

Oregon Court Allocates Defense And Indemnity Costs On Pro Rata Basis (Insurance Law Alert)

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An Oregon district court ruled that defense costs must be allocated among insurers based on time on the risk and that indemnity costs must be allocated according to statutory law, which contemplates pro rata time on the risk and policy limits. *National Surety Corp. v. TIG Ins. Co.*, 2022 WL 16694733 (D. Ore. Nov. 2, 2022).

In this contribution action, National Surety sought a declaration that TIG Insurance issued general liability policies in certain years and was therefore required to pay its share of defense and indemnity costs for a mutual insured in underlying environmental pollution litigation. Oregon statutory law provides such a right to contribution and sets forth a list of factors to consider in allocation, including each insurer's time on the risk and policy limits, among other things. *See* O.R.S. 464.480(5).

The court held that the statute, which refers to allocation of "covered damages," applies only to indemnity costs, and not to defense costs. The court further concluded that the most equitable method of allocating defense costs was time on the risk, the method endorsed by the majority of district courts in Oregon and in other jurisdictions addressing the allocation of defense costs between consecutive insurers in the context of environmental claims. In so ruling, the court noted that time on the risk allocation aligns insurers' expectations of defense costs with the proportion of risk they assumed based on the duration of their coverage period in comparison to the overall period of damage or injury.

With respect to indemnity costs, the court applied the factors set forth in O.R.S. 465.480(5) and endorsed a method that allocated costs based on the average of each insurer's pro rata time on the risk (*i.e.*, the percentage of time the policy was in effect as compared to the total period of damage) and its policy limits (*i.e.*, the percentage of the policy limit of the particular policy as compared to the overall insurance limits during the total period of damage).

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