

OREGON LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION

Justin Delaney
Chairman

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HAND DELIVERED

Lew Frederick, Senator
900 Court Street NE, S-419
Salem, OR 97301

Ken Helm, Representative
900 Court Street NE, H-490
Salem, OR 97301

Chuck Riley, Senator
Chair, Senate Business and General
Government Committee

Jeff Barker, Representative
Chair, House Business and Labor
Committee

Dear Senators Frederick and Riley and Representatives Helm and Barker:

As Chairman of the Oregon Life and Health Insurance Guaranty Association (the "Association") and General Counsel to the Association, we are writing to you to express serious concerns regarding, and opposition to, Senate Bill 419 and House Bill 2888. As you know, both Bills seek to retroactively modify the obligations of the Association back to January 1, 2009, increasing the coverage limit per insured from \$100,000.00 to \$300,000.00 for Long Term Care coverage in connection with three member insurer insolvencies, Penn Treaty Network America Insurance Company ("Penn Treaty"), American Network Insurance Company ("ANIC") and National States Insurance Company ("National States"). This effort is too late-the Association has already been legally activated to pay claims, has paid claims and made binding contractual commitments with third parties to continue payment of claims. In the cases of Penn Treaty and ANIC, the Association, with formal approvals from Insurance Commissioners in Oregon and 28 other states, has requested, received and implemented premium rate adjustments and numerous options for Policyholders where they can pay the newly adjusted premium, change benefits under their policy, or cash out their policy. Over 400 Oregon policyholders have made such modifications to their policies or surrendered their policies for cash payment. These policy options or modifications can't be undone at this late date.

The Association opposes the Bills because they present a morass of legal, contractual, financial and actuarial issues, some of which cannot be cured. The Association has taken comprehensive action to meet its statutory obligations to the policyholders of these companies, has entered into numerous legally binding contracts relating to the policyholders and would be put in the position of breach of contract should the Bills become law. In addition, the Bills improperly infringe on the rights of the Association and its member insurers in violation of the United States Constitution.

To begin with, the Bills present numerous significant financial and actuarial problems. Both Penn Treaty and ANIC were placed under Orders of Liquidation by the Commonwealth Court in Pennsylvania nearly two years ago, on March 1, 2017, which activated the

Association's legal obligations to policyholders. Prior to that date, the Association, in conjunction with the associations from 49 other jurisdictions, retained nationally recognized actuaries to calculate the amount of each individual policyholder's coverage from the Association, the Association's monetary liability and the amount of assessments to member insurers of the Association necessary to timely fund obligations to policyholders. These projections have been in place and the required funding has been provided by the Association for the last two years. Policyholder claims have been paid, assessments have been issued to and collected from member insurers, and the Association has entered into a series of legally binding contracts with numerous parties to carry out its responsibilities. Member insurers have booked present and future assessment liabilities on their financial statements which have been relied upon by regulators, investors and policyholders. Dramatically increasing the liability numbers two years after the implementation of a comprehensive liquidation plan to address the insolvencies nullifies the concerted efforts of the Association to protect Oregon policyholders.

The Association's Board of Directors, pursuant to the authority granted to them in the Association's enabling statute, resolved to join in a national liquidation plan, along with the associations from 49 other jurisdictions for Penn Treaty and ANIC policyholders. Some of the components of the plan follow below.

(1) Effective March 1, 2017, the Association entered into two legally binding Early Access Agreements with the Insurance Commissioner of Pennsylvania, in her capacity as Rehabilitator of Penn Treaty and ANIC. These agreements have given the Association, along with 49 other associations, access to estate assets to pay policyholder claims and policy administration costs. The calculation of the amount the Association was entitled to, compared to the other 49 associations, was based on its \$100,000 maximum coverage obligation to Oregon policyholders. Most of the available estate assets have been expended for policyholder claims and policy administration expenses over the past two years. These funds are no longer available. Should a retroactive coverage increase be enacted, the Association would be forced to demand that the Pennsylvania Receiver claw back funds from 49 other state guaranty associations to redistribute the funds to the Association. Litigation will result.

(2) Effective March 1, 2017, the Association entered into two binding contracts for claims service administration and reinsured the Penn Treaty and ANIC policyholder liabilities with a third party, LTC Reinsurance PCC, a protected cell association captive insurance company domiciled in Washington DC ("LTC Re"). Those reinsurance agreements are specifically based on liability numbers calculated with the \$100,000 Oregon statutory cap. Pursuant to those agreements, the Association funded claims reserves to third party LTC Re in the amount of \$2,373,000 on May 30, 2017; in the amount of \$1,650,000 on March 1, 2018; will fund \$843,000 on March 1, 2019; and will continue to fund claims in actuarially calculated amounts each year through 2058.

(3) Effective March 1, 2017, the Association entered into a Settlement Agreement with the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA"), other guaranty associations and a number of the nation's largest health insurance companies. The agreement provided for settlement of significant legal claims and disputes among the parties with settlement contingent upon performance of specific actions by the Association. Those actions have now been successfully completed and the settlement

agreement consummated. A fundamental provision in the agreement is calculated by reference to the Association's liabilities with a \$100,000 ceiling.

(4) In conjunction with the Settlement Agreement, the Association opted into a National Premium Rate Increase Strategy with NOLHGA and other impacted guaranty associations which impacts 460 of the 529 Oregon policyholders for whom coverage is provided by the Association. This comprehensive strategy includes an actuarial study of appropriate premium rates in Oregon, and provided for three options other than a rate increase for policyholders. Options offered to policyholders include benefit adjustments, a reduced paid up policy, and a cash surrender option. These premium rate adjustments and options were formally approved by the Oregon Division of Financial Regulation on September 1, 2017, and were implemented through a series of letters to policyholders beginning in January, 2018. Additionally, the rate adjustments and options were approved by 28 other insurance departments throughout the country with respect to current Oregon residents who resided in those other states when they purchased their policy. Thus, the entire liquidation plan for Oregon policyholders would be nullified if the Bills become law and 29 insurance departments would need to be approached to modify the actions they already approved and which have already been implemented. To date, 429 Oregon policyholders have received the Premium Rate Increase/Option letters. 70 have elected to modify their benefits, 16 have elected to change their policy to a Reduced Paid Up policy, 46 have elected to surrender their policy in return for a cash payment, and the remainder have or will receive the premium adjustment. These policy changes have already been implemented for those 429 Oregon residents.

It is not possible to unwind the actions taken in numbers 1 through 4 above.

The Bills as written would also apply to the coverage provided by the Association to policyholders of the National States Insurance Company insolvency. National States was placed under an Order of Liquidation on November 15, 2010, and the Association was activated at that date. Since 2010, the Association has met its statutory obligations to National States policyholders, paid all claims and closed its claims files. The last LTC claim payment was made in 2015 and only one LTC policy remains in effect. It is now impossible to reopen and re-adjudicate the National States LTC claims using new coverage limits. Some of the policyholders whose claim files have closed have likely passed away, leaving the Association with no policyholder to pay additional claim amounts to.

In addition, the retroactive application of the Bills here runs afoul of both the Contract Clause and Due Process clause in the United States Constitution. Pursuant to Article 1, Section 10 of the Constitution, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Art. I. Sec. 10. The Supreme Court has long held that, pursuant to the Contract Clause, "neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Coombes v. Getz*, 285 U.S. 434, 446 (1932). In *Coombes*, the Supreme Court held, "a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Id.* at 448; see also *State ex rel. Juv. Dep't of Multnomah Cty. v. Nicholls*, 192 Or. App. 604, 613-14, 87 P.3d 680, 686 (2004) (noting presumption against retroactive application of substantive

statutes, which will “impair existing rights, create new obligations or impose additional duties with respect to past transactions”) (quotation omitted).

The Association has the authority to enter into contracts in order to accomplish its purposes. Ore. Stat. § 734.810(15)(a). Specifically, in order to address the obligations of an impaired or insolvent insurer, the Association must collect assessments from member insurers. Ore. Stat. § 734.815(2)(b). The liabilities of the Association, and correspondingly, of its member insurers, attaches when an insurer is found impaired or insolvent. *See, e.g., Louisiana Ins. Guar. Ass'n v Guglielmo*, 276 So. 2d 720, 726 (La. Ct. App.) (“[T]he decreeing of an insurer insolvent after its effective date is the sole operative factor upon which the Association's liability attaches . . . it attaches to the status of the insolvent insurer as it then exists.”); *Fla. Ins. Guar. Ass'n, Inc. v Bernard*, 140 So. 3d 1023, 1031 (Fla. Dist. Ct. App. 2014) (“the statutory definition of ‘covered claim’ in effect at the time the insurer is adjudicated insolvent determines the scope of [the guaranty association's] liability under the [] Act”). SB 419 and HB2888 would substantially impact the vested rights of the Association and its member insurers.

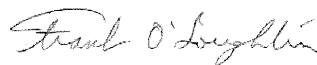
Even applying the standard espoused in *Powell v State ex rel Oregon Dept. of Land Conservation and Development*, 238 Or. App. 678, 243 P3d 798 (2010), retroactive legislation here is fatally flawed. The National States matter is virtually concluded and closed. In the Penn Treaty and ANIC matters, the Association's two years of active claims adjudicating, claims funding, long term financial and contractual commitments, all made on behalf of Oregon policyholders, cannot be undone and the attempt to do so would not constitute “rational means” to accomplish a legislative goal.

The Association respectfully opposes the retroactive changes found in SB 419 and HB2888. The Association would be happy to meet with or provide additional information to the sponsors or committee members in regards to this matter.

Sincerely,



Justin Delaney
Chairman of the Board of Directors



Franklin D. O'Loughlin
Lewis Roca Rothgerber Christie LLP