SMITH FREED & EBERHARD P.C.

OREGON LAW UPDATE

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Important Change to the Scope of Discovery in Oregon: Oregon Now Requires Disclosure of the Existence of Coverage Denials or Reservation of Rights Letters and Identification of the Policy Provisions upon Which the Denial or Reservation is Based

Oregon Rule of Civil Procedure (ORCP) 36 B(2)(a) has been amended to broaden the scope of discovery relating to disclosure of insurance information. The amendment, effective January 1, 2012, now requires a party, if so requested, to disclose:

"[T]he existence of any coverage denial or reservation of rights, and identify the provisions in any insurance agreement or policy upon which such coverage denial or reservation of rights is based." ORCP 36 B(2)(a)(ii).

The Oregon Council for Court Procedures (the Council) promulgated this rule with the intent that parties to a lawsuit will become aware early on about the potential unavailability of insurance funds and can then consider coverage issues further and determine whether to pursue costly litigation. The Council expressed the belief that this new rule will encourage settlement.

The new rule does not require disclosure of the actual denial or reservations of rights letter. However, because a party is required to identify the policy provisions upon which the coverage denial or reservation of rights is based, one concern is how to comply with the spirit of the rule without disclosing privileged communications.

Under the Oregon Evidence Code, "confidential communications" between an insurer (as "representative of the client") and the insured (as "client") are protected. OEC 503 (ORS 40.225). Further, several 2005 Ethics Opinions found the insured and insurer are both clients of the lawyer, although the insured is the "primary client" in this tripartite relationship. Requiring a copy of the reservation of rights letter can implicate the insurer's analysis as well as disclosure of information about the underlying case such as if the denial is based on the insured's intentional act.

While the Council recognized these concerns, ultimately it determined that the language of the amendment was the best way to strike a balance between providing important information while still protecting privileged communications. The rule does not foreclose the possibility of seeking a protective order under ORCP 36 C (or similar procedural mechanism) where the disclosure of specific policy provisions would implicate privilege. One method to meet the requirements is to list all of the relevant policy provisions in the reservation of rights letter and then provide a copy of the letter redacting all other parts of the letter. The second method would be to "cut and paste" the relevant provisions into a new document.

Note: The Oregon Council for Court Procedures Meeting Minutes (Sept. 11, 2010) are available at:http://legacy.lclark.edu/~ccp/Content/Minutes/2010-09-11_minutes_with_appendices.pdf, p. 3-7 (minutes discussing proposed amendment to ORCP 36 B(2)(a)).

2010 Promulgated Amendments to ORCP (with Legislative Assembly Changes)

GENERAL PROVISIONS GOVERNING DISCOVERY

RULE 36

A) Discovery methods: Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

B) Scope of discovery: Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

B(1) In general: For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having

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knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

B(2) Insurance agreements or policies:

B(2)(a) A party, upon the request of an adverse party, shall disclose:

B(2)(a)(i) the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment[.];and

B(2)(a)(ii) the existence of any coverage denial or reservation of rights, and identify the provisions in any insurance agreement or policy upon which such coverage denial or reservation of rights is based.

B(2)(b) The obligation to disclose under this subsection shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this subsection as provided in section C of this rule.

B(2)(c) Information concerning the insurance agreement or policy is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement or policy.

B(2)(d) As used in this subsection, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

B(3) Trial preparation materials. Subject to the provisions of Rule 44, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B(1)of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C) Court order limiting extent of disclosure: Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired

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into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

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