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Overview of the State of Oregon Court System

A. Trial Courts

The Oregon state court system includes the Supreme Court, Court of Appeals, Tax Court, and 36 circuit courts. Each of Oregon's 36 counties has a circuit court. Because some Oregon counties have relatively small populations and caseloads, the legislature has combined them into multicounty judicial districts for the purposes of judicial staffing. There are 27 judicial districts. State law determines the number of judges elected in each district, generally based on population and volume of cases.

The County Circuit Courts are the general trial courts for the state. The circuit court is Oregon's trial court of general jurisdiction. This means it hears cases regardless of the subject matter, amount of money involved, or the severity of the crime alleged. The circuit court is a "court of record," which means that an official court reporter or special audio or video recording system records every word of most cases except small claims and noncriminal offenses such as violations. The "record" is used in any appeal. Most appeals are "on the record," which means that the appellate court does not hold a new trial but relies on the record and on oral and written arguments to decide whether the trial court's decision was proper.

Among other powers, the circuit court has the power in **civil cases** to

- dissolve marriages and distribute the assets of the parties;
- award or change legal custody of children;
- determine who has title to land;
- distribute a decedent's property and possessions;
- preside over trials;
- commit juveniles to state institutions and place dependent children in substitute care;
- approve adoptions;
- commit mentally ill persons to state hospitals; and

- issue injunctions.

Multnomah County Circuit Court is the primary circuit court serving the Portland area, with Washington County Circuit Court and Clackamas County Circuit Court serving the outlying suburban areas. Multnomah County is considered the most liberal of the circuit courts in Oregon, along with the Circuit Court serving Eugene (Lane County Circuit Court). The map set forth below shows the temperament of each county in Oregon.

Judge Qualifications. ORS 3.050 provides that no person is eligible to the office of judge of the circuit court unless the person is a member of the Oregon State Bar. Thus, all circuit court judges are attorneys with legal training.

Claims Less than $10,000. Smaller claims cases are also handled by each Circuit Court and hears matters involving claims of less than $10,000. It is important to recognize that claims for less than $10,000 can be filed pursuant to ORS 20.080. If the simple requirements of that statute are met (primarily that Plaintiff must provide a written demand for payment 30 days before filing), Plaintiff is entitled to his attorney fees if he prevails.

Juries. Civil jury trials in circuit court are typically 12 person juries (See below for six person jury trials in Oregon.) Any verdict requires the agreement of 9 jurors, but this number varies with the type of case.

No Expert Discovery. One of the more interesting features of Oregon practice is that there is no expert discovery of any kind. There is no requirement to disclose experts to opposing counsel nor is there any discovery (depositions) of those experts.

Fast Track and Expedited Track Programs. Oregon has introduced fast track rules for managing civil cases. All civil cases must go to trial within one year of filing. Most counties in Oregon take this requirement very seriously and will not allow cases to proceed beyond one year without a showing of good cause or having the case designated complex. Complex designated cases are allowed an extra six months (18 months total) from the date of filing to trial. In the largest county (Multnomah County, Portland), cases are rarely delayed for lack of resources, such as a judge or courtroom is not available.

Multnomah County has introduced an expedited trial track that accelerates

and streamlines cases to a greater extent than the state-wide rules. The circuit court system has recently introduced an expedited civil jury track. (See Oregon Uniform Trial Court Rule 5.150.) With the agreement of all parties, any civil case eligible for a jury trial can enter the expedited track. The key features of the expedited jury trial include:

1) Trial within 4 months of expedited case designation;

2) Limited discovery including mandatory insurance, document and witness disclosures and a maximum of two depositions per party and one set of written discovery (note that interrogatories are not allowed in Oregon Civil cases regardless of track);

3) Discovery must be complete 21 days before trial (there is no discovery deadline in the state-wide fast track rules). Except for treating physician depositions, there is no expert discovery in Oregon. Further, only requests for production and requests for admissions are allowed as written discovery;

4) No pretrial motions without leave of the court; and

5) Expedited jury cases will use six jurors.

Mandatory Arbitration. Non-binding arbitration is mandatory for any claim of less than $50,000 in all circuit courts.

B. Appellate Courts

The **Oregon Court of Appeals** is Oregon's intermediate appellate court. The Court of Appeals was created by statute in 1969, and its jurisdiction is established by the legislature. With the exception of a limited number of appeals that go directly to the Oregon Supreme Court--most notably death penalty cases, ballot title cases, lawyer discipline matters, and tax court cases--the Court of Appeals receives every appeal or judicial review taken from Oregon's trial courts and administrative agencies. The Court of Appeals has jurisdiction to hear all civil and criminal appeals from circuit courts, except death penalty cases, and to review most state administrative agency actions. (See ORS 2.516.)

The ten judges of the Oregon Court of Appeals are elected statewide. The Chief Justice of the Supreme Court appoints the Chief Judge from among the ten judges on the Court of Appeals.

The Oregon Court of Appeals consistently ranks as one of the busiest appellate courts in the nation. Over the past 10 years, the range of new appeals filed per year in our court has been between 3,200 and 4,100.

The **Oregon Supreme Court** has 7 members. The court has seven elected justices. They choose one of their own to serve a six-year term as Chief Justice. The only court that may reverse or modify a decision of the Oregon Supreme Court is the United States Supreme Court.

The Supreme Court has "discretionary review" of cases from the Court of Appeals. A party who is dissatisfied with the Court of Appeals' decision may petition the Supreme Court to review that decision. The Supreme Court can choose to accept or deny the petition. If the Supreme Court denies the petition to review the Court of Appeals decision, the ruling of the Court of Appeal is final with respect to matters of Oregon state law.

In some cases, the Supreme Court has "direct review," which means that the case goes directly to the Supreme Court without first being considered by the Court of Appeals. None of these “direct review” categories include matters falling within the ambit of general civil litigation.

Procedural

A. Venue

Oregon venue issues are typically controlled by ORS 14. When the court has jurisdiction of the parties, it may exercise it in respect to any cause of action or suit wherever arising, except for the specific recovery of real property situated without this state, or for an injury thereto. ORS 14.030.

More specifically, actions and suits involving recovery of real property or injuries to real property, are to be brought where subject property is situated. (This does not typically include construction defect cases.) ORS 14.040.

All other actions shall be commenced in the county in which the defendants, or one of them, reside at the commencement of the action or in the county where the cause of action arose. ORS 14.080. **This provision typically controls personal injury claims.**

Other provisions of the venue statute include:

1. A party resident of more than one county shall be deemed a resident of each of those counties.

2. If none of the defendants reside in this state the action may be commenced in any county.

3. A corporation incorporated under the laws of this state, a limited partnership, or a foreign corporation authorized to do business in this state, is considered to be a resident of any county where the corporation or limited partnership conducts regular, sustained business activity or has an office for the transaction of business or where any agent authorized to receive process resides.

Change of Venue. A motion made by any party to a lawsuit may be filed with the Court to change the place of trial. The moving party must submit an affidavit that the motion is not made for the purpose of delay and that the lawsuit has not been commenced in the proper county. (See ORS 14.110.) A motion on the grounds that the action was commenced in the wrong county must be made before filing an answer or it is waived.

Otherwise, at any time after filing, but before trial, venue may also be changed upon a showing that:

1. The judge is a party to, or directly interested in the event of the action or suit;

2. The convenience of witnesses and the parties would be promoted by such change; or

3. The judge or the inhabitants of the county are so prejudiced against the party making the motion that the party cannot expect an impartial trial.

B. Statute of Limitations

Oregon statutes of limitations are generally found at ORS 12 et seq.

1. **Negligence** claims must be brought within two years from the date of injury (ORS 12.110);

2. **Contract** claims, whether for oral or written contract, must be brought within six years from the date of breach (ORS 12.080);

3. **Construction defect** claims must be brought within two years for claims of negligence (Abraham v. T Henry Construction, 350 Or. 29 (2011)) and 6 years for breach of contract (oral or written) as measured from substantial completion (breach). (ORS 12.135) All construction claims are subject to a 10 year statute of ultimate repose (ORS 12.115);

4. **Medical Malpractice** claims must be brought within two years from the date the injury is discovered or in the exercise of reasonable care should have been discovered. ORS 12.110(4). Medical malpractice claims also have a five year statute of ultimate repose from the date of treatment or omission, except in cases of fraud or misrepresentation. The statute of limitations is tolled during the time a claimant is within 18 years of age or insane. ORS 12.160.

5. **Advance payment**. If an advance payment is made to a person entitled to recover damages for the death, injury or destruction, you must provide written notice of the date of expiration of the period of limitation for the commencement of an action for damages set by the applicable statute of limitations not later than 30 days after the date the first of such advance payments was made. If this is done, then the advance payment does not suspend the running of such period of limitation ORS 12.155

6. **Action Begun.** An action is deemed to have begun as to each defendant when the complaint is filed **and** the summons served on the defendant. However, if service of the summons in an action occurs before the expiration of 60 days after the date on which the complaint was filed, the action is deemed to have begun on the day of filing. See ORS 12.020.

7. **Construction Design Professionals**. An action against an architect or design professional to recover damages for injury to a person, property or to any interest in property, including damages for delay or economic loss, regardless of legal theory, arising out of the construction, alteration or repair of any improvement to real property shall be commenced within two years after the date the injury or damage is first discovered or in the exercise of reasonable care should have been discovered but in any event the action must be commenced within 10 years after substantial completion or abandonment of the construction, alteration or repair.]

8**.** **Minors.** Oregon law does allow for suspension of time for minors**.** Time is extended for five years or one year after the minor turns 18, whichever occurs first. ORS 12.160.

9. **Death.** If a person entitled to bring an action dies before the expiration of the time limited for its commencement, an action may be commenced by the personal representative of the person after the expiration of that time, and within one year after the death of the person. ORS 12.190

C. Time for Filing An Answer

Time to Answer. Pursuant to ORCP 7(C)2 and ORCP 15A, an Answer must be filed within 30 days of service of the Complaint. If a defendant provides appropriate notice to plaintiff's counsel per ORCP 69, no default can be taken of the noticing party without first giving the defendant 10 days written notice of the intent to take default. Thus, serving an ORCP 69 letter on Plaintiff's counsel results in an open ended extension of time to appear that is ended only when Plaintiff's counsel demands an Answer or the Court orders an Answer be filed.

Computing Time. ORCP 10A provides that when computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is included, unless it is a Saturday, Sunday or a legal holiday, including Sunday, in which case, the deadline falls to the next day.

D. Dismissal Re-Filing of Suit

Oregon Rule of Civil Procedure (ORCP) 54 addresses voluntary dismissals.

1. A plaintiff may dismiss an action in its entirety or as to one or more defendants without order of court by filing a notice of dismissal with the court and serving such notice on all other parties not in default not less than five days prior to the day of trial if no counterclaim has been plead. Such dismissal may result in the defendants receiving their costs (not attorney fees).

2. Plaintiff may also obtain and file a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, this dismissal is without prejudice, except where the plaintiff has previously dismissed (in any court of the United States or of any state) an action against the same parties on or including the same claim.

Liability

A. Negligence

Oregon has adopted a form of modified comparative negligence. Under this doctrine, a claimant's action is barred if his fault exceeds the combined fault of all defendants and persons who have settled. Otherwise, the claimant's recovery is diminished in proportion to his percentage of fault. (See ORS 31.600.) Contributory negligence is not a bar to recovery.

B. Negligence Defenses

Oregon has abolished the defenses of assumption of risk, last clear chance, unavoidable accident and emergency situation and replaced it with a comparative negligence scheme ORS 31.610.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross negligence, recklessness and willful and wanton conduct have little application to Oregon civil jurisprudence. These concepts are largely subsumed into the comparative fault scheme and may only have application under certain statutes and claims such as the liability of a plane or boat owner (owner is only liable for passenger injuries unless accident was intentionally caused or caused by owner's gross negligence) or liability of motor carriers. (See Oregon Civil Jury Instruction 36.02, ORS 823.085)

Gross Negligence. Oregon courts have defined gross negligence, as conduct that "must go beyond mere oversight, inadvertence, or mistake and, instead, must amount to a degree of inattention that is inexcusable under the circumstances." Foster v. Gibbons, 177 Or. App. 45 (2001). Mere inadvertence, brief inattention, or error in judgment as to proper speed does not constitute gross negligence without some basis for inferring that the acts were done with some reckless mental state or a conscious indifference to the safety of others. See Brown v. Bryant, 250 Or. 196 (1968); Smith v Barry, 37 Or.App. 319 (1978).

Recklessness. Recklessness analysis applies only in the context of certain statutes and is not a matter of general application. Oregon law bars a plaintiff driving without insurance from recovering noneconomic damages unless he can prove that defendant's conduct that caused plaintiff's injuries met the statutory definition of reckless driving. (See ORS 31.715.) Recklessness requires a higher mental state than gross negligence did under the guest passenger statute. See State v Hill, 298 Or. 270 (1984). To be "reckless," a defendant must be "aware of and consciously disregard" the applicable risk. ORS 161.085(9).

D. Negligent Hiring and Retention

The Oregon Supreme Court has recognized that an employer can be found negligent for hiring or retaining an employee. Hansen v. Cohen et al, 203 Or. 157 (1955). The analysis for proving such a negligent hiring/retention claim is the same of as a regular negligence claim. Generally, "[t]o state a cause of action in negligence, a plaintiff must allege that the defendant owed a duty, that the defendant breached that duty, and that the breach was the cause in fact of some legally cognizable damage to the plaintiff." Brennen v. City of Eugene, 285 Or. 401 (1979). The negligent hiring, retention or training must be a cause in fact of plaintiff's injuries. Brown v. Pettinari, 165 Or.App 279 (2000).

An employer whose employees come into contact with members of the public during their employment is responsible for exercising a duty of reasonable care in the selection or retention of its employees. *Hansen v. Cohen et al, supra,* 203 Or. at 160-61, 276 P.2d 391. Liability is for negligently placing an employee with known dangerous propensities, or dangerous propensities which could have been discovered by a reasonable investigation, in a position where it is foreseeable that he could injure the plaintiff in the course of the work. The duty to use reasonable care in hiring or retaining employees arises because it is foreseeable that the employee, in carrying out his employment, may pose an unreasonable risk of injury to others. Cain v. Rijken, 300 Or. 706 (1986).

Oregon recognizes a separate cause of action for negligent hiring and retention. There is no authority for the proposition that a defendant is entitled to a dismissal if agency over the employee is admitted.

E. Negligent Entrustment

Under Oregon law, to establish a negligent entrustment claim when plaintiff does not allege there was a special relationship with defendant, plaintiff must show that: (1) entrustment was unreasonable under circumstances; (2) it caused harm to plaintiff; and (3) the risk of harm to plaintiff, or class of persons to whom he belongs, was reasonably foreseeable. DeBaugh v Greyhound Lines Inc. 693 F.Supp.2d 1253 (2010).

Oregon recognizes a separate cause of action for negligent entrustment. There is no authority for the proposition that a defendant is entitled to a dismissal of a negligent entrustment claim if agency over the employee is admitted.

F. Dram Shop

Oregon dram shop liability is set forth by statute at ORS 471.565

1. **Injury to Intoxicated Person.** A patron who voluntarily consumes alcoholic beverages does not have a cause of action, based on statute or common law, against the person serving the alcoholic beverages even though the alcoholic beverages are served to the patron while the patron is visibly intoxicated. (This protection for the providers of alcohol only applies to claims of injury/damage caused by intoxication, not to other causes of injury/damage.)

2. **Injury to Third Party Caused by Intoxicated Person**. A provider of alcohol is liable to third parties for damages caused by an intoxicated person if the third party proves by clear and convincing evidence that:

(a) The provider of alcohol served or provided alcoholic beverages to the patron while the patron was visibly intoxicated; and

(b) The third party did not substantially contribute to the intoxication of the patron by:

(A) Providing or furnishing alcoholic beverages to the patron;

(B) Encouraging the patron to consume or purchase alcoholic beverages; or

(C) Facilitating the consumption of alcoholic beverages by the patron.

Claims for damages arising out of wrongful death or injury must be preceded by appropriate notice of the claim to the provider of alcohol. In the event of wrongful death, notice of claim must be provided within one year of the discovery of existence of the claim, and in the event of injury other than wrongful death, notice must be given within 180 days, not including time when the claimant is incapacitated by his injuries.

ORS 471.565 supersedes all common law providing the liability of Oregon alcohol providers on any other basis.

G. Joint and Several Liability

Joint and Several Liability. Oregon has a limited form of joint and several liability. In actions arising out of bodily injury or death, the jury apportions fault among the claimant, the defendants, and persons who have settled. (ORS 31.610.) The liability of each defendant is several only for an amount proportionate to that defendant's share of fault. With solvent defendants, there is no jont and several liability and each defendant pays its allocated share. **However, if within a year of judgment plaintiff brings a motion establishing that one of the defendants is uncollectible, then that defendant's share of the**

judgment is reapportioned among the claimant and other defendants according to their relative fault. A defendant whose share of fault is 25 percent or less, or whose fault is less than that of the claimant, is not affected by the reallocation

Contribution. Tortfeasors who have paid more than a proportional share of the common liability, based on relative degrees of fault, have a right of contribution. (ORS 31.800.) There is no right of contribution from a person who is not liable in tort to the claimant. Regardless of whether a judgment has been entered in an action against two or more tortfeasors, contribution may be enforced by a separate action. (ORS 31.800.) Where there has been a judgment, contribution may also be enforced in that action by motion. An action for contribution must be commenced within two years after final judgment or settlement.

H. Wrongful Death and/or Survival Actions

Wrongful death actions in Oregon are governed by ORS 30.020 and provides:

1. The decedent's personal representative must bring the claim for the benefit of the decedent's surviving spouse, children, parents or any other individual who under the law of intestate succession would inherit the deceased's personal property;

2. Personal representative is limited only by the claims that the decedent could have brought for the same act or omission had he lived;

3. The claim must be commenced within 3 years after the date the injury that caused death is discovered or reasonably should have been discovered and, in any event, not later than, three years after the death of the decedent OR the longest of any other period for commencing an action under a statute of ultimate repose that applies to the act or omission causing the injury.

4. **Damages**. Wrongful death damages may be awarded for:

A. reasonable charges necessarily incurred for doctors' services, hospital services, nursing services, other medical services, burial services and memorial services rendered for the decedent;

B. just, fair and reasonable compensation to the decedent for disability, pain, suffering and loss of income during the period between injury to the decedent and the decedent's death;

C. just, fair and reasonable compensation for pecuniary loss to the decedent's estate; and

D. just, fair and reasonable compensation the decedent's spouse, children, stepchildren, stepparents and parents for pecuniary loss and for loss of the society, companionship and services of the decedent.

Damages may also be recovered for punitive damages as provided by ORS 31.730.

5. Distribution of Damages. Upon settlement of a claim, the personal representative pays the expenses of litigation and the decedents' medical bills, and then the remaining damages recovered are distributed to the beneficiaries in the proportions prescribed under the laws of intestate succession of the state of decedent's domicile state, or in another manner by beneficiary agreement.

6. **Damages Cap**. ORS 31.710 limited non-economic damages to $500,000 in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, **death** or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium. The Oregon Supreme Court has struck down the damages cap in all cases except for death claims. Lakin v. Senco Products, Inc., 329 Or 62 (1999), holding a limitation on amount of noneconomic damages recoverable under a common law cause of action denies plaintiffs the full effect of their constitutional right to trial by jury.

The Oregon Supreme Court, in Hughes v. Peacehealth, 344 Or. 142 (2008), held the state law capping non-economic damages in a wrongful death case at $500,000 is constitutional. The Court distinguished the case from all other injury cases in that at the time the Oregon constitution was written in 1857, state common law did not allow people to recover for the death of a loved one.

I. Vicarious Liability

Respondeat Superior. Under the doctrine of respondeat superior, an employer is liable for employee's torts when employee acts within scope of employment. Negligence or other tortious conduct by employer is not required. Chesterman v. Barmon, 305 Or. 439 (1988). To conclude that employee was acting within scope of employment when employee committed tort, employee's act must have occurred substantially within time and space limits authorized by employment, employee must have been motivated at least partially by purpose to serve employer, and act must have been of kind which employee was hired to perform. **Id**. For example, in Chesterman, an employer was not vicariously liable for employee's acts of entering woman's house and sexually assaulting her where employee's acts were outside the employee's scope of employment, were not motivated by purpose to serve employer, and were not of kind which employee was hired to perform.

Under the doctrine of respondeat superior, there are three requirements in Oregon that must be met to conclude that an employee was acting within the course and scope of employment:

(1) the act must have occurred substantially within the time and space limits authorized by the employment;

(2) the employee was motivated, at least partially, by a purpose to serve the employer; and

(3) the act is of a kind which the employee was hired to perform.

The scope of employment limitation is designed to insure that employers will be held liable only for harm resulting from activity from which they were receiving a benefit. Stanfield v. Laccoarce, 284 Or. 651 (1978); Minnis v. Oregon Mutual, 334 Or. 191 (2002).

2. **Independent Contractors.** Generally, an employer is not liable for the conduct of an independent contractor. An employer of an independent contractor is not subject to liability for bodily harm caused to another by tortious act or omission of contractor or his servant. Macomber v. Cox, 249 Or. 61 (1967).

Whether a party is an independent contractor or employee is typically a question

of law for the court. Oregon courts use the "right to control" test. Under common-law right to control test, principal factors to be examined to determine whether workers' compensation claimant was a subject employee or an independent contractor are: direct evidence of right to, or the exercise of, control; the method of payment; the furnishing of equipment; and the right to fire. Kaiel v NCE Cultural, 129 Or. App. 471 (1994). The parties understanding of the work relationship is not dispositive of the issue although in close cases may tip the balance in either direction.

ORS 670.006 also provides some guidance as to who is an independent contractor. An independent contractor means a person who provides services for remuneration and who, in the provision of the services:

(a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results; and

(b) Is customarily engaged in an independently established business.

Although employer of independent contractor is generally not liable for contractor's negligence, employer will be liable if work done by contractor is "inherently dangerous", or if it can be said as matter of law that employer's duty could not be delegated. Johnson v Salem Title Co., 246 Or. 409 (1967). Nondelegable duties arise in situations in which law deems particular duties so important and so peremptory that they will be treated as nondelegable.

An employer may be held liable for negligent hiring and retention of an independent contractor.

3. **Presumption of Agency.** Oregon courts have held that in action for injury arising out of an automobile collision on grounds that the driver of automobile was the defendant's agent, a prima facie case of agency is created by the admission that automobile was owned by the defendant. Jasper v Wells, 173 Or 114 (1943).

J. Exclusivity of Workers' Compensation

ORS 656.018 provides that every employer who provides worker's compensation insurance to its workers, is not liable civilly in any respect for the injuries suffered by the covered worker. The liability of the employer under the workers compensation scheme **is exclusive and in place of all other liability arising out of**

injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by workers. This immunity specifically include claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such conditions. Further, any agreements that contradict this immunity is void.

The employer's immunity also extends to the employer's insurer.

Damages

A. Statutory Caps on Damages

Non-economic Damages. Although the legislature has established a $500,000 cap on damages for non-economic loss in bodily injury and death cases, ORS 31.710, the Oregon Supreme Court ruled it to be unconstitutional under most circumstances. It held that the damage cap violates the right to a jury trial provided by the state constitution whenever the cap is applied to a claim for which, under common law, a jury trial was customary in 1857. Lakin v. Senco Products, Inc., 329 Or. 62 (1999). This did not overrule an earlier case upholding the constitutionality of the cap in wrongful death cases, since the wrongful death statute is a creation of the legislature. *Greist v. Phillips*, 322 Or. 281 (1995).

Oregon Tort Claims Act. The OTCA limits claims the liability of the state, its officers, employees, and agents to the following schedule:

(a) $1.5 million, for causes of action arising on or after December 28, 2007, and before July 1, 2010.

(b) $1.6 million, for causes of action arising on or after July 1, 2010, and before July 1, 2011.

(c) $1.7 million, for causes of action arising on or after July 1, 2011, and before July 1, 2012.

(d) $1.8 million, for causes of action arising on or after July 1, 2012, and before July 1, 2013.

(e) $1.9 million, for causes of action arising on or after July 1, 2013, and

before July 1, 2014.

(f) $2 million, for causes of action arising on or after July 1, 2014, and before July 1, 2015.

B. Compensatory Damages for Bodily Injury

Oregon damages for bodily injury are described in the Oregon Civil Jury Instructions 70.01 et seq. An Oregon plaintiff is entitled to economic damages (objectively verifiable monetary losses including medical and health expenses, loss of income, past and future impairment of earning capacity reasonable value of lost domestic services) and non-economic damages (subjective non-monetary losses such as pain, mental suffering, and 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.)

C. Collateral Source

Oregon has modified the collateral source rule. It permits the trial court to deduct from a verdict benefits received from third parties for the injury or death, but these cannot include life insurance, insurance benefits for which the claimant has paid premiums, retirement or disability benefits, or social security. Affidavits concerning collateral benefits are received by the court after trial and used to modify the verdict. ORS 31.580

D. Pre-Judgment/Post judgment Interest

Pre-judgment interest is provided by statute. However, pre-judgment interest is not available in tort actions when the amount of damages cannot be easily ascertained until litigation. Erickson Air-Crane Co. v. United Technologies Corp., 87 Or. App. 577, *cert. denied*, 304 Or. 680 (1987).

Post-Judgment Interest is controlled by statute and is currently 9% per year. (ORS 82.010.)

E. Damages for Emotional Distress

Generally, a person cannot recover for negligent infliction of emotional distress if the person is not also physically injured, threatened with physical injury, or physically impacted by the tortious conduct. Hammond v. Central Lane Communications Center, 312 Or. 17 (1991). Plaintiff may recover for severe emotional distress without accompanying physical injury by showing recklessness

or intent to do painful act with knowledge that it will cause grave distress, when defendant's position in relation to plaintiff involves some responsibility aside from tort itself. One such exception to the rule of physical impact is that recovery may occur if "the defendant's conduct infringed on some legally protected interest apart from causing the claimed distress." Nearing v. Weaver, 295 Or 702 (1983).

The term 'legally protected interest' refers to an independent basis of liability separate from the general duty to avoid foreseeable risk of harm, Phillips v. Lincoln County School District, 161 Or App 429 (1999), and "the identification of such a distinct source of duty is the *sine qua non* of liability for emotional distress damages unaccompanied by physical injury." *Curtis v. MRI Imaging Services II*, 148 Or App 607 (1997). Further, emotional distress damages cannot arise from infringement of every kind of legally protected interest, but from only those that are "of sufficient importance as a matter of public policy to merit protection from emotional impact." Hilt v. Bernstein, 75 Or App 502, 515 (1985); *Meyer v. 4-D Insulation Co., Inc.,* 60 Or App 70 (1982).

F. Wrongful Death and/or Survival Action Damages

See Section on "Wrongful Death" and "Statutory Caps on Damages" above

G. Punitive Damages

Punitive Damages are governed by ORS 31.73

1. A pleading in a civil action may not contain a request for an award of punitive damages.

2. At any time after the pleading is filed, a party may file a motion to allow the party to amend the pleading to assert a claim for punitive damages. The party making the motion may submit affidavits and documentation supporting the claim for punitive damages. The party or parties opposing the motion may submit opposing affidavits and documentation.

3. The court shall deny a motion to amend a pleading made under the provisions of this section if:

(a) The court determines that the affidavits and supporting documentation submitted by the party seeking punitive damages fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion

on the issue of punitive damages in a trial of the matter; or

(b) The party opposing the motion establishes that the timing of the motion to amend prejudices the party's ability to defend against the claim for punitive damages.

In practice, the threshold a plaintiff needs to meet is very low and such motions are nearly routinely granted.

4. Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has 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.

Under Oregon law, punitive damages are not recoverable in civil action unless it is proven by clear and convincing evidence that party against whom punitive damages are sought has acted with malice or has shown reckless and outrageous indifference to highly unreasonable risk of harm and has acted with conscious indifference to the health, safety and welfare of others. Jane Doe 130 v. Archdiocese of Portland in Oregon, 717 F.Supp.2d 1120 (2010).

5. Punitive Damages are payable as follows:

A. Thirty percent is payable to the prevailing party.

B. Sixty percent is payable to the Attorney General for deposit in the Criminal Injuries Compensation Account of the Department of Justice Crime Victims Assistance Section.

C. Ten percent is payable to the Attorney General for deposit in the State Court Facilities and Security Account.

H. Diminution in Value of Damaged Vehicle

The Oregon Supreme Court validated claims for diminution in value for a damaged vehicle in Gonzales v Farmers Insurance, 345 Or. 382 (2008), unless

diminution in value is specifically excluded by a policy. The Supreme Court focused on the word "repair" in Plaintiff's policy, defining it to include the restoration of the vehicle to its condition prior to a collision which implicates diminution in value if actual repair of the vehicle is insufficient.

I. Loss of Use of Motor Vehicle

Oregon does allow recovery for loss of use of repaired or replaced vehicles and is measured by the fair rental value of the vehicle and is limited to the period of time reasonably necessary to repair or replacr the vehicle. Oregon Jury Instruction No. 70.10.

Evidentiary Issues

A. Preventability Determination

There is no Oregon case law either allowing or denying admission into evidence of a preventability determination. A preventability determination is unlikely to be admitted because of the differences between standards for proving negligence and the private standards used in determining preventability.

B. Traffic Citation from Accident

A plea to a charge of a traffic crime, as defined by ORS 801.545, and any judgment of conviction or acquittal of a person charged with a traffic crime, as defined by ORS 801.545, are not admissible in the trial of a subsequent civil action arising out of the same accident or occurrence to prove or negate the facts upon which such judgment was rendered.

C. Failure to Wear a Seat Belt

Evidence of the nonuse of a safety belt or harness may be admitted only to mitigate the injured party's damages. The mitigation shall not exceed five percent of the amount to which the injured party would otherwise be entitled. ORS 31.760

D. Failure of Motorcyclist to Wear a Helmet

There is no statutory or case law prohibition on the admissibility of the nonuse of helmets similar to ORS 31.760, that provides guidance for nonuse of seatbelts. The failure to wear a helmet should then be treated as an element of comparative fault and as an affirmative defense for failure to mitigate damages.

E. Evidence of Alcohol or Drug Intoxication

1. **Implied Consent**. Any person who operates a motor vehicle upon

premises open to the public or the highways of this state shall be deemed to have given consent, subject to the implied consent law, to a chemical test of the person's breath, or of the person's blood if the person is receiving medical care in a health care facility immediately after a motor vehicle accident, for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants. ORS 813.100

At the trial of any civil or criminal action, suit or proceeding arising out of the acts committed by a person driving a motor vehicle while under the influence of intoxicants, if the amount of alcohol in the person's blood at the time alleged is less than 0.08 percent by weight of alcohol as shown by chemical analysis of the person's breath or blood, it is indirect evidence that may be used with other evidence, if any, to determine whether or not the person was then under the influence of intoxicants. ORS 813.300.

Expert testimony is allowed on retrograde extrapolation. Retrograde extrapolation is relevant to determine whether defendant, was intoxicated at the time of the incident because it is always case that blood alcohol content would be measured some time after arrest, and not at time of driving, and it was common knowledge that Blood alcohol content would dissipate with passage of time, and expert testimony on retrograde extrapolation, which was a scientific formula based on various factors, was only method to prove in retrospect that defendant's blood alcohol level, while driving, was .08 percent.

Expert testimony may not be required to provide evidence of the significance of any blood alcohol testing result. State v. Owens, 207 Or. App. 31 (2006).

F. Testimony of Investigating Police Officer

A police officer may testify only to matters which he observed or for which he has qualified as an expert. **T**he term "expert witness" **means** a witness who is qualified, by reason of special knowledge or skill gained from experience, training, or education in a particular field, to express an opinion on a matter within that field that will be of assistance to the trier of fact in discharging the trier's function. Galego v. Knudsen**, 281 Or. 43** (1978). W. R. Chamberlin & Co**. v. Northwestern Agencies Inc.,** 289 Or. **201 (1980).**

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. ORS 40.140. A police officer's ability to testify as to matters that he did not witness is dependent on the attorney laying the proper foundation for his knowledge based on his experience.

G. Expert Testimony

ORS 40.410 provides that "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." The Oregon legislature, in adopting the Oregon Evidence Code, left for judicial decision the standard to be used in determining the admissibility of "scientific" evidence. Without attempting precisely to define "scientific" evidence, Oregon Courts have held that "[t]he term 'scientific' * * * refers to evidence that draws its convincing force from some principle of science, mathematics and the like." State v. Brown, 297 OR 404 (1984). *Id.* at 407, 687 P.2d 751.

The requirement in ORS 40.410 that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" is intended to serve multiple functions, such as:

> "(1) supplying general propositions which will permit inferences from data which the trier of fact would otherwise be forced to find meaningless;
>
> (2) applying general propositions to data so as to generate inferences where the complexity of the body of propositions applied,

the difficulty of the application, or other factors make the expert's conclusion probably more accurate or precise than that of the trier of fact;

(3) modifying, qualifying, and refining general propositions which the trier of fact may reasonably be expected to use; and

(4) adding specialized confirmation and, thus, confidence to general propositions otherwise likely to be assumed more tentatively by the trier." 71 Or.L.Rev. at 360.

Once the testimony is determined to be relevant under S 40.150, helpful under ORS 40.410, and not barred by OEC 40.155 (relevant evidence admissible), it will be excluded only if its probative value is substantially outweighed by one or more of the countervailing factors set forth in ORS 40.160, which provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

In evaluating the incremental probative value of the proffered evidence, the court must assume that the evidence will be believed by the trier of fact. When the incremental probative value of the proffered scientific evidence is relatively slight, and when the jury is likely to overvalue or be misled into giving the evidence undue weight, the likelihood of exclusion under ORS is enhanced.
The court must identify and evaluate the probative value of the proffered scientific evidence, consider how that evidence might impair rather than help the trier of fact, and decide whether truthfinding is better served by admission or exclusion. Brown, 297 Or. at 409. In Brown, the court identified a number of factors that could affect a trial court's decision on admissibility of proffered scientific evidence:

"(1) The technique's general acceptance in the field;
"(2) The expert's qualifications and stature;
"(3) The use which has been made of the technique;
"(4) The potential rate of error;

"(5) The existence of specialized literature;
"(6) The novelty of the invention; and
"(7) The extent to which the technique relies on the subjective interpretation of the expert.

These factors were not intended to be exclusive, nor are they intended to be taken as a mechanical checklist of foundational requirements, but instead provide a framework for evaluating scientific evidence.

H. Collateral Source

Defendants are not entitled to an offset of any amounts Plaintiff receives from certain sources. In White v Jubitz Corp. , a jury awarded plaintiff $37,600 in economic damages for injuries suffered in slip and fall at defendant's restaurant, approximately the amount that plaintiff's medical providers had billed him for treatment of his injuries. Plaintiff was over 65 years old and, pursuant to the federal Social Security Act, Medicare had paid plaintiff's medical providers a total of $13,400 pursuant to formula to determine medical payments. Plaintiff's medical providers had accepted that sum as payment in full for their services and had "written off" the remainder of their charges. The Court held that plaintiff is entitled to recover the full amount of his judgment. White v Jubitz Corp, 347 Or. 212 (2009).

Evidence of collateral benefits is not admissible at trial, but shall be received by the court by affidavit submitted after the verdict by any party to the action. In a personal injury action, evidence that plaintiff received benefits from collateral source is inadmissible. ORS 31.580. DeYoung v. Fallon, 1990, 104 Or.App. 66.

I. Recorded Statements

1. When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, where otherwise admissible, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration,

conversation or writing which is necessary to make it understood may at that time also be given in evidence. ORS 40.040.

2. The recorded statements of an insurer may be discoverable and admissible depending on the purpose for which they were prepared. If the statements were prepared in the normal course of business, the recorded statement is discoverable, while the same statement is protected work product if it is made in anticipation of litigation. United Pacific Insurance Company v Trachsel, 83 Or.App 401 (1987).

3. If a recorded statement is discoverable under United Pacific v. Trachsel, there is a secondary question as to its admissibility. Such statements are typically hearsay, but may be admissible on numerous bases:

1. A prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. ORS 40.380

2. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. ORS 40.460(2).

3. Prior inconsistent statement of a part. ORS 40.450(4).

J. Prior Convictions

Evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record, but only if the crime:

(a) Was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted; or

(b) Involved false statement or dishonesty. ORS 40.355

Such evidence was related to convictions that are less than 15 years old.

State v. Lopez 241 Or.App. 670 (2011), and is applicable to felonies, not misdemeanors.

K. Driving History

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ORS 40.170(3). For example, the Oregon Court of Appeal ruled appropriate the introduction of evidence of parties' previous DUII conviction and the parties' completion of the diversion program to show her knowledge of the dangers of drunk driving. Lasley v Combined Transport, 236 Or. App. 1 (2010).

L. Fatigue

There is no Oregon case law limiting admissibility of hours of service violations. Alleging assertion of any federal or state statute must be accompanied by evidence that the injury suffered was of the kind sought to be prevented by the statute and the plaintiff was in the class of people sought to be protected. Such proof would likely support a negligence per se allegation is Oregon.

M. Spoliation

There is limited support in Oregon law for a negligent spoliation claim based upon foreseeability principles set forth in Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1 (1987). (See Boden v. Ford Motor Co., 86 Or.App. 465 (1987), holding that a storage facility that lost a crucial piece of evidence could be liable for the impaired value of the lawsuit resulting from the lost evidence. However, later decisions questioned and limited the reasoning of Boden because Fazzolari also limits purely economic loss claims unless the parties have a special relationship. Simpkins v. Connor, 210 Or. App. 224 (2006). Oregon courts presume that evidence willfully suppressed would be adverse to the party suppressing it. ORS 40.135(c). The wilful destruction of documentary evidence raises an unfavorable presumption against the party who destroyed it. If, however, the evidence was destroyed under circumstances which free the party from suspicion of international fraud, and, if he was without neglect or default in the premises, then secondary evidence is properly

admissible.. Before admitting such secondary evidence, however, the court should be satisfied that every inference of fraud has been overcome. Booher v Brown, 173 Or. 464 (1944)

Settlement

A. Offer of Judgment

ORCP 54E provides for Offers of Judgment in Oregon.

1. Any party against whom a claim is asserted may, at any time up to 14 days prior to trial, serve upon any other party asserting the claim an offer to allow judgment to be entered against the party making the offer for the sum, or the property, or to the effect therein specified.

2. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon and file the same with the clerk before trial, and <u>within seven days</u> from the time the offer was served upon such party asserting the claim; and thereupon judgment shall be given accordingly as a stipulated judgment.

3. If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees . It is incumbent on the offering party to specifically state if the offer includes attorney fees and/or costs.

4. If the offer is not accepted and filed within 7 days, it shall be deemed withdrawn, and cannot be used at trial.

5. The offer of judgment may be filed with the court only after the case has been adjudicated on the merits <u>and</u> only if the party asserting the claim fails to obtain a judgment more favorable than the offer to allow judgment. In such a case, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer. **<u>NOTE THAT A SUCCESSFUL OFFER TO COMPROMISE DOES NOT ENTITLE A DEFENDANT TO HIS ATTORNEY FEES.</u>**

B. Liens

Medicare Liens: Liens are typically the responsibility of the plaintiff in Oregon except as provided by Medicare Secondary Payment Statute. Medicare Secondary Payer Act: Provides that Medicare is the "secondary payer" for eligible Medicare beneficiaries' medical expenses when a "primary payer" is available. Primary payers include health insurance, worker's compensation insurance, any liability or no-fault insurance and any tortfeasor. See 42 USCS §1395y(b)(2). The statute provides that if Medicare pays compensation when it is the "secondary payer," Medicare has a right of subrogation against any "primary payer."

a) Even though the Medicare statute uses the word "subrogation," Medicare's right to recovery from "primary payers" does not depend on the recipient's rights of recovery. United States v. York (C.A.6 1968), 398 F.2d 582, 584 (finding that "Congress intended to give the United States an independent right" to recover Medicare benefits from a liable third party). The Medicare Secondary Payer Act goes beyond other statutorily imposed liens because Medicare has a right of recovery against many homeowners and automobile policies, including their "med pay" coverages. See United Services Auto. Assoc. v. Perry (C.A.5 1996), 102 F.3d 144, 148 ("[medical payments coverage] is a form of no-fault insurance"). Additionally, because a review of a patient's medical records will generally put a third party on notice of the patient's eligibility for Medicare, Medicare is not required to notify the third party of its lien. See United States v. Bartholomew (W.D. Okla. 1967), 266 F. Supp. 213, 215.

Workers Compensation Lien: The paying agency in a workers compensation claim has a statutory lien against any proceeds from the worker's civil claim against a third party. The paying agency must approve any settlement. The proceeds from such a claim are divided per ORS 656.593. The total proceeds shall be distributed as follows:

(a) Costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the advisory schedule of fees established by the Workers' Compensation Board for such actions;

(b) The worker or the beneficiaries of the worker shall receive at least 33-1/3 percent of the balance of such recovery;

(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures; and

(d) The balance of the recovery shall be paid to the worker or the beneficiaries of the worker

If the injured worker elects not to file a third party claim, that election operates as an assignment to the paying agency of the cause of action, if any, of the worker, the beneficiaries or legal representative of the deceased worker, against the employer or third person, and the paying agency may bring action against such employer or third person in the name of the injured worker or other beneficiaries. ORS 656.591.

Personal Injury Protection Lien: Any insurer who provides personal injury protection benefits to its insured is entitled to a lien against its insured's claim against the tortfeasor. ORS 742.538. The preferred method of recovery of such a lien is through inter-insurer reimbursement, but if such method is not available, a lien may be asserted. The insurer's last resort is to assert a subrogation claim. State Farm Mutual Auto v Hale, 215 Or.App.19 (2007). Typically, the lien is reduced by one third to represent the attorney fees of the insured in obtaining the reimbursement for the insurer.

Hospital and Doctor Liens: Oregon has not specific statutes regarding reimbursement of hospital and doctor liens. Reimbursement of these liens are handled per the requirements of the provider's contract.

C. Minor Settlement

Minor's Compromise for claims less than $25,000.00:

1. A person having legal custody of a minor may enter into a settlement agreement with a person against whom the minor has a claim if:

(a) a conservator has not been appointed for a minor;

(b) The total amount of the claim, not including reimbursement of medical expenses, liens, reasonable attorney fees and costs of suit, is $25,000 or less if paid in cash or if paid by the purchase of a premium for an annuity;

(c) The moneys paid under the settlement agreement will be paid as set forth in subsections (3) and (4) of this section; and

(d) The person entering into the settlement agreement on behalf of the minor completes an affidavit or verified statement that attests that the person has made a reasonable inquiry and that:

(A) To the best of the person's knowledge, the minor will be fully compensated by the settlement; or

(B) There is no practical way to obtain additional amounts from the party entering into the settlement agreement with the minor.

(e) The attorney representing the person entering into the settlement agreement on behalf of the minor, if any, shall maintain the affidavit or verified statement completed under subsection (1)(d) of this section in the attorney's file for two years after the minor attains the age of 21 years.

(ORS 126.725.) ORS 126.725 also provides the methods in which the compromise must be paid, either directly into the minor's attorney's trust account, an annuity, or a federally insured savings account.

For cases involving settlement for more than $25,000, court approval must be obtained to achieve a valid settlement. A petition must be filed to have a conservator appointed for the minor, with the conservator requesting court approval of the settlement and remaining responsible for ensuring that the settlement be used for the minor's benefit.

D. Negotiating Directly With Attorneys

It is normal and accepted practice in Oregon for claims professionals to negotiate settlements directly with attorneys.

E. Confidentiality Agreements

Confidentiality agreements are permitted and enforced in the same manner as any other contract in Oregon

F. Releases

1. Notary is not required for releases in Oregon. Translation not required in Oregon.

2. The release of one joint and several contract obligor does not release automatically the other joint and several obligors; instead, the release must be given effect according to the intentions of the parties to that release. Schiffer v United Grocers, Inc., 329 Or. 86 (1999).

3. When a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury to person or property or the same wrongful death or claimed to be liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide (but the claimant's claim against all other persons for the injury or wrongful death is reduced by the share of the obligation of the tortfeasor who is given the covenant); and

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

(2) When a covenant described in subsection (1) of this section is given, the claimant shall give notice of all of the terms of the covenant to all persons against whom the claimant makes claims. ORS 31.815.

4. Mary Carter agreements limiting the liability of settling defendants

do not violate public policy. Bocci v. Key Pharmaceuticals, Inc.158 Or.App. 521(1999).

G. Voidable Releases

No. An honest release, given in connection with a personal injury case, and untainted by unconscionable conduct, could not be set aside because improvident even though plaintiff intended releasing only certain claims known to her, and even though at the time of execution of the release all parties were mistaken as to nature and extent of her injuries. Wheeler v White Rock, 229 Or. 360 (1961). A person is presumed to be familiar with the contents of any document which bears his signature. Pokorny v. Williams, 199 Or. 17 (1953).

Transportation Law

A. State DOT Regulatory Requirements

The Oregon Department of Transportation's Motor Carrier Transportation Division administers and enforces Oregon motor carrier-related laws and rules, as well as most U.S. DOT safety regulations in Title 49, Code of Federal Regulations that apply to motor carriers operating in Oregon. Oregon has largely adopted the FMSCR, however, Oregon Administrative Rule 740-100-0010 contains a list of exceptions to federal safety regulations that Oregon has established for intrastate operations.

B. State Speed Limits

Oregon speed limits are as follows:

1. On an interstate highway - 65/70 miles per hour depending on the location. 55 mph for trucks and buses (more than 8,000 pounds);

2. 15 mph when driving on an alley or a narrow residential roadway;

3. 20 mph in a business district or school zone (school traffic light flashing or in a school zone with no traffic light between 7 am and 5 pm on a school day);

4. 25 mph in a public park;

5. 25 mph on a highway in a residence district; or

6. 55 mph in locations not otherwise described above.

ORS 811.111

C. Overview of State CDL Requirements

A commercial driver's license is required to operate a motor vehicle on highways or premises open to the public in Oregon if:

1. The gross vehicle weight or gross vehicle weight rating is greater than 26,000 pounds;

2. The vehicle is used to transport 16 or more passengers including the driver; or

3. The vehicle is used to transport hazardous materials.

Exceptions exist for recreational vehicles operated solely for personal use, certain farm vehicles, emergency fire vehicles and emergency vehicles.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Oregon's mandatory insurance law at ORS 806.010 requires every driver to insure their vehicle. The minimum liability insurance a driver must have is:

Type	**Amount**
Bodily injury and property damage liability	$25,000 per person; $50,000 per crash for bodily injury to others; and $20,000 per crash for damage to others property

State law also requires every motor vehicle liability policy to provide:

Type	Amount
Personal injury protection (for reasonable and necessary medical, dental and other expenses incurred up to 1 year after the crash)	$15,000 per person
Uninsured motorist	$25,000 per person; $50,000 per crash for bodily injury

B. Uninsured Motorist Coverage

Uninsured motorist coverage and underinsured coverage are mandatory in Oregon. ORS 742.502. Coverage for injuries is mandatory while coverage for property damage is optional. Each policy offered in Oregon is required carry uninsured motorist coverage of at least the minimum limits required for liability coverage of $25,000 per person, and $50,000 per accident with an equal amount of underinsurance protection. (Higher limits for uninsured coverage may be elected, and underinsured motorist limits will be the same on the policy unless insurance company is advised by insured to the contrary.)

Underinsured coverage applies if the at-fault driver had less than $25,000 in insurance coverage. Coverage does not "stack". In a personal injury claim against a driver with the same insurance coverage as your underinsured coverage, you do not receive any benefits under your underinsured motorist coverage. (An example of this would be if you incurred $50,000 in medical expenses and the at-fault driver had a $25,000 policy and your underinsured motorist coverage was $25,000, the most you could recover is $25,000.)

Same limits for UM as Bodily Injury: A motor vehicle bodily injury liability policy shall have the same limits for uninsured motorist coverage as for bodily injury liability coverage unless a named insured in writing elects lower limits.

Trigger of Coverage Uninsured motorist coverage and underinsurance coverage shall provide coverage for bodily injury or death when:

(a) The limits for uninsured motorist coverage of the insured equal the limits of the liability policy of the person whose fault caused the bodily injury or

death; and

(b) The amount of liability insurance recovered is less than the limits for uninsured motorist coverage of the insured.

Settlement – Uninsured Motorist: ORS 742.502(1)(a) provides "the insurer will pay all sums that the insured, the heirs or the legal representative of the insured, is legally entitled to recover as general and special damages from the owner or operator of an uninsured vehicle because of bodily injury sustained by the insured caused by accident and arising out of the ownership, maintenance or use of the uninsured vehicle." This requirement goes up to include the limit of uninsured motorist coverage. The case law interpreting the statute requires the payment must be made "only to extent that insured is able to show that, at time of accident, he or she could obtain favorable judgment against responsible party." The phrase "legally entitled to recover" requires claimant for Uninsured or underinsured motorist benefits to demonstrate not merely fault and damages, but also viable tort claim against responsible party at time of accident and ability to obtain favorable judgment in that action. Vega v. Farmers Ins. Co., 323 Or. 291 (1996).

Settlement – Underinsured Motorist: A claimant for underinsured benefits is entitled to his provable damages up to the limit of his underinsured motorist coverage minus the insurance liability limit of the tortfeasor. Vogelin v American Family Mutual Ins., 221 Or.App 558 (2008).

Exclusions: Exclusions that deny coverage via mandated insurance provisions will not be enforced. Hartford Acc. & Indem. Co. v. Dairyland Ins. Co., 274 Or. 145 (1976). Statute regarding required provisions of uninsured motorist (UM) coverage is permissive, in that it allows parties to agree to terms that are no less favorable to insured than the statutory provisions. Thus, if the exclusion leaves the claimant with coverage less beneficial than the minimum allowed by ORS 742 et eq., it will not likely be enforced. Vega v. Farmers Insurance of Oregon, 134 Or. App. 372 (1995).

Oregon's required personal injury protection is a form of no fault insurance. It is mandatory on for all Oregon policies. Payments under the personal injury protection portion of a policy are made

D. Disclosure of Limits and Layers of Coverage

No. However, the policy is discoverable per ORCP 36..

E. Unfair Claims Practices

1. Unfair settlement practices in Oregon are set forth at ORS 746.230 and include:

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

(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;

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

(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;

(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;

(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;

(k) Delaying investigation or payment of claims by requiring a claimant or the physician of the claimant 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; or

(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.

(2) No insurer shall refuse, without just cause, to pay or settle claims arising under coverages provided by its policies with such frequency as to indicate a general business practice in this state, which general business practice is evidenced by:

(a) A substantial increase in the number of complaints against the insurer received by the Department of Consumer and Business Services;

(b) A substantial increase in the number of lawsuits filed against the insurer or its insureds by claimants; or

(c) Other relevant evidence.

2. Violations of the Unfair Claims Settlement Practices Act set forth above are not independently actionable. Richardson v. Guardian Life Ins. Co. of

America, 161 Or. App. 615 (1999).

3. Oregon's administrative regulations require insurance companies to provide a response to a claim within 45 days. See OAR 836-080-0225; OAR 836-080-0230; OAR 836-080-0235. "An insurer shall complete its claim investigation not later than the 45th day after its receipt of notification of claim, unless the investigation cannot reasonably be completed within that time" OAR 834-080-0230.

4. Oregon's implied covenant of good faith and fair dealing did not require comprehensive general liability (CGL) insurer to provide notice or obtain consent from insured before settling claim if such requirements would be inconsistent with express terms of policy and, thus, could not be read into it. Hartford Acc. and Indem. Co. v. U.S. Natural Resources, Inc., 897 F.Supp. 466 (1995).

F. Bad Faith Claims

Generally, in Oregon, bad faith liability in third party claims only arises where the liability carrier assumed defense of the insured. Georgetown Realty, Inc. v. Home Ins. Co., 313 Or 97, (1992). The insurer is not liable in tort to its insured for failing to properly defend the insured where the insured did not assume the defense of the third party claim. Farris v. U.S. Fidelity and Guaranty, 273 Or 628 (1975) and Warren v. Farmers Ins. Co. of Oregon, 115 Or. App. 319 (1992). Where a liability insurer does assume responsibility for defense of the claim, it has both a fiduciary duty and a duty of good faith. The insurer may be sued in tort for a violation of either duty.

B. With respect to first party claims, the minimum which is expected of an insurer when an action is filed against its insured for more than policy limits is that insurer employ good faith. An insurer demonstrates good faith in handling negotiations for settlement by treating conflicting interests of itself and insured with impartiality, giving equal consideration to both interests, and demonstrates good faith with respect to settlement and trial by acting as if there were no policy limits applicable to claim and as if risk of loss was entirely its own; conversely, bad faith is normally demonstrated by proving that risks of unfavorable results were

out of proportion to chances of a favorable outcome. An insurer may be found to have acted in bad faith in failing to make or in unduly delaying an offer or counteroffer to settle. Also, when there is clear liability it may be bad faith for the insurer to refuse to settle. Eastham v. Oregon Auto. Ins. Co., 273 Or. 600 (1975).

In Oregon, however, there is no such thing as the tort of first-party bad faith. Oregon has limited an insurer's liability to its insured in first party insurance claims to breach of contract damages, even where the insurer violated the Unfair Claims Settlement Act at ORS 746.230. Employers Fire Ins. Co. v. Love It Ice Cream Co., 64 Or App 784 (1983). In that case, the court recognized that a first party insurer could be held liable for a tort independent of the breach of contract such as interference with perspective economic advantage.

A first party insurer may be held liable for a violation of the implied duty of good faith arising out of the contract without breaching an express provision of the contract. McKenzie v. Pacific Health and Life Ins. Co., 118 Or App 377 (1993). In that case, the defendant insurer was held liable in tort for breach of good faith, including noneconomic damages for emotional distress caused by the physical harm resulting from the insurers breach of the insurance contract.

G. Coverage – Duty of Insured

An insured has a contractual duty to cooperate. The insured's responsibility under the cooperation clause must be viewed in the frame of the State's emphasized solicitude for the victims of automobile accidents resulting in a governmental policy in favor of protecting the innocent victims of vehicular accidents even though the tortfeasor may be totally indifferent to the rights of others. Thus, an insurer relies on the insured's non-cooperation as a defense at its peril. "In order for noncooperation, whether by named insured or by person who becomes an insured under terms of policy, to provide insurer with a defense under automobile policy, insurance company has burden to plead and prove that it suffered prejudice as a result of the noncooperation. Bailey v. Universal Underwriters Ins. Co. 258 Or. 201(1970).

In addition, in State Farm Mutual Automobile Insurance Co. v. Farmers Insurance Exchange, 238 Or. 285, (1964), the court stated: "We are holding that

an insurer must make a substantial showing of diligence before it can successfully rely on the defense of non-cooperation." If the insured or a third party notifies the insurer in time for the insurer to adequately investigate the claim and protect itself; or, stating it differently, if the insurer is not prejudiced by the insured's failure to give notice as soon as practicable, the insurer cannot escape its policy obligations. Lusch v Aetna Lusch v. Aetna Cas. & Sur. Co. 272 Or. 593 (1975).

H. Fellow Employee Exclusions

A fellow employee exclusion in a liability policy eliminates insured status for an employee of the named insured organization with respect to injury that employee causes to another employee. Fellow employee exclusions are enforceable in Oregon. In Garrett v New Hampshire Ins. Co, 2012 WL 950221 (2012), a fellow employee exclusion was enforced because the passenger was covered by workers compensation benefits and thus Oregon's financial responsibility laws were not violated. ORS 742.545.