

Oregon Division of Financial Regulation Bulletin No. DFR 2020-**TO:** All Property and Casualty Insurers**DATE:****RE:** Guidance on Exclusionary Language Regarding Controlled Substances

Purpose

The purpose of this bulletin is to provide guidance on exclusionary language regarding controlled substances.

Authority

- ORS 742.005

Background

Many property and casualty insurance policies contain exclusions for property damage to controlled substances or losses arising from the production, sale, or use of those substances.¹ Recent policies filed with the Division of Financial Regulation (DFR) would expand these exclusions beyond losses caused by a specific activity to any contemporaneous loss.

For example, while previously approved policy language excluded losses “arising out of,” “due to,” or “caused by” the use of controlled substances, recently filed language would exclude losses “while the insured is under the influence.”

Some recent filings also fail to distinguish between illegal substances and prescription medications. As a result, losses arising out of the lawful use of a prescription medication would be excluded from coverage.

Discussion

Property and casualty insurers are generally free to exclude from coverage losses arising from a specific type of activity provided that policy language meets all requirements in the Insurance

¹ Title 21 U.S.C. Chapter 13, commonly known as the Controlled Substances Act (CSA), regulates and restricts the use of drugs under a comprehensive federal system. The CSA covers both illegal substances that have no permitted medical use, and prescription medications.

Code² and clearly describes the type of risk being excluded.^{3, 4} Policy language that would exclude any loss that merely coincides with an insured being under the influence of a controlled substance is overly broad and could potentially exclude any type of loss that would usually be covered, even if it had no causal relationship with the insured's activity.

For example, if someone is injured in a slip and fall on a homeowner's sidewalk, the liability should be covered under the homeowner's policy. The fact that the policy holder was under the influence of a controlled substance at the time that the accident occurred should not affect coverage, if it was not causally related to the accident.

Because the Controlled Substances Act also regulates the use of prescription medications, exclusions for "controlled substances" should clarify that the legitimate use of prescription drugs is not excluded.

Guidance

Exclusionary language relating to controlled substances must clearly describe the risks being excluded. Policies containing exclusions for controlled substances must clarify that the legitimate use of prescription drugs is not excluded. Exclusions relating to the use or other activity associated with controlled substances must be limited to losses that are causally related to the described activity.

Policy language that excludes losses "arising out of," "due to," or "caused by" the use of controlled substances, with a caveat for the legitimate use of prescription drugs, complies with the guidance in this bulletin. Policy language excluding all losses that merely coincide in time with an insured being under the influence or engaging in a described activity without a causal relationship will be disapproved.

This bulletin is effective upon issuance.

Andrew R. Stolfi
Insurance Commissioner and Director
Department of Consumer and Business Services

Date

² For example, auto liability policies providing minimum coverage may only exclude risks specifically listed under ORS 742.454. Similarly, ORS 742.500 to 742.548 sets the scope of coverage for UM/UIM and PIP. The Insurance Code does not permit exclusions for the use of controlled substances or driving under the influence from these coverages.

³ ORS 742.005(2) prohibits policy language that is unintelligible, uncertain, ambiguous or abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued.

⁴ For example, as noted in DFR Bulletin 2017-04, exclusions for marijuana or marijuana activities may not rely on exclusionary language that refers generally to "controlled substances" or "illegal activity."