WSAJ's 34TH ANNUAL INSURANCE LAW SEMINAR

JANUARY 26TH, 2012 RED LION AT THE PARK, SPOKANE
JANUARY 27TH, 2012 GREATER TACOMA CONVENTION & TRADE CENTER, TACOMA
CHAIRPERSONS: LINCOLN C. BEAUREGARD AND ANN H. ROSATO

BRENDAN W. WILLIAMS is the deputy commissioner for policy and legislative affairs to Insurance Commissioner Mike Kreidler. A former three-term state representative, Williams was involved in the 2007 passage of the Insurance Fair Conduct Act and the advocacy campaign for Referendum 67. He's served as a debater and spokesperson on six other statewide ballot measures, including the No on I-1082 campaign.

Prior to his 2004 election to the State House from the 22nd Legislative District, Williams ran the Washington Health Care Association. A former clerk of the Washington Supreme Court, Williams graduated from the University of Washington School of Law and has a M.A. in criminal justice from Washington State University.

Brendan Williams

The Effects of Good Faith Legislation (R-67)

Claims versus Realities

The Opponent’s Claims

- “Milliman found when states altered bad faith laws insurance premiums increased 3.5 to 7 percent more than the national average.”
- “Assuming the national average for insurance premium increases is 5 percent the (Milliman) study predicts Washington’s premiums could increase up to 12 percent, costing Washington consumers $650 million annually.”
- “(R-67) applies to claims related to homeowner’s insurance, auto insurance, long-term care insurance, property insurance, malpractice insurance and small business insurance.”

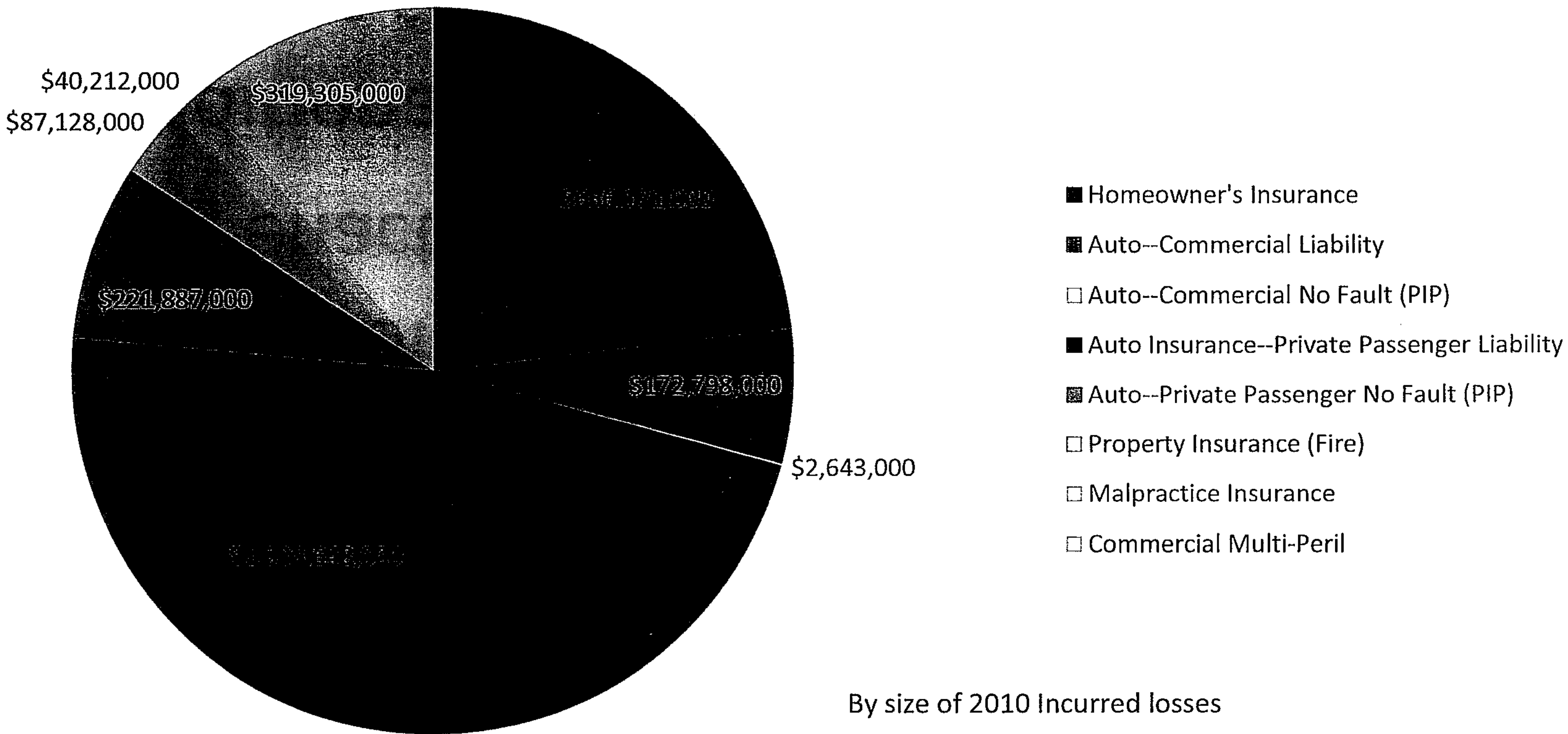
Washington Research Council
Policy Brief
October 22,2007

Post Election Claims

- “Excess UM (uninsured motorist) loss costs attributable to R-67 may have totaled as much as $17.4 million during the first two years following enactment."
- "...an additional $190 million in homeowner’s coverage loss costs—approximately $50 per insured home— in the first two years of R-67."

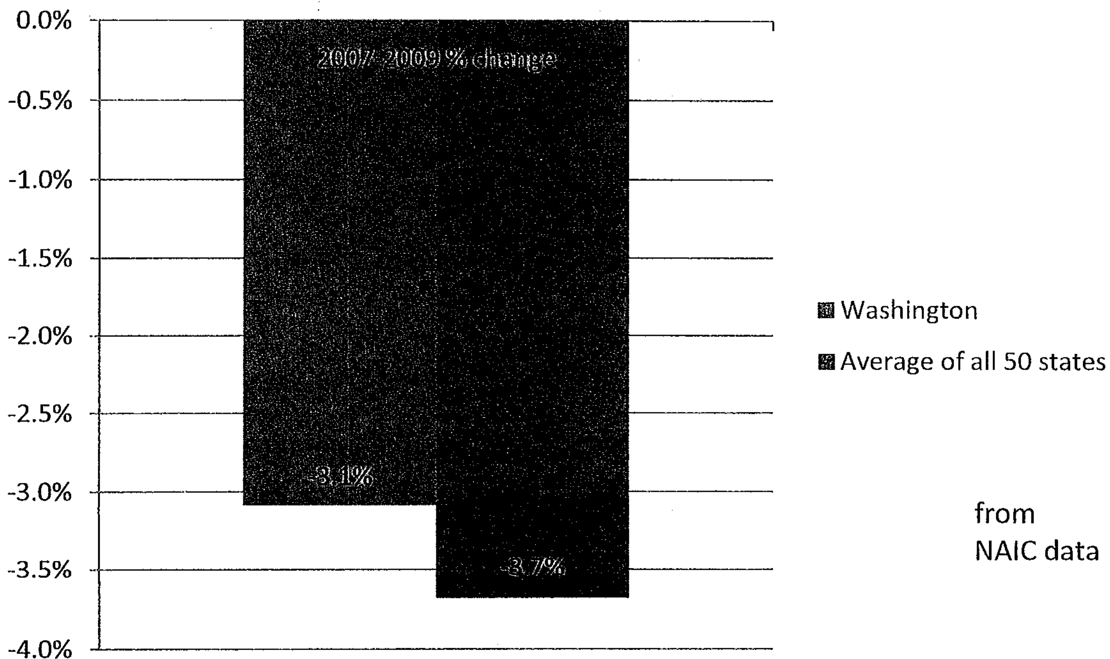
From “The Impact of First-Party Bad-Faith Legislation on Key Insurance Claim Trends in Washington State” -- Insurance Research Council (February 2011)

A little background



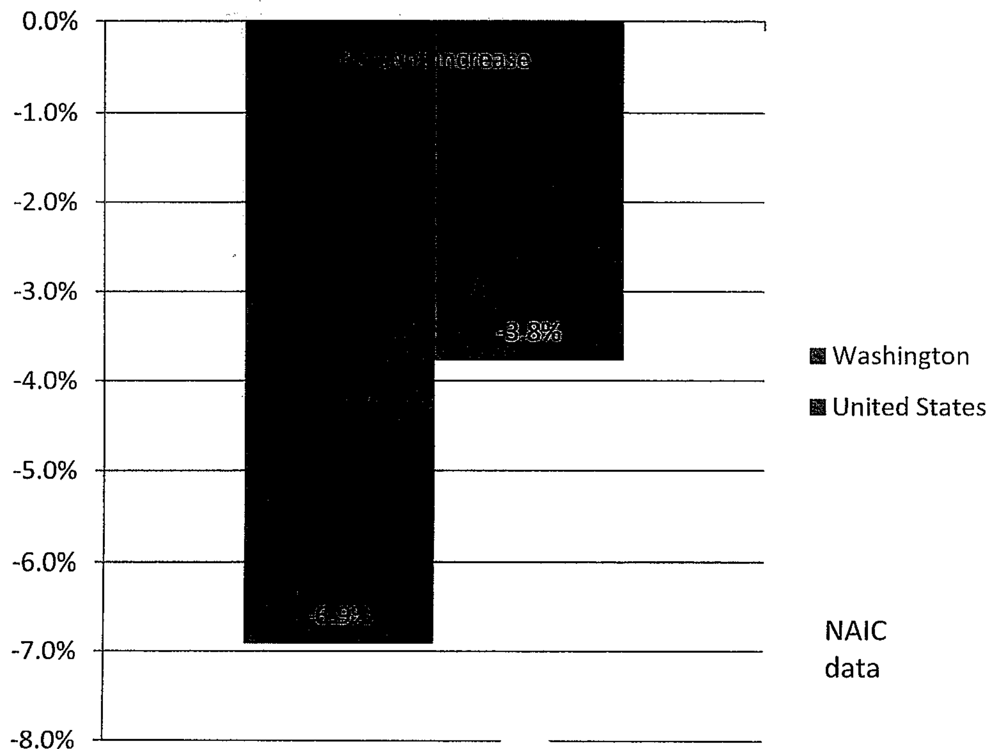
Early Indicators

- Auto

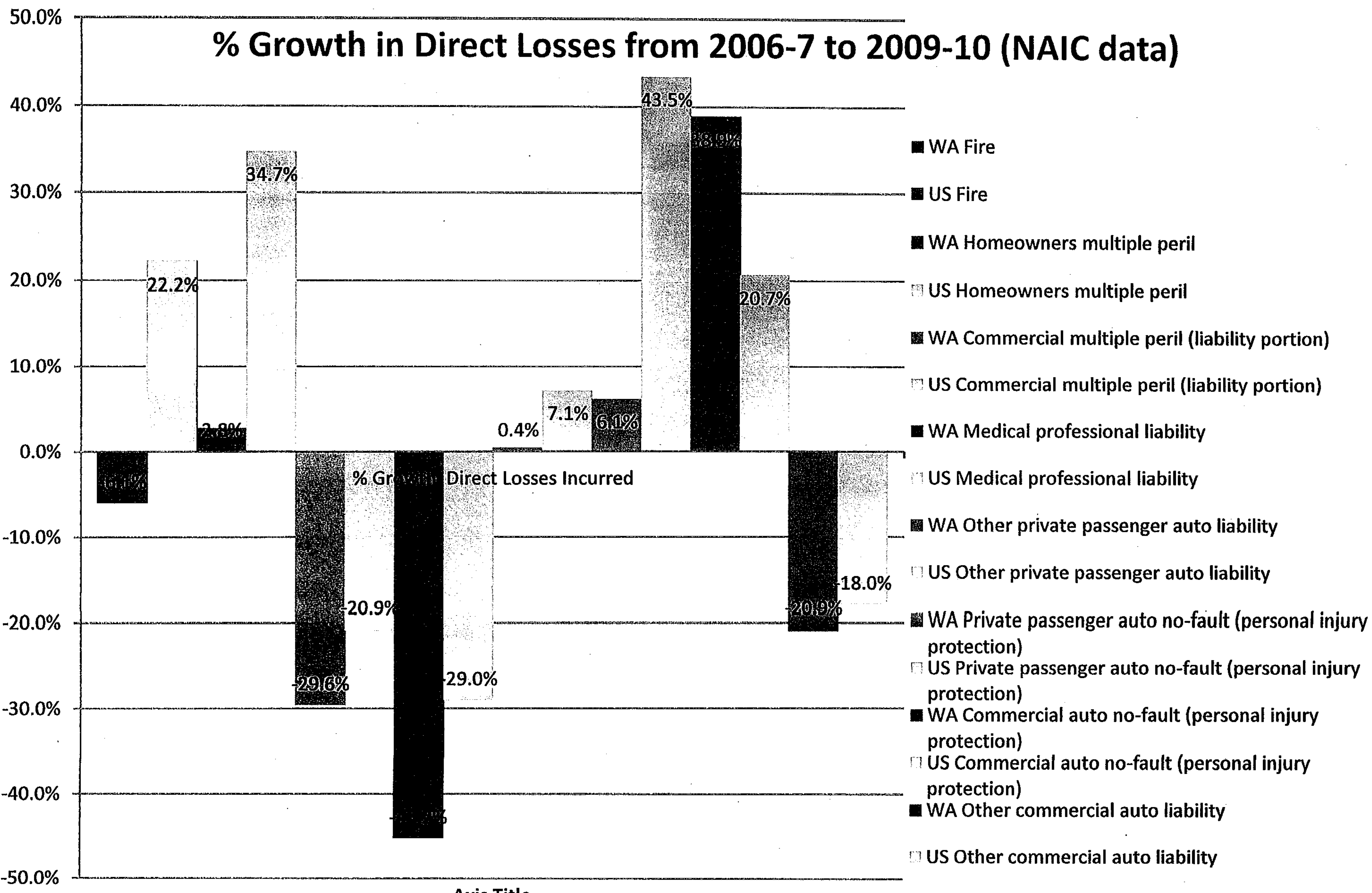


Early Indicators

- Homeowner's Insurance



Realities—data to 2010



Conclusion

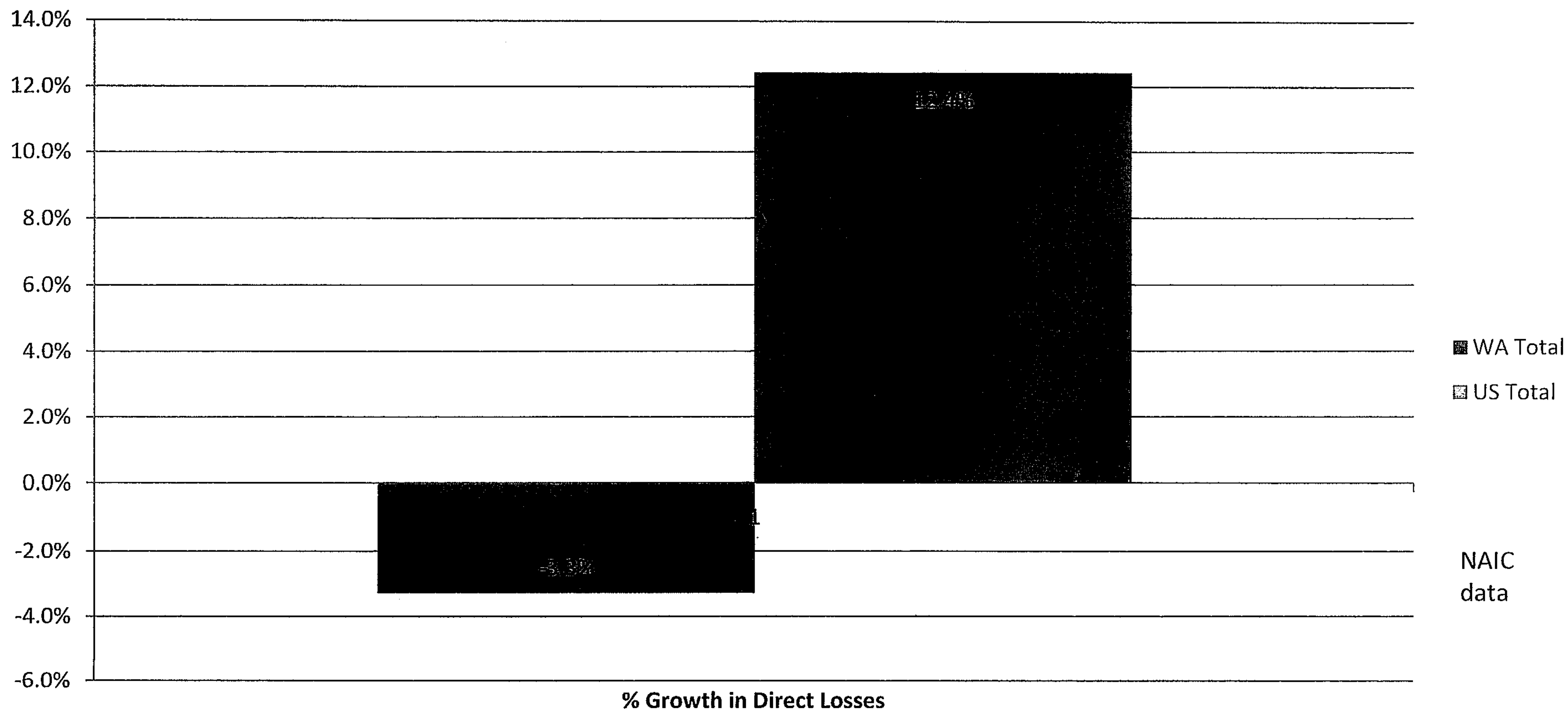
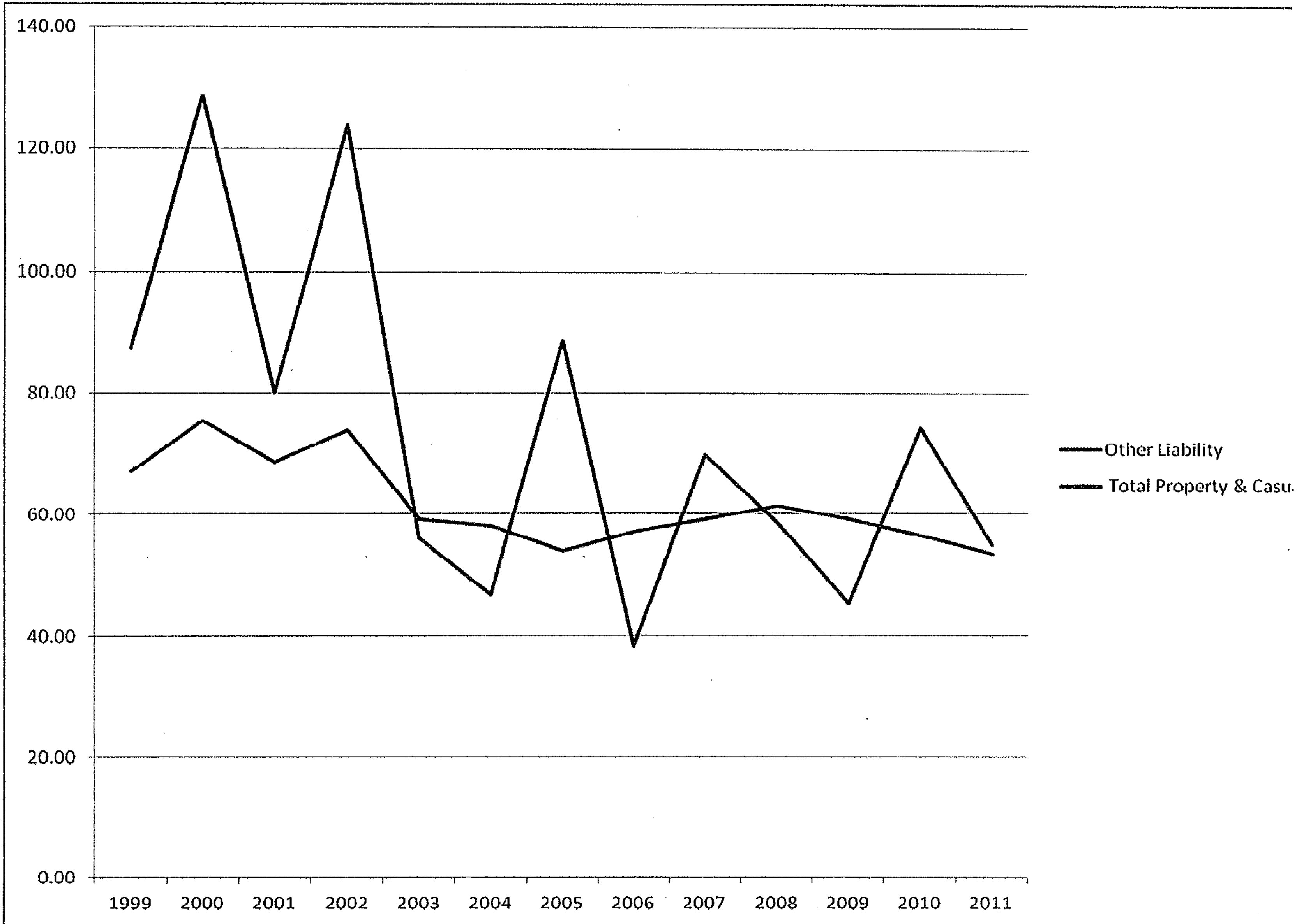


Exhibit E

Washington and Oregon insurance company liability loss ratios, showing essentially no difference between Washington, which has statutory and regulatory provisions such as those in SB 814, and Oregon, which currently does not. Exhibit E also shows there was no impact on loss ratios observed after enactment of the Washington measures (nor any impacts on loss ratios in Oregon after enactment of SB 1205 in 1999 or SB 297 in 2003).

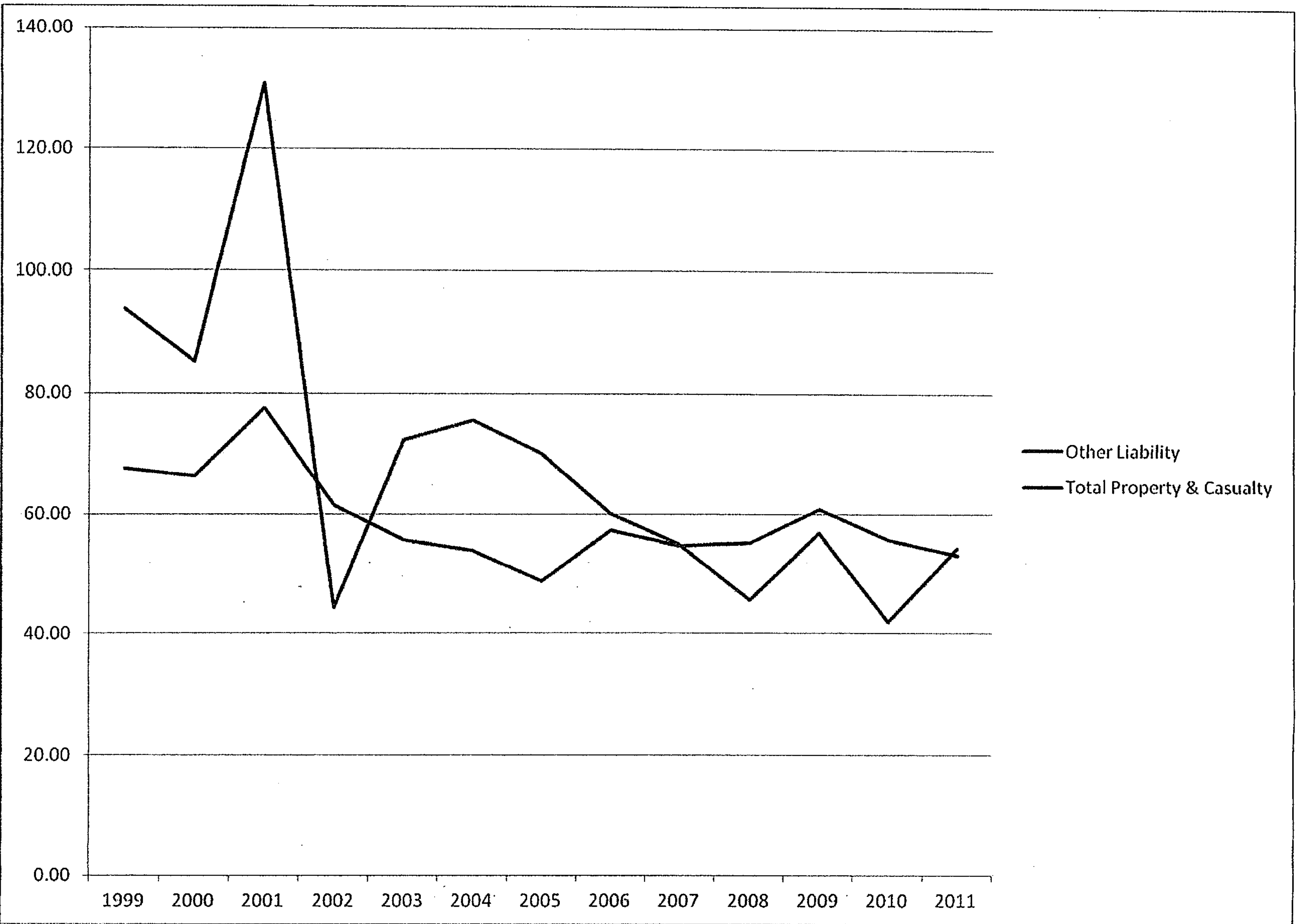
Oregon: Loss Ratio (Direct Losses Incurred/Direct Premiums Written) 1999-2011



*For 2009-2011, the loss ratios for "Other Liability – Occurrence" was used for "Other Liability."

Washington: Loss Ratio (Direct Losses Incurred/Direct Premiums Earned) 1999-2011

Percent



Year*

*For 2009-2011, the loss ratios for "Other Liability – Occurrence" was used for "Other Liability."

Exhibit F-1

Testimony Before the Senate Committee on General Government, Consumer and Small Business Protection – April 5, 2013

SB 814: 4/5/2013

Dexter Johnson, Legislative Counsel: Good Morning Mr. Chair and members of committee, Dexter Johnson, Legislative Counsel. You asked me here this morning to talk about one constitutional concern which has been raised, which involves a provision both in the federal constitution and in the Oregon constitution that prohibits laws impairing the obligation of a contract and the question of whether SB 814 violates that provision. I conclude that answer is no, in fact it does not. SB 814 essentially does a couple of things; it permits assignments of rights under an insurance policy even where the policy requires consent of the insurer. The bill would allow the assignment to go forward anyway. It provides for a number of more technical rules of construction for determining extent of coverage for certain policies involving environmental claims. It prohibits certain settlement practices and requires insurers to provide independent counsel to insurers in the context of environmental claims. Significantly, section 8 of the bill applies retroactively as well as prospectively to environmental claims that arose before, on or after the effective date of the bill. The question becomes why are these terms not an impairment of the obligation of contract that is prohibited by either the federal or state constitution, and the reason why is essentially that, well there is both a number of reasons why in my view this is not likely to substantially impair a contract and then there is a provision in this bill that I will point out to you that would essentially provide an escape valve in any event that allows the bill to, if it is enacted to be law, and nonetheless allow a court to apply provisions that vary from this bill. Let me get to that in a moment, let me first touch on what the standard is for impairment of contract and essentially it must not be merely a technical change it must be a substantial impairment and go to a material part of the contract. It must relate to what is bargained on among the parties, that is a factual determination. Second, assuming it is, the court concludes it an initial matter, it is a substantial impairment, in other words something that impairs a material term of the contract, then the court goes through a balancing test where the court weighs the nature of the impairment against if the state has a legitimate public purpose in what it is trying to achieve and if so, does the impairment far outweigh the purpose as to constitute a substantial impairment for purposes of the constitution. So they engage in this weighing methodology. Again that is a factual determination beyond the scope of my review. But, I will note that in previous legislation the legislature considered where it modified some of these same kinds of insurance policies, the laws that applied to them and contained a virtually identical effective date, in other words one that applies to both prospective changes and to existing claims and prior claims that courts have upheld that. That's the standard anyway. What I would like to do is to turn to a particular provision in the bill on page 5 lines 42-44 subsection 8 of section 4, what that does is essentially a savings clause that says if the changes that you are making in this bill force some existing law, if a court determines that that results in an interpretation that is contrary to the intent of the parities then in fact those rules don't apply. So this subsection 8 is basically an escape valve, where if a court says this would constitute an impairment of contract rather than making the law void it says for the purposes of construing the meaning of this contract we will look to the prior, we will not apply what this bill says. In light of that, I conclude that this does not violate either the federal or state prohibition of laws impairing the obligation of contract.

Exhibit F-2

MEMORANDUM

TO: SEN. BETSY JOHNSON

FROM: JOAN P. SNYDER

RE: Constitutionality of the 2013 OECAA Amendments

I. HISTORICAL BACKGROUND OF PROPOSED 2013 OECAA AMENDMENTS

In 1999, the Oregon Legislature enacted SB 1205, the Oregon Environmental Cleanup Assistance Act ("OECAA"), incorporated in the Oregon Revised Statutes as ORS 465.475, *et seq.*[1] The legislative purpose set forth in the statute was as follows:

> "**465.478 Legislative findings.** The Legislative Assembly finds that there are many insurance coverage disputes involving insureds who face potential liability for their ownership of or roles at polluted sites in this state. The State of Oregon has a substantial public interest in promoting the fair and efficient resolution of environmental claims while encouraging voluntary compliance and regulatory cooperation." [1999 c.783 §3]

The details of SB 1205 are beyond the scope of this memorandum, but in general it provided rules of construction for ambiguous or undefined policy language and rules with respect to claims handling issues not addressed by the policies at all, consistent with Oregon's long history of extensively regulating insurance company policy terms and claims handling for the protection of policyholders and injured parties. *See* ORS Chapters 742, 746. For example, SB 1205 provided that, if a government agency such as the Oregon Department of Environmental Quality ("DEQ") requested that a policyholder perform an environmental investigation, an insurance company could not deny coverage on the ground that the policyholder "voluntarily" complied instead of requiring DEQ to obtain a court order. *See* ORS 465.480(1)(a), 2(c). Importantly, however, the 1999 Legislature provided that "[t]he rules of construction set forth in this section do not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy." ORS

[1] The current version of the OECAA is attached at **Tab 1**, along with the 1999 bill (SB 1205) and the 2003 bill (SB 297).

465.480(7). Thus, nothing in the legislation was intended to contradict express and unambiguous insurance policy language.

In 1999, the Legislature carefully considered whether, because the OECAA applied to historical insurance policies sold many years earlier,[2] it "retroactively" impaired contracts in violation of the Oregon and U.S. Constitutions. Testimony and exhibits were offered by Oregon policyholders and the insurance industry. (*See* **Tab 2** (including a memorandum exploring constitutional issues prepared by Hagen, Dye, Hirschy & DiLorenzo.)) In the end, the 1999 Legislature found that there were no constitutional difficulties, based in part on the advice of Legislative Counsel. As Rep. Lane Shetterly, Chair of the House Judiciary, Civil Law Committee stated:

> "Chair: These amendments do not change the original part of the Bill that says if your contract, insurance contract, provides otherwise that this Bill will not replace any language that's in the Bill. This is important because it was raised by the insurance company, the fact that it's unconstitutional and will interfere with contract, and *so I have that research by Legislative Counsel, and their review indicated that the Bill would not infringe on someone's contract.*" (Emphasis added).

In 2003, the Legislature enacted additional rules of construction, SB 297 (**Tab 1**), again without any serious argument from opponents that these rules somehow unconstitutionally impaired contracts. Meanwhile, environmental claims continued to be litigated in the Oregon state courts, the United District Court for the District of Oregon and the Ninth Circuit Court of Appeals, with those courts applying the OECAA to historical insurance policies that existed prior to enactment. However, *not a single court decision ever held that there were constitutional problems with applying the OECAA to historical insurance policies.*[3] In fact, as discussed below, the only court to decide the issue, *Century Indemnity Co. v. The Marine Group, LLC*, Civ. No. 08-1375-AC (D. Or. Jan. 27, 2012) (*see* **Tab 3**), held that OECAA had no constitutional defect, particularly in such a highly regulated area as insurance.

The proposed 2013 OECAA Amendments ("Amendments") are attached as **Tab 4**. The proposed Amendments retain the rule that the OECAA does not apply if to enforce its provisions "results in an interpretation contrary to the intent of the parties to the general liability insurance policy." ORS 465.480(7).

---

[2] Because pollution liabilities are usually expressly excluded under liability policies sold after 1985, the OECAA has had little effect on more recent policies.

[3] Court decisions applying the OECAA without questioning its constitutionality are attached at **Tab 5**.

II. THE 2013 OECAA AMENDMENTS ARE CONSTITUTIONAL UNDER THE CONTRACT CLAUSES OF THE UNITED STATES AND OREGON CONSTITUTIONS.

The following are key arguments in support of the constitutionality of the Amendments under the United States and Oregon Constitutions.

A. The Amendments' savings clause in Section 4(8) assures that, regardless of the substantive terms of the bill, its rules of construction cannot produce a contract interpretation that varies from the parties' intent at the time of contracting. For this reason, it cannot result in retroactive substantive changes to existing contract terms.

Under Oregon law, the "primary and governing rule" of insurance contract interpretation is to ascertain the contracting parties' intent at the time of contract formation. *Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or. 464, 469, 836 P.2d 703 (1992) (attached at **Tab 6**). Section 4(7) of the OECAA, which is codified as ORS 465.480(7), includes this principle as part of its savings clause:

> "The rules of construction set forth in this section do not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy."

The Amendments extend this savings clause to the changes they make to existing ORS 465.480 as well as to new sections 2 and 7. *See* Section 4(8) of the proposed Amendments. Under this clause, the proposed changes to the rules of construction must reflect the parties' intent as of the time they entered into the insurance contract. If a court determines that the amendments are contrary to the parties' mutual intent (that is, the policy language), then the offending sections are ineffective in that case – and there is nothing left that might be found to unconstitutionally change the parties' original intent. Because of this automatic savings mechanism, the amended rules of construction may affect the interpretation of the terms of an insurance contract *only* when there is no clear mutual intent at the time the insurance policy was sold – in which case they cannot run afoul of either contract clause, and in which case Oregon courts and courts across the country traditionally look to statutory or common law to fill the gaps.

B. Section 8(1) is exactly the same effective date provision applicable to the 2003 enrolled bill, and courts considering the rules of construction after that date did not block application of the rules to existing contracts..

The effective date provision in Section 8(1) of the Amendments is *exactly* the same effective date provision applicable to the 2003 bill. In *Century Indemnity Co. v. The Marine Group, LLC*, Civ. No. 08-1375-AC (D. Or. Jan. 27, 2012) (*see* **Tab 3**), the District of Oregon determined that the OECAA's rules of construction, as applied to existing contracts, did *not* run afoul of either federal or state contract clause. It allowed application of the rules to interpret existing contract language. There is no reason to think that an Oregon state court would reach a different conclusion. In fact, Oregon Circuit Court Judge Youlee Yim You noted the effective date provision of the 2003 statute in the *Certain Underwriters at Lloyds v. Massachusetts Bonding*

case, Multnomah Circuit Court Case No. 0304-0995 (*see* **Tab 5**). Judge You raised no concerns with the application of the provision to existing contract language.

C. The Oregon Department of Justice was correct when it successfully argued in the *Century Indemnity* case that Section 8's predecessor did not violate the federal or state contract clauses, in an analysis that very closely tracked that on which the 1999 Legislature relied in enacting SB 1205.

Under the federal contracts clause, "No State shall * * * pass any * * * Law impairing the Obligation of Contracts." U.S. Constitution., art. I, § 10, cl. 1. The Oregon Constitution provides that "No * * * law impairing the obligations of contract shall ever be passed * * * ." Or. Const. art. I, § 21. Analysis of the Oregon provision generally follows federal analysis, *Towerhill Condominium Ass'n v. American Condominium Homes, Inc.*, 66 or. App. 342, 347, 675 P.2d 1051 (1984) (attached at **Tab 6**), but these prohibitions under the state and federal constitutions are not absolute. *United States Trust co. v. New Jersey*, 431 U.S. 1 (1977); *Kilpatrick v. Snow Mountain Pine Co.*, 105 Or. App. 240, 243, 805 P.2d 137 (1991) (both attached at **Tab 6**).

The Oregon Department of Justice intervened[4] in the *Century Indemnity* case to respond to challenges and to uphold the constitutionality of existing ORS 465.480, confirming the determination of Legislative Counsel in 1999. As the 1999 Legislative Counsel correctly found, the Oregon DOJ explained in its briefing (which the Court adopted in full, *see* **Tab 3**), application of the three-step analysis demonstrated that the application of the rules of construction to existing contracts was constitutional.

The Oregon Department of Justice's analysis in 2012 is entirely consistent with the legal analysis that the 1999 Legislature relied upon in passing the 1999 OECAA, discussed briefly above. *See* April 27, 1999, Senate Bill 1205: Contract Clause Analysis, Memorandum from Hagen, Dye, Hirschy & DiLorenzo to Senator Neil Bryant and Representative Max Williams; *see also* Testimony of Committee Chair at the May 13, 1999, SB 1205 hearing, confirming that Legislative Counsel reviewed and concurred in the legal analysis of the constitutionality of SB 1205 (both attached at **Tab 2**).

D. Insurance industry counsel conceded the constitutionality of Section 8's predecessor in *Century Indemnity*.

Insurance industry counsel did not object to Section 8's constitutionality in *Century Indemnity*. (*See* St. Paul's brief, attached at **Tab 7**.) In fact, it conceded that the Oregon DOJ's arguments about the OECAA's general constitutionality were correct. Instead, St. Paul argued certain third party plaintiffs were interpreting the OECAA in such manner as to result in an unconstitutional impairment of contract – *not* that the rules of construction therein could not apply to existing contracts.

---

[4] The Oregon DOJ's briefing on this issue in *Century Indemnity* is included in the materials attached at **Tab 3**.

E. **Application of the three-step contract clause analysis demonstrates that Section 8(1)'s effective date provision is constitutional.**

1. **Step One: Section 8 has not operated as a substantial impairment of a contractual relationship.** *Energy Reserves Group v. Kansas City Power & Light Co.*, 459 U.S. 400 411-12 (1983); *General Motors Corp. v. Romein,* 503 U.S. 181, 186, 112 S. Ct. 1105 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 US 234, 244, 98 S Ct 2716 (1978)) (all attached at **Tab 6**).

First, as the State of Oregon argued successfully in *Century Indemnity*, supplying rules with which to evaluate ambiguous contract terms does not change the underlying contract terms.

Second, even if the contract were modified by the new interpretive rules (which should not happen due to the savings clause in ORS 465.480(7)), such modification is not "substantial" in the insurance context, because it is a heavily regulated industry. *Id*; ORS 731-35, 737, 742-44, 746, 748, 750. In a heavily regulated industry, it is reasonable to expect that government will continue to pass legislation that will significantly affect existing contracts. This fact weighs heavily against finding a constitutional violation. *Liberty Mut. Ins. Co. v. Whitehouse,* 868 F. Supp. 425, 431, (D.R.I. 1994) ("A statute does not substantially impair a party's contract rights unless it adversely affects the party's reasonable expectations under the contract," and "one important factor is the degree of government regulation regarding the subject of the contract.") (**Tab 6.**) *See also Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1098-99 (9th Cir. 2003) ("Given the highly regulated nature of the California insurance industry * * * [the statute's] interference with contracts, while substantial, is not so severe as to render it unconstitutional."); *Energy Reserves*, 459 U.S. at 416 (extensive government regulation of gas industry weighs against finding impairment of contract by new gas price regulation) (both attached at **Tab 6**).

Third, the rules of construction contained in the Amendments do not significantly change the parties' relationship. Section 2 interprets the standard insurance policies' language requiring the consent of the insurance company to assignment of the policies, consistent with its language and the law of most states, not to bar assignment of environmental claims. Similarly, Section 4 interprets standard policy provisions relating to "damages" as a result of "property damage," among other standard terms. In addition, the Amendments provide some procedural detail to the existing OECAA scheme implementing the existing right of contribution between insurance companies and to the effect a settlement between a policyholder and an insurance company has on these contribution rights. It also creates a mechanism for judicial examination of such settlements to make sure they are in good faith. *See* Section (3)(b), (4). None of these interpretive rules substantially change the existing contractual relationship, particularly in light of the heavy regulation of the insurance business and the analysis provided by Judge Acosta in *Century Indemnity.*[5]

---

[5] The Amendments' other changes to the OECAA do not affect the rules of construction – but they also do not work substantial changes in light of the heavy regulation of the insurance industry. The Amendments address the insurance company's selection of defense counsel under circumstances when the insurer "reserves rights," also a matter typically not addressed in

(continued . . .)

2. **Step Two: Even if there is a substantial impairment, the state has a "significant and legitimate public purpose" for the regulation.** *Energy Reserves*, 459 U.S. at 411-12; *United States Trust Co.* at 25.

The requirement of a legitimate public purpose "guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves*, 459 U.S. at 412. As the Oregon DOJ explained in its briefing in *Century Indemnity*, the OECAA was enacted to further the State's substantial interest in promoting the fair and efficient resolution of environmental claims while encouraging voluntary compliance and regulatory cooperation. *See* ORS 465.478 (setting forth the policies behind the OECAA). (*See* **Tab 3**.) The District of Oregon agreed in its *Century Indemnity* opinion at page 39. (*See id.*) There is no question that this is a significant and legitimate public purpose.

3. **Step Three: The resulting adjustment of the contractual obligations is reasonable in its conditions and character in light of the underlying public purpose.** *Energy Reserves*, 459 U.S. 411-12.

When analyzing this prong of the inquiry in the context of *private* contracts, a reviewing court must defer to the legislature's judgment as to the necessity and reasonableness of a particular measure. *Keystone v. Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505, 107 S. Ct. 1231 (1987); *see also Sangl v. Occidental Life Ins. Co.*, 824 F.Supp.2d 1224, 1237 (D. Ok. 2011) (both attached at **Tab 6**). This is true even if a government entity is party to a private contract, as long as the state is not acting in its own pecuniary self-interest to impair a contractual obligation it has undertaken. *See Manuel Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 20 (1st Cir. 1997) (**Tab 6**). In this respect, the analysis applicable here is distinctly different from that which would apply to a *public* contract, such as PERS.[6] The State of Oregon alluded to this principle in its briefing in the *Century Indemnity* matter at 10:

(. . . continued)
standard insurance policy language and subject to regulation in other states. Existing law provides that it is an unfair trade practice for an insurance company to, among other things, fail to acknowledge and act promptly upon communications relating to claims, fail to adopt and implement reasonable standards for the prompt investigation of claims, and to fail to affirm or deny coverage of claims within a reasonable time after completed proof of loss statements have been submitted. ORS 746.230(1)(b),(c), (3). The Amendments provide additional detail about what these obligations entail in the context of environmental claims, essentially adopting Washington's environmental claims handling regulations and an independent counsel right similar to California's.

[6] *See also Celia Schwaber Trust Two v. Hartford Accident and Idemnity Co.*, 636 F.Supp.2d 481, 491, (D.Md. 2009) ("However, even assuming substantial impairment, the new law is permissible as a legitimate exercise of the state's police power. Because the contract is a private one, 'courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'") (citation omitted) (attached at **Tab 6**).

"Where the State is not alleged to have altered its own contractual obligations, courts 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" (Citing *Energy Reserves*, 495 U.S. at 412-13; *see also Evans v. Finley,* 166 Or. 227, 238, 111 P.2d 833 (1941) (*see* **Tab 6**).)

The *Century Indemnity* court analyzed this prong and reached a conclusion equally applicable here. Weighing the purported contractual interference (as discussed above) with the OECAA's legitimate public purpose, the readjustment of obligations was reasonable. *Century Indemnity* at 39. (*See* **Tab 3**.) There is no reason to think any court – state or federal – would reach a contrary conclusion with respect to the Amendments.

III. CONCLUSION.

For the foregoing reasons, the proposed Amendments may be enacted into law and applied to insurance policies and claims that preexisted the date of its enactment without violating the United States or Oregon Constitutions. The bill's savings clause ensures that it cannot vary the interpretation of contract terms from those originally intended by the contracting parties, and a standard contract clause analysis demonstrates that the new rules of construction may be applied without unconstitutionally impairing the obligation of contracts.

-egon Environmental Cleanup Assistance)

465.475 Definitions for ORS 465.475 to 465.480. For the purposes of ORS 465.475 to 465.480:

(1) "Environmental claim" means a claim for defense or indemnity submitted under a general liability insurance policy by an insured facing, or allegedly facing, potential liability for bodily injury or property damage arising from a release of pollutants onto or into land, air or water.

(2) "General liability insurance policy" means any contract of insurance that provides coverage for the obligations at law or in equity of an insured for bodily injury, property damage or personal injury to others. "General liability insurance policy" includes but is not limited to a pollution liability insurance policy, a commercial general liability insurance policy, a comprehensive general liability policy, an excess liability policy, an umbrella liability insurance policy or any other kind of policy covering the liability of an insured for the claims of third parties. "General liability insurance policy" does not include homeowner or motor vehicle policies or portions of other policies relating to homeowner or motor vehicle coverages, claims-made policies or portions of other policies relating to claims-made policies or specialty line liability coverage such as directors and officers insurance, errors and omissions insurance or other similar policies.

(3) "Insured" means any person included as a named insured on a general liability insurance policy who has or had a property interest in a site in Oregon that involves an environmental claim.

(4) "Lost policy" means any part or all of a general liability insurance policy that is alleged to be ruined, destroyed, misplaced or otherwise no longer possessed by the insured.

(5) "Policy" means the written contract or agreement, and all clauses, riders, endorsements and papers that are a part of the contract or agreement, for or effecting insurance. [1999 c.783 §2; 2003 c.799 §1]

465.478 Legislative findings. The Legislative Assembly finds that there are many insurance coverage disputes involving insureds who face potential liability for their ownership of or roles at polluted sites in this state. The State of -egon has a substantial public interest in promoting the fair and efficient resolution of environmental claims while -couraging voluntary compliance and regulatory cooperation. [1999 c.783 §3]

465.479 Lost policies; investigation by insurer required; minimum standards for investigation. (1) If, after a diligent investigation by an insured of the insured's own records, including computer records and the records of past and present agents of the insured, the insured is unable to reconstruct a lost policy, the insured may provide a notice of a lost policy to an insurer.

(2) An insurer must investigate thoroughly and promptly a notice of a lost policy. An insurer fails to investigate thoroughly and promptly if the insurer fails to provide all facts known or discovered during an investigation concerning the issuance and terms of a policy, including copies of documents establishing the issuance and terms of a policy, to the insured claiming coverage under a lost policy.

(3) An insurer and an insured must comply with the following minimum standards for facilitating reconstruction of a lost policy and determining the terms of a lost policy as provided in this section:

(a) Within 30 business days after receipt by the insurer of notice of a lost policy, the insurer shall commence an investigation into the insurer's records, including computer records, to determine whether the insurer issued the lost policy. If the insurer determines that it issued the policy, the insurer shall commence an investigation into the terms and conditions relevant to any environmental claim made under the policy.

(b) The insurer and the insured shall cooperate with each other in determining the terms of a lost policy. The insurer and the insured:

(A) Shall provide to each other the facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to the issuance or existence of a lost policy.

(B) Shall provide each other with copies of documents establishing facts related to the lost policy.

(C) Are not required to produce material subject to a legal privilege or confidential claims documents provided to the insurer by another policyholder.

(c) If the insurer or the insured discovers information tending to show the existence of an insurance policy -pplicable to the claim, the insurer or the insured shall provide an accurate copy of the terms of the policy or a reconstruction of the policy, upon the request of the insurer or the insured.

(d) If the insurer is not able to locate portions of the policy or determine its terms, conditions or exclusions, the insurer shall provide copies of all insurance policy forms issued by the insurer during the applicable policy period that are potentially applicable to the environmental claim. The insurer shall state which of the potentially applicable forms, if any, is most likely to have been issued by the insurer, or the insurer shall state why it is unable to identify the forms after a good faith search.

(4) Following the minimum standards established in this section does not create a presumption of coverage for an environmental claim once the lost policy has been reconstructed.

(5) Following the minimum standards established in this section does not constitute:

(a) An admission by an insurer that a policy was issued or effective; or

(b) An affirmation that if the policy was issued, it was necessarily in the form produced, unless so stated by the insurer.

(6) If, based on the information discovered in an investigation of a lost policy, the insured can show by a preponderance of the evidence that a general liability insurance policy was issued to the insured by the insurer, then if:

(a) The insured cannot produce evidence that tends to show the policy limits applicable to the policy, it shall be assumed that the minimum limits of coverage, including any exclusions to coverage, offered by the insurer during the period in question were purchased by the insured.

(b) The insured can produce evidence that tends to show the policy limits applicable to the policy, then the insurer has the burden of proof to show that a different policy limit, including any exclusions to coverage, should apply.

(7) An insurer may claim an affirmative defense to a claim that the insurer failed to follow the minimum standards established under this section if the insured fails to cooperate with the insurer in the reconstruction of a lost policy under this section.

(8) The Director of the Department of Consumer and Business Services shall enforce this section and any rules adopted by the director to implement this section.

(9) Violation by an insurer of any provision of this section or any rule adopted under this section is an unfair claim settlement practice under ORS 746.230.

(10) As used in this section, "notice of a lost policy" means written notice of the lost policy in sufficient detail to identify the person or entity claiming coverage, including information concerning the name of the alleged policyholder, if known, and material facts concerning the lost policy known to the alleged policyholder. [2003 c.799 §4]

465.480 Insurance for environmental claims; rules of construction; duty to pay defense or indemnity costs; allocation. (1) As used in this section:

(a) "Suit" or "lawsuit" includes but is not limited to formal judicial proceedings, administrative proceedings and actions taken under Oregon or federal law, including actions taken under administrative oversight of the Department of Environmental Quality or the United States Environmental Protection Agency pursuant to written voluntary agreements, consent decrees and consent orders.

(b) "Uninsured" means an insured who, for any period of time after January 1, 1971, that is included in an environmental claim, failed to purchase and maintain an occurrence-based general liability insurance policy that would have provided coverage for the environmental claim, provided that such insurance was commercially available at such time. A general liability insurance policy is "commercially available" if the policy can be purchased under the Insurance Code on reasonable commercial terms.

(2) Except as provided in subsection (7) of this section, in any action between an insured and an insurer to determine the existence of coverage for the costs of investigating and remediating environmental contamination, whether in response to governmental demand or pursuant to a written voluntary agreement, consent decree or consent order, including the existence of coverage for the costs of defending a suit against the insured for such costs, the following rules of construction shall apply in the interpretation of general liability insurance policies involving environmental claims:

(a) Oregon law shall be applied in all cases where the contaminated property to which the action relates is located within the State of Oregon. Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for sites located outside the State of Oregon.

(b) Any action or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency against or with an insured in which the Department of Environmental Quality or the United States

vironmental Protection Agency in writing directs, requests or agrees that an insured take action with respect to ntamination within the State of Oregon is equivalent to a suit or lawsuit as those terms are used in any general liability insurance policy.

(c) Insurance coverage for any reasonable and necessary fees, costs and expenses, including remedial investigations, feasibility study costs and expenses, incurred by the insured pursuant to a written voluntary agreement, consent decree or consent order between the insured and either the Department of Environmental Quality or the United States Environmental Protection Agency, when incurred as a result of a written direction, request or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency to take action with respect to contamination within the State of Oregon, shall not be denied the insured on the ground that such expenses constitute voluntary payments by the insured.

(3)(a) An insurer with a duty to pay defense or indemnity costs, or both, to an insured for an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy, must pay all defense or indemnity costs, or both, proximately arising out of the risk pursuant to the applicable terms of its policy, including its limit of liability, independent and unaffected by other insurance that may provide coverage for the same claim.

(b) If an insured who makes an environmental claim under general liability insurance policies that provide that an insurer has a duty to pay all sums arising out of a risk covered by the policy has more than one such general liability insurance policy insurer, the insured shall provide notice of the claim to all such insurers for whom the insured has current addresses. If the insured's claim is not fully satisfied and the insured files suit on the claim against only one such insurer, the insured must choose that insurer based on the following factors:

(A) The total period of time that an insurer issued a general liability insurance policy to the insured applicable to the environmental claim;

(B) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim; or

(C) The policy that provides the most appropriate type of coverage for the type of environmental claim for which the insured is liable or potentially liable.

(c) If requested by an insurer chosen by an insured under paragraph (b) of this subsection, the insured shall provide information regarding other general liability insurance policies held by the insured that would potentially provide coverage for the same environmental claim.

(d) An insurer chosen by an insured under paragraph (b) of this subsection may not be required to pay defense or indemnity costs in excess of the applicable policy limits, if any, on such defense or indemnity costs, including any exclusions to coverage.

(4) An insurer that has paid an environmental claim may seek contribution from any other insurer that is liable or potentially liable. If a court determines that the apportionment of recoverable costs between insurers is appropriate, the court shall allocate the covered damages between the insurers before the court, based on the following factors:

(a) The total period of time that each solvent insurer issued a general liability insurance policy to the insured applicable to the environmental claim;

(b) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable;

(c) The policy that provides the most appropriate type of coverage for the type of environmental claim; and

(d) If the insured is an uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for purposes of allocation.

(5) If an insured is an uninsured for any part of the time period included in the environmental claim, an insurer who otherwise has an obligation to pay defense costs may deny that portion of defense costs that would be allocated to the insured under subsection (4) of this section.

(6)(a) There is a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments or other necessary investigation, as those terms are defined by rule by the Department of Environmental Quality, are defense costs payable by the insurer, subject to the provisions of the applicable general liability insurance licy or policies.

(b) There is a rebuttable presumption that payment of the costs of removal actions or feasibility studies, as those terms are defined by rule by the Department of Environmental Quality, are indemnity costs and reduce the insurer's

applicable limit of liability on the insurer's indemnity obligations, subject to the provisions of the applicable general liability insurance policy or policies.

(7) The rules of construction set forth in this section do not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy. [1999 c.783 §4; 2003 c.799 §2]

465.482 Short title. ORS 465.475 to 465.480 shall be known and may be cited as the Oregon Environmental Cleanup Assistance Act. [1999 c.783 §6]

that the person knows is a school shall upon conviction be guilty of a Class C felony.

(b) Paragraph (a) of this subsection does not apply to the discharge of a firearm:

(A) As part of a program approved by a school in the school by an individual who is participating in the program; or

(B) By a law enforcement officer acting in the officer's official capacity.

[*(4) Notwithstanding the provisions of subsection (2)(d) of this section, a person who is licensed under ORS 166.291 and 166.292 to carry a concealed handgun may not possess a firearm in a courtroom, jury room, judge's chambers or the areas adjacent thereto that the presiding judge determines should be free of firearms to insure the safety of the litigants, court personnel, witnesses and others.*]

(5) Any [*firearm or other dangerous*] weapon carried in violation of this section is subject to the forfeiture provisions of ORS 166.280.

(6) Notwithstanding the fact that a person's conduct in a single criminal episode constitutes a violation of both subsections (1) and [*(3)*] (4) of this section, the district attorney may charge the person with only one of the offenses.

(7) As used in this section, "dangerous weapon" means a dangerous weapon as that term is defined in ORS 161.015.

SECTION 8. ORS 166.173 is amended to read:

166.173. (1) A city or county may adopt ordinances to regulate, restrict or prohibit the possession of loaded firearms in public places as defined in ORS 161.015.

(2) Ordinances adopted under subsection (1) of this section do not apply to or affect:

(a) A law enforcement officer in the performance of official duty.

(b) A member of the military in the performance of official duty.

(c) A person licensed to carry a concealed handgun.

(d) A person authorized to possess a loaded firearm while in or on a public building **or court facility** under ORS 166.370.

Approved by the Governor July 19, 1999
Filed in the office of Secretary of State July 19, 1999
Effective date October 23, 1999

CHAPTER 783

AN ACT SB 1205

Relating to actions to determine insurance coverage for environmental contamination; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 to 4 and 6 of this 1999 Act are added to and made a part of ORS 465.200 to 465.510.

SECTION 2. For the purposes of sections 2 to 5 of this 1999 Act:

(1) "Environmental claim" means a claim for defense or indemnity submitted under a general liability insurance policy by an insured facing, or allegedly facing, potential liability for bodily injury or property damage arising from a release of pollutants onto or into land, air or water.

(2) "General liability insurance policy" means any contract of insurance that provides coverage for the obligations at law or in equity of an insured for bodily injury, property damage or personal injury to others. "General liability insurance policy" includes but is not limited to a pollution liability insurance policy, a commercial general liability insurance policy, a comprehensive general liability policy, an excess liability policy, an umbrella liability insurance policy or any other kind of policy covering the liability of an insured for the claims of third parties. "General liability insurance policy" does not include homeowner or motor vehicle policies or portions of other policies relating to homeowner or motor vehicle coverages, claims-made policies or portions of other policies relating to claims-made policies or specialty line liability coverage such as directors and officers insurance, errors and omissions insurance or other similar policies.

(3) "Insured" means any person included as a named insured on a general liability insurance policy who has or had a property interest in a site in Oregon that involves an environmental claim.

SECTION 3. The Legislative Assembly finds that there are many insurance coverage disputes involving insureds who face potential liability for their ownership of or roles at polluted sites in this state. The State of Oregon has a substantial public interest in promoting the fair and efficient resolution of environmental claims while encouraging voluntary compliance and regulatory cooperation.

SECTION 4. (1) As used in this section, "suit" or "lawsuit" includes but is not limited to formal judicial proceedings, administrative proceedings and actions taken under Oregon or federal law, including actions taken under administrative oversight of the Department of Environmental Quality or the United States Environmental Protection Agency pursuant to written voluntary agreements, consent decrees and consent orders.

(2) Except as provided in subsection (3) of this section, in any action between an insured and an insurer to determine the existence of coverage for the costs of investigating and remediating environmental contamination, whether in response to governmental demand

HeinOnline -- 1999 vol. 2 1920 1999

or pursuant to a written voluntary agreement, consent decree or consent order, including the existence of coverage for the costs of defending a suit against the insured for such costs, the following rules of construction shall apply in the interpretation of general liability insurance policies involving environmental claims:

(a) Oregon law shall be applied in all cases where the contaminated property to which the action relates is located within the State of Oregon. Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for sites located outside the State of Oregon.

(b) Any action or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency against or with an insured in which the Department of Environmental Quality or the United States Environmental Protection Agency in writing directs, requests or agrees that an insured take action with respect to contamination within the State of Oregon is equivalent to a suit or lawsuit as those terms are used in any general liability insurance policy.

(c) Insurance coverage for any reasonable and necessary fees, costs and expenses, including remedial investigations, feasibility study costs and expenses, incurred by the insured pursuant to a written voluntary agreement, consent decree or consent order between the insured and either the Department of Environmental Quality or the United States Environmental Protection Agency, when incurred as a result of a written direction, request or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency to take action with respect to contamination within the State of Oregon, shall not be denied the insured on the ground that such expenses constitute voluntary payments by the insured.

(3) The rules of construction set forth in subsection (2) of this section shall not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy.

SECTION 5. (1) Sections 2 to 4 of this 1999 Act apply to all causes of action and civil actions for which a judgment adjudicating the cause of action or civil action has not been entered in the register of a circuit court before the effective date of this 1999 Act.

(2) Subsection (1) of this section shall not be construed to require the retrying of any finding of fact made by a jury in any trial of an action based on an environmental claim that was conducted before the effective date of this 1999 Act.

SECTION 6. Sections 2 to 4 of this 1999 Act shall be known and may be cited as the Oregon Environmental Cleanup Assistance Act.

SECTION 7. It is the intent of the Legislative Assembly that if any part of sections 2 to 5 of this 1999 Act is held unconstitutional or void or otherwise devoid of any force or effect, the remaining parts shall remain in force and remaining parts within any section containing parts held unconstitutional, void or otherwise devoid of any force or effect shall survive if the section is capable of being executed in accordance with the legislative intent set forth in section 3 of this 1999 Act.

SECTION 8. This 1999 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 1999 Act takes effect on its passage.

Approved by the Governor July 19, 1999
Filed in the office of Secretary of State July 19, 1999
Effective date July 19, 1999

CHAPTER 784

AN ACT SB 615

Relating to land use planning; creating new provisions; and amending ORS 197.230.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 197.230 is amended to read:

197.230. (1) In preparing, adopting and amending goals and guidelines, the Department of Land Conservation and Development and the Land Conservation and Development Commission shall:

(a) Assess:

(A) What economic and property interests will be, or are likely to be, affected by the proposed goal or guideline;

(B) The likely degree of economic impact on identified property and economic interests; and

(C) Whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

(b) Consider the existing comprehensive plans of local governments and the plans and programs affecting land use of state agencies and special districts in order to preserve functional and local aspects of land conservation and development.

(c) Give consideration to the following areas and activities:

(A) Lands adjacent to freeway interchanges;

(B) Estuarine areas;

(C) Tide, marsh and wetland areas;

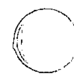
(D) Lakes and lakeshore areas;

(E) Wilderness, recreational and outstanding scenic areas;

(F) Beaches, dunes, coastal headlands and related areas;

(G) Wild and scenic rivers and related lands;

HeinOnline -- 1999 vol. 2 1921 1999



hearing procedure shall be continued under this section in the same manner as if no request for arbitration had been made. If the arbitration procedure is used, the teacher has no further rights to a hearing before a Fair Dismissal Appeals Board panel.

(b) The procedures for selection of the arbitrator are those in the applicable collective bargaining agreement. If there is no provision or agreement or if the agreement does not contain a procedure for selection, the parties shall request a list of five arbitrators from the Employment Relations Board and shall choose an arbitrator by alternative striking of names until one name is left. The remaining person shall act as the arbitrator. The Employment Relations Board shall compile a roster of qualified arbitrators from which the lists are to be taken.

(c) In determining whether the district board's dismissal or nonextension of the teacher should be sustained, the arbitrator shall use the same reasons, rules and levels of evidence as are required for the Fair Dismissal Appeals Board under ORS 342.805 to 342.910.

SECTION 5. The amendments to ORS 342.905 by section 4 of this 2003 Act apply to appeals filed with the Fair Dismissal Appeals Board on or after the effective date of this 2003 Act.

SECTION 6. This 2003 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2003 Act takes effect on its passage.

Approved by the Governor September 24, 2003
Filed in the office of Secretary of State September 24, 2003
Effective date September 24, 2003

CHAPTER 799

AN ACT SB 297

Relating to contracts; creating new provisions; and amending ORS 465.475 and 465.480.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 465.475 is amended to read:

465.475. For the purposes of ORS 465.475 to 465.480 [*and section 5, chapter 783, Oregon Laws 1999*]:

(1) "Environmental claim" means a claim for defense or indemnity submitted under a general liability insurance policy by an insured facing, or allegedly facing, potential liability for bodily injury or property damage arising from a release of pollutants onto or into land, air or water.

(2) "General liability insurance policy" means any contract of insurance that provides coverage for the obligations at law or in equity of an insured for bodily injury, property damage or personal injury to others. "General liability insurance policy" includes but is not limited to a pollution liability insurance policy, a commercial general liability insurance policy, a comprehensive general liability policy, an excess liability policy, an umbrella liability insurance policy or any other kind of policy covering the liability of an insured for the claims of third parties. "General liability insurance policy" does not include homeowner or motor vehicle policies or portions of other policies relating to homeowner or motor vehicle coverages, claims-made policies or portions of other policies relating to claims-made policies or specialty line liability coverage such as directors and officers insurance, errors and omissions insurance or other similar policies.

(3) "Insured" means any person included as a named insured on a general liability insurance policy who has or had a property interest in a site in Oregon that involves an environmental claim.

(4) "Lost policy" means any part or all of a general liability insurance policy that is alleged to be ruined, destroyed, misplaced or otherwise no longer possessed by the insured.

(5) "Policy" means the written contract or agreement, and all clauses, riders, endorsements and papers that are a part of the contract or agreement, for or effecting insurance.

SECTION 2. ORS 465.480 is amended to read:

465.480. (1) As used in this section[,]:

(a) "Suit" or "lawsuit" includes but is not limited to formal judicial proceedings, administrative proceedings and actions taken under Oregon or federal law, including actions taken under administrative oversight of the Department of Environmental Quality or the United States Environmental Protection Agency pursuant to written voluntary agreements, consent decrees and consent orders.

(b) "Uninsured" means an insured who, for any period of time after January 1, 1971, that is included in an environmental claim, failed to purchase and maintain an occurrence-based general liability insurance policy that would have provided coverage for the environmental claim, provided that such insurance was commercially available at such time. A general liability insurance policy is "commercially available" if the policy can be purchased under the Insurance Code on reasonable commercial terms.

(2) Except as provided in subsection [*(3)*] **(7)** of this section, in any action between an insured and an insurer to determine the existence of coverage for the costs of investigating and remediating environmental contamination, whether in response to governmental demand or pursuant to a written voluntary agreement, consent decree or consent order, including the existence of coverage for the costs of defending a suit against the insured for such costs, the following rules of construction shall apply in the interpretation of general liability insurance policies involving environmental claims:

(a) Oregon law shall be applied in all cases where the contaminated property to which the action relates is located within the State of Oregon.

HeinOnline -- 2003 vol. 3 3281 2003

Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for sites located outside the State of Oregon.

(b) Any action or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency against or with an insured in which the Department of Environmental Quality or the United States Environmental Protection Agency in writing directs, requests or agrees that an insured take action with respect to contamination within the State of Oregon is equivalent to a suit or lawsuit as those terms are used in any general liability insurance policy.

(c) Insurance coverage for any reasonable and necessary fees, costs and expenses, including remedial investigations, feasibility study costs and expenses, incurred by the insured pursuant to a written voluntary agreement, consent decree or consent order between the insured and either the Department of Environmental Quality or the United States Environmental Protection Agency, when incurred as a result of a written direction, request or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency to take action with respect to contamination within the State of Oregon, shall not be denied the insured on the ground that such expenses constitute voluntary payments by the insured.

(3)(a) An insurer with a duty to pay defense or indemnity costs, or both, to an insured for an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy, must pay all defense or indemnity costs, or both, proximately arising out of the risk pursuant to the applicable terms of its policy, including its limit of liability, independent and unaffected by other insurance that may provide coverage for the same claim.

(b) If an insured who makes an environmental claim under general liability insurance policies that provide that an insurer has a duty to pay all sums arising out of a risk covered by the policy has more than one such general liability insurance policy insurer, the insured shall provide notice of the claim to all such insurers for whom the insured has current addresses. If the insured's claim is not fully satisfied and the insured files suit on the claim against only one such insurer, the insured must choose that insurer based on the following factors:

(A) The total period of time that an insurer issued a general liability insurance policy to the insured applicable to the environmental claim;

(B) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim; or

(C) The policy that provides the most appropriate type of coverage for the type of environmental claim for which the insured is liable or potentially liable.

(c) If requested by an insurer chosen by an insured under paragraph (b) of this subsection, the insured shall provide information regarding other general liability insurance policies held by the insured that would potentially provide coverage for the same environmental claim.

(d) An insurer chosen by an insured under paragraph (b) of this subsection may not be required to pay defense or indemnity costs in excess of the applicable policy limits, if any, on such defense or indemnity costs, including any exclusions to coverage.

(4) An insurer that has paid an environmental claim may seek contribution from any other insurer that is liable or potentially liable. If a court determines that the apportionment of recoverable costs between insurers is appropriate, the court shall allocate the covered damages between the insurers before the court, based on the following factors:

(a) The total period of time that each solvent insurer issued a general liability insurance policy to the insured applicable to the environmental claim;

(b) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable;

(c) The policy that provides the most appropriate type of coverage for the type of environmental claim; and

(d) If the insured is an uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for purposes of allocation.

(5) If an insured is an uninsured for any part of the time period included in the environmental claim, an insurer who otherwise has an obligation to pay defense costs may deny that portion of defense costs that would be allocated to the insured under subsection (4) of this section.

(6)(a) There is a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments or other necessary investigation, as those terms are defined by rule by the Department of Environmental Quality, are defense costs payable by the insurer, subject to the provisions of the applicable general liability insurance policy or policies.

(b) There is a rebuttable presumption that payment of the costs of removal actions or feasibility studies, as those terms are defined by rule by the Department of Environmental Quality, are indemnity costs and reduce the insurer's applicable limit of liability on the insurer's indemnity obligations, subject to the provisions of the applicable general liability insurance policy or policies.

[*(3)*] **(7)** The rules of construction set forth in [*subsection (2) of*] this section [*shall*] **do** not apply if

HeinOnline -- 2003 vol. 3 3282 2003

the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy.

SECTION 3. Section 4 of this 2003 Act is added to and made a part of ORS 465.475 to 465.480.

SECTION 4. (1) If, after a diligent investigation by an insured of the insured's own records, including computer records and the records of past and present agents of the insured, the insured is unable to reconstruct a lost policy, the insured may provide a notice of a lost policy to an insurer.

(2) An insurer must investigate thoroughly and promptly a notice of a lost policy. An insurer fails to investigate thoroughly and promptly if the insurer fails to provide all facts known or discovered during an investigation concerning the issuance and terms of a policy, including copies of documents establishing the issuance and terms of a policy, to the insured claiming coverage under a lost policy.

(3) An insurer and an insured must comply with the following minimum standards for facilitating reconstruction of a lost policy and determining the terms of a lost policy as provided in this section:

(a) Within 30 business days after receipt by the insurer of notice of a lost policy, the insurer shall commence an investigation into the insurer's records, including computer records, to determine whether the insurer issued the lost policy. If the insurer determines that it issued the policy, the insurer shall commence an investigation into the terms and conditions relevant to any environmental claim made under the policy.

(b) The insurer and the insured shall cooperate with each other in determining the terms of a lost policy. The insurer and the insured:

(A) Shall provide to each other the facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to the issuance or existence of a lost policy.

(B) Shall provide each other with copies of documents establishing facts related to the lost policy.

(C) Are not required to produce material subject to a legal privilege or confidential claims documents provided to the insurer by another policyholder.

(c) If the insurer or the insured discovers information tending to show the existence of an insurance policy applicable to the claim, the insurer or the insured shall provide an accurate copy of the terms of the policy or a reconstruction of the policy, upon the request of the insurer or the insured.

(d) If the insurer is not able to locate portions of the policy or determine its terms, conditions or exclusions, the insurer shall provide copies of all insurance policy forms issued by the insurer during the applicable policy period that are potentially applicable to the environmental claim. The insurer shall state which of the potentially applicable forms, if any, is most likely to have been issued by the insurer, or the insurer shall state why it is unable to identify the forms after a good faith search.

(4) Following the minimum standards established in this section does not create a presumption of coverage for an environmental claim once the lost policy has been reconstructed.

(5) Following the minimum standards established in this section does not constitute:

(a) An admission by an insurer that a policy was issued or effective; or

(b) An affirmation that if the policy was issued, it was necessarily in the form produced, unless so stated by the insurer.

(6) If, based on the information discovered in an investigation of a lost policy, the insured can show by a preponderance of the evidence that a general liability insurance policy was issued to the insured by the insurer, then if:

(a) The insured cannot produce evidence that tends to show the policy limits applicable to the policy, it shall be assumed that the minimum limits of coverage, including any exclusions to coverage, offered by the insurer during the period in question were purchased by the insured.

(b) The insured can produce evidence that tends to show the policy limits applicable to the policy, then the insurer has the burden of proof to show that a different policy limit, including any exclusions to coverage, should apply.

(7) An insurer may claim an affirmative defense to a claim that the insurer failed to follow the minimum standards established under this section if the insured fails to cooperate with the insurer in the reconstruction of a lost policy under this section.

(8) The Director of the Department of Consumer and Business Services shall enforce this section and any rules adopted by the director to implement this section.

(9) Violation by an insurer of any provision of this section or any rule adopted under this section is an unfair claim settlement practice under ORS 746.230.

(10) As used in this section, "notice of a lost policy" means written notice of the lost policy in sufficient detail to identify the person or entity claiming coverage, including information concerning the name of the alleged policyholder, if known, and material facts concerning the lost policy known to the alleged policyholder.

SECTION 5. (1) Except as provided in subsections (2), (3) and (4) of this section, section 4 of this 2003 Act and the amendments to ORS 465.475 and 465.480 by sections 1 and 2 of this

HeinOnline -- 2003 vol. 3 3283 2003

2003 Act apply to all claims, whether arising before, on or after the effective date of this 2003 Act.

(2) Section 4 of this 2003 Act and the amendments to ORS 465.475 and 465.480 by sections 1 and 2 of this 2003 Act do not apply to any claim for which a final judgment, after exhaustion of all appeals, was entered before the effective date of this 2003 Act.

(3) Nothing in section 4 of this 2003 Act or the amendments to ORS 465.475 and 465.480 by sections 1 and 2 of this 2003 Act may be construed to require the retrying of any finding of fact made by a jury in a trial of an action based on an environmental claim that was conducted before the effective date of this 2003 Act.

(4) Notwithstanding any other provision of law, an insurer that is a party to an action based on an environmental claim for which a final judgment as to all insurers has not been entered by the trial court on or before the effective date of this 2003 Act and in which a binding settlement has been reached on or before the effective date of this 2003 Act between the insured and at least one insurer that was a party to the action may not seek or obtain contribution from or allocation to:

(a) The insured; or

(b) Any other insurer that prior to the effective date of this 2003 Act reached a binding settlement with the insured as to the environmental claim.

Approved by the Governor September 24, 2003
Filed in the office of Secretary of State September 24, 2003
Effective date January 1, 2004

CHAPTER 800

AN ACT HB 2011

Relating to economic development; creating new provisions; amending ORS 215.427, 227.178, 285A.050, 285A.090, 285A.095, 285A.136, 285B.283, 285B.286 and 285B.455; appropriating money; and declaring an emergency.

Whereas over half of Oregon's counties are currently listed as economically distressed; and

Whereas Oregon currently has the highest unemployment rate of any state; and

Whereas the retention of existing jobs and the creation of new jobs by existing businesses, as well as recruitment of new employment opportunities to Oregon, are necessary for economic prosperity; and

Whereas economic stimulus measures for reinvigorating and reversing the recent downturn in Oregon's economy should be put forward during the Seventy-second Legislative Assembly without regard to political party affiliations in a collaborative manner; and

Whereas economic health and viability depends on Oregon's ability to improve the state's working environment and appeal to the investment community for investments in Oregon; and

Whereas it is important for Oregon to be competitive with other states; and

Whereas most Oregon businesses are small businesses, employing fewer than 25 employees; and

Whereas public-private partnerships must be utilized to create jobs and retain Oregon companies; and

Whereas a healthy infrastructure, including the utilization of Oregon's ports, is critical to economic development in Oregon; and

Whereas innovative ideas are a critical component for the long-term economic viability of the state and a key component to building a sustainable economy; and

Whereas successful economic development requires focusing on the success of industrial, commercial and small businesses; and

Whereas activities that are intended to improve economic development should be managed under a statewide framework while maximizing local input and direction; now, therefore,

Be It Enacted by the People of the State of Oregon:

SECTION 1. The Oregon Economic and Community Development Commission shall develop a mission statement for the Economic and Community Development Department that gives the highest priority to promoting job development in Oregon by:

(1) Assisting existing companies that desire to expand;

(2) Assisting existing companies that desire to develop new products;

(3) Promoting the commercialization of technology developed at colleges and universities in Oregon;

(4) Recruiting businesses in targeted industries to locate in Oregon;

(5) Providing assistance to communities for local economic development efforts; and

(6) Developing infrastructure for communities that supports local economic development efforts.

SECTION 2. The Oregon Economic and Community Development Commission shall recommend legislation to the Seventy-third Legislative Assembly to modify ORS 285A.090 to reflect the priorities established under section 1 of this 2003 Act.

SECTION 3. (1) There is established the Governor's Council on Oregon's Economy.

(2) The members of the council are:

(a) The presiding officer of the Oregon Economic and Community Development Commission;

(b) The chairperson of the Oregon Transportation Commission;

HeinOnline -- 2003 vol. 3 3284 2003

HAGEN, DYE, HIRSCHY & DILORENZO, P.C.
ATTORNEYS AT LAW

TENTH FLOOR
PIONEER TOWER
888 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204-2024
(503) 222-1812
FAX: (503) 274-7979

JOHN A. DILORENZO, JR.
Admitted in Oregon and District of Columbia
E-Mail Address jdilorenzo@hagendye.com

IN REPLY PLEASE REFER
TO FILE NO.: 3749.013

April 27, 1999

via facsimile

The Honorable Neil Bryant
State Senator
Room S-206 State Capitol
Salem, Oregon 97310

The Honorable Max Williams
State Representative
Room H-475 State Capitol
Salem, Oregon 97310

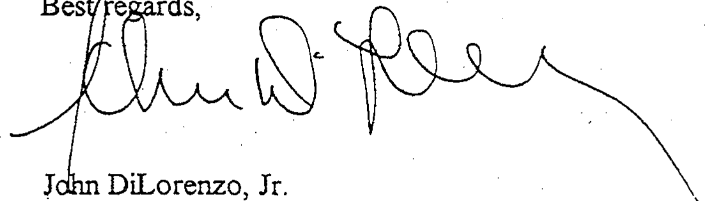
Re: *Senate Bill 1205* (Contracts Clause)

Dear Neil and Max:

Attached please find our memorandum relating to whether Senate Bill 1205 offends the Contracts Clause of the state or federal constitutions.

Please call should you have any questions.

Best regards,



John DiLorenzo, Jr.

JAD/tld
Enclosure

H:\WP7\JAD\3749_013\00089TLD.LTR

HAGEN, DYE, HIRSCHY & DILORENZO, P.C.
ATTORNEYS AT LAW

MEMORANDUM

TO: Senator Neil Bryant
Representative Max Williams

FROM: John DiLorenzo, Jr. and Aaron Stuckey

DATE: April 27, 1999

RE: SB 1205: Contracts Clause Analysis

Neil and Max, you have asked us to research whether SB 1205 (or any section thereof) is violative of the state or federal Contracts Clauses. Based upon our research of the case law interpreting these constitutional provisions, it appears that SB 1205 suffers no such constitutional infirmity.

1. Impairment of Obligations of Contracts Clauses

Article I, Section 10, of the U.S. Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Similarly, Article I, Section 21, of the Oregon Constitution states: "No . . . law impairing the obligation of contracts shall ever be passed." The Oregon constitutional provision is taken from the federal provision, *Knighton v. Burns*, 10 Or. 549, 550 (1847), and, as stated below, the courts of this state apply, in all relevant respects, the same analysis to the state provision as federal courts apply to the federal provision.

It has long been settled that, "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 103 S.Ct. 697, 704 (1983) (*quoting Home Bldg. & Loan Ass'n v. Blaisdell*, 54 S.Ct. 231, 239 (1934)). Since the analysis under the Contract Clause involves a weighing of the private and public interests, the Supreme Court has established a "balancing test" to determine whether a legislative act violates the Contract Clause. The test involves the following inquiries:

1. "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' . . . Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider

whether the industry the complaining party has entered has been regulated in the past."

Energy Reserves, 103 S.Ct. at 704; citations omitted.

2. "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. . . . The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests."

Id; citations and footnotes omitted.

3. "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties is based upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' Unless the State itself is a contracting party, '[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'"

Id; citations omitted; bracketed items from original.

The courts of Oregon have adopted a virtually identical approach to Contract Clause challenges under the state constitution. For example, in *Wilkinson v. Carpenter*, 277 Or. 557, 563 (1977), the Oregon Supreme Court analyzed whether a statutory increase in the homestead exemption constituted an impermissible impairment of existing contracts under the state and federal constitutions. After noting that "[m]odern decisions point out that the prohibition of the contract clause must be balanced against or 'harmonized' with the legislative powers reserved to the states," *Id*, at 563, the court held that "any indirect contractual impairment which may have occurred as a result of the increased homestead exemption is not unconstitutional since the increase was reasonable, and any impairment would not appear to be substantial when balanced against the governmental objective being pursued." *Id.* at 566. The Oregon Court of Appeals noted in *Towerhill Condominium Ass'n v. American Condominium Homes, Inc.*, 66 Or. App. 342, 348 (1984), that the court in Wilkinson "interpreted the federal constitution's mandate . . . which prohibits the passage of any law impairing the obligation of contracts, to be consistent with the similar restriction in Article I, section 21, of the Oregon Constitution." The Court of Appeals noted that the *Wilkinson* court "adopted a balancing test based upon reasonableness[.]" *Id.* The court added:

> "Pursuant to this modern, more flexible approach, state legislation which reflects 'the use of reasonable means to safeguard the economic structure upon which the good of all depends,' does not violate the contract clause for 'the reservation of the reasonable exercise of the protective power of the State is read into all contracts.'"

Id. (quoting Wilkinson, supra, quoting Home Building & Loan Ass'n, supra).[1]

2. SB 1205

Because you are already quite familiar with the specific provisions of SB 1205, we will treat them as a group for the purpose of this analysis. We do however note that:

1) The substantive provisions of SB 1205 are rules of construction to be used by courts in interpreting provisions of insurance contracts;

2) These rules of construction do not apply "if the application of the rule results in an interpretation contrary to the mutual intent of the parties to the" insurance contract (Section 4(3));

3) All provisions of SB 1205 pertain to insurance coverage for costs associated with remediation of environmental contamination; and

4) SB 1205 contains an emergency clause reciting that the bill is "necessary for the immediate preservation of the public peace, health and safety." (Section 8).

3. Constitutionality of SB 1205

Applying the "balancing" approach used by courts in analyzing the state and federal Contracts Clause, it appears that SB 1205 does not constitute an unconstitutional impairment of the obligations of contracts. As discussed below, it does not appear that the provisions of SB 1205 alter contracts at all because the provisions only supply interpretive aids to be used where

---

[1] In the case of *Eckles v. State*, 306 Or. 380 (1988), the Oregon Supreme Court did not employ the above-described methodology, but only because the allegedly impaired contract in *Eckles* was a contract to which the State was itself a party and because the "police power" of the state was not at issue. *Id.* at 398. The *Eckles* court did, however, note that the Oregon Supreme Court had earlier made "similar statements with respect to both the Oregon and federal constitutions," as those "balancing test" statements made by the U.S. Supreme Court in *Energy Reserves*. The court in *Eckles* did not use the "balancing test" because it "doubt[ed] that the 'police power' doctrine could be stretched so far as to permit the state to disregard a financial guarantee to persons or corporations who participate in the state insurance system." *Id.* at 398-99.

the parties have not agreed otherwise. Even if the provisions constituted "impairments", they are not "substantial" because the insurance industry (the ostensible challenger to SB 1205) is heavily regulated by states. Even if SB 1205 is considered a "substantial impairment", it is quite apparent that the state's aim in facilitating the remediation of hazardous wastes in its state is a "significant and legitimate public purpose." Finally, it is without question that SB 1205 constitutes a "reasonable and appropriate" approach to furthering the state's purpose, particularly in light of the complete deference afforded legislatures on such determinations.

A) Substantial Impairment

Before assessing the substantiality of the impact of the legislation, it must first be determined whether there is an impairment of the obligations of a contract.

In *State Farm v. Wyoming Ins. Dept.*, 793 P.2d 1008 (Wy. 1990), the Wyoming Supreme Court reviewed the constitutionality of a state regulation requiring insurers to obtain written consent of an insured to use replacement parts that were not made by the original equipment manufacturer. The insurance policies at issue only gave to the insured the right to a replacement part of like kind and quality. The insurance company argued that the regulation altered the insurance contract in this respect. The court rejected this argument, stating that:

> [T]here is no impairment since [the regulation] did not change the vested rights--the duties and obligations of the parties--which existed prior to the enactment of [the regulation.] The contract required [the insurance company] to replace the part with, or estimate the value of it on, one of "like kind and value." [The regulation] does not change this requirement. . . . [The regulation] **clarifies the language of the contract. It does not change the language. Thus, it does not "impair" the contract obligations.**

Id., 793 P.2d at 1013 (emphasis supplied). Thus, where a statute does not change, but merely interprets or clarifies, an existing contract, there is no impairment.

SB 1205 does no more than interpret or clarify provisions in liability contracts. Indeed, SB 1205 --unlike the regulation at issue in *State Farm*-- contains a provision specifically stating that its rules of construction do not apply where the parties have agreed otherwise. In this way, SB 1205 would appear to be even more immune from the impairment designation than the regulation in *State Farm*.

In *Chandler v. Jorge A. Gutierrez, P.C.*, 906 S.W.2d 195 (1995), an insured brought an action seeking to void a legislative enactment under the Contracts Clause. The statute in *Chandler* provided that all claims against insolvent insurance companies placed in receivership

had to be presented within a specified period of time. This statute gave the insured a shorter period of time in which to present his claim than was allowed under the insurance contract. The court concluded that the statute did not "impair the obligations due to Chandler under his contract with [the insurance company]." *Id.* at 203.

Again, SB 1205 appears to be an even clearer case of a non-impairment, since the bill does not change any of the provisions of an insurance policy (and because any policy that provides otherwise is automatically excepted from SB 1205).

Even if the provisions of SB 1205 are deemed impairments on the obligations of the parties to the insurance contract, it appears quite unlikely that these impairments would be considered "substantial." Several examples illustrate that, even in cases involving statutes of greater contractual intrusion than SB 1205, no substantial impairment exists.

Farmers Union Agency v. Butenhoff, 808 F. Supp. 677 (D. Minn. 1992), involved a statute establishing alternative dispute resolution for involuntarily terminated insurance agents. This alternative dispute resolution process enabled an agent to seek damages if his termination was not justified (i.e. without cause). The agreement between the parties allowed either party to terminate the agreement without cause upon 30 days notice. The insurance company sought to invalidate the statute as an impermissible impairment of contract. The court found that the statute, although an impairment of contract, was not a substantial impairment. *Id.* at 638. This conclusion was based, in large part, on the heavy regulation of the insurance industry. *Id.* In this regard, the court had earlier stated the oft-quoted proposition that

> "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."

Id. at 682 (*quoting Hudson Water Co. v. McCarter*, 28 S.Ct. 529, 530 (1908) (Holmes, J)).

Another case, *Sequra v. Frank*, 630 So.2d 714 (La. 1994), involved a statute requiring insureds to exhaust their uninsured motorist (UM) coverage with the UM insurers before proceeding against the state Insurance Guaranty Association if the tort feasor's liability insurer was declared insolvent. The statute was enacted to reverse a state court decision to the opposite effect. *Id.* at 720. This statute unquestionably resulted in greater obligations on UM insurers than they had under their insurance policies, since --without this statute-- the insured would recover against the state fund and would not recover from the UM insurer. The court looked at the extent to which the "industry the complaining party has entered has been regulated in the past[,]" *Id.* at 730, and found that "the nature of the insurance business is impressed with the public interest, and, therefore the Legislature in large measure fixes the public policy." *Id.* Although it concluded that the impairment of the statute was of "constitutional dimension," the court did note that the

traditional regulation of the insurance industry "significantly lessens the severity of the impairments of the UM insurers' contractual obligations." *Id.* at 731.

Once more, these cases involve significantly greater impairments than any conceivable impairment that could be ascribed to SB 1205. The very low level impairment (if any) of 1205, coupled with the heavy regulation of the "complaining party" (insurance industry), would suggest that SB 1205 does not substantially impair any contractual obligations.

B) Significant and Legitimate Public Purpose

Even if SB 1205 was found to substantially impair contractual obligations, there can be little debate as to whether the state's interest in passing the bill will qualify as a "significant and legitimate public purpose." The state has a profound interest in ensuring that its soil and waters are free of hazardous wastes. It has a profound interest in ensuring that its inhabitants are not exposed to unreasonable dangers caused by contaminants. In enacting SB 1205, the state will necessarily be promoting these interests by providing reasonable interpretations of insurance contracts to facilitate the remediation of contaminated sites.

It is clear from other cases that interests much less important than those underpinning SB 1205 will satisfy this second prong of the Contracts Clause balancing test. In the *Farmers Union* case, for example, the court found that, even if a substantial impairment existed by virtue of the alternative dispute resolution statute, such impairment would be "justified by the statute's purpose of providing an informal resolution method to help settle termination disputes between insurers and their agents," which "lessens the burden on the courts and benefits consumers by reducing the chance that they will get caught in between insurer/agent disputes." 808 F. Supp at 683. In the *Segura* case, the court quite candidly concluded that "[b]ecause there are few limits on the legitimacy of public purposes," the significant and legitimate public purpose inquiry "typically is perfunctory." 630 So.2d at 731. The court found that the statute requiring exhaustion of UM limits "constitutes a legitimate exercise of the state's police power for the purpose of protecting the state's citizens from economic harm," by "minimiz[ing] unnecessary depletion of the [state's Insurance Guaranty Association's] funds." 630 So. 2d at 732.

Perhaps the most telling example of how deferential courts are to the legislature on whether a statute is enacted for a "significant and legitimate public purpose" comes from the very recent case of *Vesta Fire Ins. Corp. v. State of Florida*, 141 F.3d 1427 (11th Cir. 1998). In the wake of Hurricane Andrew and the catastrophic losses caused thereby, the Florida legislature enacted a law which, among other things, prohibited insurance companies from canceling or refusing to renew residential line insurance policies and which also required insurers to pay annual premiums to the Florida Hurricane Catastrophe Fund. This legislative enactment, quite obviously, constituted an incredibly significant impairment on the contracts of the insurance companies with their insureds. Whereas the existing policies provided for cancellation upon certain conditions and

for nonrenewal at the insurers' discretion, the statute forced the insurers to continue the existing policies. Nevertheless, the court upheld these requirements because the state "demonstrated a legitimate public purpose: protection and stabilization of the Florida economy, particularly the real estate market." *Id.* at 1434.

It appears quite clear that the interest sought to be advanced by SB 1205 will satisfy the "significant and legitimate public purpose" test.

C) Reasonable Conditions and Appropriate in Nature

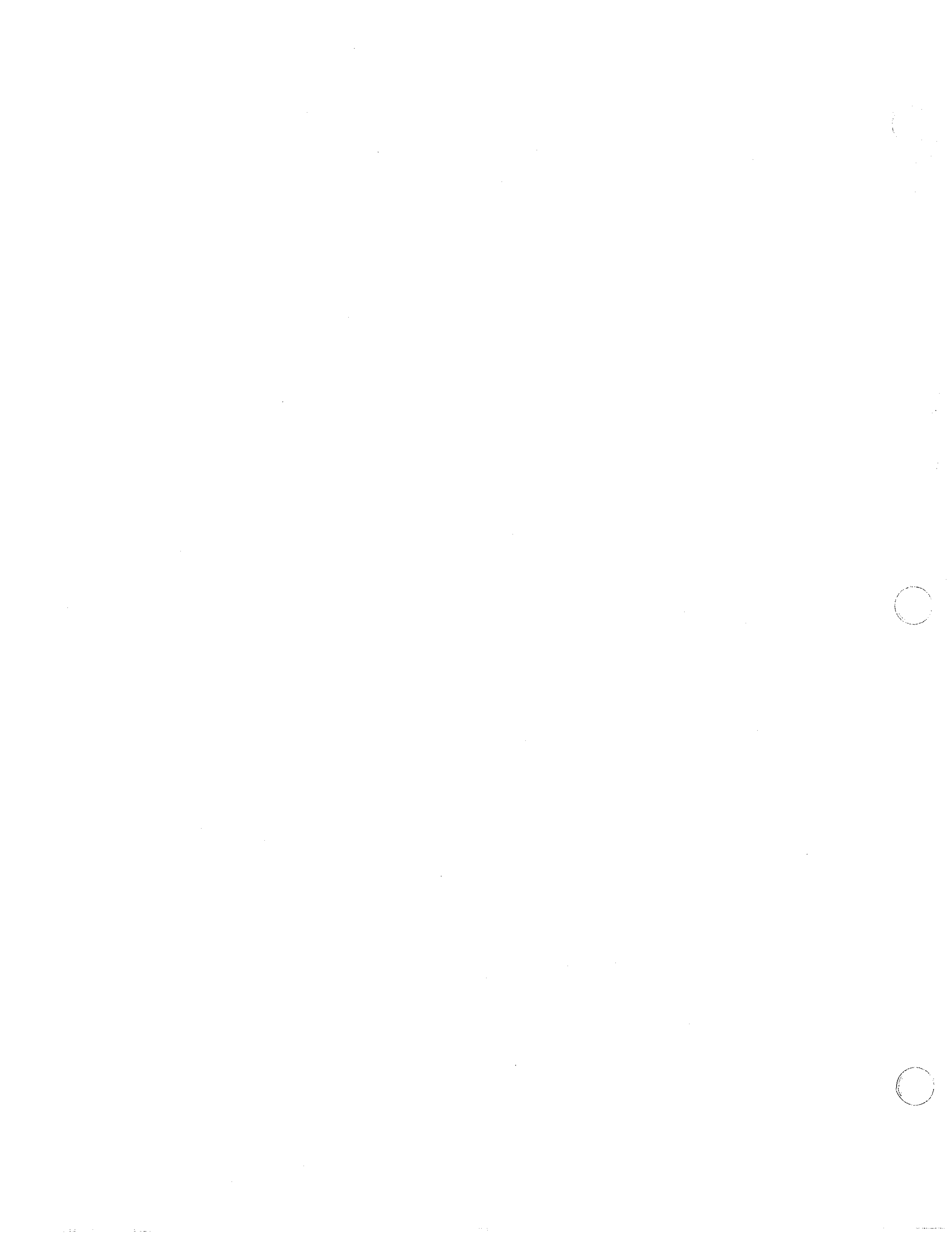
As stated above, this prong of the test is self-satisfying unless the "state itself is a contracting party," as the court will "properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves,* 103 S. Ct. at 704. Since SB 1205 does not implicate contracts to which the state is a party, the legislative judgment as to the reasonableness and appropriateness of SB 1205 will not be questioned.[2]

4. Conclusion

Based on the foregoing, we believe that SB 1205 does not violate the Contracts Clauses of the state or federal constitution. It is quite likely that a court would find that the bill does not "impair" any obligations of contract and, even if an impairment was found to exist, a court would likely not deem such impairment to be significant. Irrespective of the outcome of the "significant impairment" inquiry, it appears that SB 1205 would satisfy the "significant and legitimate public purpose" and the "reasonable and appropriate" tests and would, therefore, be deemed constitutionally permissible.

---

[2] While the mere passage of an act is sufficient to satisfy this prong, it might be noted that SB 1205 also contains an emergency clause in which the legislature expressly finds that the "act is necessary for the immediate preservation of the public peace, health and safety."



House Judiciary – Civil Law Committee
70th Legislative Assembly
Senate Bill 1205
Hearing Date: May 13, 1999

[Tape 180, Side B]

Chair: Well, now a work session on Senate Bill 1205, and this is one, if you recall, we had three-hour hearing in the evening and presentations from both the proponents and the opponents. The proponents primarily being small and large business dealing with insurance claims for hazardous waste. The opponents to the legislation were insurance companies, and after that there were some questions that were raised and John DiLorenzo, on behalf of the proponents, provided information to myself and counsel and also I enlisted Max Williams to assist me on this. And then you also have information that was provided by counsel for the insurance companies and so that is now before you, and then today there's a letter from Lane Powell Spears Lubersky which you each have. They have been retained by Lloyds of London, which is the principal excess carrier, and so they have given you a letter in opposition to Senate Bill 1205. The issues that are before us are in the –2 amendments that were one, some typographical errors, and then the initial Bill referenced claims by third parties, and I deleted that. If you

recall, that was something proponents wanted, and the insurance companies objected to because it was a little bit too nebulous—when a neighbor might or may not make a claim. In this situation, if it's a claim, it probably should an actual lawsuit rather than just a letter or demand, and so the reference to third parties has been removed. The Bill does provide though that in this situation, if you enter into a consent order with the DEQ or the EPA or have a voluntary cleanup, that would be a triggering event and entitle you to make a claim under the policy. These amendments do not change the original part of the Bill that says if your contract, insurance contract, provide otherwise that this Bill will not replace any language that's in the Bill. This is important because it was raised by the insurance company, the fact that it's unconstitutional and will interfere with contract, and so I have that research by legislative counsel, and their review indicated that the Bill would not infringe on someone's contract.

There is changes dealing with providing, in the notice of claim, relevant correspondence that has been received by the DEQ or the EPA, and if you recall, one of the attorneys representing businesses making claims said that sometimes, normally under Oregon law, if you make a claim against your insurance policy, and you prevail, you're entitled to recover your attorneys' fees and costs. And that I believe is by statute. If in these matters if the insurance policy or company offers you limits prior to the jury reaching their verdict, then they can avoid having to pay your attorneys' fees and costs, and he, I think, gave two instances of where there was either a settlement on the courthouse steps or just before the trial went to the jury. The disadvantage in that to the plaintiff is you've exceeded the time, the money for the attorneys and the witnesses, so what I've added to the –2s was a provision that's similar to condemnation that you have 60 days before the trial, you make the offer, and if after that the plaintiff beats the offer, they'd be entitled to recover their attorneys' fees and costs. Mr. DiLorenzo suggested that be nine months before the trial, and his argument was that you're spending a lot of money on experts and preparation. I went with the 60 days because it's true that you would be preparing for trial, but you're also discovering things, and I thought that would be a fairer compromise with the insurance company.

The probably most significant thing that the Bill does is it provides for, if the pollution occurs in the State of Oregon, that the Oregon law would prevail, and currently it's a choice of law situation where if the contract doesn't state which state's law prevails, then there's this test that's made by the court to determine which state has the most contacts, and then that state's law prevails. I think there's enough public interest if the pollution is in Oregon, it should be Oregon law that would be the controlling factor there.

The final issue dealt with horizontal versus vertical insurance excess exhaustion…

[End Tape 180, Side B]

[Tape 181, Side A]

Chair: ... and that is almost like genetic privacy. Not quite as far as being able to explain, and in one of the memos that we received—well, two of them—one from the insurance company and one from Mr. DiLorenzo—it talks about horizontal and vertical exhaustion of excess, and I don't find that right now. It's dated on April 27, 1999, and this refers to Section 4.2(g) of the Bill. What the –2s reflect is to go with what's proposed in the Bill with the understanding that if the primary insurance policy is a million dollars, and for some reason you settled for $900,000 with that primary insurance policy. That for purposes of pursuing the excess and making a claim on the excess, there is an assumption that you've settled for the full million dollar policy. In other words, the excess cover would not be penalized by the fact that you've settled for less than the full limits with the primary.

The final thing...

Burdick: Mr. Chair.

Chair: Yes.

Burdick: On that point, how does that come into play? Okay, you settle it for $900,000 and you've got a million dollar primary policy, why would excess insurance even be an issue there?

Chair: It would only be an issue if let's say you settled for $900,000, the cleanup was $2 million, so for whatever reason you thought it would be a good settlement at $900,000, so you settled with your primary carrier for that and pursued the excess for the other, in this case, of $2 million, the other million dollars of coverage. You wouldn't be precluded from doing that because you didn't receive the full one million dollars from your primary coverage because you're given the excess coverage credit for the full million as you pursue the additional recovery costs.

Burdick: So would you have to, if the final cleanup was $2 million, would you have to pay that remaining $100,000 out of your primary before you got into the excess or would...

Chair: Well, I think, as a practical matter, what would happen is the most you could recover in my scenario would be a million dollars from your excess. You couldn't recover $1.1 million. If you settled for less than the primary, that's an obligation and basically it comes out of your pocket. And the theory there is it wouldn't be fair to the excess coverer for you to settle on your primary policy for substantially less without giving them the opportunity then to say gee, you should have settled for the full limit, so it takes that argument away by saying...

Burdick: Yeah, I guess my question was would it be fair to go back after the excess from the primary coverer. I guess once they've settled, then they're done.

Chair: Right. And it doesn't prejudice the excess in that way because the excess carrier gets full coverage, full credit, for the full limits of that policy.

Burdick: So my next question is that vertical or horizontal?

Chair: I believe that's vertical.

Burdick: Okay.

Chair: And then the other request that was in the initial bill was to require both joint and several liability because the property owner has joint and several liability, and the argument was the policy reads that way—I cover you for your entire loss. The Bill no longer provides for that. That's something the court is going to have to determine. In my view of how to approach this with the –2s, I thought that is something that the insurance company probably didn't insure for or think they were insuring for when they, as far as environmental cleanup, when they went ahead and issued the policy. So, that's what your Chair has done in drafting the 2 amendments on this. I think that's what they accomplished, and with that I'll invite Mr. DiLorenzo to come forward. And John, who would you like to come up from your group, just to see if I've explained the –2?

John: Mr. Burris can come up with me, Senator, but I can answer your questions.

Chair: Well, and I'd like someone from the insurance company side too to see if I've mumbled through this.

DiLorenzo: Is John Powell here?

Chair: We've also received today a letter from Liberty Mutual that we will include in— I've been given also a letter from American International Group. I'll put that with the file also, and Alliance of American Insurers. So, first, Mr. DiLorenzo did I explain the –2 amendments correctly?

DiLorenzo: Thank you, Mr. Chairman. For the record, my name is John DiLorenzo. I'm here on behalf of ICN Pharmaceuticals, one of the proponents of Senate Bill 1205. I believe you did. I, of course, advocated joint and several liability as the rule. Once again, I'd just like to point out 1205 only applies to those instances in which policies are silent on particular terms. If an insurance company clearly writes what it means, then whether there's going to be vertical exhaustion or horizontal exhaustion or several liability or joint several liability is determined in accordance with the policy language. 1205 only applies when there are ambiguities or where there are gaps in the policy language. When there are gaps, I believe the amendments do accomplish the goal of preserving the vertical exhaustion. In other words, some excess companies take the position that if you've got five or six policy years, you must first clear out every single primary policy among all of those years before anyone excess carrier is exposed. Under the rule of vertical exhaustion, if you exhaust the primary policy for let's say year 1981, then the excess policy on top of your 1981 would also be responsible. I wish the Bill did

include joint several responsibility because that is in fact the rule in the State of Washington through case law and the all sums language in the policies do provide that the insurer will pay all sums which the insured is legally obligated to pay during that policy period, and during that policy period, under the law that exists today, the insured is legally obligated to pay for 100 percent of the whole cleanup. But I understand the forces at work here and I am prepared to accept the Chair's Solomaic division here. So, but I think Chair Bryant has explained the amendments. I think all in all, this is excellent public policy. It assures that people who otherwise pollution coverage are not going to be discouraged from cooperating with the regulators in working towards a proactive solution to clean ups. It avoids a situation where the insureds are refrained from cooperating with the regulators for fear of losing their insurance coverage and so all in all, I think it's an excellent piece of legislation. And I think you for the opportunity to comment.

Chair: And for the committee and the witnesses' benefits, there are some issues that we will continue to work on, for instance, what costs should be recoverable and a few other issues. I promise those who have submitted new legal briefs to me today that I will read those and Representative Williams and I and Bill Goesford will continue to be in discussion. So, John or Fred, would you like to add anything today.

Powell: Mr. Chair, my name is John Powell, representing North Pacific insurance companies and State Farm insurance companies and I think in terms of the specific amendments that are found in the dash two amendments that your explanation of those particular areas are sufficient. The issue at hand in terms of the point that Mr. DiLorenzo made about whether or not a policy is silent on these areas, as the committee understands, this legislation is retroactive which means that the insurers have not opportunity to fill in those gaps or they do not have the opportunity to make the policy speak to provisions of first party coverage such as an insured actually putting their property which is a little different that commercial liability, general liability was first created for. So, in that respect, it makes the provisions left in the bill and obviously we appreciate the consideration of the chair in regards to joint and several liability, but notwithstanding that, it still makes the provision of this bill specifically to go back in time and to capture dollars that the courts have held were not due in these particular claims and I would simply close with having you look at the amendments on page two of the dash two and I would respectfully submit legislation needing this kind of language indeed does point to the retroactive nature of it even to facts that have already been found by a jury if you look at lines 25 through 28. Thank you. Thank you.

Chair: Fred.

Vanata: I am Fred Vanata appearing before you on behalf of Liberty companies and AIG who are major players in this field. They are both gravely concerned about this language and both of them in their letters suggest that they believe this will effect

their future writing of commercial general liability insurance in this state. It is one thing even to look ahead, but for this legislation and this legislative body to look back and say that and change the rules so the insured can collect some more from the insurance company, but not also at the same time allow the insurance company to collect some more from the insured is a pretty one-sided piece of legislation, and I think that policy is one that should be weighed very carefully because its ramifications are potentially very significant.

Chair: Thank you. Questions for the panel?

Burdick: Mr. Chairman?

Chair: Yes, ___________.

Burdick: Why would it discourage them from writing new—why would the retroactive provisions discourage them from writing new policies?

Vanata?: Some of the, if I understand it correctly, and you may want to…

Powell: Maybe I can answer that, Mr. Chairman. Again, John Powell at CGL North Pacific and State Farm insurance companies. Mr. Chairman and Senator Burdick, I think that the major point be made about future policies is, in fact, the changes found in this Bill will in fact write those future policies. That is, the consumer will not have available to them a policy format that is more of a general open-ended coverage, but these specific rules of construction are going to have to be addressed in each policy. So, in effect, what you're doing here is writing insurance policies.

Burdick: Chairman?

Chair: Yes, Senator Burdick.

Burdick: If that's a problem, couldn't you just write, I mean, I guess I don't understand what's lost here. I mean, you would write in what you're not covering. I mean, this basically covers what your settlements, so what you're saying is you can't be silent on things anymore, you have to specify. I still don't see the problem with that.

Powell: Mr. Chairman, Senator Burdick. The example of which state's law applies, for example, has been discussed before the committee in terms of why a multiple state companies may not want it specified in the contract. Under this legislation, you probably need writing basically the law even though its indirectly that it will be in the contract. So, that I think is the limitation that this legislation places on future coverages. In addition to that, just the risk of pollution liability, the risk itself that the gas station may have to purchase then, will have to be written along these lines and very specifically to each of these issues. So, some people are going to have to buy this, and again with these rules of construction, it would likely very much increase the cost of that __________.

Burdick: Thank you.

Powell?: Yes. Dilemma is caused, I'm a quorum in the rules committee and so they've called me to go down there...

Man: Pardon?

Man: I've been summoned.

Man: We have, I will go to rules [inaudible] will continue and probably want to after you ask your questions, hold this one and Dave until I return but we have three house bills we can probably get through, and I'll be back.

DiLorenzo: Mr. Chairman, can I just direct a brief rebuttal to those two points? I would just say that with respect to first of all the future policy situation because we have heard those claims, that insurers will refuse to write future policies if this legislation passes. Senator Burdick is absolutely correct. The way an insurer gets around any rule that an insurer finds objectionable, and Senate Bill 1205 is to clearly specify what the rule in the new policy. This is for new policies that are written. So, for instance, if an excess insurer does not want to be responsible until such time as all of the primary insurers have paid, they merely need to say that in the new policies. With respect to the old policies that are already written, these are rules of construction, and with respect to cost, every single one of these insurers are almost uniformly reinsured for exposure normally over $600,000 to $10 million, so first of all, to the extent that any Oregon insurers would ever be responsible more so than they would be under current law, those exposures are reinsured. But, secondly, all this Bill does is, it only addresses situation where pollution coverage is there. All it says is unless it's specified an insurer cannot avoid pollution coverage which is already there because the insured is cooperating with the DEQ, or because there hasn't been a suit yet that the DEQ has issued an administrative order. And then it has a number of rules of construction which apply where these policies are silent. Now, sure, some insurers may not have anticipated every single situation, but during the testimony we adduced a speech by the person who wrote the CGL policy nationally who's very aware that pollution was an issue and I think it doesn't take in the insurance business a rocket scientist to figure out that there may be other policies and so policies should deal with other coverages. To the extent that those sections are silent, they are many times purposely silent. Well, if an insurer wants to be perfectly silent then an insurer knows what the rules would be normally.

Courtney: John, can I [inaudible] the policies that are out there now, how can they be terminated?

Powell: Mr. Chairman, Senator Courtney, do you mean a policy that someone has currently paid a premium for and the coverage is actually engaged today, like your homeowner's policy that you're currently covering? How can that be cancelled? Well, there is normally in an insurance policy a cancellation clause.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

CENTURY INDEMNITY COMPANY, a Pennsylvania Corporation,

Plaintiff,

v.

THE MARINE GROUP, LLC, a California limited liability company, as affiliated with Northwest Marine, Inc.; NORTHWEST MARINE, INC., an inactive Oregon corporation, as affiliated with Northwest Marine Iron Works; NORTHWEST MARINE IRON WORKS, an inactive Oregon corporation,

Defendants.

THE MARINE GROUP, LLC, a California limited liability company, as affiliated with Northwest Marine, Inc.; NORTHWEST MARINE, INC., an inactive Oregon corporation, as affiliated with Northwest Marine Iron Works; NORTHWEST

Civ. No. 08-1375-AC

OPINION AND ORDER

MARINE IRON WORKS, an inactive Oregon corporation; and BAE SAN DIEGO SHIP REPAIR, INC., a California corporation,

Third-Party Plaintiffs,

v.

AGRICULTURAL INSURANCE COMPANY, an Ohio corporation; AMERICAN CENTENNIAL INSURANCE COMPANY, a Delaware corporation; CHICAGO INSURANCE COMPANY, an Illinois corporation; CONTINENTAL INSURANCE COMPANY, a Pennsylvania corporation; EMPLOYERS MUTUAL CASUALTY COMPANY, an Iowa corporation; FEDERAL INSURANCE COMPANY, an Indiana corporation; GRANITE STATE INSURANCE COMPANY, a Pennsylvania corporation; HARTFORD INSURANCE COMPANY, a Connecticut corporation; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, a New Jersey corporation; INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, and CERTAIN LONDON MARKET INSURANCE COMPANIES, each a foreign corporation; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, a Pennsylvania corporation; NEW ENGLAND REINSURANCE COMPANY, a Connecticut corporation; OLD REPUBLIC INSURANCE COMPANY, an Illinois corporation; PACIFIC MUTUAL MARINE OFFICE INC., a New York corporation; RELIANCE INSURANCE COMPANY, a Pennsylvania corporation; ROYAL INDEMNITY COMPANY, a Delaware

corporation; ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Minnesota corporation; TWIN CITY FIRE INSURANCE COMPANY, an Indiana corporation; WATER QUALITY INSURANCE SYNDICATE, a syndicate of foreign corporations; WEST COAST MARINE MANAGERS, INC., a New York corporation; and JOHN DOE INSURANCE COMPANIES,

Third-Party Defendants.

ACOSTA, Magistrate Judge:

Introduction

Third-party plaintiffs bring the current motion against third-party defendants in this lawsuit. Third-party plaintiffs (hereinafter "TPPs") are The Marine Group ("TMG"), Northwest Marine, Inc. ("NWM"), Northwest Marine Iron Works ("NWMIW"), and BAE Systems San Diego Ship Repair, Inc. ("BAE"). Century Indemnity Company ("Century"), an insurance company, filed this lawsuit against TPPs seeking a declaratory judgment that it owes neither a duty to defend nor a duty to indemnify them.

TPPs' claims are against other insurance companies that they contend potentially owed duties to defend and indemnify them. Four of these insurance companies are the subject of this motion: Agricultural Insurance Company and Agricultural Excess and Surplus Insurance Company, which now collectively are known as Great American Insurance Company (hereinafter referred to collectively as "Great American"); Insurance Company of North American ("INA"); and St. Paul Mercury Indemnity Company ("St. Paul"). (Collectively, all four insurance companies are referred to as "Defendants".) Specifically, TPPs seek summary judgment that each of these four insurance

companies breached its duty to defend TPPs in a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") action against them for environmental contamination at the Portland Harbor. St. Paul opposes the motion, and both Great American and INA have joined in that opposition. In addition, Great American and INA submitted supplementary materials on specific issues. The court will address these specific issues where appropriate and to the extent they materially differ, if at all, from St. Paul's opposition arguments.

The motion raises three issues: (1) whether there is a suit that triggers the duty to defend; (2) whether any policy exclusions apply that avoid the duty to defend; and (3) whether the insurance policy benefits have followed, by way of corporate succession, from the original named insured to the particular parties to the CERCLA action. Defendants have also raised a collateral issue regarding the constitutionality of the Oregon Environmental Cleanup Assistance Act ("OECAA") as applied to the facts of this case.

On the record before it, the court concludes as a matter of law that there is a suit sufficient to trigger the duty to defend and that the deductible endorsement does not excuse certain insurers from their duty to defend. The court further finds that there are genuine issues of material fact as to whether corporate succession occurred such that the policies transferred from the named insured to the potentially responsible parties. The court also finds that OECAA is constitutional as applied.[1]

Factual Background

TPPs claim coverage under insurance policies issued for discontinuous policy periods beginning in 1954 and ending in 1982. The policies provide comprehensive coverage for general

[1] All parties have consented to jurisdiction by magistrate judge in accordance with 28 U.S.C. § 636 (c)(1).

liability and refer to a location in the Portland Harbor Superfund site ("the Site"). Over the years, the corporate form of the named insured, NWMIW, changed and the parties seeking defense coverage under the insurance policies at issue, TMG and BAE, were not named on the original policies. In the recent past, federal and state agencies have contacted both TMG and BAE regarding their possible liability for contamination at the Site. TMG and BAE seek a defense of and indemnification for these claims, and each has tendered requests for such coverage to numerous insurance companies.

I. Insurance Policies

A. INA Policies

INA issued two policies to NWMIW, the sole named insured, which policies are identical in relevant part for purposes of this motion. (INA's Opposition ("Opp.") 2.) The policies were effective July 1, 1978, to July 1, 1980. (Stapley Declaration ("Decl.") Exhibit ("Ex.") 1 at 6; Ex. 2 at 67.) The policies provide for Comprehensive General Liability ("CGL") insurance. The policies cover "all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage[.]" (Rycewicz Decl., Ex. 1 at 3.) Under the policies, "the company shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage[.]" (*Id.*) The policies are explicitly limited by Endorsements #7 and #8, respectively (the endorsements are identical and thus collectively hereinafter referred to as "the deductible endorsement"). The deductible endorsement limits the insurer's payment to amounts in excess of the deductible. It also provides:

> However, if the named insured, or a claims servicing organization acting on behalf of the named insured, fails to pay any damages within the deductible amounts after the legal obligation of the insured becomes definitely determined, the company shall

> pay such damages and the named insured shall reimburse the company promptly for any part of the deductible amount that has been paid by the company.

(Stapley Decl., Ex. 1 at 28.)

B. Great American Policies

Great American issued CGL policies to NWMIW for the policy period from July 1, 1980, to July 1, 1982. (Rycewicz Decl., Ex.3 at 11, 65.) Great American states that their terms are essentially identical to those terms in INA's policies, and this is not otherwise disputed. (Great American Opp. (#336) 4.)

C. St. Paul Policy

St. Paul issued a policy to NWMIW for the period of February 11, 1954, to February 11, 1957. (Rycewicz Decl., Ex. 15 at 22.) The sole named insured under this policy is NWMIW. It provides that the St. Paul will pay "on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages because of injury to or destruction of property . . . ." (*Id.* at 23.) The policy provides further that "the company shall . . . defend in his name and behalf any suit against the Insured alleging such . . . damage or destruction and seeking damages on account thereof . . . ." *Id.* Unlike the other policies at issue, this policy does not contain a deductible endorsement.

II. Corporate Succession

NWMIW originally incorporated in the State of Oregon on May 28, 1943. (Moses Decl., Ex. 1.) Its stock was purchased by a separate corporate entity, Southwest Marine, Inc. ("SWM"). (Engel Decl ¶ 5.) NWMIW changed its name to Northwest Marine, Inc. ("NWM") on January 25, 1990. (Engel Decl. ¶ 6.) At that time, NWM also merged with SWM, "with SWM as the surviving

corporation." (*Id.*)

In 1997, Southwest Marine Holdings, Inc. ("SWM Holdings"), purchased the stock of SWM, and TMG was formed as a "repository of certain assets, including some assets and liabilities of NWMIW, that were spun out of the sale of the SWM shipyard to SWM Holdings." (Engel Decl. ¶¶ 7-8.) A Stock Purchase Agreement ("1997 SPA") governed this transaction. The 1997 SPA stated that the sellers, stockholders of SWM, would retain certain liabilities, which the 1997 SPA referred to as the "Excluded Liabilities": "[T]he Excluded Liabilities shall specifically include all of the liabilities associated with the businesses conducted or formerly conducted by any of the Companies or their predecessors under the names 'Northwest Marine' . . . ." (Engel Reply Decl., Ex. 5 at 12, Ex. 6 at 1.) SWM assigned these liabilities to TMG in an agreement entitled "Assignment and Assumption Agreement." That agreement provided for assignment of the liabilities described in the 1997 SPA, "[a]rising from, relating to or in connection with any business or activity conducted or formerly conducted by any of the Companies (as defined in the Stock Purchase Agreement) or any of their respective predecessors" with specific reference to "Northwest Marine." (Engel Decl., Ex. 12 at 1-2.)

In 2005, SWM was renamed BAE. (Vinck Decl. Ex. 2.)

III. Agency Communications

In a confidential letter dated January 11, 2008, David C. Batson ("Batson"), as the convening neutral of a group "brought together by the [EPA] for the purpose of exploring the creation of a PRP group[,]" invited BAE to participate in an informational meeting regarding cleanup at the Site. The letter stated that "one or more participants in the Convening Group believe that you or your company are potentially responsible for response costs incurred and being incurred at the Site under Section

107(a) of CERCLA and ORS 465.255." (Huynh Decl. Ex. 1 at 2.)

On January 18, 2008, the United States Environmental Protection Agency ("EPA") sent a letter to BAE via its Secretary and General Counsel, Lloyd A. Schwartz, Esq. (Rycewicz Decl. Ex. 5.) That same day, an identical letter was sent to NWM and TMG (collectively referred to as "the January 2008 letters"). (Rycewicz Decl. Ex. 6.) The January 2008 letters informed TPPs that it was investigating contamination at the Site by way of a Remedial Investigation and Feasibility Study (the "RI/FS"). The RI/FS was expected to conclude in 2009, after which, the January 2008 letters stated, the "EPA will select a cleanup plan for the Site through a Record of Decision, which is likely to be issued in 2010." The January 2008 letters stated that EPA was "seeking information from current and past landowners, tenants, and other entities believed to have information about activities that may have resulted in releases or potential threats of releases of hazardous substances to the Site." (Rycewicz Decl., Ex. 5 at 1.) The information would be used to identify potentially responsible parties ("PRPs") who would be liable for the costs of cleanup. The the January 2008 letters also stated:

> Pursuant to the authority of Section 104(e) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9604(e), you are hereby requested to respond to the Information Request attached to this letter. While EPA seeks your voluntary cooperation with this investigation, compliance with the Information Request is required by law. Failure to respond fully and truthfully to the Information Request by the due date provided below may result in an enforcement action by EPA. Under Section 104(e)(5)(B) of CERCLA, 42 U.S.C. § 9604(e)(5)(B), pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1996, 31 U.S.C. § 3701, EPA is authorized to commence an action to assess civil penalties of not more than $32,500 per day for each day of noncompliance against any person who unreasonably fails to comply with an Information Request.

(*Id.* at 2.) The Information Request accompanied the January 2008 letters and sought a vast array of information with respect to the Site and affiliated entities from 1937 to the present. At the time,

the EPA also issued a fact sheet in which it explained that the January 2008 letters "d[id] not designate an entity as a potentially responsible party[,]" though the letters did request additional information to use in identifying PRPs. (Moses Decl. Ex. 4.)

On January 3, 2008, the Portland Harbor Natural Resource Trustee Council ("PHTC") sent a letter to "Interested Party,"[2] notifying TPPs of its intention to perform a natural resource damage assessment ("NRDA") for the site in question. The letter states: "This notice is to invite you to participate in funding and implementing this assessment. The notice requests that you respond in writing within 30 days of this letter to express your preliminary interest in participating." (Rycewicz Decl., Ex. 7 at 2.) On January 30, 2008, the PHTC sent another letter to Interested Party, stating that since the previous letter, they had been identified as an "entity that may potentially be liable for response costs under Section 107 of the CERCLA." (*Id.* at 1.) The letter also pointed out that this notice was separate from the EPA's PRP notice. (*Id.*)

In a March 26, 2008, letter, Batson informed NWM that it was a PRP: "Based on issuance of the 104(e) information requests and information obtained from the RI/FS currently being performed for the Site, it is believed that you or your company are potentially responsible for response costs incurred and being incurred at the Site under Section 107(a) of CERCLA and ORS 465.255." (Huynh Decl., Ex. 2 at 2.)

In a letter dated May 7, 2008, TMG and BAE were granted an extension of time to respond to the first request for information. The letter stated: "Failure to respond fully and truthfully to the Information Request by the due date provided in this letter may result in an enforcement action by

---

[2] The identity of "Interested Party" is ambiguous and the Rycewicz Declaration does not resolve this ambiguity.

EPA." (Rycewicz Decl., Ex. 8 at 1.) On July 9, 2008, TPPs requested defense and indemnification from INA with respect to their involvement with the Site. (Rycewicz Decl., Ex. 16 at 1.)

The EPA sent a General Notice Letters to TMG and BAE on March 12, 2010. The letters stated that "[b]ased on information presently available to EPA, EPA has determined that The Marine Group [and BAE] may be responsible under CERCLA for cleanup of the Site or costs EPA and others have incurred in cleaning up the Site." (Rycewicz, Ex. 9 at 3; Stapley Decl., Ex. 7 at 1.) Subsequently, on March 22, 2010, and again on April 20, 2010, TPPs sent a letter to counsel for St. Paul, INA, and Great American "tender[ing] EPA's claims for defense and indemnity coverage" in response to the EPA's General Notice Letter dated March 12, 2010. (Rycewicz Decl., Ex. 9 at 1; Ex. 10 at 1.)

In a September 27, 2010, letter, the PHTC sent a letter to TMG and BAE informing them that they had been identified by the EPA as PRPs, but that this "notice [was] separate from the EPA General Notice Letter and [was] connected with the Natural Resource Damage Assessment portion of the CERCLA cleanup action at Portland Harbor." (Rycewicz Decl., Ex. 11 at 3.) On September 28, 2010, TPPs sent a letter to all insurers stating in relevant part:

> On September 23, 2010, we provided notice and demand to your counsel of my Clients' participation in discussion with the NRD Trustees about potentially participating in a Phase 2 Funding and Participation Agreement ("FPA"). A copy of that communication, with its enclosures, is attached. As we advised counsel, the NRD Trustees have identified my Clients as entities which are potentially liable for NRD. Funding the FPA is presently due on October 4, 2010. We hereby demand that you agree to fund participation in activities pursuant to the FPA, and we hereby tender this matter to you for a defense and indemnity.

(Rycewicz Decl., Ex. 12 at 1.)

Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a) (2011). Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. A nonmoving party cannot defeat summary judgment by relying on the allegations in the complaint, or with unsupported conjecture or conclusory statements. *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus, summary judgment should be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Where disputed issues of material fact exist, the evidence is viewed in the light most favorable to the non-moving party. *Bamonte v. City of Mesa*, 598 F.3d 1217, 1220 (9th Cir. 2010). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). However, deference to the nonmoving party has limits. The nonmoving party must set forth "specific facts showing a *genuine* issue for trial." FED. R. CIV. P. 56(e) (2008) (emphasis added). The "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Therefore, where "the record taken as a whole could not lead a rational

trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

Discussion

I. Duty to Defend

TPPs seek summary judgment that Defendants owe them a duty to defend. Generally, "[i]n a contract dispute, a party will be entitled to summary judgment only if the governing terms of the contract are unambiguous." *Milne v. Milne Construction Co.*, 207 Or. App. 382, 388, 142 P.3d 475 (2006) (citing *Hauge v. Vanderhave*, 121 Or. App. 221, 225, 854 P.2d 1002, *rev den*, 317 Or. 583, 859 P.2d 540 (1993)). A contract provision is ambiguous where it is susceptible to "more than one plausible – that is, sensible and reasonable – interpretation." *Id.* (citing *Deerfield Commodities v. Nerco, Inc.*, 72 Or. App. 305, 317, 696 P.2d 1096, *rev den*, 299 Or. 314, 702 P.2d 1111 (1985)). A court may refer to parol evidence to evaluate the ambiguity of a contract term. *Id.* (citing *Deerfield Commodities*, 72 Or. at 317). If the court finds that the contract term is genuinely ambiguous, the meaning of that term is a question of fact. *Id.* at 389 (citing *Hauge*, 121 Or. App. at 224).

In *Ledford v. Gutoski*, 319 Or. 397, 400, 877 P.2d 80 (1994), the Supreme Court of Oregon wrote: "Whether an insurer has a duty to defend an action against its insured depends on two documents: the complaint and the insurance policy. An insurer has a duty to defend an action against its insured if the claim against the insured stated in the complaint could, without amendment, impose liability for conduct covered by the policy." Thus, "[a]n insurer should be able to determine from the face of the complaint whether to accept or reject the tender of the defense of the action." *Id.* (citing *Ferguson v. Birmingham Fire Ins.*, 254 Or. 496, 505-506, 460 P.2d 342 (1969)).

The duty to defend arises if:

> the complaint provides *any basis* for which the insurer provides coverage. Even if the complaint alleges some conduct outside the coverage of the policy, the insurer may still have a duty to defend if certain allegations of the complaint, without amendment, could impose liability for conduct covered by the policy. Any ambiguity in the complaint with respect to whether the allegations could be covered is resolved in favor of the insured.

Id. (internal citations omitted) (emphasis in original). To be clear: "[i]f some of the allegations pertain to conduct that could be covered by the insurance policy, and some that could not, the insurer must defend the entire action." *Klamath Pacific Corporation v. Reliance Insurance Co.*, 151 Or. App. 405, 413, 950 P.2d 909 (1997) (citing *Timberline Equip. v. St. Paul Fire and Mar. Ins.*, 281 Or. 639, 645, 576 P.2d 1244 (1978)).

Although the court focuses on the complaint and the policy language when considering the duty to defend, where a dispute arises as to whether the party seeking a defense is an insured under the policy, the court may consider extrinsic evidence. *Fred Shearer & Sons, Inc. v. Gemini Insurance Co.*, 237 Or. App. 468, 477-478 , 240 P.3d 67 (2010).

A. Existence of Duty to Defend in Policy

INA and Great American argue that their policies do not contain a valid duty to defend clause in light of subsequent endorsements which extinguish their duty to defend.[3] In particular, INA and Great American argue that the endorsement establishing a "deductible per occurrence" and which requires an agreement with a "claims servicing organization" extinguishes their duty to defend. INA briefed this issue extensively, which briefing Great American joins. For clarity, the court refers solely to INA, but its analysis and conclusion applies equally to Great American.

[3] St. Paul's policy does not contain such an endorsement.

The Oregon Court of Appeals described the method for interpreting a policy exclusion:

> In determining whether a policy exclusion applies to the conduct at issue, we look "only at the facts alleged in the complaint to determine whether they provide a basis for a recovery that could be covered by the policy." If the allegations in the complaint are ambiguous, but a reasonable interpretation would bring them within coverage, there is a duty to defend. Moreover, if some allegations reasonably can be interpreted as falling within the coverage, the insurer owes a duty to defend – even if other allegations of conduct or damage are excluded.

Fred Shearer & Sons, 237 Or. App. at 478 (quoting *Ledford*, 319 Or. at 400) (internal citations omitted). Notably, it is the insurer's burden to prove that an exclusion applies. *ZRZ Realty Co. v. Beneficial Fire and Casualty Insurance Co.*, 349 Or. 117, 127, 241 P.3d 710 (2010). Furthermore, this is a question of law which seeks to determine the parties' intent. *Id.* at 480.

INA argues that the duty to defend language in its original policy was invalidated by the deductible endorsement which imposed a "deductible per occurrence" and created a system whereby defense costs were borne jointly by the insurer and insured. TPPs argue that the deductible endorsement does not alter the duty to defend as it clearly contemplates an allocation of costs after a claim reaches a settlement or final judgment.

INA issued to NWMIW two policies relevant to this motion. The relevant policy language is identical unless otherwise noted. The deductible endorsement provides:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of [bodily injury or property damage] to which this insurance applies, caused by an occurrence and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage . . . .

(Rycewicz Decl., Ex. 1 at 3; Ex. 2 at 2.) The relevant portions of the deductible endorsement states that INA has an obligation to pay damages only in excess of the stated deductible; that if the insured does not pay damages up to the deductible, INA will pay those damages but will be entitled to

reimbursement by the insured; and that the insured must pay the deductible for each separate occurrence, though that amount is limited by a maximum annual obligation, referred to in the policy as the "deductible-annual aggregate." (Rycewicz Decl. Ex. 1, 20-23; Ex. 2, 17-20.) The deductible endorsement also states: "Whereas the named insured has entered into a written agreement with a qualified claims servicing organization . . . it is understood and agreed that [INA] has no duty or obligation to provide investigation, defense or settlement services with respect to such claims or suits so long as such agreement with the claims service [sic] organization remains in effect." (Rycewicz Decl., Ex. 1 at 21; Ex. 2 at 18.)

INA also points to sections of the deductible endorsement which provide that INA has the right to control and associate with the insured with respect to claims where the claim is within the policy's coverage and is "reasonably likely to exceed the 'deductible per occurrence.'" (Rycewicz Decl., Ex. 1, 21-22; Ex. 2, 18-19.) INA further points to a section of the deductible endorsement which provides for payment of loss-adjustment expenses, which generally refers to attorney fees and costs. Essentially, such expenses are paid by INA to the extent that their amount, plus the amount of any settlement or judgment, exceeds the deductible per occurrence. (Rycewicz Decl., Ex. 1 at 22; Ex. 2 at 19.)

INA argues that the provisions of the deductible endorsement create a relationship between the insurer and insured that departs from the traditional model found under a duty to defend. Instead, the deductible endorsement creates "a mutual system wherein the insured with the insurer agree to pay certain amounts at certain times based upon certain contingencies," and where the insured pays a fixed deductible amount for each occurrence giving rise to insurance coverage. (INA's Opp. 14.) INA also argues that the condition precedent to operation of the deductible endorsements has not