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Case Study

## Replacement Cost Benefits: By When Must Replacement Be Completed?

By Jeffrey D. Eberhard

**Claims pointer:** An insured that elects replacement cost coverage must actually complete replacement of the dwelling within two years. After that time, the insured has no legal remedy against the insurer.

Homeowner insurance policies usually include a provision stating actual repair or replacement is a condition to recovery of replacement cost (“RC”) benefits, and no action may be brought against the insurer unless it is filed within two years of the date of loss. What happens, however, when repair or replacement is ongoing but has not been completed within two years of the date of loss? May the insured sue for replacement cost benefits? The Oregon courts, in Patton v. Mutual of Enumclaw Insurance, et al., recently had a chance to review this topic. (Multnomah County Circuit Court (Case No. 0311-12054, September 20, 2011); on remand from the Oregon Court of Appeals (242 P3d 624, October 20, 2010))

Lowell Patton purchased homeowner insurance from Mutual of Enumclaw (MOE). During an extensive remodel and addition to his home, he increased his coverage limits to \$600,000, the maximum limit available from MOE. Patton also purchased the RC endorsement which provides additional coverage for the amount actually and necessarily spent to repair or replace the damaged building, even if that amount exceeds \$600,000. Shortly before the addition was completed, the home was destroyed by fire. Patton claimed replacement of the home would cost between \$3.6 and \$4 million dollars. MOE obtained a bid of \$1.7 million.

MOE paid Patton the \$600,000 limits immediately following the loss. When Patton had problems obtaining a building permit, he contacted MOE, and MOE agreed to advance Patton \$1.14 million for

RC benefits based upon the \$1.74 million bid obtained by MOE. The advance was not required under the policy, but was intended to help Patton move forward with construction. Still, Patton had not completed construction within two years of the date of loss and requested that MOE extend the two-year suit limitation period. MOE declined. Shortly before the two year period was up, Patton sued MOE, seeking the full \$4 million cost to repair. Construction was not complete until the trial began four years post-loss. The trial court found that the cost of replacement was \$4 million, and that MOE breached its contract with Patton by failing to pay him the full \$4 million repair cost. Both sides cross-appealed.

On appeal, MOE argued it had no obligation to pay any RC benefits until repair or replacement was complete, and that it had no obligation to pay any RC benefits after expiration of the two year suit limitation period. The Court of Appeals agreed with MOE, finding that in absence of actual completion of replacement within two years of the date of loss, MOE only had to pay the policy limits of \$600,000. The Court of Appeals also ruled that the policy does not require measured RC payments based on partial or incomplete repairs. Replacement must be complete before any RC benefits are due. The Court held MOE’s additional RC payment of \$1.14 million was not required, did not alter the policy, and in no way obligated MOE to make any additional RC payments.

The case was remanded back to the trial court, where MOE moved for summary judgment on the grounds that actual repair or replacement was not complete within two years of the date of loss. Although this same motion was filed by MOE four years earlier in the original case, and denied, the trial court, armed with the Court of Appeals decision, found in favor of MOE. The trial court wrote: “This court cannot reconcile the foregoing observations and conclusions of the Court of Appeals with any position other than, as [MOE] argues, replacement must be completed within two years of the date of loss under this policy, absent extension or waiver.” ❖

— If you would like to be notified of these new cases, please send an email to: [caseupdate@smithfreed.com](mailto:caseupdate@smithfreed.com).

## Frozen Shoulder

By Anthony Woodward, MD

Frozen shoulder, also called adhesive capsulitis, is a chronic, initially painful and debilitating condition of the shoulder. The defining characteristic of frozen shoulder is, of course, loss of range of motion of the shoulder joint.

Frozen shoulder comes in two different varieties. Primary (also called idiopathic) frozen shoulder occurs for no apparent reason and without inciting incidents. Secondary frozen shoulder follows a definite insult to the shoulder, such as a fracture, dislocation, rotator cuff tear operation, or after immobilization. This article discusses primary frozen shoulder.

### Incidence

Primary frozen shoulder affects 2-5% of the population. It is a disorder of middle age; incidence peaks at age 56 years. Up to 70% of cases occur in women.

Frozen shoulder runs in families; heredity is said to account for 45% of the incidence of frozen shoulder. Patients with diabetes are five to six times, and women with a thyroid disorder are seven times more likely to have a frozen shoulder than persons without these diseases. Insulin-dependent diabetics are more severely affected.

Dupuytren disease, which causes flexion contracture of the fingers, is uncommon in women but 45% of women who have Dupuytren disease develop a frozen shoulder. Three percent of men who have heart surgery develop frozen shoulder.

Other risk factors that contribute to primary frozen shoulder include Parkinsonism, coronary artery disease, stroke, tennis elbow and the use of protease inhibitors. Frozen shoulder is usually unilateral but 6-30% of patients will develop the condition in the contralateral shoulder.

### Pathology

Primary frozen shoulder is a disease of the shoulder capsule. Fibroblasts and myoplasts infiltrate the capsule. Collagen fibers are altered. Synovitis oc-

curs in the acute phase. Despite the synonym of adhesive capsulitis, adhesions between the joint surfaces and capsule are not found.

There is fibrosis of the rotator interval, indicated by the space between the subscapularis and the supraspinatus tendons. Contracture and thickening of the coracohumeral ligament within the rotator interval is pathognomonic for primary frozen shoulder, and is responsible for the limitation of external rotation so characteristic of primary frozen shoulder.

### Prognosis

Generally the condition improves but does not always resolve completely. In one study 223 patients were followed for four years, 39% had mild symptoms and 2% had severe symptoms. In a different study of 68 patients, at seven years 50% still had pain or stiffness. The prognosis is worse for diabetic patients.

### Treatment

Many treatments have been tried for primary frozen shoulder but in 2010 a review found that there was insufficient evidence to draw firm conclusions about the effectiveness of treatments commonly used.

#### *Medicines*

- ◇ Analgesics are required.
- ◇ Oral corticosteroids help relieve night pain.

#### *Exercise*

- ◇ Commonly prescribed for primary frozen shoulder. Some studies have suggested that exercise within the limits of pain was more successful than intensive physical therapy, and that exercises to increase scapular and glenohumeral motion were better than exercises for shoulder joint motion alone.
- ◇ Worse results were noticed in patients over age 71, male patients, those with diabetes or disease of the non-dominant shoulder, and in patients in litigation or with workers' compensation claims.

#### *Intraarticular corticosteroid injections*

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## Medical Notes... (Continued from previous page)

- ◇ Provided better results than physical therapy at three months, but by 4-12 months there was no difference between the treatments.

### *Manipulation under anesthesia*

- ◇ Often performed but has not been proven to be more effective than an exercise program.
- ◇ Arthroscopy of 30 shoulders after the manipulation under anesthesia found tears of the labrum, ligament or tendon in 12 cases.

### *Brisement*

- ◇ The forcible distension of the shoulder joint by injecting fluid is said to be helpful.

### *Operation*

- ◇ Excision of the tissues in the rotator interval and if necessary, release of the subscapularis tendon and anterior and/or posterior capsule,

can be performed by open surgery or arthroscopically in recalcitrant cases.

## Clinical Course

The affected person notices the insidious onset of severe pain in the shoulder which is worse at night and aggravated by lying on the affected shoulder. Stiffness develops. Pain may lessen but the stiffness remains.

While courses of treatment are inconclusive, an IME can demonstrate the loss of active and passive range of motion in all planes, especially loss of external rotation even with the arm at the side. Usually a 50% loss of passive motion is required for a diagnosis of frozen shoulder. In contrast, patients who have decreased range of motion from paralysis or rotator cuff tears have greater passive range of motion than active. Imaging studies such as a plain x-ray or MRI are useful to rule out other conditions.

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## PERSPECTIVES ON THE LAW

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### Permissive Drivers Entitled to Coverage Under PIP Covering Insured Vehicle

— by Flavio A. Ortiz

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Recently, in Sheptow v. GEICO General Insurance Co., 246 Or App 18 (2011), the Oregon Court of Appeals held that under the personal injury protection (“PIP”) statutory scheme, an “insured” includes a permissive driver of the vehicle.

In Sheptow, the plaintiff was injured in a motor vehicle accident while driving his mother’s vehicle with her permission. The vehicle was covered by a liability insurance policy that GEICO had issued to the plaintiff’s mother, who was the sole named insured. The plaintiff was not living with his mother at the time of the accident. The plaintiff sought PIP benefits under the GEICO policy. GEICO denied PIP coverage to the plaintiff.

GEICO’s denial of coverage was based on its presumption that ORS 742.520(1), which describes who is entitled to PIP benefits, does not describe permissive drivers. ORS 742.520(1) states the following:

“Every motor vehicle liability policy issued for delivery in this state that covers any private passenger motor vehicle shall provide personal injury protection benefits to the person insured thereunder, members of that person’s family residing in the same household, children not related to the insured by blood, marriage or adoption who are residing in the same household as the insured and being reared as the insured’s own, passengers occupying the insured motor vehicle and pedestrians struck by the insured motor vehicle”

GEICO argued that its reading of the statute was supported by an earlier case, Mid-Century Ins. Co. v. Utah Home Fire Ins. Co., 58 Or App 210 (1982), in which the Oregon Court of Appeals held that a permissive driver was not entitled to PIP benefits under a policy issued by Utah Home Fire Insurance. (In Mid-Century, the court specifically rejected the argument that a permissive driver is considered a

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## Perspectives on the Law...

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“passenger occupying the insured motor vehicle.”)

In Sheptow, however, the Oregon Court of Appeals rejected GEICO’s interpretation of ORS 742.520 (1). The court reasoned that ORS 742.520(1) specifically states that all liability policies issued in Oregon must provide PIP coverage “to the person insured thereunder.” That, in turn, requires an examination of who is a person “insured” under the liability portion of the policy. ORS 806.080(1)(b) states that liability policies must cover permissive users of a vehicle insured under the policy (except for any person properly excluded from coverage). Because a permissive user is a “person insured under” the liability portion of the policy, the court concluded that ORS 806.080 necessitates that a permissive user (which includes a permissive driver) should be entitled to benefits under the PIP portion of the policy. The court distinguished the Mid-Century Ins. decision by noting that it pre-dated

certain amendments to ORS 806.080 in 1991 that extended liability coverage to permissive users.

The holding in Sheptow is fairly straightforward: PIP insurers are generally obliged to cover people injured while permissively using or driving an insured vehicle. Notably, following the Sheptow decision, liability, PIP, and UIM coverage should generally be available to a person who is permissively operating an insured vehicle (subject to any applicable exclusions). As noted above, liability coverage should be available pursuant to ORS 806.080(1)(b) and PIP coverage should be available pursuant to ORS 742.520(1). Also, UIM coverage should be available to a permissive operator pursuant to ORS 742.504(2) (defining an “insured” to include a person “occupying an insured vehicle” with permission and defining “occupy” to mean “in or upon or entering into or alighting from.”) ❖

— If you have any questions, please feel free to contact the author: Flavio A. Ortiz (alex@lerlaw.com) at 503-768-9600.

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## Photographic Documentation of Property Claims

— by John Harbaugh, LWG Consulting

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When at a loss site part of the information we may collect are photographs. You don’t have to be a professional photographer but your pictures should be worth a thousand words. Photos can be an invaluable addition to your documentation.

### Know Your Subject

To be admissible in court pictures must be legible and provide a reasonably accurate representation of the subject.

Ask before you photograph. It may be against company policy to photograph in certain locations. If photographs aren’t permissible you may have to fall back to a thousand words!

Photograph equipment from different angles, not just the damaged side. Photograph nameplates or signage that contains any information about the equipment.

Take “big picture” pictures. Wide angle shots can

physically place equipment within a building and in relation to other equipment.

### Know Your Camera

Using a camera can be as simple as setting it to Auto and shooting. While manually programming the camera offers an almost unlimited number of settings. Familiarize yourself with your camera, before the inspection.

Lighting can vary drastically. The flash may cause reflections that could overexpose the shot. You may need to manually program the camera, and doing this well comes from experience.

Use a zoom lens if you cannot get close to the equipment. Higher resolution photos will allow for magnification and provide greater picture detail.

Review the picture on the view screen. If it doesn’t represent your subject like you want, just take another. But don’t delete the bad picture; issues of deleted pictures can come up in court.

A compact camera is easier to carry than a larger camera, especially in tight spaces. It can be worn on the belt or in a pocket.

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## Photo Documentation...

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And it's a good idea to carry a spare battery and memory card. There is nothing worse than seeing the low battery indicator just as you start your inspection.

### **Document Your Pictures**

Accurately identify and log each picture. Change the camera's picture naming convention to make the photos more descriptive. For example, naming pictures "Acme Insured 001" identifies shots better than the camera's default name like "\_DSC001".

Identify and label the pictures in your notes. Use the camera's voice memo feature to record three to four seconds of additional information.

Most digital cameras can record video. Like wide angle photos, video can record the location of equipment or features such as electrical conduits or

pipes that lead to or from the equipment.

### **Modifications to Pictures**

Pictures are part of the legal documentation of the claim, don't modify the pictures other than formatting it for print. Keep an original set of photos that haven't been altered. And don't delete any pictures, even the shots of your feet.

### **Be Careful and Safe**

We often work in cramped or dangerous locations. Ask before approaching any potential hazard such as equipment using high voltage or with moving parts.

And, while setting your shot watch where you walk. Don't hit your head on an overhead pipe or trip over low obstacles. And don't walk off the roof! ❖

*— LWG Consulting is a Vendor Partner of OCAA. John Harbaugh can be reached at [jharbaugh@lwgconsulting.com](mailto:jharbaugh@lwgconsulting.com).*