

STATE LAW SUMMARY

Overview of the State of Oregon

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Overview of the State of Oregon Court System

A. Trial Courts

The Oregon court system is made up of county circuit courts at the trial level, one Court of Appeals, and the State Supreme Court. Each of 36 county Circuit Courts serve as a court of general jurisdiction.

B. Appellate Courts

Oregon has two appellate-level courts, the Court of Appeals and the Supreme Court. With a few exceptions, the Court of Appeals has exclusive jurisdiction of virtually all appeals. This includes judgments from circuit courts in civil cases and workers' compensation board decisions.

Finality of a judgment is the key to obtaining appellate jurisdiction. The list of final judgments includes (1) An ordinary judgment, (2) An order that affects a substantial right and effectively determines the action so as to prevent a judgment, (3) a post-judgment order that affects a substantial right, including an order for a new trial, and (4) a ruling in a special statutory proceeding.

An appeal to the Court of Appeals must be filed within 30 days of entry of the trial court's judgment.¹

A party may seek review of a decision by the Court of Appeals within 35 days of the decision.² Appeals from the Court of Appeals to the Supreme Court are discretionary.³

Procedural

A. Venue

Actions relating to real property, or for recovery of personal property, must be commenced in the county where the property is located.⁴

For virtually all other actions (i.e., tort and contract cases), venue is proper either in the county where the cause of action arose or any county where one of the defendants resides. If no defendant resides in the state, venue is proper in any county.⁵

A domestic corporation, or a foreign corporation authorized to do business in Oregon, is deemed to be a resident of any county (i) in which it conducts regular sustained business activity, (ii) has an office for the transaction of business, or (iii) where an agent authorized to accept service resides.⁶

A foreign corporation which is *not* authorized to do business in Oregon, has no residency in Oregon for purposes of determining venue.⁷

Multnomah County (Portland) is the most liberal of Oregon counties, and is considered plaintiff friendly. Somewhat more moderate county venues include: Washington (Beaverton), Marion (Salem), Lane (Eugene), and Jackson (Medford) counties. Most all others are conservative venues.

A motion to change venue on grounds the action was commenced in the wrong county must be made before an answer is filed.⁸ Motions to change venue based upon convenience of the parties and witnesses – which are disfavored – may be made at any time before trial.⁹

B. Statute of Limitations

1. Bodily Injury

The statute of limitations for personal injury actions in Oregon is two years.¹⁰

2. Property Damage

An action for property damage must be commenced within six years.¹¹

3. Wrongful Death

Wrongful death actions must be brought within three years of death, or three years from discovery or when the act or omission causing death should have reasonably been discovered.¹²

4. Claims Brought By Public Bodies

Unless specifically stated otherwise, statutes of limitations do not apply to actions brought in the name of, or on behalf of, the State or any public body.¹³

5. Tort Claims Against Public Bodies

A tort claim against a public body may not be maintained unless a statutorily prescribed notice of the claim is given within one year following the injury for wrongful death claims or within 180 days after the injury for all other claims.¹⁴

6. Claims By Minors

If, at the time a bodily injury or property damage cause of action accrues, plaintiff is 18 years of age or younger, the statute of limitations is tolled. The civil action, however, must be filed within one year after plaintiff turns 18. In no event shall the statute of limitations be tolled for more than five years.¹⁵

7. Breach of Contract/Bad Faith Claims

The statute of limitations for breach of contract is six years unless a sale of goods governed by the Uniform Commercial Code is involved.¹⁶ An action involving the sale of goods must be commenced within four years.¹⁷

For the sale of goods, the parties, by original agreement, can shorten the limitations period to not less than one year, but may not extend it.¹⁸

An insurance bad faith claim seeking tort damages must be commenced within two years.¹⁹ Normally, the action will accrue when the excess verdict is returned. The claim may accrue earlier in situations where the insured hired personal counsel to protect his interest.²⁰

If a bad faith claim is based solely on a breach of a provision in the insurance policy, the remedy is breach of contract and the applicable statute of limitations is six years.²¹

C. Time for Filing an Answer

A responsive pleading (i.e., answer or motion against the complaint) must be filed within 30 days of service.²²

If a defendant has provided *written* notice of intent to appear, the plaintiff must provide ten day's written notice prior to taking an order of default.²³

D. Dismissal and Re-Filing of Suit

If an action is involuntarily dismissed without prejudice on any ground not adjudicating the merits of the action, or is involuntarily dismissed with prejudice on the ground that the plaintiff failed to properly effect service of summons and the statute of limitations for the action expired, the plaintiff may commence a new action against a defendant in the original action if the defendant had actual notice of the filing of the original action not later than 60 days after the action was filed.²⁴

The new action must be commenced within 180 days of the dismissal of the original action.²⁵

There is no similar "savings clause" for voluntary dismissals. Any new action following a voluntary dismissal must be commenced within the applicable limitations period.

Liability

A. Negligence

Oregon has abandoned the traditional "duty" analysis for most common law negligence claims. Instead of analyzing a defendant's liability in terms of breaching a "duty," liability depends on whether a defendant's conduct "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff."²⁶

A traditional "duty" analysis continues to apply in situations where a party invokes a particular status, relationship, or rule which creates, defines or limits the defendant's duty in that particular situation.²⁷ Examples where the concept of "duty" continues to apply include: premises liability, breach of fiduciary duty, products liability, and medical and legal malpractice actions.

B. Negligence Defenses

Oregon is a "modified" comparative fault state, where plaintiff's damages are reduced by the percentage of fault attributed to plaintiff. Plaintiff is barred from recovery if found more than 50% at-fault.²⁸

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

In a negligence case, describing a defendant's conduct as grossly negligent, reckless, or willful and wanton does not change the nature of the cause of action or preclude application of comparative fault.²⁹ Such terms only have significance in a punitive damages context. See *discussion infra*.

Oregon's criminal code provides that "recklessly" means a person is aware of

and consciously disregards a substantial and unjustifiable risk; the risk must be of such nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.³⁰

Using that definition, the Motor Vehicle Code goes on to define “reckless driving” as recklessly driving in a manner that endangers the safety of persons or property.³¹ Violation of the statute is a Class A Misdemeanor.³²

Apart from definitions contained in the criminal and motor vehicle codes, Oregon cases have, on a somewhat inconsistent basis, interchangeably used the terms “reckless,” “wanton,” and “willful” to describe the same culpable conduct. Reckless or wanton misconduct is an intentional act (or failure to act) when one knows or has reason to know that the conduct not only creates an unreasonable risk of harm to others but also involves a high degree of probability that substantial harm will result.³³

D. Negligent Hiring and Retention

A cause of action for negligent hiring and retention is independent of a cause of action for *respondeat superior*.³⁴

The owner of a vehicle is liable where he knew that the borrower was incompetent, or a reckless or careless driver, and likely to cause injury to others.³⁵

Oregon courts have ruled that a claim for negligent hiring, training, or retention is not actionable as a separate claim where the employer admits its driver was acting within the scope and course of his employment at the time of the driver's alleged negligent actions.³⁶ However, such claims could be actionable if punitive damages were sought based on the employer's willful and wanton failures regarding hiring and supervision.

E. Negligent Entrustment

A motor vehicle owner who entrusts his or her vehicle to a person when the owner knows or reasonably should know that the person would operate the vehicle in a negligent manner is liable for negligent entrustment of the vehicle.³⁷

Claims of negligent entrustment are duplicative if agency is admitted.

F. Dram Shop

There are three forms of dram shop liability in Oregon

- Common law negligence without reference to any statute³⁸
- For serving liquor to a minor, in violation of ORS 471.567, which is negligence *per se*.
- Finally, there is a form of strict liability found in ORS 471.565 for a bar tender who served alcohol to a person who was intoxicated, or whom he should know is intoxicated.

G. Joint and Several Liability

Liability for all damages is several only and not joint.³⁹

The trier of fact first determines the amount of damages to which plaintiff would be entitled if he is not at fault.⁴⁰ Then the percentage of fault of all parties (plaintiff, defendants, and third party defendants), and all persons with whom plaintiff has settled is determined.⁴¹ The jury may not allocate fault to a non-party.

Each liable party's share of the damages is calculated by multiplying its percentage of fault by the total amount of damages, with no reduction for settlement or contribution.⁴²

If a defendant's share of damages proves to be uncollectible, the plaintiff may apply to the court to have the non-paying party's share reallocated to other defendants.⁴³ No reallocation can be made to any defendant whose fault does not exceed 25%.⁴⁴

H. Wrongful Death and/or Survival Actions

Oregon's wrongful death statute provides that the personal representative of a decedent's estate may maintain an action against the wrongdoer if the decedent might have maintained an action, had the decedent lived, for an injury done by the same act or omission.⁴⁵

The wrongful death action is brought for the benefit of the decedent's surviving spouse, children, parents, and other persons, if any, who would be entitled to inherit the decedent's personal property under the law of intestate succession of the state of the decedent's domicile, and for the benefit of any step-child or step-parent, whether entitled to inherit from the decedent or not.⁴⁶ An unborn but "viable" fetus is a person within the meaning of Oregon's wrongful death statute.⁴⁷

I. Vicarious Liability

An employer is liable for the acts of an employee committed within the scope of his or her employment.⁴⁸ The employee may exceed the scope of his employment if he is on a detour or frolic. If so, the employer's vicarious liability turns on the issue of whether the deviation is minor or substantial.⁴⁹

As a general rule, an employer is not responsible for the negligence of an employee committed while the employee was going to or from work. However, the employee may be found within the scope of his or her employment while traveling to and from work if some of the following factors are present:

- a. The employer has the right to dictate the manner of travel, the route taken, or the method of travel;
- b. The employer pays extra compensation to cover the cost of

transportation; or

c. The employee is compensated for the time spent traveling to or from work.⁵⁰

Placard or “logo” liability generally refers to the doctrine that the display of a motor carrier’s placard (i.e., its name and USDOT number) creates a presumption of imputed liability upon the carrier, without regard to the actual use of the equipment at the time of an accident.

There are no Oregon cases, nor any controlling Ninth Circuit cases, regarding presumptions arising from the display of placards.⁵¹

Similarly, there are no Oregon state cases dealing with motor carrier liability under leasing arrangements.

Under Ninth Circuit authority, if equipment is under a permanent lease, and a trip lease is executed with another carrier, both the permanent lessor and the trip lessor may be found liable for a driver’s negligence.⁵² Further, despite the regulatory requirement that equipment leases must be in writing, an oral trip lease may lead to imputed liability.⁵³

J. Exclusivity of Workers’ Compensation

Oregon’s workers’ compensation system generally provides the “exclusive remedy” for employees injured upon the job, provided the employer has provided the required workers’ compensation insurance coverage.⁵⁴

Notwithstanding this exclusivity, a worker may sue his or her employer for any injuries that result from the deliberate intention of the employer⁵⁵ or from the employer’s “willful and unprovoked aggression.”⁵⁶

Damages

A. Statutory Caps on Damages

As part of its 1987 “tort reform,” the Oregon legislature adopted a \$500,000 cap on awards of non-economic damages.⁵⁷ Subsequently, however, the courts held that the cap violated the state Constitution if applied to common law causes of action,⁵⁸ so the 1987 statutory cap does apply to an award of damages in an ordinary negligence action (or any similar common law cause).

However, the courts also held that the cap was *not* unconstitutional if applied to any statutorily-created cause of action. Specifically, because a cause of action for wrongful death was unknown at common law and is solely a creature of statute, the legislature was free to create and limit the remedy. Therefore, no more than \$500,000 in non-economic damages can be awarded for claims of wrongful death.⁵⁹

Two other limitations on awards of noneconomic damages have also passed

judicial scrutiny, both of which apply in actions arising from the operation of motor vehicles.⁶⁰

First, a plaintiff may not recover non-economic damages if he or she was injured while operating a motor vehicle without being insured under a liability insurance policy.⁶¹ This limitation will not apply if the plaintiff had been insured at some point within the 180 days preceding the accident *and* if the plaintiff had not driven while uninsured within one year before the policy had lapsed.⁶²

Second, a plaintiff may not recover non-economic damages if he or she was guilty of DUII at the time of the accident.⁶³

Note, neither of these limitations apply if the defendant was (i) also driving while uninsured or impaired, (ii) driving "recklessly," (iii) engaged in a felony, or (iv) intentionally injured plaintiff.⁶⁴

B. Compensatory Damages for Bodily Injury

A personal injury plaintiff may recover "non-economic" and "economic" damages, which are statutorily defined terms.

Non-economic damages are "subjective, non-monetary losses, including pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience, and interference with normal and usual activities apart from gainful employment."⁶⁵

Economic damages are "...objectively verifiable monetary losses including the reasonable charges necessarily incurred for medical, hospital, nursing care services, loss of income, past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, and reasonable costs incurred for repair or for replacement of damaged property, whichever is less."⁶⁶

C. Collateral Source

A plaintiff may recover damages that have already been paid by other insurance. The paying company will have a lien against any recovery in the lawsuit. Further, plaintiff is permitted to recover even for those amounts that have been written off by a medical provider⁶⁷.

D. Pre-Judgment / Post Judgment Interest

Unless otherwise provided by contract, the statutory accrual rate for both pre-judgment and post-judgment interest is 9% per annum (simple interest).⁶⁸

Pre-judgment interest is allowed on both "liquidated damages" and where the damages demand is of such a nature that its exact pecuniary amount is either ascertained, or ascertainable by simple computation or by reference to recognized standards.⁶⁹

Post-judgment interest accrues from the date the judgment is entered, unless the judgment specifies another date. Interest accrues on the principal of the judgment and any pre-judgment interest, costs, and attorney fees entered as part of the judgment.⁷⁰

E. Damages for Emotional Distress

Oregon continues to follow the general rule that mental distress damages are not recoverable in a negligence action unless the plaintiff has suffered physical injury or some physical manifestation of injury.⁷¹

Recovery may be had for severe emotional distress without accompanying physical injury by showing recklessness or intent to do a painful act with knowledge that it will cause grave distress, when the tortfeasor's position in relation to the injured party involves some responsibility aside from the tort itself.⁷²

F. Wrongful Death and/or Survival Action Damages

The damages recoverable in a wrongful death action are set forth by statute and include:

- Charges for medical, burial, and memorial expenses;
- Any loss of income suffered by the decedent between the injury and the date of death;
- Damages for conscious pre-death pain & suffering between the injury and the date of death;
- Pecuniary loss to the decedent's estate (i.e., net present value of decedent's expected lifetime earnings minus personal consumption);
- Pecuniary loss to the decedent's spouse, children, or parents (i.e., the present value of the financial contributions and services that would have been provided during the decedent's expected lifetime);
- Damages for the beneficiaries' loss of the decedent's society and companionship.

Of these damage elements, pain & suffering and loss of society/companionship are characterized as "noneconomic damages" and the remaining elements are characterized as "economic" damages.

No damages may be recovered for grief or bereavement.⁷³

Non-economic damages in a wrongful death action are subject to a \$500,000 cap.⁷⁴

G. Punitive Damages

Punitive damages are recoverable only when established by clear and convincing evidence. The evidence must demonstrate the tortfeasor acted with malice, or showed a reckless and outrageous indifference to a highly

unreasonable risk of harm and acted with a conscious indifference to the health, safety, and welfare of others.⁷⁵

The original complaint cannot assert a claim for punitive damages.⁷⁶ After the complaint is filed, plaintiff must file a motion to amend to include a claim for punitive damages. The parties may submit affidavits and documentation supporting or opposing the punitive damages claim. Within 30 days after the motion is filed and served, the court is required to conduct a hearing on the motion.⁷⁷ The motion will be denied if the supporting documentation fails to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict to the tortfeasor on the issue of punitive damages at trial.⁷⁸

Discovery of defendant's net worth is prohibited unless and until the court permits the claim for punitive damages to proceed.⁷⁹

If the jury awards punitive damages, the court may reduce the award if it determines the award is not within the range of damages a rational juror would be entitled to award.⁸⁰ The court may further reduce the amount of punitive damages awarded if the tortfeasor has taken remedial measures that prevent a reoccurrence of the conduct that gave rise to the claim for punitive damages. Finally, the court may reduce a punitive damages award if the same defendant has previously incurred judgments for the same conduct.⁸¹

The punitive damages portion of an award is allocated as follows:

(1) Thirty percent is paid to the prevailing party. The prevailing party's attorney is paid out of this percentage, in an agreed amount not to exceed 20% of the total punitive damages award.⁸²

(2) Seventy percent is paid to the state Criminal Injuries Compensation Account or, if the prevailing party is a public entity, to the entity's general fund.⁸³

H. Diminution in Value of Damaged Vehicle

In addition to recovering the cost of repairing damaged property, Oregon courts have also permitted recovery for the "inherent diminished value" as compensation for the fact that even after repairs, the vehicle may not be returned to its pre-accident value.⁸⁴ Although diminished value must be based on "sufficient proof," testimony from the vehicle's owner about diminished value has been held to be "sufficient."⁸⁵

I. Loss of Use of Motor Vehicle

Where property is damaged but not destroyed, the property owner is entitled to recover damages for loss of use in addition to diminution damages. Loss of use damages are limited to the reasonable period of time necessary to repair the property. Loss of use is measured by the reasonable rental value of the property, and can be recovered even if no substitute rental has been arranged.⁸⁶

If the property was used for a commercial purpose, and no substitute property was readily available, net profits are recoverable.⁸⁷ As with loss of use damages, lost revenue is limited to the reasonable time needed to repair the vehicle or replace the vehicle in the event of a total loss.

J. Attorney's Fees in Small Claims Dispute

In an action for damages to a person or property, or both, where the amount pleaded is \$10,000 or less, a prevailing plaintiff is entitled to reasonable attorney fees if, that not less than thirty (30) days before the commencement of the action, the plaintiff made a written demand on defendant (and defendant's insurer, if known) for payment of the claim. The demand must include medical records and bills (in an injury case) and repair bills or estimates (in a property damage case).⁸⁸

However, no attorney fees will be allowed to plaintiff if the court finds that the defendant tendered to plaintiff, prior to the commencement of the action, an amount not less than the damages awarded to plaintiff.⁸⁹ To avoid or reduce attorney fee exposure, a pre-suit good faith offer should be strongly considered in any case under ORS 20.080. Once the suit has been filed, a later Offer of Judgment will not cut off a 20.080 claimant's right to attorney fees.

If the defendant pleads a counterclaim for \$10,000 or less, and the defendant prevails in the action, the court shall award reasonable attorney fees.⁹⁰

Evidentiary Issues

A. Preventability Determination

Arguably, a preventability determination made as part of an established safety/disciplinary program is a subsequent remedial measure and thus, inadmissible. However, there is no Oregon authority on point.

B. Traffic Citation from Accident

The fact that a person was issued a citation or charged with a traffic crime is not admissible in a related civil action.

A plea, finding, or conviction in a *traffic violation* proceeding is not admissible for any reason in any civil action.⁹¹ A traffic "violation" is an offense punishable only by a fine, and not any term of imprisonment. Common violations include violation of the basic rule, speeding, careless driving, failure to yield the right of way, failure to drive on the right, and improper turning.⁹²

A plea or a judgment (whether of conviction or innocence) in a *traffic crime* proceeding is not admissible in a related civil action to prove or negate the facts on which the judgment was rendered.⁹³ A traffic "crime" is punishable by a jail sentence,⁹⁴ and includes offenses such as reckless driving and DUII.⁹⁵ The exception to this rule is for a *plaintiff's* conviction of DUII, which is conclusive and which bars the plaintiff from recovering non-economic damages.

C. Failure to Wear a Seat Belt

Evidence of an injured party's failure to use an available seat belt is only admissible to mitigate the injured party's damages. Mitigation is limited to 5% of plaintiff's total recovery. These limitations do not apply in the unusual situation where the failure to use a seat belt was a substantial contributing cause to the accident itself.⁹⁶

D. Failure of Motorcyclist to Wear a Helmet

State law requires both operators and passengers of motorcycles to wear helmets. Failure to do so is a traffic violation.

Unlike failure to use a seat belt, there is no statutory or case law restriction regarding the admissibility or the effect of a party's failure to wear a motorcycle helmet. Therefore, evidence of nonuse should be admissible if there is non-speculative evidence that the failure caused or contributed to the party's injuries.

E. Evidence of Alcohol or Drug Intoxication

A plaintiff is barred from recovering noneconomic (pain & suffering) damages in an action for injuries arising from a motor vehicle accident if at the time of the accident the plaintiff was in violation of the state statute prohibiting operation of a motor vehicle while (i) having a blood alcohol content of 0.08% or more, or (ii) while under the influence of alcohol, an inhalant, or a controlled substance.⁹⁷

A criminal conviction of DUII conclusively establishes the bar. If plaintiff has not been criminally convicted of DUII, the defendant may nonetheless plead and prove the elements of the offense by a preponderance of the evidence.⁹⁸

The bar on recovery of noneconomic damages does not apply if: (i) the defendant was also in violation of the DUII statute, (ii) the fact-finder determines that defendant was driving recklessly; (iii) the plaintiff's injuries resulted from an intentional tort, or (iv) defendant was engaged in conduct that would constitute a felony at the time of the accident or injury.⁹⁹

F. Testimony of Investigating Police Officer

Police officers are generally percipient witnesses. However, if they are able to qualify as experts, they are permitted to testify to their area of expertise.

G. Expert Testimony

Expert testimony is governed by ORS 40.410 and is allowed if scientific, technical or specialized knowledge would assist the fact-finder. An expert may be qualified by skill, experience, training or education.

Expert testimony conforms to the *Daubert Standard*. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions

or inferences upon the subject, the facts or data need not be admissible in evidence.

H. Collateral Source

The existence and contents of any insurance policy which may be liable to satisfy all or part of a judgment are discoverable.¹⁰⁰

I. Recorded Statements

Recorded statements are subject to hearsay objections. However, if the statement is made by a party, it is considered an admission¹⁰¹.

J. Prior Convictions

Prior convictions are admissible for impeachment if the crime was punishable by death or imprisonment for one year, or the crime involved dishonesty.¹⁰² Prior convictions are not admissible if more than 15 years have elapsed from the date of conviction or release from confinement imposed for the conviction.¹⁰³

K. Driving History

In general, the driver's history is irrelevant where the defendant has admitted that the driver was acting in the course and scope of his employment.

L. Fatigue

Unless directly at issue as a cause of the accident, evidence of past fatigue or hours of service violations is generally irrelevant once course and scope of employment is admitted. However, such evidence can be used in a case involving punitive damages, provided that the employer can be shown to have knowledge of the violations or fatigue, and there must be a causal connection to the accident.

M. Spoliation

Oregon does not recognize an independent cause of action for spoliation.

However, the jury can be instructed that willful suppression (or destruction) of evidence creates a rebuttable presumption that the evidence was adverse to the party who suppressed it.¹⁰⁴

The jury may also be instructed that if a party has offered weaker and less satisfactory evidence when it appeared the party could have offered stronger and more satisfactory evidence, then it "should distrust" the evidence that was offered.¹⁰⁵

Settlement

A. Offer of Judgment

Offers of Judgment may be made by a defendant at any time up to fourteen (14) days prior to trial¹⁰⁶. Any Offer of Judgment must be accepted within seven (7) days of the time it was served.¹⁰⁷ Unless an Offer of Judgment provides otherwise, costs, disbursements, and attorney fees shall be entered in addition to the amount offered.¹⁰⁸

If plaintiff fails to obtain a more favorable judgment than offered by defendant, he shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer.¹⁰⁹

NOTE: An offer of judgment *will not* cut off a prevailing plaintiff's right to attorneys' fees on a claim subject to ORS 20.080.¹¹⁰

B. Liens

1. Personal Injury Protection (PIP) Liens

Under the controlling statutes¹¹¹, an insurer that has provided PIP benefits on behalf of its insured can recover those in one of four ways. The method chosen may depend on whether another option is available or whether the PIP carrier has elected a particular method of recovery.¹¹²

First, the statutes provide that the motor vehicle liability insurer for the responsible tortfeasor must reimburse the PIP carrier for benefits paid on behalf of its injured insured. The PIP carrier must request the reimbursement, and must not have already elected recovery by lien (see the next option, below). Any disputes as to liability or the amount of recovery are decided through arbitration. Note: The reimbursement/arbitration option does *not* depend on the existence of an inter-company arbitration agreement; rather, it is a statutorily mandated option and procedure.¹¹³

Second, if the PIP carrier's insured either makes a claim or brings an action against a responsible third-party, the PIP carrier can elect to attach a lien to any recovery by the insured. The insured is required to notify the PIP carrier whenever a claim is asserted or an action is brought. The PIP carrier then has 30 days to elect recovery by lien, which is done by giving written notice of the election to the injured person and the person against whom the claim is made. If so elected, the injured person must include as damages the amount of benefits paid by the PIP carrier.¹¹⁴

Third, if the reimbursement option is not available and if the PIP carrier has not elected recovery by lien, it nonetheless remains entitled to recover the amount of its lien (less its share of fees and expenses) from any settlement or judgment its insurer obtains from a responsible party. The injured insured is required to hold the proceeds in trust for the PIP carrier, and must do whatever is proper to secure – and nothing to prejudice – the rights of the PIP carrier.¹¹⁵

Fourth, and again if the reimbursement option is not available, the PIP carrier may bring an action to recover the amount of the benefits it paid. The action is to be brought in the name of its insured (who is required by statute to cooperate), and can only be brought for the amount of the benefits provided by the PIP carrier.¹¹⁶

2. Workers' Compensation Liens.

A workers' compensation insurer has a statutory lien against any third party claim of an injured worker.¹¹⁷

The proceeds of any settlement or judgment obtained by an injured worker are distributed as follows: costs and attorney's fees are paid first from the proceeds; then, the injured worker receives one-third of the balance; the worker's compensation carrier receives all of the balance, up to the amount it has paid and the present value of any reasonably expected future compensation benefits. The balance of the proceeds, if any, is paid to the injured worker.¹¹⁸

A settlement made with an injured worker without the written consent of the workers' compensation carrier is void.¹¹⁹

3. Hospital and Physicians' Liens.

Hospitals and physicians are entitled to claim statutory liens unless the injured person was injured in a work-related accident which entitles him to benefits under the Workers' Compensation Act.¹²⁰ To perfect a hospital or physician's lien, a notice of lien must be filed with the county recorder within thirty (30) days after the injured party is discharged from the hospital. The medical provider must serve the alleged tortfeasor and his insurance carrier with a certified copy of the lien notice by registered or certified mail with return receipt before the date of any judgment or settlement.¹²¹ Any person or insurer who settles with the injured person after receiving a valid notice of lien is liable to the hospital or physician asserting the lien for the reasonable value of the service.¹²²

C. Minor Settlement

If no conservator has been appointed, a person having legal custody of a minor may enter into a settlement agreement on behalf of the minor if the total amount of the claim, not including medical bills, liens, attorney fees and costs of suit, is less than \$25,000.¹²³

In completing a settlement with a minor, the governing statute – ORS 126.725 – must be referred to as it contains very specific requirements regarding necessary supporting documents and the manner in which the settlement funds can be paid.

D. Negotiating Directly With Attorneys

Claims professionals are permitted to negotiate directly with attorneys¹²⁴.

E. Confidentiality Agreement

Confidentiality agreements are permitted. However, the clause should be contemplated in settlement negotiations – i.e. they require consideration.

F. Releases

A general release releases all claims and demands due at the time of execution and within the contemplation of the parties.

The intent of the parties controls whether all tortfeasors are released (full) or if only one party is released.¹²⁵

A notary is not required for the release to be valid.

No translation is required.

G. Voidable Releases

In a personal injury case, where a motor vehicle liability insurer obtains a release for bodily injury within 60 days following an accident where the releasing party is eligible for PIP benefits under ORS 742.518, the release must contain language notifying the releasing party that the rights of the insuring party are not impaired.¹²⁶

Transportation Law

A. State DOT Regulatory Requirements

Oregon does not appear to have any regulations beyond the FMCSR.

B. State Speed Limits

Oregon has a “basic speed rule” which prohibits driving at any speed greater than is reasonable and prudent under all the conditions then existing.¹²⁷

Depending on conditions, the basic speed rule can require travelling at less than the posted speed.¹²⁸

Traveling faster than a posted speed is prima facie evidence that the basic speed rule has been violated. In the absence of a posted speed, the following speed limits apply on state or city roads:

- 15 mph in alleys and narrow residential areas
- 20 mph in any business district or within a school zone
- 25 mph in residential districts, public parks, or ocean shores
- 55 mph on state roads or highways not described above.¹²⁹

Unless a different limit is posted, the speed limit on interstate highways in Oregon is 65 mph for cars, and is 55 mph for trucks with a GVWR over 10,000 pounds and for truck tractors with a GVWR over 8,000 pounds.¹³⁰

C. Overview of State CDL Requirements

- Meet the qualifications for or have a regular driver license (non-commercial class C).
- Be at least 18 years of age (or 21 to operate a commercial motor vehicle in interstate commerce)
- Provide proof of: full legal name; legal presence in the US; identity and state of birth; Social Security Number; valid Oregon residence address; and, a valid mailing address
- Pass the CDL knowledge test (offered in English only)
- Determine the appropriate CDL class (A, B, C) and pass any additional CDL knowledge tests and/or meet any additional requirements
- Complete the CDL application and indicate that you have at least one year of driving experience in at least a non-commercial class C vehicle
- Complete requirements for any CDL endorsements you need
- Pass a vision screening as defined under OAR 735-062-0050
- Present a valid medical examiner's certificate and, when required, a medical waiver or exemption
- Pass CDL skills test (offered in English only)
- Pay the applicable testing and issuance fees
- Not be suspended or otherwise disqualified from holding a CDL in Oregon or any other state

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Minimum Bodily Injury: \$25,000

Minimum Property Damage: \$20,000

Minimum PIP: \$15,000

Uninsured/Underinsured: \$25,000 per person and \$50,000 per accident

B. Uninsured Motorist Coverage

The UM/UIM statutes are found at ORS 742.500–742.510. They require UM/UIM coverage in all motor vehicle liability policies issued for delivery in Oregon, or issued and delivered by an insurance company doing business in Oregon with respect to a motor vehicle principally used or garaged in Oregon.

However, UM/UIM coverage is *not* required for (i) trucks designed to carry loads rather than passengers, (ii) that weigh more than 8,000 pounds, and (iii) are operated by employees who are covered by any workers' compensation or disability benefits law.

C. No Fault Insurance

Oregon has adopted a mandatory personal injury protection (PIP) law¹³¹.

The purpose of PIP is to reduce litigation, to provide prompt payment of claims, and to ensure that all insured drivers, their families and guests, and pedestrians injured by them, would recover medical and economic losses subject to limits purchased without regard to fault.

D. Disclosure of Limits and Layers of Coverage

After litigation is commenced, on request, “any adverse party shall disclose the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.”¹³²

Because of the potential limitation on recovery of non-economic damages discussed above, the existence of plaintiff’s liability insurance in a motor vehicle case is discoverable and should always be confirmed.¹³³

E. Unfair Claims Practices

Oregon’s unfair claims practices are regulated by statute.¹³⁴ These prohibit claims practices that would typically be considered unfair, such as failure to settle in good faith, failure to contact the insured, and failure to make coverage determinations in a reasonable time.¹³⁵

A violation of the statute may subject the insurer to an enforcement action by the director of the Department of Consumer and Business Affairs.¹³⁶

Violations of the Insurance Code do not give rise to a private cause of action.¹³⁷

F. Bad Faith Claims

A first-party insurer’s “bad faith” refusal to pay policy benefits sounds in contract and is not actionable in tort in Oregon.¹³⁸ A breach of the implied covenant of good faith and fair dealing also sounds in contract.¹³⁹ Punitive damages cannot be recovered for an insurer’s breach of a first-party contract.¹⁴⁰

However, bad faith claims giving rise to extra-contractual liability may arise from an insurer’s breach of a fiduciary duty that exists when the insurer assumes the defense of an insured.¹⁴¹ The duty requires the insurer, in conducting the defense, to use such care as would have been used by an ordinarily prudent insurer with no policy limit considerations.¹⁴² A breach of this duty is actionable as a tort.¹⁴³

A bad faith claim is actionable only if the insurer, having undertaken the defense of a claim, is negligent in failing to settle. To be negligent, an opportunity to settle must have existed, and the insurer, in choosing not to settle, took an unreasonable risk. A risk is unreasonable where the chance of an unfavorable result (excess liability) is out of proportion to the chance of a

favorable result. The degree of diligence required of the insurer increases in direct proportion to the extent of the risk of an excess verdict.¹⁴⁴

Conversely, if the fiduciary relationship does not materialize, neither does the insurer's duty. Thus, an insurer who denies a defense, rightly or wrongly, owes no duty of care and is not subject to excess liability. If the insurer should have defended the claim but failed to do so, the insured's remedy is a contract action for breach of the duty to defend.

A non-assignability clause in a liability policy does not preclude the insured from assigning a bad faith claim.¹⁴⁵ On the other hand, an unambiguous non-assignability clause will preclude an insured from attempting to assign a breach of contract action based on an insurer's allegedly wrongful refusal to defend a third-party claim.¹⁴⁶

G. Coverage - Duty of Insured

The insured generally has three duties – (1) provision of notice, (2) mitigation of damages, and (3) cooperation.

The notice provision is a standard component of any insurance contract. It allows the insurer to investigate the claim in a timely manner. If the insurer is prejudiced by the lack of notice, and the insured was not reasonable in failing to provide notice, the insurer may deny coverage. Notice is not necessarily a condition precedent to coverage.¹⁴⁷

The duty to mitigate damages – i.e. avoiding further bodily injury or property damage – generally requires the insured to take steps, at their expense, to avoid incurring future loss. Those expenses are not recoverable.

The duty to cooperate entails participation in suits, settlement negotiations and in enforcing the right of contribution from any third party who may be liable to the insurer. This also carries a corresponding duty on the insurer to take reasonable steps to secure the cooperation of the insured.¹⁴⁸ Charging the insured with non-cooperation is an affirmative defense. The insurer must demonstrate that it used substantial diligence to secure the cooperation of the insured.¹⁴⁹

H. Fellow Employee Exclusions

Such exclusions are enforceable because Workers' Compensation is the exclusive remedy for work-related injuries¹⁵⁰.

However, where an employer is non-compliant with the Workers' Compensation statutes, the employee may sue the employer for the negligence of a fellow servant¹⁵¹

¹ Or. Rev. Stat. § 19.255

² Or. Rev. Stat. § 2.520

³ Or. Rev. Stat. § 19.405(1)

⁴ Or. Rev. Stat. § 14.040.

⁵ Or. Rev. Stat. § 14.080(1).

⁶ Or. Rev. Stat. § 14.080(2)

⁷ Id.

⁸ Or. Rev. Stat. § 14.120.

⁹ Id.

¹⁰ Or. Rev. Stat. § 12.110(1)

¹¹ Or. Rev. Stat. § 12.080(4)

¹² Or. Rev. Stat. § 30.020(1)(a)

¹³ Or. Rev. Stat. § 12.250

¹⁴ Or. Rev. Stat. § 30.260; 30.275(2)(a)(b)

¹⁵ Or. Rev. Stat. § 12.160

¹⁶ Or. Rev. Stat. § 12.080(1)

¹⁷ Or. Rev. Stat. § 72.7250(1)

¹⁸ *Biomass One, L.P. v. S-P Construction*, 799 P.2d 152 (1990); Or. Rev Stat. Stat. §72.7250(1)

¹⁹ Or. Rev. Stat. § 12.110(1); *Georgetown Realty v. The Home Ins. Co.*, 831 P.2d 7 (1992)

²⁰ *Bollam v. Fireman's Fund Ins. Co.*, 730 P.2d 542 (1986)

²¹ Or. Rev. Stat. § 12.080(1); *Georgetown Realty v. The Home Ins. Co.*, 831 P.2d 7 (1992)

²² ORCP 7B.

²³ ORCP 69.

²⁴ Or. Rev. Stat. § 12.220

²⁵ Id.

²⁶ *Fazzolari v. Portland School District No. 1J*, 734 P.2d 1326 (1987)

²⁷ Id.

²⁸ Or. Rev. Stat. § 31.600

²⁹ *Hampton Tree Farms v. Jewett*, 974 P.2d 738 (Or. App. 1999).

³⁰ Or. Rev. Stat. § 161.085(9)

³¹ Or. Rev. Stat. § 811.140.

³² *Id.*

³³ *Falls v. Mortenson*, 295 P.2d 182 (1956); *Johnson v. Tilden*, 562 P.2d 1188 (1977); *Hampton Tree Farms v. Jewett*, 974 P.2d 738 (Or App 1999)

³⁴ *Brown v. Pettinari*, 994 P.2d 1231 (Or App 2002)

³⁵ *Mezyk v. National Repossession, Inc.*, 405 P.2d 840 (1965)

³⁶ *Tuite v. Union Pac. Stages, et al.*, 284 P.2d 333 (1955)

³⁷ *Mathews v. Federated Service Ins. Co.*, 122 Or App 124 (1993)

³⁸ *Campbell v. Carpenter* 279 Or. 237 (1977)

³⁹ Or. Rev. Stat. § 31.610(1)

⁴⁰ Or. Rev. Stat. § 31.605(1)(a)

⁴¹ Or. Rev. Stat. § 31.600(2) and 31.605(1)(b)

⁴² Or. Rev. Stat. § 31.610(2)

⁴³ Or. Rev. Stat. § 31.610(3)

⁴⁴ Or. Rev. Stat §31.610(4)

⁴⁵ Or. Rev. Stat. § 30.020

⁴⁶ Or. Rev. Stat. § 30.020(1)

⁴⁷ *Libbee v. Permanente Clinic*, 518 P.2d 636, 520 P.2d 361 (1974)

⁴⁸ *Stanfield v. Laccoarce*, 588 P.2d 1271 (1978)

⁴⁹ *Ryan v. Western Pac. Ins. Co.*, 408 P.2d 84 (1965)

⁵⁰ *Heide/Parker v. T.C.I. Inc.*, 506 P.2d 486 (1973)

⁵¹ *But see* Zamalloa v. Hart, 31 F.3d 911, 917 (9th Cir. 1994) (in *dicta*, court notes that the parties to the case had agreed that compliance with then current ICC regulations – including placard display – created an irrebutable presumption of an employment relationship).

⁵² Zamalloa v. Hart, 31 F.3d 911 (9th Cir. 1994)

⁵³ Id.

⁵⁴ Or. Rev. Stat. § 656.018

⁵⁵ Or. Rev. Stat. § 656.156

⁵⁶ Or. Rev. Stat. § 656.018(3)

⁵⁷ Or. Rev. Stat. § 30.710(1)

⁵⁸ Tenold v. Weyerhaeuser Co., 873 P.2d 413 (1993)

⁵⁹ Greist v. Phillips, 906 P.2d 789 (1995)

⁶⁰ Lawson v. Hoke, 339 Or 253, 119 P.3d 210 (2005)

⁶¹ Or. Rev. Stat. § 31.715(1)

⁶² Or. Rev. Stat. § 31.715(6)

⁶³ Or. Rev. Stat. § 31.715(1)

⁶⁴ Or. Rev. Stat. § 31.715(5)

⁶⁵ Or. Rev. Stat. § 31.710(2)(b)

⁶⁶ Or. Rev. Stat. § 31.710(2)(a)

⁶⁷ White v. Jubitz, 347 Or. 212, 244 (2009)

⁶⁸ Or. Rev. Stat § 82.010

⁶⁹ Public Market Co. v. Portland, 171 Or 522, 625, 130 P.2d 624, 138 P.2d 916 (1943)

⁷⁰ Or. Rev. Stat. § 82.010

⁷¹ Bennett v. Baugh, 154 Or App 397, 405, 961 P2d 883 (1998)

⁷² Hammond v. Central Lane Communications Center, 816 P.2d 593 (1991)

⁷³ Or. Rev. Stat. § 30.020

⁷⁴ Or. Rev. Stat. § 31.710(1); Griest v. Phillips, 906 P.2d 789, 794-798 (1995)

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- ⁷⁵ Or. Rev. Stat. § 31.730(1); *Oberg v. Honda Motor Co.*, 888 P.2d 8, 13 (1995)
- ⁷⁶ Or. Rev. Stat. § 31.725(2)
- ⁷⁷ Or. Rev. Stat. § 31.725(5)
- ⁷⁸ Or. Rev. Stat. § 31.725(3)
- ⁷⁹ Or. Rev. Stat. § 31.725(6)
- ⁸⁰ Or. Rev. Stat. § 31.730(2); *Oberg*, 888 P.2d at 12
- ⁸¹ Or. Rev. Stat. § 31.730(3)
- ⁸² Or. Rev. Stat. § 31.735(1)(a)
- ⁸³ Or. Rev. Stat. § 31.735(1)(b)
- ⁸⁴ *Dunmire Motor Co. v. Oregon Mut. Fire Ins. Co.*, 114 P.2d 1005 (1941)
- ⁸⁵ *Scholes v. Sipco Service & Marine Inc.*, 103 Or App 503, 506, 798 P2d 694 (1990)
- ⁸⁶ *Graf v. Don Rasmussen Co.*, 592 P.2d 250 (1979)
- ⁸⁷ *United Engine Parts, Inc. v. Ried*, 584 P.2d 275 (1978); *Bullock v. Hass*, 571 P.2d 902(1977)
- ⁸⁸ Or. Rev. Stat. § 20.080(1)
- ⁸⁹ Or. Rev. Stat. § 20.080(1)
- ⁹⁰ Or. Rev. Stat. § 20.080(2)
- ⁹¹ Or. Rev. Stat. § 153.108(2)
- ⁹² Or. Rev. Stat. § 801.100, 811.109, 811.135, 811.277-292, 811.295, 811.335-365
- ⁹³ Or. Rev. Stat. § 41.905
- ⁹⁴ Or. Rev. Stat. § 801.545
- ⁹⁵ Or. Rev. Stat. § 813.010; 811.140
- ⁹⁶ Or. Rev. Stat. § 31.760. See, *Anderson v. Loomis*, 822 P.2d 752 (Or App 1991)
- ⁹⁷ Or. Rev. Stat. § 31.715(1)
- ⁹⁸ Or. Rev. Stat. § 31.715(2)
- ⁹⁹ Or. Rev. Stat. § 31.715(5)

¹⁰⁰ Or. R. Civ. P. 36B(2)

¹⁰¹ ER 801(4)(b)(A)

¹⁰² OEC 609(1); Or. Rev. Stat. § 40.355(1)

¹⁰³ OEC 609(3)(a); Or. Rev. Stat. § 40.355(3)(a)

¹⁰⁴ Or. Rev. Stat. § 40.120 and § 40.130(1)(c)

¹⁰⁵ Uniform Civil Jury Instr. No. 12.01

¹⁰⁶ Or. R. Civ. P. 54E

¹⁰⁷ Or. R. Civ. P. 54E

¹⁰⁸ Or. R. Civ. P. 54E

¹⁰⁹ Or. R. Civ. P. 54E

¹¹⁰ Powers v. Quigley, 198 P.3d 919 (2008)

¹¹¹ Or. Rev. Stat § 742.536

¹¹² Wynia v. Fick, 162 Or App, 986 P.2d 625 (1999)

¹¹³ Or. Rev. Stat. § 742.534

¹¹⁴ Or. Rev. Stat. § 742.536.

¹¹⁵ Or. Rev. Stat. § 742.538(1)-(3)

¹¹⁶ Or. Rev. Stat. § 742.538(4)

¹¹⁷ Or. Rev. Stat. § 656.580(2) and 656.593(1)

¹¹⁸ Or.Rev. Stat. § 656.593

¹¹⁹ Or. Rev. Stat. § 656.587

¹²⁰ Or. Rev. Stat. § 87.555(1)

¹²¹ Or. Rev. Stat. § 87.565

¹²² Or. Rev. Stat. §87.581

¹²³ Or. Rev. Stat. § 126.725

¹²⁴ See generally Or. Admin. Rules 836.080- 0205 et. seq. on claims handling guidelines

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- ¹²⁵ *Hicklin v. Anders*, 201 Or 128 (1953)
- ¹²⁶ Or. Rev. Stat. § 742.546
- ¹²⁷ Or. Rev. Stat. § 811.100
- ¹²⁸ Or. Rev. Stat. § 811.108
- ¹²⁹ Or. Rev. Stat. § 811.105
- ¹³⁰ Or. Rev. Stat. § 811.111
- ¹³¹ Or. Rev. Stat § 742.520
- ¹³² ORCP 36B(2)
- ¹³³ See Or. Rev. Stat. §31.715
- ¹³⁴ Or. Rev. Stat. § 746.230
- ¹³⁵ Or. Rev. Stat. § 746.230
- ¹³⁶ Or. Rev. Stat. § 731.988
- ¹³⁷ *Bob Godfrey Pontiac v. Roloff*, 630 P.2d 840 (1981)
- ¹³⁸ *Employers' Fire Ins. V. Love It Ice Cream*, 670 P.2d 160 (Or App 1983).
- ¹³⁹ *Best v. U.S. National Bank*, 739 P.2d 554 (1987)
- ¹⁴⁰ *Farris v. U. S. Fid. And Guar. Co.*, 587 P.2d 1015 (1978)
- ¹⁴¹ *Georgetown Realty v. The Home Ins. Co.*, 831 P.2d 7 (1992)
- ¹⁴² *Maine Bonding v. Centennial Ins. Co.*, 693 P.2d 1296 (1985)
- ¹⁴³ *Georgetown Realty v. The Home Ins. Co.*, 831 P.2d 7 (1992)
- ¹⁴⁴ *Maine Bonding v. Centennial Ins. Co.*, 693 P.2d 1296 (1985)
- ¹⁴⁵ *Groce v. Fidelity General Insurance*, 448 P.2d 554 (1968)
- ¹⁴⁶ *Holloway v. Republic Indem. Co. of America*, 147 P.3d 329 (2006)
- ¹⁴⁷ *Lusch v. Aetna Cas. & Surety Co.*, 272 Or 593, 599–600 (1975)
- ¹⁴⁸ *Rosalez v. Unigard Insurance Co.*, 283 Or 63, 67 (1978)
- ¹⁴⁹ *Bailey v. Universal Underwriters Ins.*, 258 Or 201 (1971)

¹⁵⁰ Or. Rev. State § 656.020

¹⁵¹ Or. Rev. Stat § 654.330