to 836-080-610 (Privacy of Health Insurance-Related Information), OR. ADMIN. R. 836-080-0615 to 836-080-0660 (Notice of Information Practices), OR. ADMIN. R. 836-080-0665 to 836-080-0700 (Disclosure of Personal, Privileged Information), and OR. ADMIN. R. 836-081-0101 to 836-081-0126 (Standards for Safeguarding Customer Information). In promulgating rules governing the use and disclosure of personal information by health insurers, the Director "shall consider the information privacy provisions of the federal Health Insurance Portability and Accountability Act of 1996 (P.L. 104-191) and the federal Gramm-Leach-Bliley Act (P.L. 106-102)." OR. REV. STAT. § 746.608.

**II. 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 P.2d 1082, 1086 (1985). An Oregon court determines that intent based on the terms and conditions of the entire insurance contract. OR. REV. STAT. § 742.016; Hoffman Constr. Co. v. Fred S. James & Co., 313 Or. 464, 469, 836 P.2d 703, 706 (1992). Defined terms are given their defined meaning. Unambiguous terms are given their plain and common meaning. Mortgage Bancorp. v. New Hampshire Ins. Co., 67 Or. App. 261, 264, 677 P.2d 726, 728, review denied, 297 Or. 339 (1984). Undefined terms are construed by resort to various interpretive aids, including plain

meaning, context used or other policy provisions. Hoffman Constr., 313 Or. at 474-75, 836 P.2d at 709. 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 P.2d 858, 861 (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, 836 P.2d at 706.

### **III. Choice of Law**

#### **A. Contract Claims**

Choice of law issues for contract claims are controlled by O.R.S. 15.300 to 15.380. To the extent not specifically excluded by O.R.S. 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 OR. REV. STAT. § 15.360 (relating to choice of law applicable to contracts).

The first question is whether the laws of Oregon and the other jurisdiction are actually in conflict. Lilienthal v. Kaufman, 239 Or. 1, 5, 395 P.2d 543, 544 (1964). 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 F.3d 1385 (9th Cir. 1993); Biomass One, L.P. v. S-P Const., 120 Or. App. 203, 208 n.2, 852 P.2d 844, 846 n.2 (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 P.2d 1350, 1351, review denied, 307 Or. 246 (1988); see also OR. REV. STAT. § 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 O.R.S. 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 O.R.S. 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, issued, and, to a lesser extent, where the risks covered by the policy are principally located.

#### **B. Tort and other Non-Contractual Claims**

Choice of law for tort and other non-contractual claims are controlled by O.R.S. 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. OR. REV. STAT. § 15.440. No Oregon appellate court has applied O.R.S. 15.400 to 15.460. 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 P.2d 494, 495 n.2 (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 P.3d 803, 809-10 (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 P.2d 398, 401, review denied, 326 Or. 58, 944 P.2d 948 (1997) (citing Lilienthal, further citation omitted); see also Frost v. Lotspeich, 175 Or. App. 163, 188-90, 30 P.3d 1185, 1198-99 (2001) (applying Lilienthal and Stricklin).

#### IV. Duties Imposed by State Law

##### A. Duty to Defend

##### 1. Standard for Determining Duty to Defend

An Oregon insurer's duty to defend is generally determined by comparing the terms of its policy with the allegations of the suit against its insured. Ledford v. Gutoski, 319 Or. 397, 399-400, 877 P.2d 80, 82-83 (1994); accord Bresee Homes, Inc. v. Farmers Ins. Exch., 353 Or. 112, 116, 293 P.3d 1036, 1039 (2012); Marleau v. Truck Ins. Exch., 333 Or. 82, 89, 37 P.3d 148, 152 (2001). But cf. Fred Shearer & Sons, Inc. v. Gemini Ins. Co., 237 Or. App. 468, 477-78, 240 P.3d 67, 73-74 (2010) (the duty to defend determination is not limited to the four corners of the underlying complaint when the determination turns on whether the claimant is an insured under the applicable insurance policy). The duty to defend exists if, without amendment, the suit allegations reasonably can be read to state a legally cognizable claim that the policy covers. Bresee Homes, 353 Or. at 117, 293 P.3d at 1039; Marleau, 333 Or. at 91, 37 P.3d at 154; Delta Sand & Gravel Co. v. Gen. Ins. Co. of America, 111 Or. App. 347, 350, 826 P.2d 82, 84, review denied, 314 Or. 175 (1992). An insurer with an obligation to defend one claim has an obligation to defend all claims against its insured. See Abrams v. Gen. Star Indem. Co., 335 Or. 392, 399-400, 67 P.3d 931, 935 (2003) (stating that the insurer has a duty to defend if the complaint contains allegations of covered conduct, even if it also contains allegations of excluded conduct); Timberline Equip. Co. v. St. Paul Fire and Marine Ins. Co., 281 Or. 639, 645, 576 P.2d 1244, 1247 (1978).

##### 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 P.2d 1296, 1299 (1985); Safeco Ins. Co. v. Barnes, 133 Or. App. 390, 395, 891 P.2d 682, 685, review denied, 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 P.2d 7, 14 (1992).

## **B. 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, 831 P.2d at 12-14; Maine Bonding, 298 Or. at 519, 693 P.2d at 1299; see also Goddard ex rel. Estate of Goddard v. Farmers Ins. Co. of Oregon, 173 Or. App. 633, 637, 22 P.3d 1224, 1227, review denied, 332 Or. 631 (2001) (duty to settle may include duty to initiate settlement discussions). 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 P.2d 812, 814 (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. v. Barnes, 133 Or. App. at 395-97, 891 P.2d at 685 (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).

## **V. Extracontractual Claims Against Insurers: Elements and Remedies**

### **A. Bad Faith**

#### **1. First-Party**

An insurer's bad faith refusal to pay policy benefits to its insured sounds in contract and is not an actionable tort in Oregon. Employers' Fire Ins. v. Love It Ice Cream, 64 Or. App. 784, 791, 670 P.2d 160, 165 (1983). However, an insurer's conduct in a first-party dispute may support tort recovery under a recognized tort theory, such as intentional infliction of emotional distress or wrongful interference with business relationships. Employers' Fire, 64 Or. App. at 791, 670 P.2d at 165; see also Green v. State Farm Fire and Cas. Co., 667 F.2d 22, 24 (9th Cir. 1982) (applying Oregon law).

#### **2. 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, 313 Or. at 110-11, 831 P.2d at 14; Maine Bonding, 298 Or. at 517-19, 693 P.2d at 1298-99 (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, 313 Or. at 110-11, 831 P.2d at 14 (negligence claim); Employers' Fire, 64 Or. App. at 791, 607 P.2d at 165 (insurer's breach of fiduciary duty to insured is present in third-party claims).

#### **3. Implied Duty of Good Faith and Fair Dealing**

Oregon law imposes a duty of good faith and fair dealing in the performance and enforcement of every contract, including insurance contracts, as long as it is consistent with the express terms of the contract. Hampton Tree Farms, Inc. v. Jewett, 320 Or. 599, 615, 892 P.2d 683, 693 (1995); McKenzie v. Pac. Health & Life Ins. Co., 118 Or. App. 377, 847 P.2d 879 (1993), review dismissed, 318 Or. 476 (1994) (health insurance contract). "[A] claim for breach of the duty of good faith may be pursued independently

of a claim for breach of the express terms of the contract." McKenzie, 118 Or. App. at 380-81, 847 P.2d at 881. In addition to typical contract damages, if physical harm results from an insurer's breach, the insured may also recover emotional distress damages. McKenzie, 118 Or. App. at 381-82; 847 P.2d at 881-82.

A claim for tortious breach of the implied covenant of good faith and fair dealing may exist if the parties have a "special relationship." See Bennett v. Farmers Ins. Co., 332 Or. 138, 160, 26 P.3d 785, 798 (2001). That type of relationship exists if the insured authorized the insurer to exercise independent judgment on his behalf, and the insurer in fact acted to further the insured's economic interests. See Bennett, 332 Or. at 160-63, 26 P.3d at 798-800; Conway v. Pac. Univ., 324 Or. 231, 240-41, 924 P.2d 818, 823-24 (1996).

#### **B. Fraud**

The elements of fraud are:

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

Strawn v. Farmers Ins. Co. of Oregon, 350 Or. 336, 351-52, 258 P.3d 1199, 1209 (2011), adhered to on reconsideration, 350 Or. 521 (2011); see also Knepper v. Brown, 345 Or. 320, 329-30, 195 P.3d 383, 387 (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 P.2d 595, 602-03 (1987). "To be 'clear and convincing,' evidence must establish that the truth of the facts asserted is 'highly probable.'" Id.

#### **C. Intentional or Negligent Infliction of Emotional Distress (IIED or NIED)**

##### **1. IIED**

"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 P.2d 841, 849 (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. McGanty, 321 Or. at 550-51, 901 P.2d at 852-53 (adopting the Restatement (Second) of Torts' definition of "intent"). 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 P.2d 202, 203 (1998), review denied, 327 Or. 431 (1998); Watte v. Edgar Maeyens, Jr., M.D.,

P.C., 112 Or. App. 234, 239, 828 P.2d 479, 481, review denied, 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 P.2d 1298, 1299, review denied, 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 P.2d 959, 964 (1984), review denied, 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. 2006), aff'd, 286 Fed. Appx. 449 (9th Cir. 2008); cf. Green, 667 F.2d 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).

## 2. NIED

In Oregon, a person generally cannot recover for negligent infliction of emotional distress unless the person is physically injured, threatened with physical injury, or physically impacted by the tortious conduct. Lockett v. Hill, 182 Or. App. 377, 380, 51 P.3d 5, 6-7 (2002); see also Hammond v. Central Lane Commc'ns Ctr., 312 Or. 17, 22-23, 816 P.2d 593, 596 (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 . . . ." Id. (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, 51 P.3d at 6-7 (citation omitted). It must be "of sufficient importance as a matter of public policy to merit protection from emotional impact." Lockett, 182 Or. App. at 380, 51 P.2d at 7. 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 P.2d 88, 95-96 (1985), review denied, 300 Or. 545 (1986) (loss of home).

## D. State Consumer Protection Laws, Rules and Regulations

O.R.S. 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, 984 P.2d at 922-23. Instead, it subjects the insurer to civil penalties enforced by the state. OR. REV. STAT. § 731.988; Farris, 284 Or. at 458, 587 P.2d at 1017-18.

Among Oregon's other consumer protection laws are: (1) the Unlawful Trade Practices Act, O.R.S. 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, O.R.S. 815.410; (3) O.R.S. 83.010 to 83.680 (requiring certain disclosures in consumer credit contracts); (4) the Consumer Warranty Act, O.R.S. 72.8010 to 72.8200 (enforcement of U.C.C. warranty provisions); (5) Oregon's "lemon law," O.R.S. 646A.400 to 646A.418 (allowing return or replacement of new motor vehicle



with uncorrectable defect covered by manufacturer's express warranty); (6) O.R.S. 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, O.R.S. 646.639 to 646.041 (prohibiting certain practices in the collection of consumer debts).

## **VI. Discovery Issues in Actions Against Insurers**

### **A. 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 (O.R.C.P.) 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 O.R.C.P. 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 P.2d 1059, 1061, review denied, 303 Or. 332 (1987).

### **B. 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 OR. R. CIV. P. 36 B(1) (stating general discoverability standards).

### **C. 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 O.R.C.P. 36 B(1).

### **D. 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).

## **VII. Defenses in Actions Against Insurers**

### **A. Misrepresentations/Omissions: During Underwriting or During Claim**

Under O.R.S. 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 P.3d 759, 763-64 (2004); see also OR. REV. STAT. § 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 P.2d 32, 35

(1994); accord Story v. Safeco Life Ins. Co., 179 Or. App. 688, 693, 40 P.3d 1112, 1116 (2002). The insurer's reliance on the misrepresentations must be, among other things, justifiable. Story, 179 Or. App. at 693-95, 40 P.3d at 1116-17. Absent information giving the insurer notice that the applicant has misrepresented facts, the insurer has no obligation to investigate the applicant's misrepresentations. Story, 179 Or. App. at 696, 40 P.3d at 1117; cf. Seidel v. Time Ins. Co., 157 Or. App. 556, 561-62, 970 P.2d 255, 257-58 (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 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 P.2d 888, 888-89 (1993) (fraudulent claim); OR. REV. STAT. § 742.208 (insured's willful concealment or misrepresentation of material fact, before or after a loss, voids entire fire policy).

#### **B. 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 P.2d 219, 222 (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 P.2d 1312, 1315 (1995).

#### **C. 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 P.2d 110, 112-13, reh'g denied, 346 P.2d 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 P.2d 1298, 1305 (1980) (discussing the doctrine of excuse); see also Holloway v. Republic Indem. Co. of America, 341 Or. 642, 147 P.3d 329 (2006) (invalidating insured-defendant's purported assignment of rights under policy to plaintiff, based on policy's anti-assignment provision).

#### **D. Statutes of Limitations**

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. OR. REV. STAT. § 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. OR. REV. STAT. § 12.110(1).

### **VIII. Trigger and Allocation Issues for Long-Tail Claims**

#### **A. Trigger of Coverage**

Oregon appellate courts have not announced a generally applicable rule that determines when property damage that is not easily divisible occurs. 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 P.2d 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).

#### **B. 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. 110 at 129, 341 P.2d at 110-19 (1959). But see Cascade Corp. v. American Home Assurance Co., 206 Or. App. 1, 135 P.3d 450, review 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. at 699-700, 870 P.2d at 265, modified, 128 Or. App. 234 (1994), rev'd on other grounds, 324 Or. 184 (1996) (noting that allocation issue is separate from coverage trigger issue).

### **IX. Contribution Actions**

#### **A. 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 P.2d 1212, 1213 (1988) (citing Lamb-Weston, 219 Or. 110, 341 P.2d 110 (1959)). 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. See OR. REV. STAT. § 465.480(4).

#### **B. 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 P.2d 198, 203 (1965). Unlike in statutory contribution claims between tortfeasors, there are no clearly delineated elements. Cf. OR. REV. STAT. § 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. See Lamb-Weston, 219 Or. 110, 341 P.2d 110.

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. OR. REV. STAT. § 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.

OR. REV. STAT. § 465.480(5).