I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determination

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. Fid. and Guar. Co.*, 284 Or 453, 458, 587 P2d 1015 (1978). The maximum penalty for each violation is $10,000 ($1,000 for individual insurance producers, adjusters or insurance consultants). ORS 731.988(1).

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 proof of loss is filed, if the insured brings an action an 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).

The Oregon Supreme Court recently expanded on what constitutes “plaintiff’s recovery” to determine whether that recovery exceeds the insurer’s tender. *Long v. Farmers Ins. Co. of Oregon*, 360 Or 791, 803-04, 388 P3d 312 (2017). The court specified 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.*

A “proof of loss,” which starts 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).” *Dockins v. State Farm Ins. Co.*, 329 Or 20, 29, 985 P2d 796 (1999). The Oregon Supreme Court clarified that 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). 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

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1 Recently proposed legislation, if it passes in its current form, would allow penalties of up to $50,000 (for a first violation) and $100,000 (for subsequent violations) where “the Attorney General finds that an insurer or other person is engaged in a pattern or practice of resistance to the rights that the Insurance Code protects or that an insurer or other person has been denied rights that the Insurance Code protects to a group of persons.” 2019 Oregon House Bill No. 2421, § 9.
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 Determination and Settlements

ORS 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;

\[\ldots\]

(d) Refusing to pay claims without conducting a reasonable investigation based
on all available information;

\[\ldots\]

(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. ORS 731.988; Farris, 284 Or at 458;
Richardson, 161 Or App at 623-24.

II. PRINCIPLES OF CONTRACT INTERPRETATION

“The primary governing rule of the construction of insurance contracts is to ascertain the
(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. Unambiguous terms
are given their plain and common meaning. 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.

III. CHOICE OF LAW

A. Contract Claims

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).

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 P2d 543 (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 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.

B. Tort and Other Non-Contractual Claims

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–I 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, further citation omitted); see also Frost v. Lotspeich, 175 Or App 163, 188-90, 30 P3d 1185 (2001) (applying Lilienthal and Stricklin).

IV. Duties Imposed by State Law

A. 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, – P3d – (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.

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

**B. 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 165.992; ORS 165.900. 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).


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.

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2 Recently proposed legislation, if passed in its current form, would pay any expenses incurred in the recovery of punitive damages first, and divide the remaining amount in equal amounts to the prevailing party, the attorney for the prevailing party, and the Attorney General for deposit in the Criminal Injuries Compensation Account. 2019 Oregon SB No. 874, § 1.
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).

V. **EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES**

A. **Bad Faith Claim handling/Bad Faith Failure to Settle Within Limits**

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 P2d 160 (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. Id. at 791; see also Green v. State Farm Fire & Cas. Co., 667 F2d 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, 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, 313 Or at 110-11 (negligence claim); Employers’ Fire, 64 Or App at 791 (insurer’s breach of fiduciary duty to insured is present in third-party claims).

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.


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 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-Čnty. 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).
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, 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).

D. **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. *But cf.* n 1.

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).

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 (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).

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 ORCP 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 ORCP 36 B(1).

D. Attorney/Client Communications

VII.  Defenses in Actions Against Insurers

A.  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).


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 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).

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 P2d 110, reh’g denied, 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).

D. **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.

VIII. **TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS**

A. **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 Homeowners’ Ass’n v. Fountaincourt Dev., LLC*, 360 Or 341, 364, 380 P3d 916 (2016).

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. *But see Cascade Corp. v. American Home Assurance Co.*, 206 Or App 1, 135 P3d 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 P2d 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). *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).

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 P2d 1212 (1988) (citing *Lamb-Weston*, 219 Or 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. ORS 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 reimbursed[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).

X. 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, 693 P2d at 1299. 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. v. Barnes, 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).

XI. LH&D BENEFICIARY ISSUES

A. 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, 213 Or App at 305. 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).

**B. 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 v. Great-West Life Assur. Co.*, 213 Or App 298, 160 P3d 1026 (2007) (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.

**XII. INTERPLEADER ACTIONS**

**A. 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.*

**B. Differences in State v. 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).