

# Oregon Insurance Coverage Law

The Policyholders' Perspective

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# Policy Interpretation Under Oregon Law

- *Hoffman Construction Company v. Fred S. James & Co.*, 313 Or 464 (1992): General Rules of Policy Interpretation
  - Court's Role: ascertain the intent of the parties
  - Ambiguous terms are construed against the insurer

# Policy Interpretation Under Oregon Law

- *Konell Construction and Demolition Corp. v. Valiant Insurance Company*, USDC Case No. CV03-412-MO (May 15, 2006) (Judge Mosman)
  - Now, Valiant is probably the winner of the argument in one sense: at some intuitive level, its interpretation of the policy definition seems better than Konell's. In a popularity contest, Valiant's interpretation might win most of the time. But this court's task, under governing law, is not to choose the better of two interpretations. When the policy is reasonably susceptible to more than one interpretation – and this one is at least on these facts – then it should be construed against the drafter. Here, Valiant seems to have tried to perform an “e pluribus unum” with pollution incidents, but failed to do so clearly enough to cover this situation unambiguously.
  - In sum, nothing in the definition “pollution incident” makes the language reasonably susceptible to only one meaning. Based on the plain meaning of the policy terms, as well as the overall context of the policy, it cannot be said that Konell's interpretation is unreasonable.

# Comprehensive General Liability Insurance

- What is Covered? “All sums” that the insured becomes legally obligated to pay because of:
  - Bodily Injury
  - Property Damage
  - Personal Injury and Advertising Injury
- Caused by an “Occurrence”
  - “An accident, including continuous or repeated exposure to substantially the same general conditions.”
  - Single occurrence versus multiple occurrences

# Comprehensive General Liability Insurance

- The Duty to Defend
  - Extremely broad, and triggered by the mere potential for coverage
  - Based on two documents: the complaint and the policy. Insurers may not deny coverage based on extrinsic evidence
  - One potentially covered claim = defense to entire suit, including uncovered claims
  - What is a “suit”?

# Comprehensive General Liability Insurance

- The Duty to Indemnify
  - The narrower of the insurer's two primary policy obligations
  - What triggers the duty?
  - “All sums” versus allocation: *Cascade Corporation v. American Home Assurance Co., et al.*, 206 Or App 1 (2006)
  - The Duty to Settle

# Comprehensive General Liability Insurance

- Key Exclusions:
  - Intentional Acts
  - “Known Loss”
  - “Your Product” or “Your Work”: the business risk exclusions
  - Pollution
    - Total vs. Absolute vs. “Sudden and Accidental”
  - Newer Endorsements: The Incredible Shrinking Liability Policy

# Comprehensive General Liability Insurance

- Hot Topics in Liability Coverage
  - Insurer efforts to limit coverage
  - Bad faith and tort liability of insurers
    - Limited consequences for insurer breach
    - Failure to settle within policy limits?
    - Other tort exposure:
      - The evolving “special relationship”
      - Intentional interference
  - Additional Insured Endorsements and Certificates of Insurance

# First-Party Property Coverage

- What is typically covered?
- What is typically excluded?
- Causation issues
- Business interruption coverage
- Hot topics in first-party coverage:
  - Collapse Coverage
  - Coinsurance Provisions and Limits

# Other Coverage

- Directors and Officers Coverage
  - Scope of Coverage
  - Claims Made vs. Occurrence-based Coverage
  - Fraud Exclusions
    - Typically apply **only** if fraud is proven at trial
    - Impact on insurer's duty to settle?
  - Insured vs. Insured Exclusions
  - Rescission Issues

# Other Coverage

- Errors and Omissions Coverage
  - Professional liability coverage: attorneys, architects, engineers
  - Technology Errors and Omissions?
  - Typically Claims Made Coverage

# Other Coverage

- Employment Practices Liability Coverage
  - Relatively new coverage; no developed body of law
  - But subject to Oregon rules of policy interpretation
    - Ambiguities construed against insurer
    - Exclusions strictly construed
    - Duty to Settle?
  - Choice of counsel?
  - Conflicts issues, especially with high-level claims

# Coverage Disputes and the Role of Policyholder Coverage Counsel

- Getting Beyond “No”: Fighting the Coverage Denial
- Dealing with a Reservation of Rights
  - Working with retained defense counsel to protect the insured
  - Educating insurer on its duty of good faith and fiduciary obligations to the insured
- Settlement Negotiations
  - Maximizing insurer participation
- Litigation
  - Policyholder’s statutory right to attorneys’ fees: ORS 742.061
    - *Morgan v. Amex*: “delivered or issued for delivery” in Oregon
  - Stipulated Judgments and Assignments of Rights
    - A “last resort” tactic in Oregon