same time, the statutory scheme is designed to encourage the prompt cleanup of environmental contamination, short of an enforcement action. For example, ORS 465.325 authorizes DEQ to enter into an agreement with "potentially responsible persons" to perform remedial action. The agreement may be entered (in circuit court as a consent judgment) without any admission of liability. ORS 465.325(4)(a) - (c). ORS 465.327 likewise allows DEQ, through a written agreement, to "provide a party with a release from *potential liability* to **[*126]** the state under ORS 465.255" if certain conditions are met. (Emphasis added.) Thus, the scheme as a whole regulates parties who are liable for environmental contamination as well as those who are only "potentially liable."

HN15 The phrase "is liable or potentially liable" is used throughout Oregon's environmental cleanup statutes and, in **[***48]** particular, in three contribution-related statutes: ORS 465.257; ORS 465.325; and ORS **465.480(**4). ORS 465.257(1) provides that "[a]ny person who *is liable or potentially liable* under ORS 465.255 may seek contribution from any other person *who is liable or potentially liable under ORS 465.255.*" (Emphasis added.) ORS 465.325(6)(a) likewise provides that "[a]ny person may seek contribution *from any other person who is liable or potentially liable under ORS 465.255.*"). (Emphasis added.) And ORS **465.480(**4) allows an insurer that has paid an environmental claim to "seek contribution from *any other insurer that is liable or potentially liable.*" (Emphasis added.) [15]

FOOTNOTES

15 The statutes also use the term to describe an insured's "liability or potential liability" for an environmental claim, *see* ORS **465.480(**4)(b) (the court shall consider, in allocating covered damages between the insurers, "[t]he 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*" (emphasis added)). The phrase is used similarly outside of ORS chapter 465. *See* ORS 129.405(1)(g) **[***49]** (trustee shall make "[d]isbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, *collecting amounts from persons liable or potentially liable for the costs of those activities,* penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties and defending claims based on environmental matters" (emphasis added)).

HN16 One of the best clues as to the legislature's intended meaning of that phrase is that it is used in each instance to describe the universe of persons from whom contribution may be *sought.* That is to be distinguished from describing the persons from whom contribution can be *obtained.* When the legislature addressed the latter issue in the contribution statutes, it did so more explicitly--and more narrowly. Take, for example, ORS 465.257(1). Although the first sentence of that statute allows a plaintiff to "seek" contribution from any other person who "is liable or potentially **[***50]** liable," the second **[*127]** sentence of the statute leaves it to the court to apportion the costs among parties **[**120]** who are ultimately determined to be liable (as opposed to "potentially" liable): "When such a claim for contribution is at trial and the court determines that apportionment of recoverable costs among the *liable* parties is appropriate," the court then determines the share of each party according to various factors, including the "relative culpability or negligence of the *liable* persons." ORS 465.257(1) (emphasis added).

The same is true under ORS 465.325(6)(a). *HN17* The first sentence of that statute provides, in the context of consent agreements with DEQ, that "[a]ny person may seek contribution from any other person who *is liable or potentially liable* under ORS 465.255." (Emphasis added.) The second sentence, however, provides, "In resolving contribution claims, the court shall allocate remedial action costs among *liable* parties *in accordance with ORS 465.257*"--again leaving it to

the court to allocate costs among liable parties. ORS 465.325(6)(a) (emphasis added).

HN18 The structure of ORS **465.480(**4) parallels that of the other contribution statutes. The first sentence of ORS **465.480(**4) provides **[***51]** that a paying insurer may seek contribution from any other insurer that "is liable or potentially liable." The second sentence leaves the merits of the claim to court determination: "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 [certain enumerated factors]." ORS **465.480(**4).

Thus, the context and structure of ORS **465.480(**4) undermine National Union's contention that the phrase "is liable or potentially liable" has anything to do with the merits of a contribution claim, let alone bars such a claim in the event of a settlement between the insured and its insurer. Rather, HN19 the structure of ORS **465.480(**4) suggests that the legislature simply intended to provide that insurers that pay environmental claims can "seek" contribution from other insurers that covered the same risk, whether or not the liability of those other insurers has already been determined (*i.e.,* even if the other insurers are only "potentially liable").

[*128] Other contextual clues further undermine National Union's suggestion that the "is liable or potentially liable" language in ORS **465.480(**4) **[***52]** was intended to address the effect of a settlement on the insurer's exposure to contribution claims. The most significant of those clues, in our view, is the fact that the legislature specifically addressed that very issue--*in a different part of the statute. See* Or Laws 2003, ch 799, § 5(4).

ORS **465.480(**4), as previously discussed, was enacted as part of the 2003 amendments to the OECAA. The 2003 amendments contained express retroactivity provisions, but those provisions were not codified in the Oregon Revised Statutes. The retroactivity provisions read as follows:

> "(1) Except as provided in subsections (2), (3), and (4) of this section, [the amendments enacting ORS **465.480(**3) and (4), among other provisions] * * * appl [y] to all claims, whether arising before, on or after the effective date of this 2003 Act.
>
> "(2) [The amendments] 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 [the amendments] 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 **[***53]** 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.*"

Or Laws 2003, ch 799, § 5 (emphasis added).

[121]** **[*129]** As the above-emphasized text demonstrates, HN20 the 2003 amendments expressly cut off contribution claims against insurers who "reached a binding settlement with the insured as to the environmental claim." The problem for National Union is that section 5(4)(b)

only cuts off contribution claims against settling insurers in a narrow window of cases--those in 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." **[***54]** In this case, however, a final judgment *had* been entered before the effective date, making section 5(4)(b) inapplicable.

Section 5(4)(b) of the 2003 amendments is significant for two reasons. First, it demonstrates that the legislature was both aware of the settlement issue and knew how to address it explicitly when that was its desire. [16] Second, section 5(4)(b) would have been meaningless surplusage if the legislature had understood ORS **465.480(**4) to operate as National Union contends. *See State v. Stamper,* 197 Ore. App. 413, 418, 106 P3d 172, *rev den,* 339 Ore. 230, 119 P.3d 790 (2005) ("we assume that the legislature did not intend any portion of its enactments to be meaningless surplusage"); *see also* ORS 174.010. That is because ORS **465.480(**4) expressly applied "to all claims, whether arising before, on or after the effective date of this 2003 Act," except where "a final judgment, after exhaustion of all appeals, was entered before the effective date of this 2003 Act." Or Laws 2003, ch 799, § 5(1), (2). If, under ORS **465.480(**4), a settlement between an insured and its insurer barred a contribution claim against that insurer **[*130]** in all pending cases, the act would have already accomplished everything **[***55]** that section 5(4)(b) does, thereby rendering the provision entirely redundant. [17] We assume the legislature would not have drafted the law in that way. [18] *Stamper,* 197 Ore. App. at 418.

FOOTNOTES

16 *HN21*A related statute, ORS 465.325(6)(b), likewise deals specifically and expressly with the effect of a settlement by a party that otherwise might be "liable or potentially liable" for purposes of contribution:

> "A person who has resolved its liability to the state in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement."

17 National Union acknowledges as much in its brief: "No further protections were necessary for settling insurers, beyond the language of the 'is liable or potentially liable' provision."

18 Indeed, had the legislature intended the "is liable or potentially liable" language to have the effect National Union contends, we would expect some discussion of that issue in the legislative history, particularly **[***56]** in light of section 5(4)(b). The 2003 amendments were extensively debated in House and Senate committees and during floor debates, with full knowledge that the amendments would affect pending cases. *See, e.g.,* Audio Recording, House Committee on Judiciary, Senate Bill 297, July 7, 2003, http://www.leg.state.or.us/listn/archive/archive.2003s/HJUD-200307071241.ram, at 1:12 (discussing pending cases) (accessed Apr 22, 2010). National Union does not direct us to, nor are we aware of, any legislative history that supports the notion that the legislature intended to retroactively extinguish common-law contribution rights when it used the phrase "is liable or potentially liable" in ORS **465.480(**4). Indeed, the only mention of anything related to cutting off contribution rights--via settlement with the insured or otherwise--came with respect to the draft amendments that eventually became section 5(4)(b); and even then, there was absolutely no mention of the "is liable or potentially liable" language.

Finally, we observe that National Union's construction of the phrase "is liable or potentially liable" is implausible when the phrase is read the same way in other related statutes. *Mid-Century Ins.*

Co. v. Perkins, 344 Ore. 196, 211, 179 P3d 633, **[***57]** *modified on recons,* 345 Ore. 373, 195 P3d 59 (2008) (where legislature uses the same term in related statutes, the court begins with the assumption that the term has the same meaning in those statutes). National Union contends that, once an insurer has settled its obligation to its insured, the insurer no longer "is liable or potentially liable" within the meaning of ORS **465.480**(4). Yet if that same meaning is given to the phrase "is liable or potentially liable" in ORS 465.257, it would gut the statute. *HN22* ORS 465.257 describes the party *seeking* contribution in terms of "liability or potential liability": "Any person who *is liable or potentially liable* under ORS 465.255 may seek contribution from any other person *who is liable or potentially liable under ORS 465.255.*" (Emphasis added.) **[**122]** As National Union reads the phrase "is liable or potentially liable," a party who has satisfied a judgment against it or already paid the necessary cleanup costs would, at that point, no longer be "liable or potentially liable" within the meaning of ORS 465.257; **[*131]** hence, that party would not have any right under the statute to seek contribution. The legislature could not have intended that result. And for **[***58]** that reason, in addition to the others previously discussed, we reject National Union's cross-assignment of error.

III. CONCLUSION

In sum, the trial court erred in granting summary judgment dismissing plaintiffs' contribution claims. The trial court also erred in ruling in favor of Beneficial and U.S. Fire and against plaintiffs on the parties' cross-motions for partial summary judgment regarding the duty to defend. The court was correct, however, in granting defendants' motion for partial summary judgment regarding plaintiffs' entitlement to attorney fees. Accordingly, we reverse in part and remand for further proceedings.

Reversed in part and remanded.

*2005 U.S. Dist. LEXIS 40189, **

GE PROPERTY & CASUALTY INSURANCE COMPANY, Plaintiff, v. PORTLAND COMMUNITY COLLEGE, Defendant. GE PROPERTY & CASUALTY INSURANCE COMPANY, Third-Party Plaintiff, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY and COMMERCIAL INSURANCE COMPANY OF NEWARK, NJ, Third-Party Defendants.

No. CV 04-727-HU

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2005 U.S. Dist. LEXIS 40189

November 17, 2005, Decided

PRIOR HISTORY: GE Prop. & Cas. Ins. Co. v. Portland Cmty. College, 2005 U.S. Dist. LEXIS 40164 (D. Or., Aug. 24, 2005)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff filed a declaratory judgment against defendant college and third party defendant insurer in which plaintiff sought a declaration that it had no duty to defend or indemnify the college in connection with a voluntary letter agreement between the college and the Department of Environmental Quality dealing with possible groundwater contamination at property owned by the college.

OVERVIEW: In order to determine if the insurers had a duty to defend the college, the court had to make two inquiries: (1) whether the voluntary agreement was deemed a complaint; and, if so, (2) whether the allegations in the agreement could impose liability for conduct that was covered by the comprehensive general liability policies. The court noted that there did not appear to be any dispute that the agreement was analogous to a complaint in court or charges in an administrative contested case proceeding. Therefore, the agreement was a suit within the terms of the insurers' duty to defend. The first of the insurers' grounds for refusing to defend the college was the owned property exclusion of the policies. The court found that the owned property exclusion did not exonerate the insurers from the duty to defend. The court found that the insurers did have a duty to defend the college. The court found that plaintiff insurer was entitled to summary judgment on the issue of the duty to indemnify because the college was not seeking indemnity costs.

OUTCOME: The court denied the insurers' motions for summary judgment as to the issue of the duty to defend, but granted plaintiff insurer's motion for summary judgment as to the issue of the duty to indemnify.

CORE TERMS: contamination, voluntary agreements, soil, groundwater, duty to defend, site, insured, groundwater contamination, insurer, coverage, environmental, hazardous substances, cleanup, owned property, summary judgment, impose liability, declaration, occurrence, drywell, property damage, insurance policies, duty to indemnify, property owned, human health, significant impacts, underground, remediation, beneficial, pollution, triggered

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Supporting Materials > Affidavits

HN1 Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

Insurance Law > General Liability Insurance > Obligations > Defense

HN2 The duty to defend is broader than the duty to indemnify, and the two duties are independent. Any doubts regarding coverage are resolved in favor of the insured.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Insurance Law > General Liability Insurance > Obligations > Defense

HN3 An insurer has a duty to defend if the allegations of the complaint in the underlying action, without amendment and with ambiguities construed in favor of the insured, could impose liability for the conduct covered by the policy. The duty to defend is determined by reference to the insurance policy and the facts alleged in the complaint.

Administrative Law > General Overview

HN4 The term suit or lawsuit is defined to include administrative proceedings and actions taken under Oregon or federal law, including actions taken under administrative oversight of the Oregon Department of Environmental Quality pursuant to written voluntary agreements, consent decrees and consent orders. Or. Rev. Stat. § **465.480**(1)(a).

Insurance Law > General Liability Insurance > Obligations > Notice

HN5 Oregon law provides that property owners are obligated to report environmental contamination to the Department of Environmental Quality and to investigate the contamination to determine whether remediation is necessary.

Environmental Law > General Overview
Insurance Law > General Liability Insurance > Obligations > Indemnification

HN6 See Or. Rev. Stat. § **465.480**(6)(a).

Insurance Law > General Liability Insurance > Obligations > Indemnification

HN7 The duty to indemnify is established by proof of facts demonstrating a right to coverage.

COUNSEL: [*1] Attorneys for plaintiff: Mark A. Turner, Ater Wynne LLP, Portland, Oregon; Kevin J. Kuhn, Veder, Price, Kaufman & Kammholz, Chicago, Illinois.

Attorneys for defendant: Jerry B. Hodson, Hong Huynh, Miller Nash, Portland, Oregon.

JUDGES: Dennis James Hubel, United States Magistrate Judge.

OPINION BY: Dennis James Hubel

OPINION

AMENDED

OPINION AND ORDER

HUBEL, Magistrate Judge:

This is an action for declaratory judgment brought by GE Property & Casualty Insurance Co., now known as AIG Centennial Insurance Company (GE) against Portland Community College (PCC) and third party defendant St. Paul Fire & Marine Insurance Co. (St. Paul). GE seeks a declaration from the court that it has no duty to defend or to indemnify PCC in connection with a Voluntary Letter Agreement between PCC and the Oregon Department of Environmental Quality (DEQ), dealing with possible groundwater contamination at property owned by PCC. GE has filed a motion for summary judgment in its favor on both the duty to defend and the duty to indemnify. PCC and St. Paul have filed cross motions for partial summary judgment on the duty to defend.

Factual Background

The property that is at the center of this dispute **[*2]** is called the Old SE Center Site (the Site) and is situated on SE 82nd Avenue in Portland. In the 1960s the Site comprised a large building, a small shed, a gas station, and a large parking lot. More than 20 underground injection control (UIC) drywells were scattered throughout the parking lot. The UIC drywells were designed to collect storm water from the Site; the storm water then percolated into the groundwater. Some of the UIC drywells are more than 20 feet deep. The Site also contained five underground storage tanks (USTs), three of which were used by the service station.

PCC bought the Site on June 26, 1978 and began holding classes at the site in 1979. Although PCC did not use any of the USTs, in 1985, PCC decommissioned four of them *in situ*, including three motor fuel tanks located in the area of the former gas station. Eventually, PCC purchased a larger piece of property down the street and put the Site on the market. In the summer and fall of 2003, PCC assessed the Site's current environmental conditions, investigating and assessing all drywells. Analysis of soil samples collected from the bottom of the drywells during the investigation revealed that UICs # 4 and # 33 **[*3]** had metals and volatile organic compounds that exceeded initial screening levels, thus requiring further investigation.

Under Oregon law, OAR 340-044-0018(3), PCC was obligated to report the drywell contamination to the Oregon Department of Environmental Quality (DEQ) and to investigate the contamination to determine its extent and whether remediation was necessary. After PCC provided the requisite notice to DEQ, DEQ asked PCC to enter the Site into a voluntary cleanup program (VCP) in October 2003. PCC agreed to enter into the VCP on November 3, 2003, executing a document called a Voluntary Letter Agreement on November 3, 2003 (Voluntary Agreement). PCC seeks coverage under its Comprehensive General Liability (CGL) insurance policies for the tasks undertaken pursuant to the Voluntary Agreement. The Voluntary Agreement states, in part:

> This letter serves as a Letter Agreement between you and Oregon Department of Environmental Quality (DEQ) regarding DEQ review and oversight of the investigation and/or cleanup of hazardous substances at your property located at PCC Old SE Center Campus, 2850 SE 82nd Avenue, Portland, Oregon. DEQ requested that [PCC] enter the Voluntary Cleanup **[*4]** Program (VCP) due to the discovery of chlorinated solvents in soil beneath two [UIC] wells, # 4 and # 33, located in the northwest corner of the property.
>
> Work to be completed under this Letter Agreement will include completion of a Site Investigation and Risk Assessment. The objective of the Site Investigation is to determine whether hazardous substances discovered in soil at the Property during decommissioning of [UIC] systems pose an unacceptable risk to human health through future direct contact, or have or may cause significant impacts to beneficial uses of groundwater. A second objective is to verify that no significant contamination is present in soil related to four previously decommissioned [USTs], one abandoned UST, and one hydraulic lift located at the property. DEQ will review the findings of the Site Investigation and Risk Assessment to determine whether a

> "no further action" determination is warranted for the site, or whether a more formal agreement is required.
>
> ***
>
> Under this Letter Agreement, you [i.e., PCC] will . . . Submit a Site Investigation Work Plan to DEQ within 30 days of completion of the site visit and scoping meeting. The Work plan should **[*5]** be designed to identify the sources of contamination, the nature of contamination, the extent of contamination (to include an initial groundwater investigation near UICs # 4 and # 33), contaminant migration pathways, exposure pathways, likely receptors, and potential hot spots of contamination.
>
> ***
>
> This Letter Agreement is not and shall not be construed as an admission by you of any liability under ORS 465.255 or any other law or as a waiver of any defense to such liability. This Letter Agreement is not and shall not be construed as a waiver, release, or settlement of claims DEQ may have against you or any other person or as a waiver of any enforcement authority DEQ may have with respect to you or the property.

McEwen Declaration, Exh. 14.

The Voluntary Agreement set out specific tasks to be done by DEQ and by PCC. PCC was to conduct site investigation and risk assessment to determine whether the hazardous substances discovered in the soil posed an "unacceptable risk to human health through future direct contact," or to "beneficial uses of groundwater." It was to submit a site investigation work plan designed to identify the sources, nature and **[*6]** extent of the contamination, and DEQ was to review the findings to determine whether a "no further action" determination could be issued.

PCC complied with the terms of the Voluntary Agreement. In March 2004, a site-specific risk assessment concluded that the contamination posed no significant future threat to groundwater, and that there was no need for remediation. On October 6, 2004, the DEQ sent a "no further action" determination to PCC. In January 2004, PCC sold the Site.

Between July 1, 1977, and July 1, 1978, Continental and Commercial Insurance Company (Commercial) provided CGL coverage to PCC. Between July 1, 1978, and July 1, 1982, PCC had two CGL policies with St. Paul. Compass Insurance Company replaced St. Paul and provided coverage to PCC from July 1, 1982 to July 1, 1984. GE's predecessor, Colonial Penn Insurance Co., provided CGL coverage to PCC from July 1, 1984 to July 9, 1985. PCC had excess coverage from Allianz between July 1, 1982 and July 1, 1984, and from Granite State Insurance Company from July 1, 1984 to July 1, 1985.

PCC gave notice of the Voluntary Agreement to all insurers, including St. Paul and GE, as soon as DEQ asked PCC to enter the Voluntary Agreement **[*7]** and as soon as PCC was able to reconstruct its policies and learn the identity of the insurers. PCC notified St. Paul of DEQ's claim on November 3, 2003, and notified GE on November 20, 2003. PCC demanded that St. Paul and GE defend and indemnify PCC for the claims raised in, and the activities undertaken pursuant to, the Voluntary Agreement. Because some policies had been lost, PCC also requested, pursuant to Or. Rev. Stat. § 465.479 that the insurers provide the policy form or specimen that would most likely have been issued during PCC's coverage period.

On March 16, 2004, St. Paul attached a form of its CGL policy to its reservation of rights letter. See Huynh Declaration, Exhibit 1. The form states that St. Paul would protect an insured from claims for "damage to tangible property resulting from an accidental event." Id. Under that form, St. Paul would not cover damages to property owned by the insured. It would, however,

"defend any suit brought against [the insured] for damages covered under this agreement, even if the suit is groundless or fraudulent." On April 2, 2004, St. Paul denied coverage.

Commercial accepted the tender of defense on **[*8]** October 6, 2004. McEwen Declaration, Exhibit 8, p. 1. Commercial has not answered the complaint nor taken any position on these motions. PCC's other primary insurance carrier, Compass, settled with PCC out of court.

GE filed the complaint in this action on May 28, 2004, attaching a copy of the policy form that would have been issued to PCC. Complaint P 6; McEwen Declaration, Exhibit 19. GE filed an amended complaint on December 24, 2004.

Standards

HN1 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

HN2 The duty to defend is broader than the duty to indemnify, and the two duties are independent. *See, e.g.*, Western Equities, Inc. v. St. Paul Fire and Marine, 184 Or. App. 368, 374, 56 P.3d 431 (2002); St. Paul Fire v. McCormick & Baxter Creosoting, 126 Or. App. 689, 701, 870 P.2d 260, *modified on reconsideration*, 128 Or. App. 234, 875 P.2d 537 (1994), *aff'd in part, rev'd* **[*9]** *in part on other grounds*, 324 Or. 184, 923 P.2d 1200 (1996). Any doubts regarding coverage are resolved in favor of the insured. *See, e.g.*, Continental Casualty Co. v. Reinhardt, 247 F. Supp. 173 (D. Or. 1965), *aff'd*, 358 F.2d 306 (9th Cir. 1966).

Discussion

A. Duty to defend

HN3 An insurer has a duty to defend "if the allegations of the complaint in the underlying action, without amendment and with ambiguities construed in favor of the insured, could impose liability for the conduct covered by the policy." Ledford v. Gutowski, 319 Or. 397, 399, 877 P.2d 80 (1994); *see also* Abrams v. General Star Indemnity Co., 335 Or. 392, 400, 67 P.3d 931 (2003). The duty to defend is determined by reference to the insurance policy and the facts alleged in the complaint. Ledford, 319 Or. at 399; Abrams, 335 Or. at 396.

To resolve the issue of the insurers' duty to defend PCC, the court must make two inquiries: 1) whether the Voluntary Agreement is deemed a complaint; and, if so, 2) whether the "allegations" in the Voluntary Agreement could impose liability for conduct that is covered by the CGL policies.

[*10] 1. Is the Voluntary Agreement a complaint?

PCC asserts that the Voluntary Agreement issued to PCC by DEQ is considered a "suit" or "complaint" under Oregon law:

> Any action or agreement by [DEQ] *** against or with an insured in which [DEQ] *** 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.

Or. Rev. Stat. § **465.480(**2)(b). *HN4* The term "suit" or "lawsuit" is defined to include administrative proceedings and actions taken under Oregon or federal law, including actions taken under administrative oversight of DEQ "pursuant to written voluntary agreements, consent decrees and consent orders." Or. Rev. Stat. § **465.480(**1)(a); *see also* Schnitzer

Investment Corp. v. Certain Underwriters at Lloyd's of London, 197 Or. App. 147, 155-57, 104 P.3d 1162 (2005) (a "suit" includes correspondence from DEQ notifying insured of its intent to list sites on environmental database and requesting further investigation or cleanup); McCormick & Baxter Creosoting, 126 Or. App. at 700-01 **[*11]** (fact that insured chooses to try to gain a more favorable resolution by cooperation instead of litigation does not mean that the agency is not making a claim that the insured is responsible for damages under the statutes governing cleanup of environmental damage).

There does not appear to be any dispute that the Voluntary Agreement is analogous to a complaint in court or charges in an administrative contested case proceeding, and therefore a "suit" within the terms of an insurer's duty to defend.

2. Does the Voluntary Agreement allege conduct that is covered by the policy?

a. The owned property exclusion

The first of St. Paul and GE's grounds for refusing to defend PCC is the owned property exclusion of the policies. The insurers assert that the Voluntary Agreement merely alleges soil contamination to PCC's own property, and that such damage is excluded from coverage under the policy's owned property exclusion.

The GE policy states:

> This insurance does not apply:
>
> (g) to property damage:
>
> > (1) to property owned or occupied by or rented to the insured, or . . . to property held by the insured for sale or entrusted to the ensured
> >
> > . . . .

St. **[*12]** Paul asserts that if a policy was issued to PCC by St. Paul, it would have contained the following provision:

> We won't cover damage to property you or any other protected person own, rent, occupy, use of [sic] physically control. Nor will we be responsible for any damage to premises you've sold or transferred to someone else.

See Nanzig Affidavit, Exhibit 1, p. 4, 6.

GE relies on cases holding that the owned property exclusion is unambiguous and enforceable in the context of soil contamination on the insured's property, such as Baumann v. North Pacific Insurance. Co., 152 Or. App. 181, 187-88, 952 P.2d 1052 (1998). In that case, while decommissioning an underground storage tank, the insured discovered soil contamination. The DEQ required the insured to clean up the contamination. The insured sought coverage for the cleanup cost and the insurer denied coverage based upon the owned property exclusion.

PCC counters that the Voluntary Agreement alleged not simply soil contamination, but possible groundwater contamination as well, [1] and argues that the owned-property exclusion does not apply to groundwater contamination. PCC relies on Lane Electric Co-op v. Federated Rural Electric, 114 Or. App. 156, 160-61, 834 P.2d 502 (1992), **[*13]** holding that contamination of groundwater is "property damage," and on Or. Rev. Stat. § 537.110 and Lane, 114 Or. App. at 161, both standing for the proposition that groundwater, like all other water within the state, belongs to the public and is within public control. *See also* McCormick & Baxter Creosoting, 126 Or. App. at 700, 870 P.2d at 266 (groundwater is property owned by the public) and Schnitzer,

197 Or. App. at 159 (owned-property exclusion does not apply to contamination of groundwater).

FOOTNOTES

1 In the Bauman case, the Court of Appeals refused to consider plaintiff's argument that there was a genuine issue of fact as to whether there was contamination of groundwater, because plaintiff failed to raise the issue in the trial court. Thus the court did not reach the issue of whether there was possible damage to third-party property as a result of groundwater contamination created by the soil contamination on the insured's property. 152 Or. App. at 185.

[*14] The Voluntary Agreement contains references to the possibility of groundwater contamination, as well as soil contamination. For example, the Voluntary Agreement states that the objective of the Site investigation is to "determine whether hazardous substances discovered in soil at the Property during decommissioning of underground injection control (UIC) systems pose an unacceptable risk to human health through future direct contact, or have or may cause significant impacts *to beneficial uses of groundwater.*" (Emphasis added) The Voluntary Agreement also specifies that PCC's work plan should be designed to identify the sources, nature and extent of contamination, specifically an "initial *groundwater investigation* near UICs # 4 and # 33." (Emphasis added).

However, GE. argues that the language of the Voluntary Agreement really only requires PCC to perform a site investigation and risk assessment because of *soil* contamination. GE disputes PCC's argument that its agreement to perform a "risk assessment" to see if there was groundwater contamination is equivalent to an affirmative allegation by DEQ that there *was* actual groundwater contamination. GE asserts that the definition **[*15]** of "risk assessment" in OAR § 340-122-0115(49) supports its argument:

> "Risk Assessment" means the process used to determine the probability of an adverse effect due to the presence of hazardous substances. A risk assessment includes identification of the hazardous substances present in the environmental media; assessment of exposure and exposure pathways; assessment of the toxicity of the hazardous substances; characterization of human health risks; and characterization of the impacts or risks to the environment.

GE argues that the Voluntary Agreement required PCC to perform a risk assessment because of soil contamination, not groundwater contamination, pointing to the phrases in the Voluntary Agreement stating that DEQ has requested PCC to enter into the Voluntary Cleanup Program "due to the discovery of chlorinated solvents in soil" beneath the two UICs, and that the objective of the Site Investigation was to determine whether that soil contamination posed a risk to human health or could have a significant impact on the groundwater.

PCC has the more persuasive argument. The duty to defend arises whenever there is a *possibility* that the policy provides coverage, **[*16]** that is whenever the allegations of the complaint, without amendment, *could* impose liability for conduct covered by the policy. *See* Sch. Dist. No. 1 v. Mission Ins. Co., 58 Or. App. 692, 696, 650 P.2d 929 (1982). Stated somewhat differently, the question is whether, on the allegations contained in the Voluntary Agreement, a court would allow DEQ to put on evidence of groundwater contamination at the Site. I conclude that it would.

My conclusion is reinforced by the authority upon which GE relies, the Martin case. In holding that the insurer had no duty to defend, the court noted that the allegations in the complaint

were limited to contamination in the soil. The court specifically said, "The plaintiffs *did not allege* that the contamination had migrated or *threatened to migrate* to soils off the property or to groundwater under the property." 146 Or. App. at 273-74. This suggests that if an Oregon court were presented with the Voluntary Agreement in this case, which clearly alleges that the soil contamination may have already migrated to the groundwater near UICs # 4 and # 33, it would find a duty to defend. Although, in this case, the environmental **[*17]** damage, in hindsight, was limited to soil contamination, and DEQ did not require PCC to take any remedial action, at the time of the Voluntary Agreement, there was an allegation of groundwater contamination and an order to investigate and determine its extent. Because the Voluntary Agreement raises the possibility of groundwater contamination caused by the soil contamination, the insurers' reliance on Martin is misplaced.

Further, HN5 Oregon law provides that property owners are obligated to report environmental contamination to the DEQ and to investigate the contamination to determine whether remediation is necessary. This element of legal compulsion strengthens the inference that the terms of the Voluntary Agreement should be construed as affirmative allegations rather than hypothetical statements.

I conclude that the owned property exclusion does not exonerate GE and St. Paul from the duty to defend. [2]

FOOTNOTES

2 In the McCormick & Baxter Creosoting case, the court seemed to acknowledge that usually, soil contamination and groundwater contamination are linked. See 126 Or. App. at 700, n. 10:

> Insurers argue that, with the possible exception of groundwater pollution, there was no evidence of damage to the property of third parties. They contend, therefore, that they were entitled to a declaration that they had no liability for the cost to M & B of repairing or cleaning up its own property, such as the soil. That would be so if the pollution to the soil is not inextricably linked to the pollution of the groundwater, for example having to clean the soil to prevent pollution to the water filtering through the soil. Whether such facts exist cannot be resolved on summary judgment.

[*18] b. Are risk assessment costs considered "damages?"

GE asserts that the Voluntary Agreement does not seek damages on account of property damage to groundwater; to the extent that the costs incurred by PCC in performing the site inspection and risk assessment can be considered "damages," those "damages" are the result of the discovery of soil contamination, and to the extent the costs incurred by PCC can be considered defense costs, those defense costs relate to the DEQ' s claim that the soil on PCC's property was contaminated.

PCC argues that the costs of risk assessments, preliminary assessments, and remedial investigations, such as those incurred by PCC, are considered defense costs. PCC relies on Or. Rev. Stat. § **465.480(**6)(a) and on McCormick & Baxter Creosoting, 126 Or. App. at 702.

Section **465.480(**6)(a) provides:

> HN6 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 **[*19]** applicable general liability insurance policy or policies.

In McCormick & Baxter Creosoting, the insurers had argued that cleanup costs are not damages within the meaning of the insurance policies, because they are expended to prevent future harm, not to remedy past harm. The court rejected the argument, holding that the costs expended in cleaning up contamination are "damages," as that term is used in general liability policies, and that such costs are covered by those policies.

GE's argument is unpersuasive. The argument that site inspection and risk assessment costs do not constitute defense costs is explicitly contradicted by Or. Rev. Stat. § **465.480(**6). The argument that the Voluntary Agreement does not seek "damages" (i.e., costs of remediation) for anything more than soil contamination is foreclosed by the court's holding in McCormick & Baxter Creosoting that cleanup costs are "damages" as that term is used in CGL policies, in combination with Or. Rev. Stat. § **465.480(**6), which, through the terms "preliminary assessments" and "risk assessment," clearly contemplates situations where, as here, the nature and extent **[*20]** of the contamination is still undetermined. Again, the Voluntary Agreement clearly anticipated ground water contamination.

c. "Occurrence" and "accidental event"

An additional ground asserted by GE for its refusal to defend PCC is that the Voluntary Agreement between PCC and DEQ does not allege an "occurrence" of covered property damage during the policy period. The GE policy defines an "occurrence" as

> an event, or a continuous or repeated exposure to conditions, which causes bodily injury or property damage during the policy period that is neither knowing or [sic] intentionally caused by or at the direction of the insured.

GE continues to assert that the Voluntary Agreement alleges only that hazardous substances have been discovered in the soil, but does not allege actual damage to groundwater, much less damage to groundwater that occurred between July 1, 1984 and July 9, 1985, the policy period. GE argues that because the Voluntary Agreement "does not allege the actual existence of groundwater contamination," there is no allegation of an "occurrence" in the Voluntary Agreement. St. Paul makes a similar argument. It contends that the Voluntary Agreement merely **[*21]** requires PCC to determine *whether* hazardous substances discovered at the property "have or may cause significant impacts to beneficial uses of groundwater," and that there is "no indication in the Voluntary Agreement that the groundwater is contaminated." For the reasons set forth above, these arguments fail here.

As a corollary to that argument, St. Paul argues that the Voluntary Agreement also fails to allege the occurrence of an "accidental event" because it does not state when the contamination started, or what caused the contamination. St. Paul cites the case of Martin v. State Farm Fire & Cas. Co., 146 Or. App. 270, 932 P.2d 1207 (1997), where the court held that "failing to exclude a possibility of an event is not the same as affirmatively alleging that the event has occurred."

Although this is a difficult issue, the Martin case, discussed above, and the Schnitzer case indicate that a duty to defend can be triggered by an allegation of the threat or possibility of harm, rather than an allegation of actual harm.

In Schnitzer, the court concluded that a consent order, a letter, and other documents (hereafter referred to as the "consent order") constituted **[*22]** a complaint for purposes of a duty to

defend:

> The consent order contains DEQ's factual contentions concerning the condition of the property, the accuracy of which plaintiff did not admit.
>
> At the least, CNA had to treat those documents [i.e., the consent order, DEQ's June 7, 1991 letter and the accompanying documents] at that time as the functional equivalent of a judicial complaint. When read together, they described the factual basis on which DEQ sought to hold plaintiff liable for the cost of the environmental cleanup of its property. . . . As of September 26, 1991, CNA had the duty to defend plaintiff with regard to the actions against plaintiff being taken by the DEQ. That duty continued as to each unit until the Record of Decision for that unit was filed.

197 Or. App. at 157.

The Schnitzer court found a duty to defend had been triggered even though the consent order did not contain an allegation of actual damage to groundwater or the occurrence of a specific event that caused actual damage. Rather, the consent order merely stated that Schnitzer was to determine "the nature and extent of releases of hazardous substances on or from plaintiff's **[*23]** property."

In Schnitzer, the studies ultimately revealed that there was no groundwater contamination at Schnitzer's property, and Schnitzer was only required to remediate soil contamination and continue to monitor the groundwater. Nevertheless, the court rejected the argument that the owned property exclusion provided a basis for CNA's refusal to defend.

GE counters that Schnitzer is inapplicable because in Schnitzer the consent order specifically alleged the existence of groundwater contamination and indicated that the DEQ intended to impose liability upon the insured for damage to the groundwater, while in this case there is no allegation of the actual existence of groundwater contamination and no indication that the DEQ intended to impose liability upon the insured. I disagree with this reading of the case. The Schnitzer court specifically said that "the consent order by itself shows that there was a *possibility* that DEQ would require plaintiff to remedy the groundwater under the site." 197 Or. App. at 159 (emphasis added).

I also find unpersuasive GE's argument that in Schnitzer, the DEQ clearly intended to impose liability upon Schnitzer **[*24]** for groundwater contamination. A careful reading of the facts shows that DEQ intended to impose liability on Schnitzer if groundwater contamination were found, but that the studies ordered by Schnitzer showed soil contamination only, and DEQ required Schnitzer to remediate soil contamination only. The only requirement imposed on Schnitzer with respect to groundwater contamination was that it continue to monitor the groundwater for a period of five years.

GE also argues that in Schnitzer, the court held that the insurers were not liable for actions taken by the insured to prevent contamination-rather, the terms of the policies required payment only to repair damage that had already occurred. 197 Or. App. at 160-61. But that was the court's holding with respect to the duty to indemnify, a separate issue from the duty to defend.

This case is factually quite close to Schnitzer. In Schnitzer, as here, the "complaint" alleged soil contamination and the possibility of groundwater contamination resulting from the soil contamination. The investigation ordered included a determination of the extent of any groundwater contamination. In Schnitzer, as here, the investigation **[*25]** ultimately revealed that no groundwater contamination had occurred. Nevertheless, the court found the owned-property exclusion inapplicable and held that the insurer had a duty to defend that was triggered when the insured and DEQ agreed that the insured would conduct an investigation to determine the nature and extent of the contamination.

I am also unpersuaded by St. Paul's contention that there was no duty to defend because the Voluntary Agreement failed to allege when the contamination occurred and how, and by GE's contention that there was no duty to defend because the Voluntary Agreement did not allege that the contamination occurred during the coverage period of the policy. The holding in Schnitzer indicates that it is not necessary for groundwater contamination to be either directly alleged nor ultimately proven, in order to trigger a duty to defend. Nor do I see any indication in Schnitzer or in Martin that a duty to defend is not triggered absent an allegation of exactly when the contamination occurred, as St. Paul argues. The key here, as with all duty to defend cases, is that nothing in the Voluntary Agreement precluded proof that a release of contaminants **[*26]** within the policy period of each insurer, and from a cause within each insurer's coverage, had contaminated the groundwater. Thus a duty to defend exists.

B. Duty to indemnify

*HN7*The duty to indemnify is established by proof of facts demonstrating a right to coverage. Western Equities, 184 Or. App. at 374. PCC stated at oral argument that it was not seeking indemnity costs against the insurer, and concedes that GE is entitled to summary judgment on that issue. This motion is granted.

Conclusion

GE's motion for summary judgment (doc. # 43) is DENIED with respect to the duty to defend and GRANTED with respect to the duty to indemnify. St. Paul's motion for partial summary judgment in its favor on the duty to defend (doc. # 47) is DENIED. PCC's motion for partial summary judgment in its favor on the duty to defend (doc. # 36) is GRANTED.

IT IS SO ORDERED.

Dated this 17th day of November, 2005.

Dennis James Hubel

United States Magistrate Judge

*2012 U.S. Dist. LEXIS 94610, **

NORTHWEST PIPE COMPANY, Plaintiff, v. RLI INSURANCE COMPANY, Defendant. EMPLOYERS INSURANCE OF WAUSAU, Counter Claimant, v. NORTHWEST PIPE COMPANY, Counter Defendant; RLI INSURANCE COMPANY, Third-Party Plaintiff, v. ACE PROPERTY AND CASUALTY INSURANCE COMPANY, ACE FIRE UNDER WRITERS INSURANCE COMPANY, Third-Party Defendants.

CV 09-1126-PK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2012 U.S. Dist. LEXIS 94610

June 25, 2012, Decided
June 25, 2012, Filed

SUBSEQUENT HISTORY: Later proceeding at Northwest Pipe Co. v. RLI Ins. Co., 2012 U.S. Dist. LEXIS 129240 (D. Or., July 9, 2012)
Adopted by, in part Northwest Pipe Co. v. RLI Ins. Co., 2012 U.S. Dist. LEXIS 129359 (D. Or., Sept. 7, 2012)

PRIOR HISTORY: Northwest Pipe Co. v. RLI Ins. Co., 2012 U.S. Dist. LEXIS 82573 (D. Or., June 13, 2012)

CORE TERMS: pipe, coverage, insurer, declaration, pollution exclusion, environmental, travelers, declare, insured, liability insurance, pollutants, summary judgment, insurance policy, duty to defend, uninsured, policy covering, partial, named insured, general liability, recommendation, insurance coverage, liability insurers, covering, site, period of time, time period, similarly-situated, occurrence-based, contamination, evidentiary

COUNSEL: **[*1]** For Northwest Pipe Company, an Oregon corporation formerly known as Northwest Pipe & Casing Company, Plaintiff, Counter Defendant: Margaret E. Schroeder, LEAD ATTORNEY, Black Helterline, Portland, OR; Michael B. Merchant, LEAD ATTORNEY, Black Helterline, LLP, Portland, OR.

For RLI Insurance Company, an Illinois corporation, Defendant: Christopher W. Tompkins, LEAD ATTORNEY, PRO HAC VICE, Betts Patterson & Mines PS, Seattle, WA; Bruce C. Hamlin, Timothy J. Fransen, Martin, Bischoff, Templeton, Langslet & Hoffman LLP, Portland, OR.

For Employers Insurance Of Wausau, a Wisconsin mutual company, Defendant, Counter Claimant, Cross Claimant, ThirdParty Defendant: Bryan M Barber, LEAD ATTORNEY, PRO HAC VICE, Barber Law Group, Palo Alto, CA; Hanne Eastwood, William G. Earle, LEAD ATTORNEYS, Davis Rothwell Earle & Xochihua, PC, Portland, OR.

For Ace Property and Casualty Insurance Company, Ace Fire Underwriters Insurance Company, ThirdParty Defendants, Counter Claimants: R. Lind Stapley, Soha & Lang, P.S., Seattle, WA.

For Ace Property and Casualty Insurance Company, Ace Fire Underwriters Insurance Company, ThirdParty Plaintiffs: Richard A. Lee, LEAD ATTORNEY, Bodyfelt Mount LLP, Portland, OR.

For **[*2]** RLI Insurance Company, an Illinois corporation, Cross Defendant, ThirdParty Plaintiff, Counter Defendant: Christopher W. Tompkins, LEAD ATTORNEY, Betts Patterson & Mines PS, Seattle, WA; Bruce C. Hamlin, Timothy J. Fransen, Martin, Bischoff, Templeton, Langslet &

Hoffman LLP, Portland, OR.

JUDGES: Honorable Paul Papak, United States Magistrate Judge.

OPINION BY: Paul Papak

OPINION

FINDINGS AND RECOMMENDATION

PAPAK, Magistrate Judge:

Northwest Pipe Company ("Northwest Pipe") filed this declaratory judgment and breach of contract action in Multnomah County Circuit Court against RLI Insurance Company ("RLI") and Employers Insurance of Wausau ("Wausau") on July 14, 2009, seeking this court's declarations that Wausau and RLI are each obligated to undertake Northwest Pipe's defense in connection with superfund-related claims brought against it by the Environmental Protection Agency (the "EPA") and the Oregon Department of Environmental Quality (the "DEQ"), as well as damages for costs incurred in investigating and defending those claims. Wausau removed the action to this court on September 22, 2009, on diversity grounds. On September 29, 2009, Wausau filed a counterclaim against Northwest Pipe, seeking this court's declaration **[*3]** that Wausau has no duty to defend or obligation to indemnify Northwest Pipe in connection with the insurance policy between Wausau and Northwest Pipe that is the subject of Northwest Pipe's claims against Wausau, as well as this court's declaration that Wausau has no duty to defend and no obligation to indemnify Northwest Pipe in connection with two other insurance policies between Wausau and Northwest Pipe, as to which Wausau is currently contributing to Northwest Pipe's defense.

On August 12, 2010, Judge Brown granted partial summary judgment in favor of Wasau, dismissing all of Northwest Pipe's claims against it, and granting judgment in Wasau's favor as to its counterclaim for declaratory judgment that Wausau has no duty to defend or obligation to indemnify Northwest Pipe in connection with the insurance policy between Wausau and Northwest Pipe that was the subject of Northwest Pipe's claims against Wausau. Judge Brown additionally granted partial summary judgment in favor of Northwest Pipe as to RLI's duty to defend only.

Effective March 18, 2011, Wausau amended its pleading to state cross-claims against RLI, specifically for this court's declaration of Wausau's and RLI's "respective **[*4]** rights and obligations, if any, under each of their respective insurance policies issued to Northwest Pipe," including a declaration that "in the event that Northwest Pipe can establish the existence, terms, and conditions of any contract of insurance issued by Wausau, and in the event coverage is found to exist under any policy so established as issued by Wausau, that such coverage should be apportioned among Northwest Pipe and all defendants in a fair and equitable manner," and for equitable contribution of RLI's proportionate share of moneys already expended by Northwest Pipe's insurers other than RLI in connection with Northwest Pipe's defense. Effective August 11, 2011, RLI amended its pleading to state third-party claims against ACE Property and Casualty Insurance Company ("APCIC") and ACE Fire Underwriters Insurance Company ("AFUIC" and, collectively with APCIC, the "ACE defendants") for contribution of the ACE defendants' proportional share of Northwest Pipe's defense costs and to state a counterclaim for this court's declaration of all parties' respective rights under the parties' insurance contracts, including the ACE defendants.

On March 19, 2012, I recommended on the basis **[*5]** of the parties' evidentiary submissions that the court find that, of those of Northwest Pipe's defense costs that are properly allocable to the insurer parties hereto, the ACE defendants are responsible for 34.48% of those costs, Wausau for 50.16%, and RLI for 15.36%. I expressly recommended, on the basis of the

evidentiary record then before me, that the court refrain from deciding what proportion, if any, of Northwest Pipe's defense costs were properly allocable to Northwest Pipe itself, and from assigning specific dollar amounts to any party's appropriate share of those costs. In addition, I expressly noted that the parties' evidentiary submissions suggested that Northwest Pipe had no insurance coverage during the period between June 14, 1983, and July 8, 1983, a time period material to the EPA/DEQ investigation.

Northwest Pipe subsequently offered additional evidence not previously submitted to the court, tending to establish that it had insurance coverage provided by Aetna Fire Underwriters Insurance Company, the predecessor in interest of third-party defendant AFUIC, during the period from June 14, 1983, to July 8, 1983. The insurer parties hereto have since so stipulated.

Wausau **[*6]** and ACE objected to my method of allocating defense costs, contending that in determining the amount of defense costs allocated to each insurer, I erred by not considering each insurers' applicable policy limits in addition to each insurers' respective coverage period. RLI did not object to my method of allocating defense costs, agreeing that it is appropriate to consider only the length of the insurer's respective coverage periods.

On June 13, 2012, Judge Brown modified the legal reasoning underlying my recommendation of March 19, 2012, concluding that Or. Rev, Stat. **465.480**(4) - (6) requires consideration of the insurers' respective policy limits when allocating defense costs. In light of this conclusion and after taking into account the additional 23 days of coverage stipulated by the parties, she concluded that of those of Northwest Pipe's defense costs that are properly allocable to the insurer parties hereto, the ACE defendants are responsible for 24,92% of those costs, Wausau for 31.81 %, and RLI for 43.27%.

Now before the court are RLI's motion (#148) for partial summary judgment as to the proportional share of Northwest Pipe's defense costs that may properly be allocated to **[*7]** Northwest Pipe and Northwest Pipe's informal motion to strike the declaration of Edwin J. Rinehimer dated March 13, 2012, I have considered the motion, the parties' briefs, and all of the pleadings and papers on file. For the reasons set forth below, Northwest Pipe's informal motion to strike should be denied and RLI's motion for partial summary judgment should be denied,

LEGAL STANDARDS

I. Motion to Strike

Federal Civil Procedure Rule 12 provides that the district courts "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" on their own initiative or pursuant to a party's motion. Fed. R. Civ. P. 12(f). The disposition of a motion to strike is within the discretion of the district court. *See Federal Sav. & Loan Ins. Corp. v. Gemini Management*, 921 F.2d 241, 244 (9th Cir. 1990). Motions to strike are disfavored and infrequently granted. *See Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty., Ltd.*, 647 F.2d 200, 201, 201 n.1, 207 U.S. App. D.C. 375 (D.C. Cir. 1981); *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 947 (CD, Cal. 1990), abrogated on other grounds by *Stanton Road Ass'n v. Lohrey Enters.*, 984 F.2d 1015 (9th Cir. 1993).

II. [*8] Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not proper if material factual issues exist for trial. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996). In evaluating a motion for summary judgment, the

district courts of the United States must draw all reasonable inferences in favor of the nonmoving party, and may neither make credibility determinations nor perform any weighing of the evidence. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

BACKGROUND[1]

FOOTNOTES

1 Except where otherwise indicated, the following recitation constitutes my construal of the evidentiary record in light of the legal standard governing motions for summary **[*9]** judgment under Federal Civil Procedure Rule 56.

I. Parties

Northwest Pipe Company (formerly known as Northwest Pipe & Casing Company) is an Oregon corporation with its principal place of business in Vancouver, Washington. At all material times beginning February 1, 1982, Northwest Pipe owned and operated a facility (the "Portland Facility") near the Willamette River in North Portland, located at 12005 N. Burgard Road.

Each of the ACE defendants is a Pennsylvania corporation with its principal place of business in Pennsylvania. Each ACE defendant is in the business of providing liability insurance. APCIC issued Northwest Pipe a liability insurance policy covering the period from June 14, 1980, to June 14, 1982. AFUIC (and/or its predecessor in interest, the Aetna Fire Underwriters Insurance Company) issued Northwest Pipe a liability insurance policy covering the period from June 14, 1982, through July 8, 1983. Each of the ACE defendants' policies has a coverage limit of $100,000.

Employers Insurance of Wausau is a Wisconsin corporation with its principal place of business in Wisconsin. Wausau is in the business of providing liability insurance. Wausau issued three insurance policies to **[*10]** Northwest Pipe, each with a $500,000 coverage limit, one covering the period from July 8, 1983, through July 8, 1984, one covering the period from July 8, 1984, through July 8, 1985, and one covering the period from July 8, 1985, through July 8, 1986. Wausau has undertaken to defend Northwest Pipe against the superfund claims in connection with the policies covering the period from July 8, 1983, through July 8, 1984, and the period from July 8, 1984, through July 8, 1985, but has not undertaken Northwest Pipe's defense in connection with the policy covering the period from July 8, 1985, through July 8, 1986.

RLI Insurance Company ("RLI") is an Illinois corporation with its principal place of business in Illinois. RLI is in the business of providing liability insurance. RLI issued Northwest Pipe a so-called "umbrella" liability insurance policy with a $1,000,000 coverage limit, covering the period from July 8, 1985, through February 19,1986.[2]

FOOTNOTES

2 The policy was originally issued for a period of one year, but was canceled effective February 19, 1986.

II. Policies

A. ACE Defendants' Policies

The ACE defendants' policies, covering the period from June 14, 1980, through July 8, 1983,

contain a **[*11]** coverage exclusion for certain specified environmental damage, but the exclusion is expressly inapplicable to "sudden and accidental" discharge, dispersal, release, or escape of pollutants. The ACE defendants have undertaken to defend the actions against Northwest Pipe under both of their policies subject to a reservation of rights.

B. Wausau's Policies

Wausau's policies covering the period from July 8, 1983, through July 8, 1984, and the period from July 8, 1984, through July 8, 1985, contain a coverage exclusion for any damage caused by pollution *other* than "sudden and accidental" pollution. That is, the policies cover damage caused by sudden and accidental release of pollutants, and do not cover damage caused by any other form of release of pollutants, Wausau has undertaken to defend the actions against Northwest Pipe in connection with each of these two policies subject to a reservation of rights, and is currently defending Northwest Pipe in those actions under these policies.

By contrast, Wausau's policy covering the period from July 8, 1985, through July 8, 1986 (Wausau's "1985-1986 policy"), as amended, contains a so-called "absolute" pollution exclusion, excluding from coverage **[*12]** all damage caused by pollutants, applicable as follows:

> (1) to bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
>
> > (a) at or from premises owned, rented or occupied by the named insured;
> >
> > (b) at or from any site or location used by or for the named insured or others for the handling, storage, disposal, processing or treatment of waste;
> >
> > (c) which are at any time transported, handled, stored, treated, disposed of or processed as waste by or for the named insured or any person or organization for whom the named insured may be legally responsible; or
> >
> > (d) at or from any site or location on which the named insured or any contractors or subcontractors working directly or indirectly on behalf of the named insured are performing operations:
> >
> > > (i) if the pollutants are brought on or to the site or location in connection with such operations; or
> > >
> > > (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
>
> (2) to any loss, cost or expense arising out of any governmental direction or request that the named insured test for, monitor, clean up, remove, contain, treat, **[*13]** detoxify or neutralize pollutants.
>
> > Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The absolute pollution exclusion was added to the 1985-1986 policy by Endorsement No. 8 on August 6, 1985, approximately one month into the effective period of the policy. By its express

terms, Endorsement No. 8 was intended to apply retroactively to the entire effective period of the policy. Wausau has not contributed to Northwest Pipe's defense under the 1985-1986 policy and, under Judge Brown's order of August 12, 2010, is not required to.

C. RLI's Policy

RLI's policy, covering the period from July 8, 1985, through February 19, 1986 (the "RLI policy"), provides insurance coverage in the event of property damage, among other losses. The policy contains a provision (the "underlying-insurance provision") expressly providing that RLI must undertake Northwest Pipe's defense in the event of a covered loss as to which no coverage exists under any insurance policy "underlying" the RLI policy:

> With respect to any occurrence not covered by **[*14]** the underlying policies listed in the Schedule of Underlying Insurance hereof or any other underlying insurance collectible by the Assured, but covered by the terms and conditions of this policy except for the amount of Retained Limit specified in the Declarations, the Company shall
>
> > (a) defend any suit against the Assured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent. . . .

The Schedule of Underlying Insurance specifically lists Wausau's 1985-1986 policy as an underlying policy.

The RLI policy contains a further provision (the "other-insurance provision") providing that coverage under the RLI policy does not arise until coverage under all other applicable policies is exhausted, other than coverage under policies expressly excess to the RLI policy:

> If other valid and collectible insurance with any other insurer is available to the Assured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed **[*15]** to make this policy subject to the terms, conditions and limitations of other insurance.

Pursuant to Judge Brown's order of August 12, 2010, RLI is obligated to contribute to Northwest Pipe's defense under its policy.

III. History of the Coverage Dispute

On November 19, 1999, the Oregon Department of Environmental Quality sent Northwest Pipe a letter indicating that the Portland Facility was a "high priority" location for assessment and testing in connection with the investigation of the significant contamination of the Portland Harbor superfund site. On December 8, 2000, the Environmental Protection Agency sent Northwest Pipe a letter indicating that Northwest Pipe had been identified as a potentially responsible party in connection with the contamination of the Portland Harbor superfund site. As a potentially responsible party, Northwest Pipe was required to conduct an investigation of the contamination at the Portland Facility and to defend itself against EPA and DEQ claims against it.

On January 16, 2002, Northwest Pipe tendered the defense of the EPA and DEQ claims to the ACE defendants, Wausau and RLI. As noted above, the ACE defendants undertook Northwest Pipe's defense in connection **[*16]** with both of its policies, and Wausau undertook Northwest Pipe's defense in connection with two of its three policies. However, Wausau declined to defend Northwest Pipe in connection with the 1985-1986 policy on the ground that coverage was excluded under the absolute pollution exclusion of that policy, and RLI declined to undertake

Northwest Pipe's defense on the ground that its duty to defend was not triggered until Northwest Pipe had exhausted all other applicable insurance coverage.

On August 12, 2010, Judge Brown declared that Wausau has no duty to defend or indemnify Northwest pipe in connection with the 1985-1986 policy. Judge Brown further declared that RLI owes Northwest Pipe a duty to defend under its purported umbrella policy.

ANALYSIS

I. Northwest Pipe's Informal Motion to Strike

Northwest Pipe moves to strike the declaration of Edwin J. Rinehimer dated March 13, 2012, on the grounds that Rinehimer did not declare that he made his declaration on the basis of personal knowledge. *See* Fed. R. Evid. 602. However, while a witness' lack of personal knowledge may be sufficient to render the witness' testimony inadmissible, it is not grounds for striking the testimony from the record. **[*17]** I therefore recommend that the motion to strike be denied.

II. RLI's Motion for Partial Summary Judgment

RLI moves for partial summary judgment for determination of the proportion of Northwest Pipe's defense costs, if any, that may properly be allocated to Northwest Pipe itself. The Oregon Environmental Cleanup Assistance Act provides, in relevant part, as follows:

> 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) **[*18]** 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.

Or. Rev. Stat. **465.480**(4). Section **465.480** further provides that:

> 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.

Or. Rev. Stat. **465.480**(5). For purposes of Section **465.480**, "an uninsured" refers to "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." Or. Rev. Stat. **465.480(**1)(b), "A general liability insurance policy is 'commercially available' if the policy can be purchased under the Insurance Code on reasonable commercial terms." *Id.*. It is RLI's position that Northwest Pipe was an uninsured for some period of the time **[*19]** period material to the EPA/DEQ investigation, and that therefore Northwest Pipe is responsible to pay some corresponding proportion of its defense costs pursuant to Section **465.480(**4)(d).

As noted above, Northwest Pipe first became involved with operations at the Portland Facility under investigation by the EPA and DEQ beginning February 1, 1982. At that time Northwest Pipe enjoyed commercial general liability insurance coverage from the ACE defendants, and it continued to be covered by commercial general liability insurance policies issued by one or more of the ACE defendants through July 8, 1983. Northwest Pipe enjoyed commercial general liability insurance coverage under policies issued by Wausau from July 8, 1983, through July 8, 1985. It has been the law of this case since August 12, 2010, that coverage under RLI's policy "dropped down" and was in effect from July 8, 1985, through February 19, 1986, and that RLI owes Northwest Pipe a duty to defend in connection with its policy.

RLI argues primarily that Northwest Pipe should be considered an uninsured for purposes of Section **465.480** during the period from July 8, 1985, through February 19, 1986. In effect, RLI's arguments constitute **[*20]** a request for reconsideration of Judge Brown's August 12, 2010, rulings against it. I decline RLI's invitation to disturb Judge Brown's decision. Until such time, if any, that Judge Brown should elect to modify her prior rulings, it is the law of the case that RLI owes Northwest Pipe a duty to defend in connection with its policy providing coverage during the period from July 8, 1985, through February 19, 1986, and on that basis I recommend that RLI's motion be denied to the extent premised on the theory that Northwest Pipe was an uninsured during that period.

RLI secondarily argues that Northwest Pipe should be considered an uninsured for purposes of Section **465.480** during the period between February 19, 1986, and approximately July 1, 1987. In support of this argument, RLI offers two declarations of Edwin J, Rinehimer, an employee of the Travelers Companies from 1977 through 2004. Rinehimer declares that the Travelers Companies, which offer commercial general liability insurance policies, did not include "absolute" pollution exclusions from their CGL policies prior to "mid to late 1987," and that prior to that time the Travelers Companies generally offered "occurrence-based" CGL policies **[*21]** containing pollution exclusions that excluded coverage only for environmental contamination caused by "expected or intended" discharge of pollutants. Rinehimer concedes that the Travelers Companies did employ an absolute pollution exclusion in some of its policies prior to mid-1987, but declares that other than for "some selected accounts" it did not "widely" adopt the absolute pollution exclusion until mid to late 1987. Rinehimer further declares that, "to the best of [his] knowledge," the Travelers Companies "offered occurrence-based general liability insurance with the 'expected or intended discharge' pollution exclusion to Oregon businesses on comparable terms as other similarly-situated commercial liability insurers." Attached to Rinehimer's second declaration is a letter dated September 24, 1986, addressed to Don Miller of the Travelers Insurance Co. and signed by T.W. Brezinski, apparently a regional Vice President of the Zurich-American Insurance Group, indicating that, according to a survey of insurers apparently conducted by the Zurich-American Insurance Group, the Travelers Insurance Company expected to adopt the Insurance Services Office's form CGL policy that incorporated **[*22]** the absolute pollution exclusion on January 1, 1987. The letter bears a handwritten notation, which Rinehimer declares is in his own hand, changing that date from January 1 to July 1, 1987. It is RLI's position that Rinehimer's declaration is sufficient to establish that general liability insurance was available for purchase by Northwest Pipe on reasonable commercial terms during the period from February 20, 1986, through at least approximately July 1, 1987.

In opposition to RLI's motion, Northwest Pipe offers, *inter alia*, two declarations of George Flanigan, a former professor of insurance at the Katie Insurance School at Illinois State University. Flanigan declares that Rinehimer's declaration "is inconsistent with the state of

affairs in the insurance market in the mid-1980s." By and through his first declaration, Flanigan declares that in 1984, after Superfund claims began causing insurers to incur significant losses in connection with environmental damage, the insurance industry suffered an "availability crisis" under which "[t]here was simply no pollution liability coverage available," Following widespread adoption of the Insurance Services Office's form CGL policy incorporating **[*23]** the absolute pollution exclusion in approximately 1987, Flanigan declares, the insurance market became "soft" once again and insurers once again became willing to issue commercial general liability insurance.

With specific respect to Rinehimer's declaration that, "[t]o the best of [his] knowledge," prior to mid-1987 the Travelers Companies offered CGL policies containing only an "expected or intended discharge" pollution exclusion "on comparable terms as other similarly-situated commercial liability insurers," Flanigan further declares that "[i]t is [his] opinion that the mere existence of a hypothetical Travelers CGL policy issued to a hypothetical insured does not convey much of anything." Specifically, Flanigan declares, "[t]hat the policy existed in Travelers [']portfolio certainly is not evidence of insurance availability at reasonable commercial terms for NW Pipe." By and through his second declaration, Flanigan declares further as follows:

> Underwriting depends upon the nature of the risk that is being insured. Even if travelers offered occurrence-based general liability insurance after February 19, 1986, and even if Northwest Pipe's receipts were within the acceptable range of **[*24]** business written by Travelers at that time, that does not mean that Travelers would have insured Northwest Pipe given the nature of its manufacturing business and location near the Willamette River.

In addition to Flanigan's declarations, Northwest Pipe offers evidence that the pre-1987 exclusion for damage caused by "expected or intended discharge" of pollutants contained within the Travelers Companies' CGL policies was significantly more restrictive of coverage than were other, similar exclusions contained within CGL policies offered by other insurers at the time.

I agree with Northwest Pipe that Rinehimer's declarations are not sufficient to establish as a matter of law that CGL insurance was commercially available to Northwest Pipe during the period between February 19, 1986, and approximately July 1, 1987. First, Rinehimer does not declare unequivocally that Travelers actually wrote or offered any such policy to an insured situated similarly to Northwest Pipe in Oregon during that period of time, but rather only states that to "the best of [his] knowledge" it would have done so. Second, Rinehimer does not declare that if the Travelers Companies did offer such a policy to an insured **[*25]** situated similarly to Northwest Pipe in Oregon during that period of time, it would have done so on "reasonable commercial terms," but rather only that it would have done so "on comparable terms as other similarly-situated commercial liability insurers." As both Flanigan's declarations and Rinehimer's declarations establish, during the period from 1985 to 1987, all major American commercial general liability insurers were working towards nationwide adoption of the absolute pollution exclusion drafted in 1985 by the Insurance Services Office. It is thus not possible to determine from the evidence of record whether any "similarly-situated commercial liability insurers" existed that were offering policies not containing the absolute pollution exclusion in Oregon at that time. Even if such insurers existed, the record is devoid of evidence that any such insurers were offering CGL policies without an absolute pollution exclusion "on reasonable commercial terms" in 1986 or 1987, during a time when the entire industry was moving towards adoption of the absolute exclusion. Rinehimer's declaration leaves open the possibility that, as Flanigan declares, in anticipation of the imminent adoption **[*26]** of the absolute pollution exclusion, CGL insurers were not writing new CGL policies to insureds situated similarly to Northwest Pipe in 1986 or 1987.

For the foregoing reasons, RLI has not met its burden to establish the absence of any material question of fact as to the availability to Northwest Pipe on reasonable commercial terms of commercial general liability insurance lacking an absolute pollution exclusion during the period between February 19, 1986, and July 1, 1987. I therefore recommend that RLI's motion be

denied to the extent premised on the theory that Northwest Pipe was an uninsured during that period.

CONCLUSION

For the reasons set forth above, Northwest Pipe's informal motion to strike should be denied, and RLI's motion (#148) for partial summary judgment should be denied.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When **[*27]** the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

Dated this 25th day of June, 2012.

/s/ Paul Papak

Honorable Paul Papak

United States Magistrate Judge

UNITEDSTATES DISTRICT COURT

DISTRICT OFOREGON

PORTLAND DIVISION

SILTRONIC CORPORATION, aDelawareCorporation,

Plaintiff,

v.

EMPLOYERSINSURANCE COMPANYOF WAUSAU, aWisconsinCorporation; GRANITE STATEINSURANCECOMPANY, aPennsylvania Corporation; CENTURY INDEMNITY COMPANY, aPennsylvania Corporation; and FIREMAN'S FUND INSURANCE COMPANY, aCalifornia Corporation,

Defendants.

CaseNo. 3:11-cv-1493-ST

OPINIONANDORDER

STEWART, Magistrate Judge:

INTRODUCTION

In order to allocate financial responsibilitypursuant to the terms and conditions of various insurancepolicies, plaintiff, SiltronicCorporation ("Siltronic"),brings this action for declaratoryjudgment andbreach of contract againstthe followingdefendants: Employers InsuranceCompanyof Wausau ("Wausau"), GraniteStateInsuranceCompany("GraniteState"), Century Indemnity InsuranceCompany("CenturyIndemnity"), andFireman's FundInsurance Company("Fireman'sFund"). Siltronicpurchased liabilityinsurancepolicies fromdefendants which provide coverage for costsincurred in defendingagainstclaims bythird parties, including

claims forpropertydamage. Complaint (docket #1),¶ 8. Between August 17, 1978 and January 1, 1986, Siltronicobtained itscommercial liabilitycoverage from Wausau. *Id*, ¶9. Duringthis period, with the exception ofoneyear (1985),GraniteStateprovidedumbrellaliabilitycoverage. *Id.* From 1980 through1985, Siltronicobtained blanket excess coveragefromeither CenturyIndemnity(1981) orFireman's Fund(1980, 1982-85). *Id.*

All parties haveconsentedto allow aMagistrate Judgetoenter final ordersand judgment in this casein accordancewith FRCP73 and 28 USC§ 636(c).

Siltronic has filed aMotion forPartial SummaryJudgment (docket #50) onthe limited issueof whetherWausauhas a continuingobligation to defendcoveredenvironmental claims afterexhaustingits indemnitycoverage under sixpoliciescovering1980-86. Forthe reasonsset forth below, the motion is DENIED.

BACKGROUND

Siltronicowns real propertylocated at 7200 NW Front Avenue ("Property")on the southwest shoreof theWillametteRiver in a "heavyindustrial"area. Complaint,¶¶1, 19. The Propertyis surrounded on threesides byotherindustrial properties, includinganareaownedby the Northwest Natural Gas Company("NWNatural"). *Id*, ¶19.[1] Siltronicoperatesasilicon wafer manufacturingplant at the Property. *Id*, ¶ 1. On or about December2000, a5½ mile section ofthe WillametteRiver, aportion of whichis immediatelyadjacent to the Property, was placed on the SuperfundListbythe United StatesEnvironmental Protection Agency("EPA"). *Id*, ¶19. TheSuperfundareahas sincebeen expanded to include 10 rivermiles and is known as

[1] ThePropertywasonceownedbythePortlandGasandCokeCompany("GASCO"),whichalsoowned adjacentpropertyandoperatedanoilgasificationplantthereuntil1956.BurrDecl.(docket#52),Ex.1, pp.1-2.In 1958GASCObecameNWNatural,andin1962NWNaturalsoldtheportionoftheGASCOpropertythatis now ownedbySiltronictoan unknownentity.*Id.*SiltronicacquiredthePropertyin1978. *Id*,p. 1.

the Portland HarborSuperfund Site; thePropertyis located adjacent to theapproximate centerof this area. *Id.*

Siltronicpurchased sixconsecutiveCommercialGeneralLiabilitypoliciesfrom Wausau fortheyears 1980-1986. *Id*, ¶¶8-9; Wausau'sAnswer (docket #31), ¶¶ 8-9.[2] Each ofthe six policies provides $1 millionin liabilitylimits, foratotalof$6 millionof available liability coverage. Burr Decl. (docket #52), ¶2. Each policyalso provides separatecoveragefordefense costs. *Id.* Theprovisionat issueis thesamein each of the Wausau policies andprovides the followingcoverage forpropertydamage:

> The companywillpayonbehalf ofthe insured allsumswhich the insured shall become legallyobligated to payas damagesbecause of . . .property damageto which this insuranceapplies, causedbyanoccurrence, and the companyshall havetheright and dutyto defend anysuit againstthe insured seekingdamageson account of such . . . propertydamage, even if anyof the allegations of thesuit aregroundless,false or fraudulent, and maymakesuchinvestigation and settlement of anyclaimorsuitas it deems expedient, but the companyshall not beobligated to payanyclaim orjudgment or to defendanysuit after theapplicable limitof the company's liabilityhas been exhausted bypayment ofjudgments or settlements.

Complaint, Ex. A, p. 89.[3]

On October4, 2000, theOregon Department of Environmental Quality("DEQ") issued an Order ("2000DEQOrder") to Siltronic and itsneighbor,NWNatural, requiringthem to conduct a "remedial investigation"ofthe Propertyand"implement sourcecontrol measures"as deemed necessarybythat investigation. *Id*, ¶20;BurrDecl.,¶3,Ex. 1. ThisOrder made variousfindings of fact and conclusions of lawand noted that Siltronic and NWNaturalhad refused oneor more requeststo perform remedialand sourcecontrol measures. BurrDecl.,

[2] Wausaualsoissueda policycoveringtheperiodAugust17,1978,toJanuary1, 1980,whichisnotthe subjectofthismotion.

[3] Thepartieshave notsubmittedcompletecopiesofthenumerousinsurancepoliciesatissue,buthave includedexcerptsofallthepoliciesasExhibitAtothe Complaint.Thissameclausealso appearsintheexcerpted policiesinExhibitA.

Ex. 2, pp. 4-5. It required Siltronic and NWNaturalto conduct removal and remediation actions, source control measures,and additional measures necessaryto address thereleaseor threatened releaseof hazardous substances. *Id.* Italso required Siltronic and NWNaturalto provide written noticeof intent to complywithin 10 days. *Id*, p. 5.

On December8, 2000, the EPA issued aNoticeof PotentialLiability("2000EPA Notice")which deemedSiltronicapotentiallyresponsible party ("PRP") forsediment contamination then alleged to existin a designated section ofthe WillametteRiver. Complaint, ¶21; BurrDecl.,¶4, Ex. 2. This Notice also stated that Siltronicmight"beordered to perform response actions deemednecessarybyEPA orDEQ" and "to payfor damages to,destruction of orlossof natural resources, includingthecostsofassessingsuch damages."Burr Decl., Ex. 2, p. 1. It advised that thenext stepwould bethe negotiation of an AdministrativeOrder on Consent with "willingPRPsforthe performance [of]aRemedialInvestigation/Feasibility Study."*Id*, p. 2.

On September28, 2001,theEPA issued an AdministrativeOrder on Consent for RemedialInvestigation/FeasibilityStudy("2001 EPA AdministrativeOrder"), entered into with anumberofPRPs, includingSiltronic. Complaint, Ex. F, p. 10.

On June23, 2003, Siltronicnotified Wausau ofthe EPA and DEQactionsagainst it. *Id*, ¶ 26, Ex. B. Wausau,though its administrator, Nationwide, agreed to paySiltronic's defense costssubject to a reservation of rights. *Id*, Ex. C;MooreDecl. (docket #58),¶3. Beginningon or about September 2003, Wausaubegan payingSiltronic's costsincurred in response to the EPA and DEQ demands. Complaint,¶ 29; MooreDecl., ¶ 4. As part ofthis process, Nationwidesegregated or accounted forthe payments as either "defense"or "indemnity" payments. Complaint,¶ 29.

On February5, 2004, DEQ issued an Order ("2004 DEQ Order")requiring Siltronicto perform additional remedial investigations and conduct additional sourcecontrol measures. *Id*, ¶22; BurrDecl.,¶ 5, Ex. 3. This Order specificallytargeted for remedial investigation the discoveryof releases of trichloroethene ("TCE") and its degradation byproducts, and required Siltronicto identifyand implement source controlmeasures for unpermitteddischarges or releases of TCE and its associated hazardous substances into the Willamette River. *Id*, p. 1. It also required Siltronictoprovide written noticeofits intent to complywithin 10 days. *Id*, p. 4.

On February17, 2004, Siltronic responded to the2004 DEQ Order byprovidingits NoticeofIntent to Comply("2004Intent to Complywith DEQ"). BarberDecl. (docket #57), Ex. B.Siltronic agreed to"perform such RemedialInvestigation and SourceControl Measures and additional measures as set forth [in the2004 DEQ Order]or areotherwiserequired to identify, assess and implement sourcecontrol measures, asappropriate, with respect to TCE and the hazardous substancesassociated with TCE asmaybelocated on theSiltronicProperty[.]" *Id*, p. 1.

On April27, 2006, EPA, Siltronic, and the other PRPs entered into an Administrative Settlement Agreement and Order on Consent for RemedialInvestigation/FeasibilityStudy ("2006 EPA Settlement Agreement") whichamended the 2001 EPA AdministrativeOrder. Complaint, Ex. F, p. 10.

In September orOctober2006, DEQ, Siltronic, and the otherPRPs enteredinto a Consent Judgment ("2006 DEQ Consent Judgment") to resolvethe PRPs'liabilityforcertain

remedial action costsat thePortland Harbor Superfund Site.[4] *Id*, pp. 7-41. The2006 EPA Settlement Agreement was incorporated into thisConsent Judgment. *Id*, p. 10.

InFebruary2007, Wausau and Siltronicentered into an Agreement to FundSettlement of StateClaims("WausauStateClaims Agreement")in order to fund Siltronic's shareof apartial settlement of DEQ claims forpast remedialactioncostsincurred in connection with the Portland HarborSuperfund Site. *Id*, ¶ 29, Ex. F. ThisAgreement notes the following:

> Siltronic and otherpotentiallyresponsible partieshaveagreed to settle claims threatenedbytheDEQwhich DEQalleges arise from DEQ's allegation that Siltronic and others areliable forcertain remedial action costsDEQ alleges ithasincurredathePortland HarborSuperfundSite, located in Portland, Oregon. Theterms of this settlement areset forth in a Consent Judgment entered into the record of theCircuitCourt forthe State ofOregonforthe Countyof Multnomah ("Consent Judgment"), acopyof which is attached heretoand incorporated herein as Exhibit A.

Id, Ex. F, p. 2.

Pursuant to thisAgreement,Siltronic asked Wausauto fund Siltronic's shareof the payments dueunder theterms of the2006 DEQ Consent Judgment, which amounted to $49,920.00. *Id*. Wausau agreed to paySiltronic's share,notingthat this payment was "intended to indemnifySiltronic for Siltronic's liabilityto DEQ forits past remedial action costsand interim remedial action costs, as defined bythe Consent Judgment." *Id*, p.3. Theparties further agreed that thepayment shallapplyequallyto each of thepolicies "and theamountof coverage limits remainingavailableunder each Policyshallbe reduced therefore." *Id*.

In June2008, Wausau and Siltronic entered into an Agreement toFundInterim Participation in NaturalResourceInjuryAssessment("WausauNatural ResourceInjury

[4]ThesubmittedcopyoftheConsentJudgmentdoesnotshowthedateoffiling.SinceeachofthePRPs signeditinSeptemberorOctober2006,presumablyitwasfiledshortlythereafter.Siltronicsignedthe Consent JudgmentonSeptember18,2006.Complaint,Ex.F,p. 39.

Agreement") in order to fund Siltronic's shareof theinterimpaymentmadeto theNational ResourceTrusteesunderthe terms of anInterim Fundingand Participation Agreement. *Id*, ¶ 31, Ex. G. ThisAgreement notes the following:

> ThePortland Harbor Natural ResourceTrusteeCouncil("NRT") has subsequentlydeclared that Siltronicis partiallyresponsible under the Comprehensive Environmental Response, Compensation andLiabilityAct of1980, 42 USC§ 9601 et seq. ("CERCLA")fordamages forinjuryto, destruction of, or loss ofnatural resources includingthe reasonable costs of assessingthe same. As a result, NRT has, amongotherthings, notified Siltronicof its intent to perform anInjuryAssessment, utilizingaphased approachand hasrequested participation in, and fundingof, the assessment ofnatural resourceinjuries bySiltronic and otherpotentially responsible parties[.]

Id, Ex. G, p. 2.

Pursuant to thisAgreement,Siltronic askedWausauto payits shareof the interim paymentdueto NRT, which amounted to $27,777.78. *Id.* Wausauagreed,notingthat this payment was "intended to indemnifySiltronic for Siltronic's liabilityto NRT foraportion of the natural resourceinjuryassessment costs underCERCLA Section 107." *Id*,p. 3. Theparties furtheragreed that thepayment shall applyequallyto each of thepolicies "and the amountof coveragelimits remainingavailable under each Policyshall bereduced therefore." *Id.*

In September 2009, EPA, NWNatural, and Siltronic entered into anAdministrative Settlement Agreement and Order on Consent for Removal Action ("2009 EPA Settlement Agreement") with respect to an areaknown as theGASCO Sediments Sitewhich is located within the Portland HarborSuperfund Site. Complaint,¶ 23; BurrDecl.,¶5, Ex. 4. This Agreementrequires that Siltronic and NWNatural perform"a response action investigationand designactivities" and pay"responsecostsincurred bythe United Statesand Tribal Governments"related tothe GASCO Sediments Site. BurrDecl., Ex. 4, p. 3. Thestatedgoal is to "lead ultimatelyto afinal remedy"that "will beimplemented under a consent decree

followingEPA issuanceofthe ROD" (Record ofDecision), but EPA reserved its right to order Siltronic "to perform response actions at theGASCO Sediment Siteunder CERCLA's order authorization either beforeor after aRODis issued." *Id*, p. 21.

Sometimein September 2009, Wausaudeclared exhaustionofits coveragelimitsand refused to payanyadditional defense costs. Complaint, ¶ 32; Burr Decl., ¶8. Although ithas provided no accounting,Wausau contends that between 2003 and 2009, itnot onlypaid the full $6 millionin indemnitycosts,but also paid $7,699,837.00 in defensecosts, includingpayments to attorneys,environmental consultants,and others. MooreDecl., ¶ 7. Wausaumadethese payments at Siltronic's request. *Id*; BurrDecl., ¶7.

Upon Wausau's declaration of exhaustion, GraniteState, Siltronic's umbrellaliability insuranceprovider, accepted Siltronic's tender for coveragesubject to an express reservation of its right to contest Wausau's exhaustion claim. Complaint, ¶33. At somepoint, GraniteState concluded that its payment of Siltronic's defenseand indemnitycostswas premature since Wausaustillhad a continuingobligation to paythese costs. *Id*, ¶ 34;BurrDecl., ¶ 8. Siltronic again tendered paymentofdefense coststo Wausau, but Wausaurejected thetenderand refused to payanycontinuingdefense costs. Complaint, ¶ 35; Burr Decl., ¶8. These costscontinueto accrue. Complaint, ¶ 38.

On December9, 2011, Siltronic filed this action for declaratoryjudgment and breach of contract againstallof its insurers. Granite Stateand Wausauhave filedcross claims againsteach other, and Wausauhasalso filed counterclaims againstSiltronic. All parties seek adeclaration ofthe various rights andresponsibilities under theterms of the various insurancepolicies.

///

///

STANDARDS

FRCP56(c) authorizes summaryjudgment if"nogenuineissue" exists regarding any material fact and "the movingpartyis entitled to judgment asamatterof law."Themoving partymustshowan absenceof an issueof material fact. *CelotexCorp.v.Catrett*, 477 US 317, 323 (1986). Oncethe movingpartydoes so, thenonmovingpartymust"go beyond the pleadings" and designatespecific facts showinga"genuine issue for trial." *Id* at 324, citing FRCP56(e).Thecourtmust"not weigh theevidenceor determinethe truth of the matter, but only[determine]whetherthereis agenuineissuefortrial."*Balint v. Carson City, Nev.*, 180 F3d 1047, 1054 (9thCir 1999)(citation omitted). A "'*scintilla*of evidence,'or evidencethat is 'merelycolorable'or 'not significantlyprobative,'"does not present agenuine issue ofmaterial fact. *United Steelworkers of Am. v. Phelps DodgeCorp.*, 865 F2d 1539, 1542 (9thCir), *cert denied*, 493 US 809 (1989) (emphasis in original)(citation omitted).

Thesubstantivelawgoverningaclaim or defensedetermines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F3d 1130, 1134 (9thCir 2000) (citation omitted). The court mustviewthe inferencesdrawn from the facts "in thelight most favorableto thenonmoving party." *Farrakhanv. Gregoire*, 590 F3d 989, 1014 (9thCir 2010), citing*Anderson v. Liberty Lobby, Inc.*, 477 US 242,255 (1986).

DISCUSSION

Siltronicseeks partial summaryjudgment on its FirstClaim fordeclaratoryjudgment against Wausau and asksthe court todeclarethatWausauhas a continuing dutyto defend Siltronicinconnection with its cleanup responsibilities at thePortland Harbor SuperfundSite. Wausauopposes summaryjudgment on theground thatbymaking$6 millionin indemnity

paymentson behalf ofSiltronic between 2003and2009, the liabilitylimits of thesixpolicies are exhausted, thusterminatingany continuingdutyto defend Siltronic.

OnceWausau's dutyto defend ends,GraniteStateisobligated to defend Siltronicunder its umbrellainsurancepolicies. Which insurer provides adefense mayseem to bea relatively insignificant issue to Siltronic. However, Granite Statetakes the position that it has asingle, combined indemnity/defense limit, suchthat everydollar spent on defenseis oneless dollar available for indemnity. Therefore, if Wausauhasno continuingobligation to defend, then Siltronic faces the prospectat somepointofpayingits own defensecosts, which could be substantial.

Resolution of this issue turns onhow to interpret thepolicyprovision whichstates that Wausau "shall not beobligated topayanyclaimor judgment orto defendanysuit*after the applicable limitof the company's liabilityhas been exhausted bypaymentofjudgments or settlements*."Complaint, Ex. A, p. 89 (emphasis added). Siltronictakes the position that the phrase "judgments and settlements" is notambiguous andthat Wausaumustcontinueto defend Siltronicin theongoingproceedings with DEQ and EPA untilthose proceedings are finally resolved though "judgments and settlements." Given the largenumber of PRPs involvedin the Portland HarborSuperfund Site,the parties predict thatsucha resolution maytakeyears.

Siltronic concedesthat itis legallyobligated to paycleanup costsand thatbetween 2003 and 2009, it sought and receivedreimbursement of variouscleanup costsfrom Wausau. Siltronic also acknowledges that ifWausauhas indeed paidmorethan $6millionin indemnitycosts, it need not continue to paythose costs. However, thedutyto defend is distinct from the dutyto indemnifyandrestsonwhether Wausau's indemnity"liabilityhas beenexhausted bypayment of judgments or settlements." Siltronic focuses its argument ongeneral insurance contract

interpretation, askingthecourt to giveeffect to theplain languageof thepolicy. Wausaudoes not appearto contend that thelanguage at issue isambiguous, insteadarguingthat Wausau's payment of environmentalcleanupcostsmandated byDEQ and EPA to dateis the equivalent of the "payment ofajudgments orsettlements."

Theparties do not dispute that Oregon law applies. InOregon, the interpretation of an insurancepolicyis a question oflaw. *Hoffman Construction Co. v. Fred S. James&Co.*, 313Or 464, 469, 836 P2d 703, 706 (1992). When interpretingan insurance contract, the court's primary task is to "ascertain theintention ofthe parties"throughanalysisof theterms and conditions contained in thepolicy. *Id*; *Holloway v. RepublicIndemn. Co. of Am.*, 341Or642, 649, 147 P3d 329, 333 (2006). If thepolicyitself does not definethe termorphraseat issue, then the court mustconsider whetherithas a plain meaning. *Holloway*, 341 Or at 650, 147 P3d at333. If only oneinterpretationis plausible, then thecourt will applythat meaningand proceed nofurther. *Id.* Ifthe term or phrasehasmorethan oneplausibleinterpretation, then thecourt will look to the "particular context inwhich that phraseis used inthe policyand the broader context of the policyasawhole." *Id*, 341 Or at 650, 147 P3d at334. If thephraseis stillambiguous, then "any reasonabledoubt as to theintended meaningofsuch atermwillberesolved againstthe insurance company."*Id.*

Because the phrase"exhausted bypayment ofjudgments or settlements"is notdefined bythe policies, thecourtmustlook toits plain meaning. Though this phrasemayseem straightforward at firstglance, thefactcannot be overlooked that this is notan ordinaryinsurance coveragecase, but instead involvesan environmental action byDEQ andEPA. As summarized byanother court:

> In the typical coverage case, aprimaryinsurer validlyexhaustsits indemnitylimits when itpaysasettlement orjudgment resolvingthird

> partyclaims . . .In anenvironmental action likethis onewheretheinsured is faced with an RAO (Remedial Action Order), however, thereis no settlement or judgment in the usual senseof thewords. Forthesereasons, itis difficult to ascertainpreciselyat which pointindemnitylimits maybe validlyexhausted.

County of Santa Clara v. United States Fidelity&GuarantyCo., 868 FSupp 274, 277 (NDCal 1994).

Consequently, in the context of an environmental action,the phrase"exhausted by payment of judgments orsettlements"isambiguous because it issubject tomorethan one reasonableinterpretation. The court must therefore consider thecontext in which the term is usedin thepolicyas wellas the "broadercontext of thepolicyas a whole." *Holloway*, 341 Or at 650, 147 P3d at334.

Oregon hasrecognizedthedifficultythat arises ininterpretinginsurance contracts involvingenvironmentalclaimsand has adoptedrules of constructionfor resolvingand interpretingcoverage under thesecircumstances. In particular,for the purposeof compelling coveragein ageneral liabilityinsurancepolicy,ORS465.480treatsenvironmental claims as if theywerelawsuits:

> Anyaction oragreement bythe DEQ or theEPAagainstor with an insured in which theDEQ orthe EPA in writing*directs, requestsor agrees* that an insured take action with respect tocontamination within the Stateof Oregon is equivalent to a suit or lawsuit as thoseterms as used in anygeneral liabilityinsurancepolicy.

ORS465.480(2)(b)(emphasisadded);[5] *seealsoSchnitzer Invest. Co., v. Certain Underwriters at Lloyds of London*, 197 Or App 147, 155-57, 103 P3d 1162,1167-69 (2005),*aff'd*, 341 Or128, 137 P3d 1282 (2006); *St. Paul Fire&MarineIns. Co., Inc. v. McCormick&Baxter Creosoting Co.*, 126 OrApp 689, 700-02, 870 P2d 260, 266, *modified on reconsideration*, 128 OrApp 234,

[5] Thisstatute wasadoptedbytheOregonlegislaturein1999,manyyearsafterthepoliciesatissuewere written.

875 P2d 537 (1994), *aff'd in part, rev'd in part on other grounds*, 324 Or184, 923 P2d 1200 (1996).

Thestatute alsoprovidesthat an insurer "maynot be required to paydefenseor indemnitycostsin excess of the applicable policylimits[.]"ORS465.480(3)(d). It creates a "rebuttable presumption"that "the costsof preliminaryassessments, remedial investigations, risk assessments or other necessaryinvestigation"are "defense costs"and that"the costsof removal actions or feasibilitystudies" are "indemnitycostsand reducethe insurer'sapplicable limitof liabilityon the insurer's indemnityobligations." ORS465.480(6)(a)&(b).

Between 2000 and 2009,the EPA and the DEQ issuedat leastthreewrittenorders (2000 DEQOrder, 2001 EPAAdministrativeOrder,and 2004 DEQOrder) andentered intotwo agreements (2006 EPA Settlement Agreement and2009 EPA Settlement Agreement)directing orrequiringSiltronictotakevariousactions regardingcontamination at theProperty. Consequently, theseDEQ and EPA actions are "equivalent to asuitor lawsuit" under ORS465.480(2)(b).

Thequestion then becomes whether Wausau'spayment of$6 millionover aperiod ofsix years to satisfySiltronic's remediation obligations pursuantto thoseDEQand EPA actionsis equivalent to the "payment of judgments or settlements" forthe purposeofexhaustingthe liabilitylimits in Wausau's policies. Despiteitsundisputed legal obligation to paythose interim remediation costs, Siltronic argues that Wausau cannot terminate its defenseobligation until all ofthe issues between Siltronic and allof theother PRPs involved incleanup of the Portland HarborSuperfund site are resolved in afinal Consent Decree.

Several environmental cases that arehelpful to theanalysis. In the most closely analogous case, the Washington Supreme Court heldthat the insurer's"payment offunds for

costsof complyingwitha consent decreeis thefunctional equivalent ofasettlement,"thereby terminatingthat insurer'sdutyto defend. *Weyerhaeuser Co. v. CommercialUnion Ins. Co.*, 142 Wash 2d 654, 692, 15 P3d 115, 136 (2001). Washington law, as does Oregon law, provides for coveragewhenan insured cooperates with an environmental agencyin thecleanup ofhazardous waste even if no formal lawsuit has beenfiled. *Id*, 142 Wash 2d at 691, 15 P3d at 135. Although the court concluded that payment"for cleanup costsimposedviaconsent decrees . . . is the equivalent of exhaustion bysettlement" underthe policy, it denied summaryjudgmentto the insurer dueto afactualissue. Because"thereisno complete accountingofthe costsof these consent decrees," the court could notdeterminewhether the insurer actuallypaid thefull amount ofthe policylimit. *Id.*

A Texas district court came to asimilar conclusionthat cleanup costsconstitute the payment of judgments orsettlements, though therewas no dispute about entryofa final judgment orsettlement or whetherthe allocation of costsmet the indemnitylimit.

> [T]he court has alreadyconcluded that cleanup costsconstitute property damagethat depletes thepolicylimits. Thus, bypaying$1million of the cleanup costs, [the insurer]has used up the applicable limitof insurancein the payment of judgments or settlements . . . After [the insurer]exhausted the primarypolicylimits, it had neither thedutynorthe right to defend [the insured].

Mid-Continent Cas. Co.v. Eland, No. Civ. 06-576-D, 2009 WL3074618,at *9 (ND Tex Mar. 30, 2009).

Consideringthe slightlydifferent question ofwhether an excess insurerhad adutyto defend, another district court facedmanyof thesame issues presented bythis case. *Pacific Emp'rs Ins. Co. v. Servco Pacific Inc.*, 273FSupp 2d 1149 (D Haw 2003). Inan environmental pollution action, the plaintiff incurredat least $500,000.00 in remediation costsequal tothe indemnitylimit on theprimarypolicy. Theprimarypolicyhadidentical languagetoWausau's

policies at issue here, though theexcess carrier's policyhad different languageto trigger itsduty to defend. *Id*at 1153-54(discussingthe differencebetween the primarypolicywhich provided exhaustion after "payments of judgment orsettlements" and the excess insurer's dutyto defend which arosewhen theprimaryinsurer's obligationwas "exhausted becauseof. . . property damage."). Theprimaryinsurer denied that it hadan obligation to defend or indemnify the plaintiff, but nonethelessentered into a$1.5 million settlement toresolve all coveragequestions. Because remediation anddefenseefforts werestillongoingat thetime ofthesettlement,the insured looked to its excess insurer for further defense and indemnitycoverage. Theexcess insurerdeclined to provide coverage,contending thatthe excess policyhad notbeen triggered because theprimaryinsurer did notexhaust itspolicylimits bypaying a "judgment or settlement" ofthe underlyingenvironmental claim. The court was"unconvinced"bythis argument. It reasonedthatif an excess carrier's duties werenot triggered until theunderlying claims werefinallysettled, "then the excess carrier's dutyto defend wouldbeillusory. Requiringthe primarycarrier first to litigate theunderlying claim to judgment, or makethe payments in settlingthe claim, would mean the excess carrierwould then havenothingto defend[.]"*Id* at 1154.

The court ultimatelyconcluded, followingthe reasoningof*Weyerhaeuser*,that the settlement exhausted the primarypolicywhich triggered theexcess insurer's duties. Inreaching this conclusion, the court interpreted the languagein theprimarypolicyreferringto"judgments orsettlements" as stating"the commonsenseproposition that if [the primaryinsurer]pays its limits byjudgment orsettlement– *i.e.*, if theunderlyingaction is gone– then [the primary insurer's]duties have ended. It might also refer to settlements, like the[onehere], with the insured."*Id* at 1154.

It also distinguished other caseswhich "areprimarilyconcernedwith 'premature' tenderingof indemnitylimits.""[T]heprimaryinsurer cannot extinguish its defense obligation simplybytenderingits indemnitylimits to the insured and walking awayfrom the fray– a temptingmaneuver whenitappears that defense costswillexceed indemnitylimits." *Id* at 1155, quoting*County of Santa Clara*, 868 FSupp at 277. Incontrast, the primaryinsurer'ssettlement was notsucha "prematuretender" sinceit occurred over threeyears after theinsuredoriginally tendered paymentto theprimaryinsurerand wellafter it had incurred theliabilitylimit in remediation costs. Because "[n]othingindicates thesettlement was collusiveor not a resultof a good faith compromise,"the court concluded that it exhausted the primarypolicy'sindemnity limits. *Id.*

Theproblem of "prematuretender"or"dumping"is asignificantconcern in the context of environmental actionswheredefense costsmaywellexceed indemnitylimits. Applying California law, adistrictcourt concluded that a primaryinsurer's paymentofthe policylimits to the insured beforeapproval of aremediation plandid not"constitute avalid exhaustion of primarycoverage"because "the payment must bemadeto satisfyan obligation arisingout of either an adjudication ora compromiseof athirdpartyclaim." *County ofSanta Clara*, 868 FSupp at278. TheRemedial Action Order ("ROA")at issue onlyrequired the insured to investigateand developaremediation plan forcontamination at the site. Even though noncompliancewith theRAOwould resultin stiffstatutorypenalties, theinsured did notyet have any"liabilityto a third party"dueto itsrightto appeal theRAO andrefuseto complybased on various defenses. *Id* at 278. However, onceanapproved remediation planwasin place, it would become "the functional equivalent of afinal adjudication ofliabilitysufficient to exhaust primaryindemnitylimits and trigger [the insurer's]defense obligation." *Id*at 279. At that point,

the insurer "can tender its policylimits to the [insured]and therebyextinguish its dutyto defend." *Id* at 280.

The common threadrunningthroughout thesecases isthatan insurer maynot exhaust its indemnitylimits untilasettlement or judgmentofsome kindimposes alegal obligationon the insured to a third party. In*Weyerhaeuser*, the insured incurred indemnitycostsbycomplying with a consent decree. 142 Wash 2d at 690-91, 15 P3dat 134-35. In*PacificEmployers*, the insurer and the insured had entered into asettlementagreementto resolve the coverage issues. 273 FSupp2d at 1154. And in *Countyof Santa Clara*, indemnitycostswould occur oncethe RAO's remediation planwas approved. 868 FSupp at 277.

Siltronic contends that merelypayingtheremediation costs required bytheDEQ and EPA orders andagreementsprior to entryof a final Consent Decree is notsufficient toamountto "exhaustion bypaymentofjudgments or settlements." However, Siltronicoverlooks the fact that theseordersand agreementsinclude languageof finalityand an intent to createlegally enforceablerightsand responsibilitiesto a third party. *See*BarberDecl., Ex. B, pp. 1-2, Complaint, Ex. F, pp. 3-4; Burr Decl., Ex. 4, p. 55.

At oral argument, Wausaurepresented that itmade the majorityof its indemnity payments in response to the2004Intent to Complywith DEQ,filedin responseto the2004 DEQ Orderwhich required Siltronicto identifyand implement sourcecontrol measuresfor the cleanup ofTCEand associated hazardous substances on theProperty. Burr Decl., Ex. 3. Siltronic responded that the remediation performedin response to that Order was just a small pieceof theongoing cleanup effortsinvolvingmanyotherPRPsand that its finalliabilitywill not be known until a much later date. However, environmental actionsoften do not resultin *final*judgments or settlementsfordecades becausethe cleanupis a longprocess involvingmany

parties makingclaims againstone another. Siltronic's argument essentiallyboils down to asking the court to insert theword "final"before "judgmentsorsettlements."While this is one plausibleinterpretation of the clause, itis not themostreasonable interpretation after takinginto consideration the "particular context in which [thephrase]is used in thepolicyand thebroader context of thepolicyasawhole." *Holloway*, 341Or at 650, 147 P3d at 334. Consequently,by payingSiltronic's undisputed liabilityto third parties,Wausauhas been payingindemnitycosts in response to "judgments or settlements" as thoseterms areused in thepolicies.

As noted above,aninsurer maynot prematurelytender thepolicylimits in an attemptto avoid prolonged defensecosts. Here,as in*PacificEmployers*, thereis no evidence that Wausau's payment oftheindemnitylimits wasanythingotherthan ingoodfaith. The underlying environmental actionhad been ongoingfor nineyearsbefore Wausaudeclared exhaustion ofthe coveragelimits. Additionally, and perhaps most importantly, Wausau accepted tender forcoverageat thetime that Siltronicgavenoticeoftheenvironmental contamination actions againstit. Within two months,it began payingthecosts Siltronicincurred in response to DEQ's and EPA's variousdemands. It continuedto paythosecostsforsixyearsandeven entered into two agreementswith Siltronic to paya total of nearly$78,000.00 forSiltronic's shareof various remediation costsas assessed bytwo different agreements,onewith theDEQ (WausauStateClaims Agreement)and onewith theNRT(WausauNatural ResourceInjury Agreement). Complaint, Ex. F, p. 2; Ex. G, p. 2.Consequently, nothingabout this situation supports a conclusion that Wausau tendered thefullamountof theindemnityliabilityin an attemptto avoid havingto paydefense costs. In fact, byWausau's calculations, ithas spenteven morein defense costs($7,699,837.00) than in indemnitypayments ($6million).Thus, ithas paid almost double the policy's liabilitylimits. Accordingly,as longas Wausauhas indeed paid

at least $6million in indemnitypayments at Siltronic's request, its "liabilityhas been exhausted bythe payment of judgments or settlements" andhas no continuingdutytodefend.

However, this does notnecessarilyend the analysis. Otherthan Wausau'sown statement that ithas paid the fullindemnityamountandthestatements in two Agreements attached to the Complaintas toamountspaid, thereis no otheraccountingofits paymentsin the record. None ofthe documents submitted contain acomplete accounting ofthe total indemnitycostspaid by Wausau. Thetwo Agreementsthat provide dollarfigurestotalless than $78,000.00, which is a far cryfrom the $6 millionliabilitylimits.

Forpurposes of this motion,Siltronic does notcontest Wausau's accountingofits indemnitypayments. It allegesonlythat GraniteStatedisagrees with Wausau's accounting, Complaint,¶34; BarberDecl., Ex. A. At somepoint, itwillbenecessaryto determinewhether Wausauhas actuallypaid$6millionforindemnitycosts. However, thenarrowlegal issue presented bythis motion is whether, assumingthatWausau has paid $6 million in indemnity costs, ithad paid"judgments or settlements" as those terms areusedin thepolicies. Based on the assumption that Wausauhad paid $6 million in indemnitycosts, this court concludes that Wausauhas exhausted its indemnityliabilitybypayment of"judgments orsettlements" and has no continuingdutyto defend Siltronic. Accordingly, Siltronic's motion seekingadeclaration to the contraryis denied.

At oral argument, Wausau askedthiscourt, in theevent that it denied Siltronic's motion, to *sua sponte*grant summaryjudgment in its favoron Siltronic's claim fordeclaratoryjudgment. Such adeclaration is within the court's power. *SeeColumbia River Rentals, LLC v. Phillips*, No. Civ.08-395-HU, 2009WL632933, at *4 (DOrJan. 14, 2009), citing*Kassbaum v. Steppenwolf Prods., Inc.*, 236 F3d 487, 495 (9thCir 2000);*Fordycev. City of Seattle*, 55 F3d 436, 442 (9thCir

1995). Given that the purposeof this motionistoresolve Wausau's legal obligations with regard to itscontinuingdutyto defend, itseemsareasonable and efficientcourseofaction to grant summaryjudgment inWausau's favor on this limited issue.

ORDER

Siltronic's Motion for Partial SummaryJudgment(docket #50) isDENIED,and Wausau is entitled to a declaration that, assumingithas paid $6 million in indemnitycostsincurred by Siltronicpursuant to DEQ's andEPA's Ordersand Agreements,it has exhausted itsliabilityin the sixpolicies at issue"bypayment ofjudgments or settlements" and, thus, has no continuing dutyto defend Siltronic.

DATEDFebruary4, 2013.

s/ JaniceM. Stewart

JaniceM. Stewart
United States Magistrate Judge

Contents of Tab 6 removed to limit size of exhibit

Thomas A. Gordon, OSB No. 741172
tgordon@gordon-polscer.com
Andrew S. Moses, OSB No. 983009
amoses@gordon-polscer.com
GORDON & POLSCER, L.L.C.
Suite 650
9755 S.W. Barnes Road
Portland, OR 97225
Telephone: (503) 242-2922
Facsimile: (503) 242-1264

Attorneys for Defendant St. Paul Fire and Marine Insurance Company

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CENTURY INDEMNITY COMPANY, a Pennsylvania corporation,

Plaintiff,

v.

THE MARINE GROUP, LLC, a California limited liability company, as affiliated with NORTHWEST MARINE, INC., an inactive Oregon corporation, as affiliated with NORTHWEST MARINE IRON WORKS, an inactive Oregon corporation,

Defendants.

THE MARINE GROUP, LLC, a California limited liability company, as affiliated with NORTHWEST MARINE, INC., an inactive Oregon corporation, as affiliated with NORTHWEST MARINE IRON WORKS, an inactive Oregon corporation; and BAE SYSTEMS SAN DIEGO SHIP REPAIR,

Case No. 3:08-CV-01375-AC

ST. PAUL FIRE AND MARINE INSURANCE COMPANY'S RESPONSE TO STATE OF OREGON'S [PROPOSED] MEMORANDUM ON CONSTITUTIONALITY OF THE OREGON ENVIRONMENTAL CLEANUP ASSISTANCE ACT

INC., a California corporation,

Third-Party Plaintiffs,

v.

AGRICULTURAL INSURANCE COMPANY, et al.,

Third-Party Defendants.

and

STATE OF OREGON

Intervenor

The State of Oregon misconstrues the arguments of Third-Party Defendant St. Paul Fire and Marine Insurance Company ("St. Paul") regarding the Oregon Environmental Cleanup Assistance Act ("OECAA"). The State asserts that St. Paul wants the Court to rule that a portion of the OECAA is unconstitutional. This is incorrect. As stated plainly in St. Paul's Memorandum in Opposition to Third Party Plaintiffs' Motion for Summary Judgment ("St. Paul Memo in Opp.," pp. 30 – 36), the constitutionality of the OECAA as written and enacted is not in dispute here. Rather, St. Paul argues that the Court should not rely on Third Party Plaintiffs' interpretation of the OECAA to define "suit" as used in the St. Paul insurance policy at issue to mean something other than what the policy and the OECAA actually say. Adopting Third Party Plaintiffs' interpretation – *i.e.*, that the OECAA supplies a definition of "suit" for the St. Paul policy that includes agency information request letters – would amount to an unconstitutional application of the statute because it would contravene the very point the State makes: that the OECAA only applies when not contrary to the intent of the contracting parties. (ORS 465.480(7); State's Memorandum, p. 3).

I. There Is No Dispute That The OECAA As Enacted Is Constitutional.

The State devotes most of its Memorandum to reciting the history and purposes of the OECAA in defense of its constitutionality. St. Paul does not take issue with any of that discussion, other than noting its irrelevance because St. Paul is not contesting the constitutionality in general of the statute. The State and St. Paul are in agreement that both the U.S. and Oregon Constitutions prohibit laws impairing the obligations of contracts, and that the determination whether a statute violates the Contracts Clause is guided by the factors set out by the U.S. Supreme Court in *Energy Reserves Group v. Kansas Power and Light*, 459 US 400, 410-411, 103 S.Ct. 697 (1983). (*See* St. Paul Memo in Opp., pp 30, 31 and State's Memorandum, pp. 4, 5).

Where the State's arguments go astray is in mischaracterizing St. Paul's position. The State contends St. Paul is arguing that application of the OECAA impairs contracts. (State Memorandum, p. 5, referencing St. Paul Memo in Opp., p. 32). The State takes St. Paul's argument out of context and turns it into a blanket generalization. What St Paul actually argues is that if one were to apply the OECAA as interpreted by Third Party Plaintiffs in this case – construing "suit" to include agency information requests – that would constitute an overbroad impairment of the contract between St. Paul and the alleged predecessors in interest of Third Party Plaintiffs. (See St. Paul Memo in Opp., p. 32). Furthermore, St. Paul does not argue (as the State contends in its Memorandum at p. 9) that the OECAA lacks a legitimate purpose. St. Paul is not challenging any of the stated purposes of the OECAA. St. Paul is challenging Third Party Plaintiffs' interpretation and application of the OECAA to bolster its contention that the agency correspondence they received constitutes a "suit." (See St. Paul Memo in Opp., pp. 32-36).

II. There Is No Ambiguous Term or Intent of The Parties Warranting Invocation of the OECAA's Rule of Construction.

The language of the St. Paul policy at issue only potentially requires the insurer to defend a "suit," not "claims." (See Exhibit 5 to Rycewicz Decl, Docket # 307-5, p. 23). The policy thus includes an express distinction between "suits" and "claims." *Id.* Under Oregon law, the mere fact that a term is not specifically defined in a policy does not necessarily lead to the conclusion that the intent of the parties cannot be determined. *See, Hoffman Construction Co. v. Fred S. James & Co.,* 313 Or 464, 836 P.2d 703, 706 (Or 1992); *Clinical Research Institute of Southern Oregon, P.C. v. Kemper Ins. Cos.*, 191 Or App 595, 84 P.3d 147, 151 (Or App 2004). The intent of the parties here can be determined through analysis of the provisions of the policy. The posture of this case is that Third Party Plaintiffs are not faced with responding to or complying with any agency directives to undertake environmental remediation. They have not been requested to do anything other than provide information. Accordingly, there is not even a "claim" pending, much less a "suit" triggering defense obligations under the St. Paul policy.

Applying the analytical framework for contract interpretation set out by the Oregon Supreme Court in *Yogman v. Parrott*, 325 Or 358, 361-64, 937 P.2d 1019 (1997),[1] there is no need to resort to judicial or statutory rules of construction unless the Court determines in the first instance that a disputed term is indeed ambiguous. That initial determination derives from examination of the contract terms in question in the context of the agreement as a whole. *Id.* at 361. Employing that analysis, the parties to the St. Paul insurance contract clearly intended to differentiate between "suits" and "claims," and limit the insurer's duty to defend to "suits."

---

[1] It is, however, St. Paul's position that *Hoffman Construction* is the appropriate case for insurance contract interpretation.

In addition, the State does not argue that the St. Paul policy is in fact ambiguous. The State is making only the general argument that the OECAA can be used to supply a definition of "suit" to an insurance policy when the term is unclear and application of the OECAA would not contradict the intent of the parties. Adopting the view of Third-Party Plaintiffs here – that the EPA, Trustee Council and convening neutral's letters constitute a suit for purposes of defense obligations under the St. Paul policy – would result in an interpretation contrary to the intent of the contracting parties.

The intent of the parties is presumed to correspond to the plain meaning of the policy language. *See, e.g. North Pacific Insurance Company v. American Manufacturers Mutual Insurance Co.*, 200 Or App 473, 478, 115 P.3d 970 (2005); *Mutual of Enumclaw Insur. Co. v. Rohde*, 170 Or App 574, 578-579, 13 P.3d 1006 (2000). Both before and after the enactment of the OECAA, Oregon courts have concluded that the plain meaning of "suit" does not entail just any interaction between administrative agencies and insureds, but rather agency actions where the insured faces imminent imposition of liability and remediation obligations. The presumed intent of the parties, therefore, to both pre- and post-OECAA policies is that "suits" do not include requests for information or voluntary participation in Superfund groups because those activities do not seek to impose liability or demand cleanup measures. The terms of the OECAA do not alter this intent. *See Certain Underwriters at Lloyd's London v. Massachusetts Bonding & Insur. Co.*, 235 Or App 99, 121, n.13, 230 P.3d 103(2010) (describing the OECAA as having codified the "same construction" of the term "suit" as Oregon courts had reached in previous cases). Third-Party Plaintiffs have not shown that application of the OECAA's rule of construction to achieve their interpretation of what amounts to a "suit" would not contravene the plain intent of the parties to the St. Paul policy.

III. Even If The OECAA Were To Apply, Routine Agency Information Requests Do Not Come Within The Statute's Definition of "Suit."

The OECAA supplies a definition of "suit" for purposes of the duty to defend against an agency's requirement to remedy environmental contamination:

> "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.
>
> (ORS §465.480 (1)(a))

ORS §465.480 (2)(b) imposes as a "rule of construction" in actions between an insured and an insurer regarding coverage for environmental investigation and remediation costs ("including the existence of coverage for the costs of defending a suit against the insured for such costs…"):

> Any action or agreement by the [DEQ] or the [USEPA] against or with an insured in which the [DEQ] or the [USEPA] 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.

The statute plainly requires either an "action" by EPA against the insured, or an "agreement" between EPA and the insured to implement some action to address contamination. In the present case, there has been no "agreement" between EPA and any Third-Party Plaintiffs to take any action regarding contamination within the Portland Harbor Superfund confines. The 104(e) request for information letters, General Notice letters, and correspondence from the convening neutral and Trustee Council do not direct Third-Party Plaintiffs to take any action to investigate, remediate or clean up contamination. The OECAA requires adversarial compulsion, an imposition on the insured that is greater than a mere suggestion of the possibility of future liability. The collection of letters that Third-Party Plaintiffs seek to categorize as a "suit" are nothing more than a request to cooperate in an investigation by providing information, not an

order to take action to address contamination.

IV. Third Party Plaintiffs' Interpretation Of The OECAA Raises Constitutional Concerns, Not The Language Of The Statute Itself.

Under the three-step analysis of *Energy Reserves Group*, determining whether a statute's application violates the Contracts Clause involves : (1) ascertaining whether there is a substantial impairment of contract; (2) if so, "the State, in justification, must have a significant and legitimate public purpose behind the regulation"; and (3) considering 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." 459 U.S. at 411-12 (citations omitted).

In the present case, the particular manner in which the Third Party Plaintiffs would apply the OECAA to the St. Paul policy is what invites constitutional problems under the *Energy Reserves Group* analysis. The St. Paul policy recites that the insurer is only required to defend a "suit," as opposed to a "claim," and grafting into the policy Third Party Plaintiffs' view of "suit" under the OECAA as including EPA Section 104(e) letters or Trustee Council invitations to participate in site studies would substantially impair the agreement of the original parties by altering the scope of bargained-for defense rights. *See* St. Paul Memo in Opp., pp. 32-33. To construe the statute as including the Section 104(e) letters or Trustee Council letters does present a substantial impairment because it far more of an expansive interpretation than intended by the parties or the statute. Furthermore, the fact that the insurance industry in general is heavily regulated is not determinative. *Western Nat'l Mut. Ins. Co. v. Lennes (In re Worker's Compensation Refuned)*, 46 F.3d 813, 819-20 (8th Cir. 1995).

Adopting Third Party Plaintiffs' expansive interpretation of "suit" under the OECAA would exceed the legitimate purpose of the statute as enacted by including within its ambit

responding to mere inquiries regarding site investigation. The OECCA was intended to address situations where a business is being pursued for cleanup of environmental contamination and seeks "defense or indemnity submitted under a general liability insurance policy." *See* O.R.S. § 465.475(1); St. Paul Memo in Opp. pp. 33-34. The agency letters Third Party Plaintiffs received seek information from entities that may or may not ultimately be determined to be liable for contamination. Such requests do not fall within the stated purpose of the statute. Nor would it be reasonable and appropriate to the fulfillment of that purpose to apply the statute in the manner urged by Third-Party Plaintiffs. The statute's stated purpose is to encourage parties to cooperate with environmental agencies in remedying contamination. Even reviewing the legislative history materials cited by the State indicates that the statute's language was not intended to apply to letters requesting information. Thus, reading the statute to include the Section 104(e) or General Notice or Trustee Council letters would be beyond the statute's own legitimate public purpose behind the regulation.

The agency letters in this case do not constitute an agreement to remedy contamination. Construing ORS § 465.480(2)(b) to supplant this intent by requiring defense of Section 104(e) or General Notice or Trustee Council letters would exceed what is appropriate and reasonable to achieve the legislation's goal, because those types of agency communications are not necessary to encourage parties to enter into agreements with the EPA or State DEQ to clean up a contaminated site. *See* St. Paul Memo in Opp., pp. 34-35.

V. CONCLUSION

The State errs in positing that St. Paul seeks to challenge the constitutionality of the OECAA. The OECAA does not need to be invoked in this case to provide a meaning for the term "suit" in the St. Paul policy, because the term is not ambiguous in the context of the policy

as a whole, which clearly distinguishes between "suit" and "claim." Even if the OECAA is deemed applicable to the St. Paul policy, its proper and constitutional application does not yield the result Third Party Plaintiffs contend. The OECAA does not define the type of correspondence Third Party Plaintiffs have received from agencies as constituting a "suit." Adopting Third Party Plaintiffs' construction would result in an unconstitutional application of the statute for the reasons discussed herein and in St. Paul's Memorandum in Opposition to Summary Judgment, pp. 30-36. There is no need to traverse the path of potential constitutional infirmity, since (a) if the Court rejects Third-Party Plaintiffs' overbroad application of O.R.S. § 465.480(2)(b), there will be no need to address and decide any constitutional questions, and (b) a court should construe provisions of a statute in a manner that avoids constitutional conflicts. *Westwood Homeowners Assoc. v. Lane County*, 318 Or 146, 160, 864 P.2d 350 (1003, *and see, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392 (1988 ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). There is no constitutional conflict here unless Third Party Plaintiffs' interpretation of what they contend "suit" means under the OECAA is applied to the St. Paul policy.

DATED: August 10, 2011

/s/ Thomas A. Gordon
Thomas A. Gordon, OSB No. 741172
Andrew S. Moses, OSB No. 98300
(503) 242-2922

Attorneys for Defendant St. Paul Fire and Marine Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2011, I electronically filed **ST. PAUL FIRE AND MARINE INSURANCE COMPANY'S RESPONSE TO STATE OF OREGON'S [PROPOSED] MEMORANDUM ON CONSTITUTIONALITY OF THE OREGON ENVIRONMENTAL CLEANUP ASSISTANCE ACT** with the Clerk's office using the CM/ECF System for filing which will send notification of such filing to the following:

R. Lind Stapley
E-mail: stapley@sohalang.com
Misty A. Edmundson
E-mail: edmundson@sohalang.com
Soha & Lang, P.S.
1325 Fourth Avenue, Suite 20400
Seattle, Washington 98101-7003
Phone: (206) 624-1800
Fax: (206) 624-3583

Attorneys for Plaintiff, Third-Party Defendant Insurance Company of North America, and Counter Defendant Century Indemnity Company

William G. Earle
E-mail: wearle@davisrothwell.com
Jonathan Henderson
E-mail: jhenderson@davisrothwell.com
Davis Rothwell Earle & Xóchihua P.C.
111 S.W. Fifth Avenue, Suite 2700
Portland, Oregon 97204-3650
Phone: (503) 222-4422
Fax: (503) 222-4428

Attorneys for Plaintiff, Third-Party Defendant Insurance Company of North America, and Counter Defendant Century Indemnity Company

Michael R. Seidl
E-mail: mick@seidl-law.com
Seidl Law Office, PC
888 S.W. Fifth Avenue, Suite 300
Portland, Oregon 97204
Phone: (503) 224-7840
Fax: (503) 224-9721

Attorneys for Third-Party Plaintiff American Manufacturer's Mutual Insurance Company

Ira Revich
E-mail: irevich@crwllp.com
Charlston, Revich & Wollitz LLP
1925 Century Park East, Suite 1250
Los Angeles, California 90067-2746
Phone: (310) 551-7020
Fax: (310) 203-9321

Attorneys for Third-Party Plaintiff American Manufacturer's Mutual Insurance Company

Doug Tuffley
E-mail: dtuffley@cozen.com
Jodi A. McDougall
E-mail: jmcdougall@cozen.com
Molly Siebert Eckman
E-mail: meckman@cozen.com
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, Washington 98101
Phone: (206) 340-1000
Fax: (206) 621-8783

Attorneys for Third-Party Defendant Chicago Insurance Company

Margaret M. Van Valkenburg
E-mail: megge.vanvalkenburg@bullivant.com
Bullivant Houser Bailey, PC
888 S.W. Fifth Avenue, Suite 300
Portland, Oregon 97204-2089
Phone: (503) 228-6351
Fax: (503) 295-0915

Attorney for Third-Party Defendants Employers Mutual Casualty Company, Pacific Mutual Marine Office, Inc., and West Coast Marine Managers, Inc.

David E. Prange
E-mail: dprange@prangelawgroup.com
Sean W. Carney
E-mail: scarney@prangelawgroup.com
Alexander J. Williamson
E-mail: awilliamson@prangelawgroup.com
Aaron C. Denton
E-mail: adenton@prangelawgroup.com
Prange Law Group, LLC
111 S.W. Fifth Avenue, Suite 2120
Portland, Oregon 97204-3699
Phone: (503) 595-8199
Fax: (503) 595-8190

Attorney for Third-Party Defendant The Continental Insurance Company and Third-Party Defendants Agricultural Insurance Company and Agricultural Excess and Surplus Insurance Company

Edward J. Tafe
E-mail: edward.tafe@cna.com
Colliau Elenius Murphy Carluccio Keener & Morrow
555 Mission Street, Suite 330
San Francisco, California 94105
Phone: (415) 932-7000
Fax: (415) 932-7001

Attorney for Third-Party Defendant The Continental Insurance Company

Kenneth H. Sumner
E-mail: ksumner@spcclaw.com
Sinnott, Puebla, Campagne & Curet, APLC
555 Montgomery Street, Suite 720
San Francisco, California 94111-3910
Phone: (415) 352-6200
Fax: (415) 352-6224

Attorney for Third-Party Defendants Granite State Insurance Company, Insurance Company of the State of Pennsylvania, and National Union Fire Insurance Company of Pittsburgh PA

Thomas W. Brown
E-mail: tbrown@cvk-law.com and jsouth@cvk-law.com
Cosgrave Vergeer Kester LLP
805 S.W. Broadway, 8th Floor
Portland, Oregon 97205
Phone: (503) 323-9000
Fax: (503) 323-9019

Attorney for Third-Party Defendants Granite State Insurance Company, Insurance Company of the State of Pennsylvania, and National Union Fire Insurance Company of Pittsburgh PA

Wayne S. Karbal
E-mail: wkarbal@karballaw.com
Alan M. Posner
E-mail: aposner@karballaw.com
Karbal Cohen Economou Silk & Dunne, LLC
150 S. Wacker Drive, Suite 1700
Chicago, Illinois 60606
Phone: (312) 431-3702
Fax: (312) 431-3670

Attorneys for Third-Party Defendants Hartford Fire Insurance Company, New England Reinsurance Corporation, and Twin City Fire Insurance Company

Christopher T. Carson
E-mail: ccarson@kilmerlaw.com
Kilmer, Voorhees & Laurick, P.C.
732 N.W. 19th Avenue
Portland, Oregon 97209-1302
Phone: (503) 224-0055
Fax: (503) 222-5290

Attorney for Third-Party Defendants Hartford Fire Insurance Company, New England Reinsurance Corporation, and Twin City Fire Insurance Company

John B. Hayes
E-mail: jhayes@forsberg-umlauf.com
Carl Forseberg
E-mail: cforseberg@forsberg-umlauf.com
Charles Alberstson
E-mail: calbertson@forsberg-umlauf.com
Forsberg & Umlauf, P.S.
900 Fourth Ave, Ste 1700
Seattle, Washington 98164
Phone: (206) 689-8500
Fax: (206) 689-8501

Attorney for Third-Party Defendants Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies

Rebecca A. Lindemann
E-mail: rlindemann@schwabe.com
Schwabe, Williamson & Wyatt, P.C.
1211 S.W. Fifth Avenue, Suite 1900
Portland, Oregon 97204
Phone: (503) 222-9981
Fax: (503) 796-2900

Attorney for Third-Party Defendant Old Republic Insurance Company

Mark D. Paulson
E-mail: mpaulson@clausen.com
Amy Rich Paulus
E-mail: apaulus@clausen.com
Clausen Miller P.C.
10 South LaSalle Street
Chicago, Illinois 60603
Phone: (312) 855-1010
Fax: (312) 606-7777

Attorneys for Third-Party Defendant Old Republic Insurance Company

Peter J. Mintzer
E-mail: pmintzer@cozen.com
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, Washington 98101
Phone: (206) 340-1000
Fax: (206) 621-8783

Attorney for Third-Party Defendant Federal Insurance Company

Doug Tuffley
E-mail: dtuffley@cozen.com
Thomas M. Jones
E-mail: tjones@cozen.com
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, Washington 98101
Phone: (206) 340-1000
Fax: (206) 621-8783

Attorneys for Third-Party Defendant Royal Indemnity Company

David M. Schoeggl
E-mail: dschoeggl@mms-seattle.com
Stephania Camp Denton
E-mail: sdenton@mms-seattle.com
Mills Meyers Swartling
1000 Second Avenue
30th Floor
Seattle, Washington 98104-1064
Phone: (206) 382-1000
Fax: (206) 386-7343

Attorneys for Third-Party Defendant Industrial Indemnity Company

Christopher A. Rycewicz, OSB No. 862755
E-mail: christopher.rycewicz@millernash.com
Hong N. Huynh, OSB No. 984133
E-mail: hong.huynh@millernash.com
Phone: (503) 224-5858
Fax: (503) 224-0155

Attorneys for defendants and third- party plaintiffs, The Marine Group, LLC, Northwest Marine, Inc., Northwest Marine Iron Works, and third-party plaintiff BAE Systems San Diego Ship Repair, Inc.

C. Kent Roberts
E-mail: ckroberts@schwabe.com
Anna Helton
E-mail: ahelton@schwabe.com
Brien J. Flanagan
bflanagan@schwabe.com
Schwabe, Williamson & Wyatt, P.C.
1211 S.W. Fifth Avenue, Suite 1900
Portland, Oregon 97204
Phone: (503) 222-9981
Fax: (503) 796-2900

Attorneys for Third-Party Defendant Water Quality Insurance Syndicate

John M. Woods
E-mail: john.woods@clydeco.us
Phone: (212) 710-3915
Mary H. Mulhearn
E-mail: mary.mulhearn@clydeco.us
John R. Stevenson
E-mail: john.stevenson@clydeco.us
Phone: (212) 710-3906
Clyde & Co US LLP
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
Fax: (212) 710-3950

Attorneys for Third-Party Defendant Water Quality Insurance Syndicate

Gary V. Abbott
E-mail: gabbott@abbott-law.com
Klarice A. Benn
E-mail: kbenn@abbott-law.com
Abbott Law Group, P.C.
111 S.W. Fifth Avenue, Suite 2650
Portland, Oregon 97204
Phone: (503) 595-9510
Fax: (503) 595-9519

Attorneys for Third-Party Defendant American Centennial Insurance Company

William M. Cohn
E-mail: william.cohn@mclolaw.com
Cohn Baughman & Martin
Suite 900
333 West Wacker Drive
Chicago, Illinois 60606
Phone: (312) 753-6608

Attorneys for Third-Party Defendant American Centennial Insurance Company

Jeffrey V. Hill
E-mail: hill@bodyfeltmount.com
Vicki M. Smith
E-mail: smith@bodyfeltmount.com
Heather A. Bowman
E-mail: bowman@bodyfeltmount.com
Bodyfelt Mount LLP
707 SW Washington St, Ste 1100
Portland, OR 97205
Phone: 503-243-1022
Fax: 503-243-2019

Attorneys for Argonaut Insurance Company

Jay W. Beattie
E-mail: jbeattie@lindseyhart.com
Lindsay Hart Neil & Weigler, LLP
1300 SW Fifth Ave, Ste 3400
Portland, OR 97201
Phone: 503-226-7677
Fax: 503-226-7697

Attorneys for Argonaut Insurance Company

DATED this 10th day of August, 2011.

/s/ Thomas A. Gordon
Thomas A. Gordon, OSB No. 741172
(503) 242-2922

Attorneys for Defendant St. Paul Fire and Marine Insurance Company

STOEL RIVES LLP
ATTORNEYS AT LAW

MEMORANDUM

May 7, 2013

TO: JENNIFER HUDSON

FROM: JOAN P. SNYDER AND SCOTT J. KAPLAN

RE: Response to May 2, 2013 Letter on Behalf of Property and Casualty Insurers Association re SB 814

I. INTRODUCTION

You have asked us to review the May 2, 2013 letter from former Chief Justice De Muniz on behalf of the Washington state office of the Property and Casualty Insurers Association of America ("PCI Letter") regarding SB 814. Briefly, the PCI Letter provides nothing that was not already raised by the insurance industry's Washington DC lawyer before the Senate Committee and nothing that has not already been rebutted by Legislative Counsel. In particular:

1. SB 814 primarily fills in the gaps *where there is no policy language*. It does not contradict policy language. For example, the historical insurance policies at issue say nothing at all about independent counsel, billing rates, contribution between carriers and the like.

2. SB 814's savings clause means that, in the event a policy does have unambiguous language on a particular issue, the policy language controls over the statute.

3. The PCI Letter cites only authority related to public contracts. However, SB 814 does not involve the state trying to change the terms of a contract it entered into with a private individual. The bill merely adds additional regulation governing *private contracts in the heavily regulated area of insurance in which the state already regulates, for example, which policy terms are allowed and how insurance companies adjust claims*. The bill just adds specificity to existing regulation in the case of environmental claims.

Below we respond to each section of the PCI Letter. Because the PCI letter concludes that it is "less clear" there are alleged constitutional problems under federal law and asserts that Oregon law has a stricter constitutional test for impairment of contracts, we focus on Oregon law. As shown below, because SB 814 does not impair obligations of contract in violation of Art I, section 21 of the Oregon Constitution, there can be no dispute that it passes muster under the U.S. Constitution as well.