No. 03-35147
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FACTORY MUTUAL INSURANCE COMPANY, as successor in interest to Allendale Mutual Insurance Company, a foreign corporation,

Plaintiff-Appellee,

v.

NORTHWEST ALUMINUM COMPANY, an Oregon corporation

Defendant-Appellant.

Appeal from the United States District Court for the District of Oregon
Case No. CV 02-198 KI

REQUEST FOR LEAVE TO SUBMIT BRIEF AMICUS CURIAE; BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT-APPELLANT NORTHWEST ALUMINUM COMPANY AND IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

Page

I. INTRODUCTION 3

II. ARGUMENT 4

A. The Equitable Tolling Doctrine Furthers The Interests Of And Protects The Rights Of Both Insurer And Insured 4

1. Oregon's Insurance Laws Are Intended To Balance The Rights And Interests of the Insured and Insurer 4

2. Courts Have Adopted The Equitable Tolling Doctrine To Maintain a Balance Between The Rights and Interests of the Insurer and Insured 6

B. The Equitable Tolling Doctrine Is Widely Accepted And Is Consistent With Oregon Case Law 8

1. The Oregon Supreme Court Has Refused To Apply A Limitation Provisions If It Deprives A Diligent Litigant Of The Right To Sue 8

2. If The Court Declines To Adopt Equitable Tolling Here And Also Refuses To Certify The Issue To The Oregon Supreme Court, The Court Should Hold That The Standard For Waiver Or Estoppel Is Established Under The Facts Of This Case 11

III. CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Berry v. Branner,
421 P.2d 996 (Or. 1966) 7, 8, 9

Christensen v. First Ins. Co. of Hawaii, Ltd.,
967 P.2d 639 (Haw. App. 1998) 7

Clark v. Truck Ins. Exch.,
598 P.2d 628 (Nev. 1979) 7

Duncan v. Dubin,
556 P.2d 105 (Or. 1976) 10

FDIC v. Aetna Cas. & Sur. Co.,
903 F.2d 1073 (6th Cir. 1990) 12

Ford Motor Co. v. Lumbermens Mut. Cas. Co.,
319 N.W.2d 320 (Mich. 1982) 7

FSLIC v. Aetna Cas. & Sur. Co.,
701 F. Supp. 1357 (E.D. Tenn. 1988) 12

Herman v. Valley Ins. Co.,
928 P.2d 985 (Or. App. 1996) 5, 7

Humana v. Forsyth,
525 U.S. 299 (1999) 1

Meadows v. The Employers' Fire Ins. Co.,
298 S.E.2d 874 (W.Va. 1982) 12

Moore v. Mutual of Enumclaw Insurance. Company,
855 P.2d 626 (Or. 1993) 9

New York Central Mut. Fire Ins. Co. v. Markowitz,
147 A.D.2d 461 (1989) 11

Proc v. Home Ins. Co.,
217 N.E.2d 136 (N.Y. 1966) 11

Prudential-LMI Commercial Ins. v. Superior Court,
798 P.2d 1230 (Cal. 1990) 7, 8, 10

Rosane v. Senger,
149 P.2d 372 (Colo. 1944) 7

Schnitzer v. South Carolina Ins. Co.,
661 P.2d 550 (Or. App. 1983) 5, 8

Vandenberg v. Superior Court,
982 P.2d 229 (Cal. 1999) 1

Statutes

Fed. R. App. P. 32(a)(5) 14

Fed. R. App. P. 32(a)(6) 14

Fed. R. App. P. 32(a)(7)(B) 14

Fed. R. App. P. 32(a)(7)(B)(iii) 14

O.R.S 12.155(2) 10

O.R.S. 742.230 .... 5, 6

O.R.S. 742.232 .... 5, 6

O.R.S. 742.240 .... 4, 5, 6

O.R.S. 743.240 9

Other Authorities

16 Couch on Insurance § 234:4 5

Johnson, "The Suit Limitation Provision and the Equitable Tolling Doctrine,"
30 *Tort and Insurance Law Journal* 1015 (Summer 1995) 11

REQUEST FOR LEAVE TO SUBMIT BRIEF AMICUS CURIAE

United Policyholders was founded in 1991. It is a non-profit organization that is dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code §501(c)(3). United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

United Policyholders serves as a resource for insurance claimants and actively monitors legal and marketplace developments affecting the interests of policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

United Policyholders has been granted leave to file *amicus curiae* briefs on behalf of policyholders in more than one hundred cases throughout the United States involving insurance principles that are likely to affect large segments of the public and business community. United Policyholders' *amicus* brief was cited in the United States Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299 (1999), and its arguments were adopted by the California Supreme Court in *Vandenberg v. Superior Court*, 982 P.2d 229 (Cal. 1999).

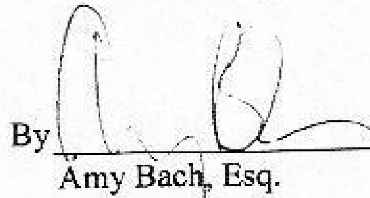
United Policyholders hereby respectfully seeks leave to submit this amicus brief to urge this Court to adopt the equitable tolling doctrine, which, as explained below, is consistent with Oregon law and protects the interests of the insurer and insured, or, alternatively, to certify to the Oregon Supreme Court the question of whether Oregon law provides for an equitable tolling doctrine.

For all of the foregoing reasons, the Court should grant United Policyholders leave to file the attached brief *amicus curiae*.

DATED: July 17, 2003

Respectfully submitted,

Law Office of Amy Bach



By ____________________

Amy Bach, Esq.

Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

I. INTRODUCTION

The contractual suit limitations provision that appears in every property insurance policy issued to Oregon policyholders (and in property insurance policies in virtually every other jurisdiction as well) is designed to promote the resolution of claims by requiring insureds to present, and insurers to adjust, property claims in a timely fashion. But the limitations period is not meant to penalize the diligent insured and is not meant to be a weapon employed to cut off viable claims properly tendered to the insurer.

To avoid such an unjust result, courts have adopted the equitable tolling doctrine, which stops the running of the limitations period from the time the insured tenders a claim until the insurer completes the adjustment process and denies coverage. The equitable tolling doctrine is fully consistent with the purpose of the suit limitations provisions and, at the same time, avoids the possibility of injustice to the insured when the insurer fails to act diligently in adjusting a claim. The suit limitations period begins to run when the loss begins, so insureds have a strong incentive to present claims in a timely fashion. The doctrine does not impair the insurer's rights: It does not create coverage where none exists and does not divest the insurer of any other defenses to coverage that it might have.

Application of the equitable tolling doctrine to this case, and generally to property insurance claims in Oregon, is essential because in Oregon an insured may find itself without recourse once an insurer denies coverage for a claim. This case provides a perfect example. Some claims, like the one at issue in this case, cannot be adjusted within the limitations period because complicated investigations and loss calculations are involved. Indeed, throughout the limitations period in this case, the insurer affirmatively represented that it was in the process of investigating the claim, and had not denied coverage. Filing suit against the insurer under those

circumstances could well have been premature and subjected the insured to a motion to dismiss for failure to allege a basis for declaratory relief and breach of contract. Indeed, the insurer waited until the end of the limitations period before even hinting that it would not cover the claim. Yet, according to the district court, the insurer thereby deprived the insured of coverage. Such a result, we respectfully submit, ought to be untenable.

To be sure, no Oregon court has squarely adopted the equitable tolling doctrine. However, the doctrine is perfectly consistent with Oregon case law. The Oregon Supreme Court has consistently interpreted limitations provisions so that they do not deprive diligent litigants of their opportunity to seek redress in the courts.

II. ARGUMENT

A. The Equitable Tolling Doctrine Furthers The Interests Of And Protects The Rights Of Both Insurer And Insured

1. Oregon's Insurance Laws Are Intended To Balance The Rights And Interests of the Insured and Insurer

Like other states, Oregon requires all property insurance policies that cover fire losses to include a suit limitations provision. Under the Oregon statute, a claimant has 24 months in which to bring a lawsuit under the policy. *See* O.R.S. 742.240. Virtually all Oregon property insurance policies have a suit limitation provision because they cover fire losses either alone or as part of a broader package policy.

Courts have noted that a suit limitation provision balances the interests of the insurer and insured. A suit limitation provision promotes the timely resolution of claims while evidence and facts still exist and memories are fresh just as a statutory statute of limitations provision does. Courts and legislatures have recognized that the passage of time, without more, does not benefit either party to a

lawsuit, particularly the one charged with the duty to act by contract, law or otherwise. *See* 16 Couch on Insurance § 234:4 at 234-12 to 234-13 (3d ed. 2000) (citing cases). Suit limitations provisions also allow an insurer to calculate and predict its present and future liabilities and to close claim files. "Without such a limitation provision, an insurer could not accurately forecast its future liabilities, set aside proper reserves, or close even ancient claim files." *Herman v. Valley Ins. Co.*, 928 P.2d 985, 991 (Or. App. 1996).

At the same time that Oregon has established an outside limit for the bringing of lawsuits on an insurance policy, it has also established an inside limit – a time period in which no suit may be brought. An insured normally cannot bring suit until the conditions precedent in the property policy have been satisfied, including the provisions that require the policyholder to supply sufficient information for the insurer to adjust the claim and to participate in an appraisal, if demanded. *See, e.g.,* O.R.S. 742.230, .232, and .240.[1]

As with the limitations provision, these provisions have been found to benefit both the insured and insurer. "The purpose of timely notice is 'for the insurer to adequately investigate the potential claim and thus protect itself and the insured.'" *Herman v. Valley Ins. Co.*, 928 P.2d at 990 (quoting *Lusch v. Aetna Cas. & Surety Co.*, 538 P.2d 902, 904 (Or. 1975)). Similarly, requiring the insured and the insurer to satisfy procedures for resolving the amount of the claim has been described as providing the insurer and the insured the benefit of "a method of resolving disputes which avoids the delay and expense of litigation." *Schnitzer v. South Carolina Ins. Co.*, 661 P.2d 550, 552 (Or. App. 1983).

To ensure that these rules are not circumvented, Oregon discourages lawsuits on the policy until the insured has given proper notice, the insurer has

[1] The referenced statutes are attached in full to the appendix to this brief.

adjusted the claim, and a dispute over coverage has arisen. *See* O.R.S. 742.230, .232, .240, and 742.660. These rules have the incidental benefit of insulating the courts from congestion caused by anticipatory or precipitous lawsuits. However, without the equitable tolling doctrine, these rules lead to inequitable results.

2. Courts Have Adopted The Equitable Tolling Doctrine To Maintain a Balance Between The Rights and Interests of the Insurer and Insured

In cases such as this one, blanket application of the suit limitations provision would undermine, not accomplish, its purpose. An insured who has no basis for filing suit, such as when the claim is under investigation and no dispute has arisen with the insurer, may nonetheless be barred from any recovery under the policy if the limitations period has run. In other words, an insured may be diligent in providing notice and all information sought by the insurer but, because the insurer delays and holds out its investigation as an impediment to making a decision on the claim until the limitations period has run, the insured may be deprived of his or her day in court.

Alternatively, and closely tracking the facts of this case, the insurer may provide extensions to the 24 month limitation provision justified by a real or ostensible investigation. But the insurer may await the running of that extension to notify the insured that the claim has been denied. In either instance, the insured, however diligent in pursuing claims with the insurer, is without recourse.

The larger the claim, the greater the need for insurance coverage, and the more likely this inequitable result. An insurer called on to pay millions of dollars does not wish to run the risk of paying claims that it should not pay. It must therefore investigate the claim. And, the larger the claim, the more complex the issues, the greater time it will take to evaluate the cause and amount of the loss and possible coverage issues. Yet, an insured who timely provides notice, cooperates

fully with the insurer's investigation, addresses the insurer's coverage concerns, and otherwise performs all of its duties under the policy, may have its rights under that policy forfeited because the time consumed in this process exceeds 24 months.

This result is aptly described as a "mockery." As noted by the Oregon Supreme Court: "To say to one who has been wronged, 'You had a remedy but before the wrong was ascertainable to you, the law stripped you of your remedy,' is to make a mockery of the law." *Berry v. Branner*, 421 P.2d 996, 998 (Or. 1966) (quoting *Rosane v. Senger*, 149 P.2d 372, 375 (Colo. 1944)).

To avoid this result, but to achieve the benefits articulated above, courts have employed the equitable tolling doctrine. The equitable tolling doctrine applies the suit limitation provisions of an insurance policy but tolls it between the date that the insurer receives notice of a claim and the date the insurer denies the claim. *See, e.g., Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (Cal. 1990); *Ford Motor Co. v. Lumbermens Mut. Cas. Co.*, 319 N.W.2d 320 (Mich. 1982); *Clark v. Truck Ins. Exch.*, 598 P.2d 628 (Nev. 1979); *Christensen v. First Ins. Co. of Hawaii, Ltd.*, 967 P.2d 639 (Haw. App. 1998), *aff'd in part, rev'd in part on other grounds* 963 P.2d 345 (Haw. 1998). The equitable tolling doctrine does not provide coverage where none exists and it does not deprive insurers of any defenses they may have. It simply ensures that the time consumed by an insurer's investigation and consideration of the claim does not count against the insured. *See, e.g.*, *Prudential-LMI*, 798 P.2d at 1241.

Thus, the equitable tolling doctrine protects the rights and interests of the insurer and the insured while removing the perverse result of a loss of coverage due to the running of the limitations period before suit can, or should, be brought. An insurer given adequate notice of the claim can investigate the claim and thereby preserve and develop evidence. It has the ability to set aside proper reserves and forecast future liabilities. *See Herman*, 928 P.2d at 991 (citing these policy reasons

in support of limitations provision).

Moreover, the equitable tolling doctrine fosters and promotes resolution of matters without court interference. The insurer and insured are provided the time to not merely investigate the claim but to resolve issues that arise from that investigation without the need to file suit while parties attempt to reach agreement on coverage. *See Prudential-LMI,* 798 P.2d at 1241-42 (noting the policy considerations that justify the equitable tolling doctrine); *see also Schnitzer*, 661 P.2d at 552 (noting that the benefit of certain insurance laws is to save insurer and insured time and expense of litigation).

In addition, the equitable tolling doctrine removes the incentive of an insurer to wait out the limitations period without denying the claim. An insurer cannot sleepily shelve a claim until 24 months have passed. Nor, as here, will an insurer be able to assert the limitations as a defense when its seemingly enthusiastic investigation and promises to resolve the claim have lulled the insured into refraining from filing suit because the claim appears to be "all but resolved."

B. The Equitable Tolling Doctrine Is Widely Accepted And Is Consistent With Oregon Case Law

1. The Oregon Supreme Court Has Refused To Apply A Limitation Provisions If It Deprives A Diligent Litigant Of The Right To Sue

There are strong indicia that the Oregon Supreme Court would adopt the equitable tolling doctrine if requested to do so. In *Berry*, for example, the court recognized that one purpose of the statute of limitations is to protect defendants against stale claims, but found that this purpose could not justify the absurd result of depriving a plaintiff of the right to sue when the plaintiff does not discover the injury until after the limitations period has run. Simply put, "[t]he protection . . . from stale claims does not require such a harsh rule." *Berry*, 421 P.2d at 999. Instead, "[t]he mischief the statute was intended to remedy was delay in the

assertion of a legal right by one who had slumbered for the statutory period during which process was within his reach." *Id.* As a result, the court held that plaintiff's malpractice claim accrued on the date plaintiff discovered the injury.[2] The court reached this conclusion, moreover, despite its express admission that "[t]he legislature left the matter undetermined." *Id.* In response to the charge that "a decision of this kind amounts to judicial legislation," the court stated that it ruled as it did precisely because the Oregon legislature had not spoken to the issue. *Id.*

Berry is instructive here because in this case, unlike in *Berry*, there is no countervailing consideration such as the prevention of stale claims. The equitable tolling doctrine tolls the time period *between notice to the insured and denial.* An insured who allows a claim to gather dust by failing to notify the insurer of its claim does not receive the benefits of equitable tolling. Therefore, a claim that is stale when the insurer is provided notice is not saved by the equitable tolling doctrine. As the California Supreme Court remarked, "[e]quitable tolling is also consistent with the policies underlying the claim and limitations periods – e.g., the insurer is entitled to receive prompt notice of a claim and the insured is penalized

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[2] In *Moore v. Mutual of Enumclaw Insurance. Company*, 855 P.2d 626 (Or. 1993), the Oregon Supreme Court considered when the suit limitations provision in an insurance policy *begins* to run. Construing O.R.S. 743.240, which states that the limitations period starts to run at the "inception of the loss," the court concluded that the limitations period for filing suit under first party policies begins when injury occurs rather than when the claim accrues. *Id.* at 635. However, *Moore* cannot be read as an indication that the Oregon Supreme Court would decline to adopt the equitable tolling doctrine or that the policies underlying *Berry* (i.e., providing a party a realistic opportunity to bring suit) are suspect. That is because the equitable tolling doctrine does not affect *when* the limitations period begins to run. It only comes into play *after* the limitations period starts, whenever that might be. Thus, the equitable tolling doctrine does not depend on whether the limitations period for a claim begins to run when injury occurs (as in *Moore*) or upon the discovery of the injury (as in *Berry*).

for waiting too long after discovery to make a claim." *Prudential-LMI*, 798 P.2d at 1242.

Berry is not the sole indicator that the Oregon Supreme Court would adopt the equitable tolling doctrine. In *Duncan v. Dubin*, 556 P.2d 105 (Or. 1976), the Oregon Supreme Court extended the scope of a statutory insurance tolling provision to protect an insured's right to sue. At issue in *Duncan* was Oregon Revised Statute 12.155(2), which requires an insurer who advances payments to a third party for personal injury or property damage claims to notify the third party of the date on which the suit limitation period expires. If the insurer fails to provide such notice, the limitations period is tolled. *See* O.R.S 12.155(2). In *Duncan*, the insurer made an advance payment to the third party plaintiff for *property damage* without giving notice of the expiration date for the plaintiff's claim. After that period expired, plaintiff brought a *personal injury action* and the defendant claimed that it was time barred. Defendant claimed that no payments had been made for personal injury and the tolling provisions of O.R.S. 12.155(2) did not apply. Echoing *Berry*, the *Duncan* Court acknowledge that the legislature had not spoken to this issue. The court explained that "[i]t is very likely that the legislature did not anticipate the problem presented in this case." *Duncan*, 556 P.2d at 108. Nonetheless, to effectuate the purpose of ensuring that third parties are not deprived of their right to bring a claim, the court extended the scope of the tolling provision so that the plaintiff's claims were tolled. *Id.*

Thus, even in the face of legislative silence, Oregon courts have carefully avoided an interpretation of suit limitation provisions that would deprive litigants of their opportunity to seek legal redress. Adoption of the equitable tolling doctrine is an accepted means of ensuring the opportunity to seek legal redress and it is consistent with Oregon case law. *See* Johnson, "The Suit Limitation Provision and the Equitable Tolling Doctrine," 30 *Tort and Insurance Law Journal* 1015,

1018-19 (Summer 1995) (citing cases and statutes adopting or implementing the equitable tolling doctrine).

2. If The Court Declines To Adopt Equitable Tolling Here And Also Refuses To Certify The Issue To The Oregon Supreme Court, The Court Should Hold That The Standard For Waiver Or Estoppel Is Established Under The Facts Of This Case

Those courts that have not adopted the equitable tolling doctrine have found other ways to mitigate the harm that results from a delay in denying the claim. For example, New York has refused to adopt the equitable tolling doctrine. *See Proc v. Home Ins. Co.*, 217 N.E.2d 136 (N.Y. 1966). However, New York courts so ruled because they have another doctrine, waiver, that precludes an insurer from delaying its coverage decision until the limitations period has run or all but run. *See New York Central Mut. Fire Ins. Co. v. Markowitz*, 147 A.D.2d 461, 537 N.Y.S.2d 571, 572 (1989)

In New York, if an insurer fails timely to deny a claim, it waives the right to do so. In one instance, a New York court found that a six month delay was unreasonable and barred the insurer from denying a duty to defend. It noted that timely denial was essential even when, as in that case, the insured provided untimely notice of its claim. In its words, "[t]he foregoing rule is applicable 'even if the insured or injured claimant has in the first instance failed to give timely notice' . . ." because "'[w]here the carrier itself has unreasonably delayed in making a disclaimer * * * [sic] it cannot take advantage of a failure to give timely notice of accident . . . .'" *New York Central Mut. Fire Ins. Co.*, 537 N.Y.S.2d at 572 (citations omitted) (finding that insurer waived right to disclaim coverage because it waited six and a half months in denying claim based on untimely notice when untimeliness of notice was readily apparent).

New York does not stand alone in this regard. As noted by the West

Virginia Supreme Court when it determined that insurance suit limitation provisions would not begin to run until an insurer declines to pay a loss, "[e]ven among those courts which purport to give strict adherence to the . . . limitation of suit provision, there is a recognition that this period will be extended if the insurance company by negotiations or other actions induces the insured to delay filing suit." *Meadows v. The Employers' Fire Ins. Co.*, 298 S.E.2d 874, 878-79 (W.Va. 1982) (citing an Indiana Supreme Court case finding implied waiver when insurer throughout suit limitations period was seeking information relating to the claim; and citing an Oklahoma Supreme Court case and a Utah Supreme Court case also finding implied waiver); *see also FSLIC v. Aetna Cas. & Sur. Co.*, 701 F. Supp. 1357, 1360-62 (E.D. Tenn. 1988) (adopting the equitable tolling doctrine and noting that courts have sought to avoid the cutting off of an insured's right to sue under a suit limitation provision by a variety of means including finding that the cause of action against an insured does not begin to run until denial of a claim, adoption of the equitable tolling doctrine, or adoption of waiver or estoppel doctrines where the traditional elements need not be met), *disapproved on other grounds*, *FDIC v. Aetna Cas. & Sur. Co.*, 903 F.2d 1073 (6th Cir. 1990).

A similar rule should apply in this proceeding. Here, the insurer waited years to give its position on coverage. Under the guise of an investigation, it requested information, met with the insured, shared information and extended the time so that these things could be accomplished. It only denied the claim after the last such extension purportedly expired. Just as other numerous courts have concluded that blanket application of a suit limitation provision is inequitable, this Court, too, should refuse to countenance an insurer's sharp practice of using a suit limitations provision to avoid its obligations to a diligent insured. Thus, if the Court does not adopt equitable tolling or certify the issue to the Oregon Supreme Court, it should hold that the standard for waiver or estoppel is established as a

matter of law under the facts of this case.

III. CONCLUSION

The equitable tolling doctrine is a widely accepted means of furthering the interests of the insured and insurer. It is consistent with the policies underlying Oregon's insurance laws and jurisprudence and is consistent with Oregon Supreme Court's interpretation of its statute of limitations laws. It should therefore be adopted by this Court. If the Court declines to adopt the equitable tolling doctrine, it should certify the issue to the Oregon Supreme Court or, alternatively, find for the insured on waiver or estoppel grounds.

DATED: July 17, 2003

Respectfully submitted,

Law Office of Amy Bach

By ______________________

Amy Bach, Esq.

Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Form 6. Certificate of Compliance With Rule 32(a)

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Dated: July 17, 2003

By: ______________________

Amy Bach
CA Bar No. 142029

APPENDIX

1991 c.968 §1]

12.137 Action for loss of or damage to property arising from nuclear incident. (1) An action, arising from a nuclear incident that involves the release of radioactive material, excluding releases from acts of war, that causes loss of or damage to property, or loss of use of property shall be commenced:

(a) Within two years from the time an injured person discovers or reasonably could have discovered the injury to property and the causal connection between the injury and the nuclear incident; or

(b) Within two years from any substantial change in the degree of injury to the property arising out of a nuclear incident.

(2) As used in this section, "nuclear incident" has the meaning given that term in 42 U.S.C. 2014(q).

(3) In no event shall any action under subsection (1) of this section or ORS 12.110 (5) be commenced more than 30 years from the date of the nuclear incident. [1987 c.705 §§1,2]

Note: 12.137 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 12 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

12.140 Actions not otherwise provided for. An action for any cause not otherwise provided for shall be commenced within 10 years.

12.150 Suspension of running of statute by absence or concealment. If, when a cause of action accrues against any person, the person is out of the state and service cannot be made within the state or the person is concealed therein, such action may be commenced within the applicable period of limitation in this chapter after the return of the person into the state, or after the termination of the concealment of the person; and if, after a cause of action has accrued against a person, the person shall depart from and reside out of this state, or if the person is concealed therein, the time of the absence or concealment of the person shall not be deemed or taken as any part of the time limited for the commencement of such action. [Amended by 1973 c.206 §1; 1987 c.158 §4]

12.155 Effect of notice of advance payment on running of period of limitation. (1) If the person who makes an advance payment referred to in ORS 18.520 or 18.530 gives to each person entitled to recover damages for the death, injury or destruction, not later than 30 days after the date the first of such advance payments was made, 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, then the making of any such advance payment does not suspend the running of such period of limitation. The notice required by this subsection shall be in such form as the Director of the Department of Consumer and Business Services prescribes.

(2) If the notice required by subsection (1) of this section is not given, the time between the date the first advance payment was made and the date a notice is actually given 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 is not part of the period limited for commencement of the action by the statute of limitations. [1971 c.331 §5; 1981 c.892 §85b]

12.160 Suspension as to persons under disability. If, at the time the cause of action accrues, any person entitled to bring an action mentioned in ORS 12.010 to 12.050, 12.070 to 12.250 and 12.276 is within the age of 18 years or insane, the time of such disability shall not be a part of the time limited for the commencement of the action; but the period within which the action shall be brought shall not be extended more than five years by any such disability, nor shall it be extended in any case longer than

t a finding that an insured
the insurer before a fire.
from the insured for one-
red for fire damage to the
ce Co. v Valley Insurance

2.224 (formerly ORSA
urance contract need be
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e policies. Frontier Insur-
o., 262 Or 470, 499 P2d

gation of mortgagee

visions as follows:
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ich mortgagee a 10 days'

of loss such mortgagee,
the form herein specified
ct to the provisions hereof
nd of bringing suit. If this
ed as to the mortgagor or
loss to the mortgagee, be
recovery, but without im-
pay off the mortgage debt
ie mortgage. Other provi-
is of such mortgagee may

743.639), if an insurer in
exists as to the mortgagor
and damaged by fire, the
o the mortgagee. Where a
agee's interest was pro-
y, and the insurer paid off

the interests of two mortgagees, the insurer was entitled to the mortgagees' remedies. Northwest Farm Bureau Ins. Co. v Althauser, 90 Or App 13, 750 P2d 1166, review denied by 305 Or 672, 757 P2d 422 (1988)(Decided under prior law).

A clause that made the loss payable to mortgagees was inserted by a mutual fire insurance association. Under a predecessor of ORSA 742.224 (formerly ORSA 743.639), the Supreme Court held that this clause resulted in a contractual relationship between the association and the mortgagee and that even though a mortgagor failed to comply with a provision requiring proof of loss, a mortgagee to whom the loss was payable could still recover. Meader v Farmers' Mutual Fire Relief Association, 137 Or 111, 1 P2d 138 (1931)(Decided under prior law).

742.228 Pro rata liability of insurer

A fire insurance policy shall contain a provision as follows: "This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not." [Formerly 743.642]

ANNOTATIONS

OREGON CASES

ORSA 742.228 (formerly ORSA 743.642) provides that under a fire insurance policy, a company shall not be liable for a greater proportion of any loss than the amount insured in the policy bears to the total coverage on the property. Where two policies are designed to secure a seller's interest in the event of fire loss, and the policy obtained by the buyer pays the full amount of the loss to the seller, that insurer is entitled to contribution from the seller's insurer. Farmers Ins. v St. Paul Fire & Marine, 305 Or 488, 752 P2d 1212 (1988), aff'g 86 Or App 367, 739 P2d 605 (1987)(Decided under prior law).

ORSA 742.224 (formerly ORSA 743.642) provides for pro rata liability of an insurer providing fire insurance coverage. Where fire insurance company A paid a greater portion of the loss from a fire than the amount of fire insurance coverage under its policy required by comparison to the total of its policy and fire insurance company B's policy, A was entitled to contribution from B for the excess payments made. Farmers Ins. v St. Paul Fire & Marine, 86 Or App 367, 739 P2d 605 (1987)(Decided under prior law).

742.230 Requirements in case loss occurs

A fire insurance policy shall contain a provision as follows: "The insured shall give immediate written notice to this company of any

loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 90 days after receipt of proof of loss forms from the company, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."
[Formerly 743.645]

742.232 Appraisal

A fire insurance policy shall contain a provision as follows: "In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a

loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 90 days after receipt of proof of loss forms from the company, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground; and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."
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court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting the appraiser and the expenses of appraisal and umpire shall be paid by the parties equally."
[Formerly 743.648]

Cross References

Provision regarding legal action in fire insurance policy, see ORSA 742.240.

ANNOTATIONS

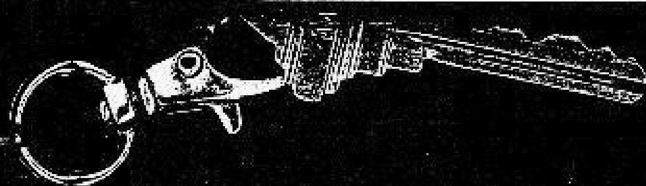
OREGON CASES

A party that demands appraisal under ORSA 742.232 (formerly ORSA 743.648) will be deemed to have consented voluntarily to the appraisal process, and the appraisal award will be binding on that party. The award is non-binding on the non-demanding party who is entitled to have the amount of damages determined by a jury. Molodyh v Truck Ins. Exchange, 304 Or 290, 744 P2d 992 (1987), aff'g 77 Or App 619, 714 P2d 257 (1986)(Decided under prior law).

ORSA 742.232 (formerly ORSA 743.648) sets forth an appraisal procedure to be used in the event of a dispute over the actual cash value or the amount of the loss under a fire insurance policy. While the appraisal procedure must be included in all insurance policies providing fire coverage, the statute does not require appraisal in all cases when the amount of loss is disputed. Molodyh v Truck Ins. Exchange, 304 Or 290, 744 P2d 992 (1987), aff'g 77 Or App 619, 714 P2d 257 (1986)(Decided under prior law).

The purpose of ORSA 742.232 (formerly ORSA 743.648) is to create a method of resolving disputes that avoids the delay and expense of litigation, which purpose would be frustrated by permitting an appraisal to be delayed and litigation costs to be incurred while non-dispositive questions relevant to determining the amount of a loss are adjudicated. The insured was prohibited from bringing a declaratory judgment action concerning three disputed policy provisions in advance of the appraisal demanded by the insurer. Director v South Carolina Insurance Co., 49 Or App 179, 619 P2d 649 (1980)(Decided under prior law).

Where one of the parties was aware that the other party's choice of an appraiser was a nonresident, the party's failure to object was deemed a waiver of that objection. Further, even though an appraiser selected by one of the parties had acted for it on prior occasions, that prior service by the appraiser did not render him incompetent to act. Stemmer v Scottish Union & National Insurance Co., 33 Or 65, 49 P 588, 53 P 498 (1897)(Decided under prior law).



742.234 Insurer's options

A fire insurance policy shall contain a provision as follows: "It shall be optional with this company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after the receipt of the proof of loss herein required."
[Formerly 743.651]

742.236 Abandonment

A fire insurance policy shall contain a provision as follows: "There can be no abandonment to this company of any property."
[Formerly 743.654]

742.238 When loss payable

A fire insurance policy shall contain a provision as follows: "The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided."
[Formerly 743.657]

742.240 Suit on policy

A fire insurance policy shall contain a provision as follows: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 24 months next after inception of the loss."
[Formerly 743.660; 1991 c.437 §1]

Cross References

Written notice required of insured in case of loss, see ORSA 742.230.

ANNOTATIONS

OREGON CASES

The limitations period contained in this section begins to run at the "inception of the loss," meaning the date of the casualty; this may not

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 17th day of July, 2003, I served, via United States Mail overnight delivery, postage prepaid, two copies of the foregoing **REQUEST FOR LEAVE TO SUBMIT BRIEF AMICUS CURIAE; BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT-APPELLANT NORTHWEST ALUMINUM COMPANY AND IN SUPPORT OF REVERSAL** upon:

Lisa E. Lear
Douglas G. Houser
Stuart Duncan Jones
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888 SW Fifth Avenue, Suite 300
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Vancouver, WA 98666
Tel: (360) 696-3312

I filed the original and fifteen copies of the **REQUEST FOR LEAVE TO SUBMIT BRIEF AMICUS CURIAE; BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT-APPELLANT NORTHWEST ALUMINUM COMPANY AND IN SUPPORT OF REVERSAL** with:

Ms. Cathy Catterson
Clerk of the
Ninth Circuit Court of Appeals
95 7th Street
San Francisco, CA 94103-1526

Via United States Mail overnight delivery, postage prepaid, on July 17, 2003.

Amy Bach