

Oregon Case Update



Oregon Court of Appeals Requires an Insurer to Indemnify its Insured for Intentional Timber Trespass Claim Despite an Exclusion for Intentional Acts

From the desk of Josh Hayward: Commercial general liability insurance policies issued in the state of Oregon typically include the duties to defend and indemnify. A common exclusion in these policies is an exclusion for intentional acts. If an insured is found liable for an intentional timber trespass, can the insurer rely on an intentional act exclusion for its refusal to indemnify? Read on to find out.

Case Pointer: In this dispute arising from an insurer's refusal to defend and indemnify a timber trespass claim, the Oregon Court of Appeals affirmed the trial court's determination that the insurer had a duty to defend and indemnify. Despite the fact that the insured was found liable for intentional timber trespass, the insurer was required to defend and indemnify the insured because the insured did not expressly intend to damage the trees and other potential exclusions were ambiguous. This case is a reminder that any ambiguity or uncertainty contained in a policy will be construed against the insurance company.

[Bighorn Logging Corp. v. Truck Ins. Exchange, 295 Or App 819 \(Jan. 30, 2019\).](#)

In 2012, Bighorn Logging Corporation ("Bighorn") was engaged in an extensive logging project on property owned by Dr. Edney ("Edney Property"). To assist in its operation, Bighorn sought and obtained permission from Paul Ater to use trees on his property as rope anchors to assist in the logging operation. Mr. Ater agreed to specified terms, including that Bighorn would use only two to three trees and use a special anchoring technique that would not damage the trees. Following the operation, Mr. Ater alleged that Bighorn cut down or damaged 18 trees on his property. He filed a timber trespass lawsuit against Bighorn. In Oregon, if a plaintiff can prove timber trespass, they are entitled to enhanced damages and attorney fees. The amount of the enhancement is based on the culpability of the defendant.

Mr. Ater's Complaint alleged both intentional and negligent timber trespass. Bighorn was insured under a policy issued by the Truck Insurance Exchange ("Truck"). Bighorn tendered the defense of the timber trespass action to Truck, which denied coverage based on its assertion that Bighorn's conduct was not covered by the policy and certain exclusions applied to preclude coverage. A jury returned a verdict in favor of Mr. Ater, finding Bighorn liable for intentional or reckless timber trespass. A judgment was entered against Bighorn for intentional timber trespass.

Following the conclusion of Mr. Ater's lawsuit, Bighorn brought a breach of contract claim against Truck for its refusal to defend and indemnify. It moved for summary judgment, arguing that Truck's duty to defend was triggered as a matter of law because Mr. Ater's complaint alleged negligence. Truck responded that Bighorn's conduct was not covered by the policy because Bighorn was found liable for property damage that it intended to occur. The insurance policy issued by Truck contained the following provisions relevant to this matter.



Josh Hayward

jhayward@smithfreed.com

Phone: 503.227.2424

Fax: 503.227.2535

www.smithfreed.com

Oregon Office

111 SW 5th Ave, Suite 4300
Portland, OR 97204



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"[T]ruck will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. [Truck] will have the right and duty to defend the insured against any 'suit' seeking those damages."

The policy included several exclusions, including an exclusion for "property damage 'expected or intended' by the insured." The policy also contained two other exclusions that Truck argued applied to its duty to defend and indemnify.

The trial court granted Bighorn's motion, acknowledging that coverage does not exist for intentional conduct, but reasoning that an intentional act in the insurance context is "one where the action was intended and a purpose of damaging a person or property was also intended." Because Mr. Ater had not alleged that Bighorn's intentional conduct was done with the express purpose of damaging or killing the trees, Bighorn's conduct did not fall within the intentional conduct context in insurance policies. Truck took exception to the trial court's ruling and this appeal followed.

The appellate court first examined Truck's assertion that it did not have a duty to defend under the other two exclusions at issue. Finding that these exclusions were ambiguous as applied to the allegations in the complaint, the court ruled that Truck's duty to defend was triggered because ambiguities must be construed against the insurer. Since the complaint alleged negligent and intentional conduct, Truck likely did not argue that the intentional act exclusion would affect their duty to defend.

The court then examined whether Truck's duty to indemnify was triggered after the jury's verdict and the judgment, despite the exclusion for "intended injury" in the policy. Truck argued two main points. First, it argued that Bighorn "could never prove under the circumstances that Truck's obligation to indemnify was triggered because...the trial court's judgment in the *Ater* case held Bighorn liable for 'intentional timber trespass.'" Second, Bighorn's conduct was excluded because it "intended" the property damage to Mr. Ater's property to occur. The court was not persuaded by Truck's arguments. It reasoned that Bighorn's actions did not have the subjective intent or purpose of causing damage to Mr. Ater's trees. Or, more specifically, "Bighorn's liability to Ater for intentional trespass did not establish that Bighorn acted with the purpose of damaging Ater's trees." Further, because the jury found that Bighorn was liable for intentional or reckless conduct, the judgment was not conclusive. For these reasons, Truck was not relieved of its duty to indemnify Bighorn for its intentional conduct.

This case is yet another example of why insurers must be extremely careful when denying coverage under policies issued in the state of Oregon. Further, it is a reminder of the breadth of Oregon's timber trespass statute. Despite the court finding that Bighorn did not have the subjective intent to damage Mr. Ater's trees, Bighorn could still be liable for intentional timber trespass, which subjected Bighorn to treble damages and attorney fee exposure.

View full opinion at https://cdm17027.contentdm.oclc.org/ui/custom/default/collection/coll_p17027coll3/resources/custompages/OJDRedirect.html?collection=p17027coll5&identifier=A163054.pdf



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jhayward@smithfreed.com

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