

Chapter 743

Insurance Policies

743.006

CASE CITATIONS: *Richardson v. Ry. Express Agency*, (1971) 258 Or 170, 482 P2d 176.

ATTY. GEN. OPINIONS: Approval of group credit insurance form with a "sound-health" clause, 1966-68, p 7.

743.009

ATTY. GEN. OPINIONS: Reserve required for companies operating under a mutual assessment plan, 1964-66, p 14; approval of group credit insurance form with a "sound-health" clause but no medical questionnaire, 1966-68, p 7.

743.015

ATTY. GEN. OPINIONS: Reserve required for companies operating under a mutual assessment plan, 1964-66, p 14; approval of group credit insurance form with a "sound health" clause, 1966-68, p 7.

743.033

NOTES OF DECISIONS

Plaintiff's complaint alleged an interest at the time of the fire which was insurable. *Fenter v. Gen. Acc. Fire and Life Assur. Corp.*, (1971) 258 Or 545, 484 P2d 310.

743.042

NOTES OF DECISIONS

1. In general

The insured is not bound by false representations made in the application if made by the insurer's agent with knowledge of the facts. *Bunn v. Monarch Life Ins. Co.*, (1970) 257 Or 409, 478 P2d 363; *Gabel v. Time Ins. Co.*, (1970) 257 Or 241, 478 P2d 368; *Scribner v. Equitable Life & Cas. Ins. Co.*, (1971) 257 Or 602, 481 P2d 76. *Bunn v. Monarch Life Ins. Co.*, supra, overruling *Comer v. World Ins. Co.*, (1957) 212 Or 105, 318 P2d 916; *Reserve Life Ins. Co. v. Howell*, (1960) 225 Or 71, 357 P2d 400 and *Martin v. Ore. Ins. Co.*, (1962) 232 Or 197, 375 P2d 75.

2. Under former similar statute

Whether a fact misrepresented would reasonably have influenced the company in accepting the risk or fixing the premium determines the materiality of the misrepresentation. *Mayflower Ins. Exch. v. Gilmont*, (1960) 280 F2d 13.

The purpose of the statute was to provide certainty in this area of law and to prevent fraud. *Martin v. Ore. Ins. Co.*, (1962) 232 Or 197, 375 P2d 75.

Statutory safeguards against fraud and deception were mandatory and could not be waived. *Id.*

LAW REVIEW CITATIONS: 7 WLJ 14.

743.045

NOTES OF DECISIONS

The insured is not bound by false representations made in the application if made by the insurer's agent with knowledge of the facts. *Bunn v. Monarch Life Ins. Co.*, (1970) 257 Or 409, 478 P2d 363; *Gabel v. Time Ins. Co.*, (1970) 257 Or 241, 478 P2d 368. *Bunn v. Monarch Life Ins. Co.*, supra, overruling *Comer v. World Ins. Co.*, (1957) 212 Or 105, 318 P2d 916; *Reserve Life Ins. Co. v. Howell*, (1960) 225 Or 71, 357 P2d 400 and *Martin v. Ore. Ins. Co.*, (1962) 232 Or 197, 375 P2d 75.

Ambiguous provisions in a policy should be resolved in favor of the assured. *Whitlock v. United States Inter-Ins. Assn.*, (1932) 138 Or 383, 6 P2d 1088.

Ambiguities in an application prepared by the company will be construed against the company; words susceptible of two reasonable constructions will be given the one most favorable to the insured so as to avoid forfeiture. *Purcell v. Wash. Fid. Nat. Ins. Co.*, (1932) 141 Or 98, 16 P2d 639.

It is the duty of the applicant to make truthful answers to the questions and to make reasonable use of his faculties in endeavoring to understand them, but it is also incumbent upon the company so to frame its questions that they will be free from misleading interpretations. *Id.*

The fact that an applicant, who already possesses a policy which partly overlaps the protection sought, fails to disclose that fact in answering one of the questions will not release the insurer from liability unless the question was specific enough to induce in the applicant's mind a reasonable belief that mention of such policy was contemplated. *Id.*

Where one is asked to sign an instrument, he is bound by the instrument he signs in the absence of evidence showing that he was misled or that there were other circumstances excusing him from scrutinizing the instrument. *Knappenberger v. Cascade Ins. Co.*, (1971) 259 Or 392, 487 P2d 80.

Statements made in an oral application cannot be transformed into warranties simply by designating them as such in the policy. *Williams v. Pac. States Fire Ins. Co.*, (1926) 120 Or 1, 251 P 258. *Distinguished in Comer v. World Ins. Co.*, (1957) 212 Or 105, 318 P2d 916.

In order to invalidate a policy of accident insurance, incorrect statements made in the application as to the applicant's occupation and income must be material and must have been wilfully made with intent to deceive. *Eaid v. Nat. Cas. Co.*, (1927) 122 Or 547, 259 P 902. *Distinguished in Comer v. World Ins. Co.*, (1957) 212 Or 105, 318 P2d 916.

Where an applicant for health and accident insurance answered "none" to a question as to what other health or accident insurance he carried although in fact a certain life policy had an incidental disability provision, the policy was not avoided or the answer considered false. *Purcell v. Wash. Fid. Nat. Ins. Co.*, (1932) 141 Or 98, 16 P2d 639.

FURTHER CITATIONS: *Medford v. Pac. Nat. Fire Ins. Co.*, (1950) 189 Or 617, 219 P2d 142, 222 P2d 407; *Scribner v. Equitable Life & Cas. Ins. Co.*, (1971) 257 Or 602, 481 P2d 76.

ATTY. GEN. OPINIONS: Authority of agents of fire insurance companies to write all-risk automobile insurance, 1924-26, p 249; whether automobile dealer may be licensed as agent to write own fire and auto insurance, 1924-26, p 332; approval of group credit insurance form with a "sound health" clause, 1966-68, p 7.

743.048

NOTES OF DECISIONS

A policy stipulation providing that only the courts of a particular foreign jurisdiction are competent "for the fulfillment of this contract" was void. *State v. Tazwell*, (1928) 125 Or 528, 266 P 238, 59 ALR 1436.

743.054

NOTES OF DECISIONS

1. Under former similar statute

A stock company policy containing a clause providing for distribution of earnings to holders of participating policies did not violate the statute *General Ins. Co. v. Earle*, (1937) 156 Or 40, 65 P2d 1414.

The fact that a policy contained a clause which provided that the company could from time to time distribute to holders of its participating policies "such sums out of its earnings as in its judgment is proper" did not render it objectionable for failure to specify on its face the amount of the premium required to be paid. *Id.*

ATTY. GEN. OPINIONS: Validity of policies and indorsements specifying profit sharing, 1928-30, p 280.

743.072

CASE CITATIONS: *Walker v. Fireman's Fund Ins. Co.*, (1925) 114 Or 545, 234 P 542; *Medford v. Pac. Nat. Fire Ins. Co.*, (1950) 189 Or 617, 219 P2d 142, 222 P2d 407.

ATTY. GEN. OPINIONS: Whether marine risks include docks, 1936-38, p 54; authority to refuse to renew license of a company which has issued policies in violation of law, 1936-38, p 181; combining life insurance and medical expense benefits in one policy, 1958-60, p 3.

743.093

NOTES OF DECISIONS

Prior to the 1967 amendment, insured had no duty, after notice of loss, to furnish proof of loss, until the company had furnished him with forms. *Higgins v. Ins. Co. of No. America*, (1970) 256 Or 151, 469 P2d 766.

743.099

NOTES OF DECISIONS

This section applies when a person takes out insurance with his own funds, but does not apply to insurance taken out by him with funds of another to which he is not entitled. *Jansen v. Tyler*, (1935) 151 Or 268, 47 P2d 969, 49 P2d 372.

A trust will be impressed on insurance effected by a fiduciary with funds wrongfully taken from his cestui que trust. *Id.*

This section should be given a liberal construction. *Milwaukie Constr. Co. v. Glens Falls Ins. Co.*, (1968) 389 F2d 364.

LAW REVIEW CITATIONS: 12 OLR 267; 17 OLR 67; 37 OLR 363.

743.102

CASE CITATIONS: *Richardson v. Ry. Express Agency*, (1971) 258 Or 170, 482 P2d 176.

743.114

NOTES OF DECISIONS

1. In general
 - (1) Validity
 - (2) Construction and purpose
2. Application
3. Conditions governing allowance
4. Pleading
5. Allowance of fee
 - (1) In trial court
 - (2) In Supreme Court
 - (3) Particular fees allowed

1. In general

(1) **Validity.** This section was not unconstitutional as violating the prohibition against class legislation under Ore. Const. Art. I §20. *Spicer v. Benefit Assn.*, (1933) 142 Or 574, 17 P2d 1107, 21 P2d 187.

The 1931 amendment to this section relating to allowance of attorney's fees in the Supreme Court was sufficiently indicated within the title thereof and not unconstitutional under Ore. Const. Art. IV §20. *Id.*

Allowance of the fee herein authorized amounts to nothing more than the imposition of an item of costs so that application of the section to actions arising out of pre-existing policies does not violate the constitutional provisions prohibiting impairment of contract. *Id.*

(2) **Construction and purpose.** The language of this section is plain and its meaning clear so that construction thereof is not permitted. *School Dist. 106 v. New Amsterdam Cas. Co.*, (1930) 132 Or 673, 288 P 196; *Whitlock v. United States Inter-Ins. Assn.*, (1932) 138 Or 383, 6 P2d 1088.

This section is compensatory rather than penal. *Hagey v. Mass. Bonding & Ins. Co.*, (1942) 169 Or 132, 126 P2d 836, 127 P2d 346; *Zurich Ins. Co. v. Sigourney*, (1960) 278 F2d 826.

This section should be liberally construed. *Staff Jennings, Inc. v. Fireman's Fund Ins. Co.*, (1962) 218 F Supp 112; *Continental Cas. Co. v. Reinhardt*, (1967) 284 F Supp 687.

A suit for a declaratory judgment is not an action against an insurance company within the meaning of this section. *Continental Cas. Co. v. Reinhardt*, (1967) 284 F Supp 687; *Hardware Mut. Cas. Co. v. Farmers Ins. Exch.*, (1970) 256 Or 599, 474 P2d 316. **But see** *Foles v. United States Fid. & Guar. Co.*, (1971) 259 Or 337, 486 P2d 537.

The purpose of this section is not to postpone litigation, but to require the company to pay reasonable attorney's fees for unnecessary and wrongful delay. *Murray v. Firemen's Ins. Co.*, (1927) 121 Or 165, 254 P 817.

The object of this section was to discourage expensive and lengthy litigation. *Dolan v. Continental Cas. Co.*, (1930) 133 Or 252, 289 P 1057.

The word tender used herein has the meaning outlined in ORS 20.180. *Id.*

The provisions of this section should be given the same consideration they would be accorded if they were a part of the contract of insurance. *Title & Trust Co. v. United States Fid. & Guar. Co.*, (1932) 138 Or 467, 1 P2d 1100, 7 P2d 805. **But see** *Tierney v. Safeco Ins. Co. of America*, (1963) 216 F Supp 590.

The law of the forum controls the allowance of attorney's fees. *Horwitz v. N.Y. Life Ins. Co.*, (1935) 80 F2d 295.

The statute contemplates an action by any person. *Staff Jennings, Inc. v. Fireman's Fund Ins. Co.*, (1962) 218 F Supp 112.

This section applies in an action on a bond given by a

contractor to protect those supplying him with labor and material. *Travelers Indem. Co. v. United States ex rel. W. Steel Co.*, (1966) 362 F2d 896.

The purpose of this section is to encourage the settlement of claims and discourage the unreasonable rejection of claims by insurers. *Heis v. Allstate Ins. Co.*, (1968) 248 Or 636, 436 P2d 550.

This section allows recovery of attorney fees in a case where the assignee of insured brings the action. *Groce v. Fid. Gen. Ins. Co.*, (1968) 252 Or 296, 448 P2d 554.

It is the intent of this section that "plaintiff" include "defendant" who files a counter claim or cross-complaint. *Hardware Mut. Cas. Co. v. Farmers Ins. Exch.*, (1970) 256 Or 599, 474 P2d 316.

Recovery of attorney fees is not defeated by insurer's good faith in failure to settle; the statute is compensatory, not penal. *Id.*

A shipping receipt issued by an express company to a shipper is not a policy of insurance within the meaning of this section. *Richardson v. Ry. Express Agency*, (1971) 258 Or 170, 482 P2d 176.

Where the insured is the plaintiff and seeks both a declaration of coverage and a judgment, the insured is entitled to attorney fees under this section. *Foles v. United States Fid. & Guar. Co.*, (1971) 259 Or 337, 486 P2d 537.

2. Application

This section was not intended to cover actions brought by one insurance company as subrogee of rights against another insurer. *General Acc. Fire & Life Assur. Corp. v. Continental Cas. Co.*, (1961) 287 F2d 464; *Zidell v. Travelers Indem. Co.*, (1967) 264 F Supp 496. *General Acc. Fire & Life Assur. Corp. v. Continental Cas. Co.*, supra, rev'g 179 F Supp 535.

An attorney's fee is not authorized in an action brought by an insurance company to recover premiums. *Ocean Acc. & Guar. Corp. v. Albina Marine Iron Works*, (1927) 122 Or 615, 260 P 229.

The fact that an action upon a policy of casualty insurance is prosecuted on a contingent fee does not preclude allowance of an attorney's fee. *Denley v. Ore. Auto. Ins. Co.*, (1935) 151 Or 42, 47 P2d 245, 946.

A fee may be allowed for services rendered by a district attorney in an action brought in the name of the state on the bond of a public officer. *State v. Claypool*, (1934) 145 Or 615, 28 P2d 882.

A fee may be allowed in an action on a real estate broker's bond. *Richer v. Burke*, (1934) 147 Or 465, 34 P2d 317.

This section applies to policies issued by inter-insurance organizations. *Whitlock v. United States Inter-Insur. Assn.* (1932) 138 Or 383, 6 P2d 1088.

Allowance of an attorney's fee in a workmen's compensation proceeding is not contemplated by this section. *Davis v. State Ind. Acc. Comm.*, (1937) 156 Or 393, 64 P2d 1330, 66 P2d 279, 68 P2d 118.

This section authorizes allowance of attorney's fees upon appeal of an action on a beneficiary certificate issued prior to the 1931 amendment relating to attorney's fees in the Supreme Court. *Lane v. Brotherhood*, (1937) 157 Or 667, 73 P2d 1396.

This section was not intended to cover award of fees to insured in action for declaratory judgment determining liability. *Breier v. Gladden*, (1964) 229 F Supp 823.

This was not intended to cover action by insured for declaratory judgment determining liability of underwriters subscribing certificates of third party property damage insurance. *Close-Smith v. Conley*, (1964) 230 F Supp 411.

This section permits the allowance of attorney fees in an action on a voluntary workmen's compensation policy. *Shore v. St. Paul Fire & Marine Ins. Co.*, (1965) 242 F Supp 164.

In an action upon Miller Act Payment Bond, recoverability of attorney fees is governed by the law of the state wherein the bond was issued. *United States ex rel. Western Steel Co. v. Travelers Indem. Co.*, (1965) 37 FRD 322.

3. Conditions governing allowance

There can ordinarily be no allowance of attorney's fees if no proof of loss has been filed. *Title & Trust Co. v. United States Fid. & Guar. Co.*, (1934) 147 Or 255, 32 P2d 1035; *Breier v. Gladden*, (1964) 229 F Supp 823.

A fee may be recovered regardless of the period of delay referred to in this section if the defendant waived proof of loss before the action was commenced. *Eaid v. Nat. Cas. Co.*, (1927) 122 Or 547, 259 P 902.

An attorney's fee may be allowed though no proof of loss was made, if the policy does not require such proof and judgment is not entered until more than six months after commencement of the action. *State v. Claypool*, (1934) 145 Or 615, 28 P2d 882.

This section restricts the recovery of an attorney's fee to those cases wherein a final judgment has been entered. *United States Fid. & Guar. Co. v. Zidell-Steinberg Co.*, (1935) 151 Or 538, 50 P2d 584, 51 P2d 687.

An appellate court can allow attorney's fee only if the trial court allowed the fee and the judgment is affirmed by the appellate court. *American Sur. Co. v. Fischer Whse. Co.*, (1937) 88 F2d 536.

Recovery of attorney's fee was allowed from surety company where surety company and county clerk were joined in the same action. *Esselstyn v. Casteel*, (1955) 205 Or 344, 286 P2d 665, 288 P2d 214, 215.

4. Pleading

The correct way to ask for attorneys' fees in an action that was filed before expiration of the period allowed for settlement is by filing a supplemental complaint after the period has expired, and not by amendment of the original complaint at the trial. *Walker v. Fireman's Fund Ins. Co.*, (1925) 114 Or 545, 234 P 542; *Johnson v. Prudential Life Ins. Co.*, (1927) 120 Or 353, 252 P 556; *Murray v. Firemen's Ins. Co.*, (1927) 121 Or 165, 254 P 817.

It is not error to award an attorney's fee, even though the allegation in respect thereto was premature, if the defendant neither demurs to it nor moves to strike it but, on the contrary, joins issue thereon. *Murray v. Firemen's Ins. Co.*, (1927) 121 Or 165, 254 P 817.

A complaint which alleged that demand had been made more than six months prior to the action, that the defendant neglected and refused to pay and that a certain sum was reasonable attorney's fees was sufficient. *School Dist. 106 v. New Amsterdam Cas. Co.*, (1930) 132 Or 673, 288 P 196.

Letters sent to the company's agent which stated the amount of loss and made demand for reimbursement were sufficient evidence of proper demand. *Id.*

5. Allowance of fee

(1) **In trial court.** A defendant that admits its liability on retrial after reversal of a judgment in favor of the plaintiff thereby renders itself liable for attorney's fee. *Dolan v. Continental Cas. Co.*, (1930) 133 Or 252, 289 P 1057.

Error in instructing the jury that in fixing the attorney's fee they may take into consideration the possibility of an appeal will not warrant a reversal, if the fee allowed is not exorbitant and, in fact, less than what the testimony would have permitted. *Johnson v. Prudential Life Ins. Co.*, (1927) 120 Or 353, 252 P 556.

Attorney fees incurred in declaratory judgment proceeding to determine coverage of insurance policy cannot be collected under this section in subsequent action to recover for damages under the policy. *Hollopeter v. Ore. Mut. Ins. Co.*, (1970) 255 Or 73, 464 P2d 316.

The amount of attorney fees is a question of fact to be determined by the trial court. *Higgins v. Ins. Co. of N. America*, (1970) 256 Or 151, 469 P2d 766.

(2) In Supreme Court. Prior to the amendment of 1931, the courts held that this section did not authorize an award for services rendered in the Supreme Court. *Lewis v. Continental Cas. Co.*, (1931) 135 Or 170, 295 P 450; *Spicer v. Benefit Assn.*, (1933) 142 Or 574, 17 P2d 1107, 21 P2d 187.

A large allowance by the trial court does not abrogate the plaintiff's right to an allowance in the Supreme Court. *Bertschinger v. N.Y. Life Ins. Co.*, (1941) 166 Or 307, 111 P2d 1016.

In affirming a judgment for the plaintiff in an action on an indemnity bond, the Supreme Court may award him additional attorney's fees. *Fred Christensen, Inc. v. Hansen Constr. Co.*, (1933) 142 Or 549, 21 P2d 195.

Where the trial court has allowed attorney's fees and the judgment is affirmed, federal appellate court will also allow fees. *Michigan Millers Mut. Fire Ins. Co. v. Grange Oil Co.*, (1949) 175 F2d 544.

If the insured is the appellant on appeal he is not entitled to attorney's fees under subsection (2) of this section. *Schweiger v. Beneficial Life Ins. Co.*, (1955) 204 Or 292, 282 P2d 621.

The immunity of the United States against liability for attorney fees does not extend to defendant corporation. *Baker v. Fed. Crop Ins. Corp.*, (1965) 241 Or 609, 407 P2d 841, cert. dis., 385 U.S. 801, 86 S Ct 1459, 16 L Ed 2d 538.

Where consolidated actions to recover on marine insurance policies were affirmed on appeal, an additional sum of \$150 was allowed in each case as attorney's fees on the appeal. *Shaver Forwarding Co. v. Eagle Star Ins. Co.*, (1945) 177 Or 410, 162 P2d 789.

(3) Particular fees allowed. The Supreme Court allowed \$500 on a second appeal in which a judgment for \$3,400 was affirmed although the trial court allowed \$500 also. *Purcell v. Wash. Fid. Nat. Ins. Co.*, (1934) 146 Or 475, 30 P2d 742.

A fee of \$250 was not excessive for services rendered in both the trial court and the Supreme Court, though the judgment proper was only for \$376.32 and interest. *State v. Employes' Hosp. Assn.*, (1937) 157 Or 618, 73 P2d 693.

Where the amount involved was \$1000 and interest, a total fee of \$450 for services was reasonable and allowed. *Trevathan v. Mut. Life Ins. Co.*, (1941) 166 Or 515, 113 P2d 621.

Where the trial court allowed \$1000, the Supreme Court allowed \$50 although the defendant argued the first fees were grossly excessive. *Bertschinger v. N.Y. Life Ins. Co.*, (1941) 166 Or 307, 111 P2d 1016.

An additional fee of \$350 was allowed for services rendered in the Supreme Court where the amount involved was \$7,500. *Mock v. Glens Falls Indem. Co.*, (1957) 210 Or 71, 309 P2d 180.

FURTHER CITATIONS: *Rosebraugh v. Tigard*, (1927) 120 Or 411, 252 P 75; *Gibbs v. First Nat. Ins. Co.*, (1935) 151 Or 241, 47 P2d 943; *Bird v. Cent. Mfg. Ins. Co.*, (1942) 168 Or 1, 120 P2d 753; *Hefford v. Metropolitan Life Ins. Co.*, (1944) 173 Or 353, 144 P2d 695; *New York Life Ins. Co. v. Lee*, (1956) 232 F2d 811; *Borglund v. World Ins. Co.*, (1957) 211 Or 175, 315 P2d 158; *Roberts v. Union Ins. Socy.*, (1958) 215 Or 183, 332 P2d 600; *Bankers Union Life Ins. Co. v. Montgomery*, (1958) 261 F2d 852; *Brown v. Mut. Benefit Health & Acc. Assn.*, (1960) 222 Or 165, 352 P2d 748, 83 ALR2d 694; *State v. E. H. White Co.*, (1960) 224 Or 483, 356 P2d 943; *Beitay v. Benefit Assn. of Ry. Employes*, (1961) 226 Or 522, 360 P2d 620; *Zeh v. Nat. Hosp. Assn.*, (1963) 233 Or 221, 377 P2d 852; *Oregon Farm Bureau v. Thompson*, (1963) 235 Or 162, 378 P2d 563; *Ladd v. Gen. Ins. Co.*, (1964) 236 Or 260, 387 P2d 572; *First Nat. Bank v. Malady*, (1965) 242 Or 353, 408 P2d 724; *Kennedy v. Pac. Indem. Co.*, (1967)

267 F Supp 16; *New York Life Ins. Co. v. Hannon*, (1967) 280 F Supp 291; *Williams v. Stockman's Life Ins. Co.*, (1968) 250 Or 160, 441 P2d 608; *State ex rel. Hawkins-Hawkins Co. v. Travelers Indem. Co.*, (1968) 250 Or 356, 442 P2d 612; *State Farm Mut. Auto. Ins. Co. v. Brewer*, (1968) 406 F2d 610; *Pringle v. Robertson*, (1970) 258 Or 389, 465 P2d 223, 483 P2d 814; *Richardson v. Ry. Express Agency*, (1971) 258 Or 170, 482 P2d 176.

743.150

NOTES OF DECISIONS

Under a former similar statute the courts did not favor narrow and unreasonable interpretations of the provisions of an insurance policy. *Stipcich v. Metropolitan Life Ins. Co.*, (1927) 277 US 311, 48 S Ct 512, 72 L Ed 895.

FURTHER CITATIONS: *Mut. Life Ins. Co. v. Muckler*, (1933) 143 Or 327, 21 P2d 804; *Hall v. Metropolitan Life Ins. Co.*, (1934) 146 Or 32, 28 P2d 875; *Union States Life Ins. Co. v. Bernert*, (1939) 161 Or 44, 87 P2d 774; *Christiansen v. Prudential Ins. Co.*, (1963) 235 Or 93, 384 P2d 142; *Green v. Beneficial Standard Life Ins. Co.*, (1963) 235 Or 282, 383 P2d 770; *Clough v. Prudential Ins. Co.*, (1963) 235 Or 625, 386 P2d 464; *Peterson v. State Farm Mut. Auto. Ins. Co.*, (1964) 238 Or 106, 383 P2d 651.

ATTY. GEN. OPINIONS: Regulation of provisions allowing participation in divisible surplus, 1964-66, p 61.

743.153

ATTY. GEN. OPINIONS: Income savings bonds as life insurance, 1926-28, p 316.

743.168

NOTES OF DECISIONS

Under a former similar statute, telephone information given by the physician of the applicant to the insurance company's medical examiner was not available in defense of a claim. *Northwestern Mut. Life Ins. Co. v. Wiggins*, (1926) 15 F2d 646.

743.174

NOTES OF DECISIONS

Under former similar statute where there was no ambiguity, a policy was not subject to oral explanation or variance. *Morford v. Calif. W. States Life Ins. Co.*, (1941) 166 Or 575, 113 P2d 629.

A former similar statutory provision, which provided that the policy constituted the entire contract, did not prevent application of the general rule which made the contract voidable if the applicant failed to disclose conditions within his knowledge which affected the risk. *Stipcich v. Metropolitan Life Ins. Co.*, (1927) 277 US 311, 48 S Ct 512, 72 L Ed 895.

743.177

NOTES OF DECISIONS

I. Under former similar statute

It was presumed that the answers made by the insured to queries contained in the application were true. *Northwestern Mut. Life Ins. Co. v. Wiggins*, (1926) 15 F2d 646.

That false statements by the insured were knowingly made by him had to be proved by the insurer to avoid the policy. *Mutual Life Ins. Co. v. Muckler*, (1933) 143 Or 327, 21 P2d 804; *Northwestern Mut. Life Ins. Co. v. Wiggins*, (1926) 15 F2d 646.

The burden of proving that the insured's statements were

false rested on the insurer, and its proof had to be clear, cogent and convincing. Northwestern Mut. Life Ins. Co. v. Wiggins, (1926) 15 F2d 646.

Equity would not accord relief to an insurance company because the answers to some of the questions on the application form were false, if the insured showed that the insurer's agent did not ask him the questions, but wrote in the answers on his own initiative. Simmons v. Wash. Fid. Nat. Ins. Co., (1931) 136 Or 400, 299 P 294.

743.186

NOTES OF DECISIONS

Under former similar statute, a policy loan did not create the ordinary relation of debtor and creditor between the company and the insured, but was an advancement on the policy without any personal obligation as to repayment. Jansen v. Tyler, (1935) 151 Or 268, 47 P2d 969, 49 P2d 372.

743.189

NOTES OF DECISIONS

Under former similar statute, upon recovery of a judgment on a contested policy, interest was properly allowed from the date of the expiration of the period set forth in statute on nonforfeiture. Security Sav. & Trust Co. v. Commercial Cas. Ins. Co., (1934) 147 Or 193, 32 P2d 582, 93 ALR 409.

743.225

CASE CITATIONS: Hall v. Metropolitan Life Ins. Co., (1934) 146 Or 32, 28 P2d 875; Peterson v. State Farm Mut. Auto. Ins. Co., (1964) 238 Or 106, 393 P2d 651.

ATTY. GEN. OPINIONS: Authority of commissioner to prohibit use of policy, 1962-64, p 427.

743.303 to 743.345

ATTY. GEN. OPINIONS: Five-year limitation on credit life insurance applied to group credit life insurance, 1958-60, p 33; group credit policy issued with sale of shares in a mutual investment fund, 1960-62, p 94.

743.402 to 743.498

NOTES OF DECISIONS

1. Under former similar statute

If the insurer denied liability on grounds other than those related to defects in the notice, compliance with the notice and proof of loss requirements was deemed waived. Travelers Ins. Co. v. Peerless Ins. Co., (1961) 287 F2d 742.

Voiding a voidable policy was not a cancellation under former ORS 741.130 (2) (h). Martin v. Ore. Ins. Co., (1962) 232 Or 197, 373 P2d 75.

FURTHER CITATIONS: Headley v. United Fid. Hosp. Assur. Co., (1963) 235 Or 302, 384 P2d 1007; Peterson v. State Farm Mut. Auto. Ins. Co., (1964) 238 Or 106, 393 P2d 651.

743.405

CASE CITATIONS: Peterson v. State Farm Mut. Auto. Ins. Co., (1964) 238 Or 106, 393 P2d 651.

743.417

NOTES OF DECISIONS

A former similar statute prohibited the application of payments to premiums after expiration of the grace period. Kennedy v. Pac. Indem. Co., (1967) 267 F Supp 16.

743.561

ATTY. GEN. OPINIONS: Investment plan with life insurance protection as credit insurance, 1956-58, p 147; blanket policy of group credit life insurance as insurance not subject to five-year limitation, 1958-60, p 33; regulation of debt cancellation contracts executed by national banks, 1964-66, p 59.

743.564

ATTY. GEN. OPINIONS: Reserve required for companies operating under a mutual assessment plan, 1964-66, p 14; regulation of debt cancellation contracts executed by national banks, 1964-66, p 59.

743.585

ATTY. GEN. OPINIONS: Regulation of debt cancellation contracts executed by national banks, 1964-66, p 59.

743.603 to 743.681

NOTES OF DECISIONS

1. Under former similar statute

Patrons of husbandry fire insurance associations were not subject to the pre-1967 insurance code. Rosebraugh v. Tiggard, (1927) 120 Or 411, 252 P 75.

The state had a general power to exclude, restrict or regulate foreign insurance companies seeking to do business within its borders but the exercise of such power was subject to all applicable state and federal constitutional provisions. Herbring v. Lee, (1928) 126 Or 588, 269 P 236, 60 ALR 1165.

Except for the section relating to standard fire policy provisions, the insurance code enacted in 1917 completely covered the fire branch of the insurance business. Geddes v. Ore. Grange Fire Relief Assn., (1934) 147 Or 275, 32 P2d 774.

ATTY. GEN. OPINIONS: Extent of insurer's right to subrogation under loss payable to mortgagee clause, 1922-24, p 757; inspection of premises damaged by fire by the State Fire Marshal, 1924-26, p 523; whether a misstatement by mortgagor in sworn claim is perjury, 1930-32, p 96.

743.603

NOTES OF DECISIONS

1. In general

The public policy of the state is violated when one procures fire insurance upon property in which he has no interest. Yoshida v. Sec. Ins. Co., (1933) 145 Or 325, 26 P2d 1082.

A month by month tenant of buildings who used such buildings for hog feeding had an insurable interest in the buildings. Id.

2. Under former similar statute

A person had an insurable interest in property only when conditions were such that he would suffer loss or damage by the destruction of the property. Oatman v. Bankers' Fire Relief Assn., (1913) 66 Or 388, 133 P 1183, 134 P 1033.

A married man had no insurable interest in his wife's property in this state. Id.

A policy of fire insurance on an automobile was voided where the insured sold and delivered the automobile to another without the assent of the insurer indorsed on the policy. Cranston v. Calif. Ins. Co., (1919) 94 Or 369, 185 P 292.

A person in possession of property as trustee could insure

it in his own name. *Pacific State Fire Ins. Co. v. Rowan Motor Co.*, (1927) 122 Or 665, 260 P 441.

In an action on an insurance policy, plaintiff had to allege and prove that the insured had an insurable interest in the property, both at the time of making the contract of insurance and at the time of the loss. *Armbrust v. Travelers Ins. Co.*, (1962) 232 Or 617, 376 P2d 669.

743.606

NOTES OF DECISIONS

1. Under former similar statute

The court had authority to reform a policy for mutual mistake. *Boardman v. Ins. Co.*, (1917) 84 Or 60, 164 P 558; *Spexarth v. R. I. Ins. Co.*, (1926) 118 Or 22, 245 P 515.

Although a fire insurance policy required payment of loss, an agreement by the insurer to loan insured the amount of the loss was valid. *Condor Inv. Co. v. Pac. Coca-Cola Bottling Co.*, (1962) 211 F Supp 671; *Waterway Terminals Co. v. P.S. Lord Mechanical Contractors*, (1965) 242 Or 1, 406 P2d 556; 13 ALR 3d 1.

Where the insured did not read the policy delivered to him, he was not precluded from having the policy reformed where he had explained to the agent the nature of his interest in the property and the agent omitted to insert the proper rider. *Gregan v. Northwestern Ins. Co.*, (1917) 83 Or 278, 163 P 588.

A clause which in general terms prohibited assignment of the policy before loss did not apply to a conditional transfer made to a creditor to give him a lien on the proceeds of the policy in event of loss. *Sheridan v. Pac. States Fire Ins. Co.*, (1923) 107 Or 285, 212 P 783.

A single contract of insurance could contemplate several different policies, as where insurance covering a number of articles was effected by insertion in the main contract of a series of "covering notes." *Walker v. Fireman's Fund Ins. Co.*, (1925) 114 Or 545, 234 P 542.

743.612

NOTES OF DECISIONS

1. Under former similar statute

The terms "fraud" and "false swearing" had the same application. *Willis v. Horticultural Fire Relief*, (1914) 69 Or 293, 137 P 761.

False swearing had to have been knowing and wilful to avoid the policy, but it need not have been done with a fraudulent intent. *Id.*

To avoid the policy for fraud, the insurer had to show that the statement complained of was false, that it was relied upon, and that it caused injury. *Waller v. City of N.Y. Ins. Co.*, (1917) 84 Or 284, 164 P 959, Ann Cas 1918C, 139.

An insured who made a knowingly false statement of his losses thereby lost standing in court as to all claims under the policy. *Willis v. Horticultural Fire Relief*, (1914) 69 Or 293, 137 P 761.

Misrepresentation of the value of property covered by the policy was not necessarily fatal if the property was duly examined by the agent of the insurer. *Walker v. Fireman's Fund Ins. Co.*, (1925) 114 Or 545, 234 P 542.

If a misrepresentation was material the insurer need not establish as a part of its defense that it suffered or would suffer a pecuniary loss as a result of the misrepresentation. *Hendricksen v. Home Ins. Co.*, (1964) 237 Or 539, 392 P2d 324.

743.633

NOTES OF DECISIONS

Under a former similar statute, a provision in the policy requiring notice and proof of loss, being for the benefit of

the insurer, could be waived. *Heidenreich v. Aetna Ins. Co.*, (1894) 26 Or 70, 37 P 64.

743.636

NOTES OF DECISIONS

Under a former similar statute, cancellation provisions of the statute did not apply to automobile insurance policies written by a fire insurance company. *Medford v. Pac. Nat. Fire Ins. Co.*, (1950) 189 Or 617, 219 P2d 142, 222 P2d 407.

743.639

NOTES OF DECISIONS

1. Under former similar statute

When the insurer at the request of the insured inserted a clause making the loss payable to the mortgagee, a contractual relation was entered into by the insurer and mortgagee. *Meador v. Farmers' Mut. Fire Relief Assn.*, (1931) 137 Or 111, 1 P2d 138.

A mortgagee of the insured property to whom the loss was made payable could recover despite a breach of condition by the mortgagor; and this rule applied to policies issued by both stock and mutual organizations. *Id.*

The "loss payee" did not claim as an assignee of the policy, but merely as an appointee to collect the insurance. *Armbrust v. Travelers Ins. Co.*, (1962) 232 Or 617, 376 P2d 669.

743.648

NOTES OF DECISIONS

1. Under former similar statute

It was the duty of each of the parties to select appraisers who were impartial. *Stemmer v. Scottish Ins. Co.*, (1898) 33 Or 65, 49 P 588, 52 P 498.

Objections to the qualifications of an appraiser had to be made at the time of appointment or be deemed to be waived. *Id.*

The fact that an appraiser selected by the insurer had acted for it on other occasions was not sufficient to render such appraiser incompetent to act. *Id.*

The award of the appraisers was conclusive on both parties in the absence of fraud or other misconduct on the appraisers' parts. *Id.*

743.660

NOTES OF DECISIONS

1. In general

The estoppel of the insurer to set up the defense of the limitations does not endure forever but merely suspends the limitation until the estoppel is removed. *Gilbert v. Globe & Rutgers Fire Ins. Co.*, (1919) 91 Or 59, 174 P 1161, 178 P 358; *Cody v. Ins. Co. of Ore.*, (1969) 253 Or 587, 454 P2d 859.

2. Under former similar statute

The insurer could by its conduct estop itself from setting up the defense that the action was not brought within the time limited in the provisions of the policy. *Kimball v. Horticultural Fire Relief*, (1916) 79 Or 133, 154 P 578.

An action to recover damages for failure to deliver a policy conforming to the oral contract of the parties was too late when brought 15 months after loss of the property sought to be protected. *Greenberg v. German Am. Ins. Co.*, (1917) 83 Or 662, 160 P 536, 163 P 820.

Commencement of an action within the limitation in the statute was governed by ORS 12.030. *Bell v. Quaker City Fire & Marine Ins. Co.*, (1962) 230 Or 650, 370 P2d 219.

743.669

CASE CITATIONS: Peterson v. State Farm Mut. Auto. Ins. Co., (1964) 238 Or 106, 393 P2d 651.

743.672

NOTES OF DECISIONS

Liability to pay an assessment is a matter of contract, and only members who have assumed a contract obligation to pay assessments can be liable therefor. Beaver State Ins. Assn. v. Smith, (1920) 97 Or 579, 192 P 798; Rosebraugh v. Tigard, (1927) 120 Or 411, 252 P 75; Johnson v. Sch. Dist. 1, (1929) 128 Or 9, 270 P 764, 273 P 386.

Members who have nonassessable policies on the cash premium plan and have duly paid the premium cannot be assessed for the purpose of paying losses or expenses. Beaver State Ins. Assn. v. Smith, (1920) 97 Or 579, 192 P 798; Johnson v. Sch. Dist. 1, (1929) 128 Or 9, 270 P 764, 273 P 386.

The right to fix the contingent and mutual liability of members is not confined by this section to domestic companies. Johnson v. Sch. Dist. 1, (1929) 128 Or 9, 270 P 764, 273 P 386.

A foreign mutual company may issue nonassessable policies so long as it maintains the assets and surplus required by statute. Id.

The cash premium plan is not in conflict with the theory of mutual insurance. Id.

ATTY. GEN. OPINIONS: When exemption from assessment on nonassessable policies ceases, 1922-24, p 628; contingent liability of members, 1938-40, p 238.

743.675

NOTES OF DECISIONS

A mutual insurance organization may, by its course of dealing, preclude itself from asserting forfeiture for delinquency in payment of assessments. Rosebraugh v. Tigard, (1927) 120 Or 411, 252 P 75.

A waiver of the right to enforce forfeiture may result from extending the time for payment of assessments. Id.

All persons who become members of mutual insurance organizations bind themselves to pay all assessments when due. Geddes v. Ore. Grange Fire Relief Assn., (1934) 147 Or 275, 32 P2d 774.

743.681

CASE CITATIONS: Geddes v. Ore. Grange Fire Relief Assn., (1934) 147 Or 275, 32 P2d 774.

743.708

ATTY. GEN. OPINIONS: Certificates, purporting to evidence fractional interest in notes and mortgages securing such notes, as secured obligations, 1966-68, p 22.

743.732

NOTES OF DECISIONS

The sole requirement for a surety company to justify its to exhibit its certificate of authority to do business within the state or a certified copy thereof. In re First & Farmers Nat. Bank, (1933) 145 Or 150, 26 P2d 1103.

ATTY. GEN. OPINIONS: Whether writing of undertakings in criminal cases is surety business, 1936-38, p 693; procuring official bond of justice of peace from company for which the justice is the agent, 1964-66, p 105; director of soil and

water conservation district as surety on treasurer's bond, (1968) Vol 34, p 298.

743.735

CASE CITATIONS: Bell v. Hanover Fire Ins. Co., (1923) 107 Or 513, 214 P 340, 215 P 171; Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028; Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261; Osburn v. DeForce, (1927) 122 Or 360, 257 P 685, 258 P 823; Herring v. Springbrook Packing Co., (1956) 208 Or 191, 299 P2d 604, 300 P2d 473.

743.738

ATTY. GEN. OPINIONS: Authority of county court to pay premium of deputy sheriff's bond, 1928-30, p 180; authority of state agency to approve claim for premium paid for bond given to secure state against loss on warrant, 1930-32, p 160; surety bond as official undertaking of justice of peace or constable and payment of premiums thereon, 1948-50, p 46; procuring official bond of justice of peace from company for which the justice is the agent, 1964-66, p 105.

743.741

NOTES OF DECISIONS

The last clause of subsection (3) is not to be construed as permitting a company that has qualified to do a surety business within this state to write any other kind of insurance it chooses. Earle v. Holman, (1936) 154 Or 578, 55 P2d 1097, 61 P2d 1103.

743.744

ATTY. GEN. OPINIONS: Cancellation of bond which is no longer required, 1932-34, p 211; whether salesman's bond given in favor of the state may be canceled before expiration of salesman's license, 1944-46, p 94; applicability to warehousemen's bond, 1956-58, p 249.

743.747

ATTY. GEN. OPINIONS: Cancellation of bond of Oregon National Guard officers, 1924-26, p 422; required provisions in bond of state officer, 1934-36, p 784; filing notice of cancellation of justice of peace bond, 1940-42, p 368; applicability to warehousemen's bonds, 1956-58, p 249; conditions necessary for approval of blanket position bond, 1966-68, p 83.

743.753

ATTY. GEN. OPINIONS: Sufficiency of bond submitted for approval, 1966-68, p 83.

743.756

CASE CITATIONS: Hagey v. Mass. Bonding & Ins. Co., (1942) 169 Or 132, 126 P2d 836, 127 P2d 346.

ATTY. GEN. OPINIONS: Allowance of portion of premium for bond towards new bond as a prohibited rebate, 1924-26, p 248.

743.759

CASE CITATIONS: Peterson v. State Farm Mut. Auto. Ins. Co., (1964) 238 Or 106, 393 P2d 651.

LAW REVIEW CITATIONS: 37 OLR 96; 41 OLR 203; 48 OLR 74, 76, 79, 85.

743.783

NOTES OF DECISIONS

An insurer must make a substantial showing of diligence before it can successfully rely on the defense of noncooperation. *Johnson v. Doughty*, (1963) 236 Or 78, 385 P2d 760; *State Farm Mut. Auto. Ins. Co. v. Farmers Ins. Exch.*, (1964) 238 Or 285, 387 P2d 825, 393 P2d 768.

This action is an equitable proceeding in the nature of creditor's bill. *State Farm Mut. Auto. Ins. Co. v. Farmers Ins. Exch.*, (1964) 238 Or 285, 387 P2d 825, 393 P2d 768; *Burnett v. W. Pac. Ins. Co.*, (1970) 255 Or 547, 469 Or 602.

A provision in an automobile liability insurance policy to pay all costs taxed against the assured in any legal proceedings defended by the company and all interest accruing after entry of the judgment must be construed with this section. *New Jersey Fid. & Plate Glass Ins. Co. v. Clark*, (1929) 33 F2d 235.

Under this statute, the injured party is given all the rights which the insured would have had if he had paid the judgment, or if bankruptcy or insolvency had not intervened, including the right to recover costs and interest irrespective of the limits of liability contained in the policy. *Id.*

Statutes like this section which permit third-party-beneficiary actions by judgment creditors of injured tort-feasors are held to give the injured plaintiff the same, but not necessarily greater, rights than the insured had under his contract. *Jarvis v. Indem. Ins. Co.*, (1961) 227 Or 508, 363 P2d 740.

This section may be construed with ORS 743.114 to allow attorney fees in action by a third person. *Tierney v. Safeco Ins. Co. of America*, (1963) 216 F Supp 590.

Where garnishee insurance company served and filed an appeal bond limited to \$20,000, the appeal bond did not stay levy of execution on the judgment. *Hecht v. James*, (1959) 218 Or 251, 345 P2d 246.

FURTHER CITATIONS: *Zimmerman v. Union Auto. Ins. Co.*, (1930) 133 Or 600, 291 P 495; *Denley v. Ore. Auto. Ins. Co.*, (1935) 151 Or 42, 47 P2d 245, 946; *Pacific Indem. Co. v. McDonald*, (1938) 25 F Supp 522; *Jackman v. Jones*, (1953) 198 Or 564, 258 P2d 133; *Hale v. Fireman's Fund Ins. Co.*, (1956) 209 Or 99, 302 P2d 1010; *Grubb v. Boston Old Colony Ins. Co.*, (1970) 257 Or 208, 477 P2d 901.

ATTY. GEN. OPINIONS: Attachment of a condition relating to insolvency of the assured as compliance with section, 1926-28, p 415; type of provision permitted, 1926-28, p 568.

LAW REVIEW CITATIONS: 9 OLR 57; 12 OLR 256; 44 OLR 86-90.

743.789

NOTES OF DECISIONS

The purpose of a former similar statute was to place the injured policyholder in the same position he would have been in if the tortfeasor had had liability insurance. *Peterson v. State Farm Mut. Auto. Ins. Co.*, (1964) 238 Or 106, 393 P2d 651.

FURTHER CITATIONS: *Shore v. Livengood*, (1963) 234 Or 280, 381 P2d 492; *State Farm Mut. Auto. Ins. Co. v. Farmers Ins. Exch.*, (1964) 238 Or 285, 387 P2d 825, 393 P2d 768; *Bowsher v. State Farm Fire and Cas. Co.*, (1966) 244 Or 549, 419 P2d 606; *Sparling v. Allstate Ins. Co.*, (1968) 249 Or 471, 439 P2d 616.

ATTY. GEN. OPINIONS: Uninsured motorist clause requirement for insurance on motorcycles and motor scooters, 1960-62, p 182; compulsory arbitration clause in uninsured motorist indorsements, 1960-62, p 190.

LAW REVIEW CITATIONS: 39 OLR 130; 43 OLR 258; 44 OLR 78, 89; 48 OLR 74-94; 1 WLJ 557; 2 WLJ 56-65.

743.792

NOTES OF DECISIONS

Under a former similar statute, the purpose of an exception was to relieve truckers of the cost of providing uninsured motorist protection if their employes were given equivalent protection by workmen's compensation. *Safeco Ins. Co. v. Christensen*, (1968) 248 Or 550, 436 P2d 270.

FURTHER CITATIONS: *American Motorists Ins. Co. v. Thompson*, (1969) 253 Or 76, 453 P2d 164; *Foles v. United States Fid. & Guar. Co.*, (1971) 259 Or 337, 486 P2d 537.

LAW REVIEW CITATIONS: 41 OLR 203; 48 OLR 74-94.