

Update

ORS 18.592 Declared Constitutional by Court of Appeals

— by Jay Enloe

On October 15, 2003, nearly four years after the original effective date of ORS 18.592, the Oregon Court of Appeals declared this statute to be a fully constitutional exercise of legislative authority. This is the statute which makes noneconomic damages unavailable for either intoxicated or uninsured drivers, subject to certain exceptions. Although this new decision may not totally silence those plaintiff attorneys who contend that their intoxicated or uninsured client drivers should be entitled to sue for noneconomic damages, since it is possible they may harbor some hope that the recent Court of Appeals decision will be reviewed and reversed by the Oregon Supreme Court or they may try to carve out an exception for their clients to the reach of the statute, this decision makes it absolutely clear that the statute is constitutional and is to be enforced by Oregon arbitrators and Circuit Court judges. If anybody tries to assert the contrary in a claim you are handling, you can refer them to the Oregon Court of Appeals case of *Elisa Lawson v. Spencer Hoke*.

As a refresher, ORS 18.592 makes noneconomic damages unavailable if the plaintiff driver (note that this does not apply to a plaintiff passenger) was either uninsured or was under the influence of intoxicants at the time of the accident giving rise to the claim. There are enough uninsured (not to mention intoxicated) motorists on the road in Oregon that this situation comes up with some frequency. Inquiry into the potential plaintiff's sobriety or lack thereof and his or her liability insurance should be a primary focus of the investigation of any driver's bodily injury claim.

As you are investigating any auto accident claim, you should carefully explore all aspects of these factual issues. For example, it is not merely driving after having consumed alcohol which brings the statute into play and makes noneconomic damages unavailable. Rather, it is driving while intoxicated. If there has been no criminal prosecution of the driver establishing his or her intoxication, that is a factual issue which will require careful investigation and perhaps will not be conclusively decided until a jury decides it.

The question of liability insurance is even more difficult to discern at times. A potential plaintiff may tell you that while he had no liability insurance on the day of the accident, he is sure he had insurance shortly before the accident and that he had never driven uninsured before the accident. These contentions should be carefully investigated, and documentation confirming prior coverage and its lapse should be obtained and reviewed for accuracy, because often these contentions will be incorrect. Even if the plaintiff tells you that he had insurance within 180 days prior to the accident (which would usually be an exception to the noneconomic preclusion of ORS 18.592), if he had driven without insurance even once within the year preceding the date his prior coverage lapsed, the statute is applicable and noneconomic damages are unavailable.

Even since the recent Court of Appeals decision in *Lawson v. Hoke*, some plaintiff attorneys continue to assert the statute's inapplicability. The attorney who represents the plaintiff in that case has said he

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will be seeking Oregon Supreme Court review of the decision. Unless and until the Supreme Court reverses the Court of Appeals, which first requires the Supreme Court to decide there is a reason to even take a look at the issue, the Court of Appeals decision is the law and it will be applied.

Another position being taken by some plaintiff drivers who try to avoid the reach of this statute is to suggest that they had driven somebody else's insured vehicle, at some point within 180 days prior to the date of the accident, and that this brings them within one of the exceptions to the statute. Although this is a novel theory, we do not expect it to prevail and do not recommend settling claims on the basis of such a contention.

As a reminder, there are certainly other situations in which the statute would be inapplicable in any given case. Such situations are: (1) when the defendant was also driving uninsured or was under the influence of intoxicants; (2) where the injury resulted from the defendant's "intentional" tort (e. g., driving into someone on purpose with the intention of injuring that person); (3) where the defendant was driving "recklessly" (which would be more than mere "negligence"); (4) where the defendant was engaged in a felony at the time of the accident; or (5) where the plaintiff had been insured within 180 days prior to the day of the accident but that coverage has lapsed, and the driver had not driven while uninsured for a period of one year prior to the date coverage lapsed.

There are most certainly a large number of claims currently pending which will be affected by the Court of Appeals' decision in *Lawson v. Hoke*. We recommend that no claims for noneconomic damages be entertained if they are properly not available under ORS 18.592, even if the plaintiff attorney involved contends the Oregon Supreme Court will reverse the Oregon Court of Appeals. The likelihood of that happening is remote.

Hopefully, the result of this well-reasoned decision will be to encourage plaintiff attorneys who represent intoxicated or uninsured drivers to counsel their clients to mend their ways and not engage in either of these socially irresponsible

behaviors in the future. Viewing this statute in the bigger picture, it was surely the goal of the Oregon Legislature when passing it to cause drivers to drive while sober and while insured, more than it was to deny claims of intoxicated or uninsured drivers. With the Court Appeals affirming the Legislature's enactment, perhaps that social goal will be achieved. And, of course, with fewer intoxicated and uninsured drivers on the highway, there should be fewer claims to have to deal with. ❖

— Please feel free to call upon the author, Jay Enloe, if you have any questions about this subject or would like to discuss how it might apply in any given case. He may be contacted by phone at 503/768-9600 or by email at jay@lerlaw.com.