

OREGON LAW UPDATE

No Contribution From Third Party Whose Liability Is Not Extinguished by Settlement

From the Desk of Jeff Eberhard: In this case, the Oregon Court of Appeals held that in order for a contribution or indemnity claim to survive, an associated settlement must fully discharge the liability of all non-settling parties.

Claims Pointer: Oregon's rules on contribution and indemnity help allocate financial responsibility when multiple parties are at fault for a plaintiff's injury. When one of the at-fault parties settles with the plaintiff, that party has a right to pursue reimbursement from the other at-fault parties, only when the settlement discharged the liability of the non-settling parties. If the settlement leaves open the possibility that the original plaintiff can still pursue the non-settling parties, the settling party has no further recourse. Insurers and their attorneys should keep these requirements in mind when executing settlement agreements, making note of whose liability is extinguished by the agreement, and whose is not.

case in point ...

Marton v. Ater Construction Co., LLC, in the Court of Appeals of the State of Oregon, A148407 (May 15, 2013).

Marton hired Ater Construction Company, LLC ("Ater") to build a home. In constructing the home, Ater used windows manufactured by Marvin Windows, Inc. ("Marvin") and distributed by Medallion Industries, Inc. ("Medallion"). In April 2006, Marton discovered water damage in the home and sued Ater for breach of contract and negligence. Ater then sued Marvin and Medallion, alleging that the damage to Marton's house was their fault.

Eventually, Ater and Marton entered into a settlement which included a so-called "Mary Carter Agreement," a settlement agreement whereby Ater remained a party to Marton's lawsuit, but its liability to Marton would be capped at \$100,000. Marvin and Medallion then filed for summary judgment against Ater. They argued that Ater's claims for contribution and indemnity must fail because Ater had discharged its liability to Marton via the Mary Carter Agreement, but had not discharged any liability on the part of Marvin and Medallion. The trial court agreed with Marvin and Medallion, dismissing Ater's claims against them. Ater appealed.

On review, the Oregon Court of Appeals applied ORS 31.800, Oregon's contribution statute, to the facts of the case. That statute permits a party which has paid more than its proportional share of a common liability

to seek recovery from the other negligent parties. When a tortfeasor settles, however, he or she cannot seek contribution from another tortfeasor whose liability is not discharged by the settlement. This is to avoid a situation where a non-settling party pays the settling party for contribution, and then is later sued by the original plaintiff. The Court found that the settlement between Ater and Marton did not extinguish any liability of Marvin or Medallion. Those parties could still, in theory, be sued by Marton. Accordingly, the trial court was correct to dismiss Ater's contribution claims against Marvin and Medallion.

The Court went on to evaluate Ater's indemnity claims against Marvin and Medallion. Under Oregon common law, a plaintiff in an action for indemnity must prove (1) that it has discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) between the plaintiff and the defendant, the obligation should be discharged by the defendant. Fulton Ins. v. White Motor Corp., 261 Or 206, 210 (1972). As with Ater's contribution claim, the court found that the second requirement—that the settlement discharge Marvin and Medallion's liability—was not met. Accordingly, Ater's indemnity claim, like his claim for contribution, could not survive.



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