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MEMORANDUM

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To: TO WHOM IT MAY CONCERN

From: W. MICHAEL GILLETTE

Date: April 25, 2019

Subject: CONSTITUTIONALITY OF SENATE BILL 419 (2019 Legislative Session)

INTRODUCTION: I have been asked to review Senate Bill 419, 2019 Oregon Legislative Session, and to express my opinion respecting the constitutional permissibility of that proposed measure in light of settled principles of Oregon constitutional law. I have reviewed the proposed measure. For the reasons that follow, it is my opinion that the proposed measure, as presently written, violates Article 1, section 21, of the Oregon Constitution.

LIMITATION OF SCOPE: This memorandum opinion is confined to the question of the constitutional permissibility of the proposed measure. I have not been asked to opine as to the conceptual value of a measure like SB 419, and nothing in what follows should be understood as any effort on my part to do so. My sole task is to opine whether, *in the manner in which it attempts to accomplish its goals,* the proposed measure is unconstitutional.

PRESENT LAW: Just like other businesses, insurance companies can find themselves in serious financial difficulties, and may even fail. Because of the importance of insurance both to persons and to businesses, many states have created nonprofit legal entities that in effect provide a measure

of re-insurance, claims payment guarantees, and continuation of insurance coverage for policyholders whose personal insurance companies are in such difficulties. In Oregon, that nonprofit legal entity is the Oregon Life and Health Guaranty Association ("the Association"). *See*, generally, ORS 734.750 *et seq.* (the "Oregon Life and Health Insurance Guaranty Association Act"). The Association is made up of member insurers who transact insurance in Oregon. Such membership is a condition of the authority of an insurance company to transact insurance in Oregon. *See* ORS 734.800 (so providing).[1]

[1] As pertinent here, ORS 734.800 provides:

> (1) There is created a nonprofit legal entity to be known as the Oregon Life and Health Insurance Guaranty Association. All member insurers shall be and remain members of the association as a condition of their authority to transact insurance in this state. The association shall perform its functions under the plan of operation established and approved under ORS 734.820 (Plan of operation), and shall exercise its powers through a board of directors established under ORS 734.805 (Association board of directors). For purposes of administration and assessment, the association shall maintain three accounts:
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> (a) The health insurance account, composed of the following subaccounts:
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> (A) The disability insurance subaccount;
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> (B) The long term care insurance subaccount; and
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> (C) The major medical and all other health insurance subaccount;
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> (b) The life insurance account; and
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> (c) The annuity account
>
> (2) The association shall come under the immediate supervision of the Director of the Department of Consumer and Business Services and shall be subject to the applicable provisions of the insurance laws of this state. [1975 c.251].

An insurer in financial difficulty, but not insolvent, is called an "impaired insurer." ORS 734.760(6). An insurer that is insolvent is called an "insolvent insurer." ORS 734.760(7). If an insurer member of the Association, whether located in Oregon or elsewhere, becomes impaired or insolvent, the Association is empowered to step in and protect the interests of policyholders residing in Oregon.

The remedies that the Association can provide are somewhat complex and far-reaching, but they are not a panacea: Perhaps most importantly, the Association's available funds are not illimitable.[2] Because of this limitation, the legislature has, from time to time, statutorily adjusted the maximum amount that the Association may be required to make good for each of several classes of insurance policy issued by members or held by residents of this state. *See* ORS 734.810(11) (so providing). To illustrate: The legislature in 2011 revised and updated the limitations on coverage provided by the Association respecting insurers first declared impaired or insolvent on or after May 27, 2011, the effective date of the legislation.. *See* chapter 142, Oregon Laws 2011, §§1-10 (so providing). Those statutory limitations are the only ones presently in place. The important point, however, is that—as they are presently worded—the limitations are *prospective only*, *i.e.*, they apply to new cases coming to the Association after the effective date of that Act (May 27, 2011). I turn to the present proposed measure and its intended effect on the foregoing scheme.

[2] The Association is funded through assessments imposed from time to time on its Oregon member insurers. *See* ORS 374.815 (providing for assessments).

SENATE BILL 419: The proposed measure amends the amount of insurance coverage that is to be paid to qualifying policyholders in the event that their insurer is either placed under an "order of rehabilitation" or an "order of liquidation," either of which orders can be issued (depending on the specific financial circumstances) in cases of financial distress of the insurer. The substantive part of the measure, Section 1[3], provides:

SECTION 1. Section 11, chapter 142, Oregon Laws 2011, is amended to read:

Sec. 11. (1) **Except as provided in subsection (2) of this section**, the amendments to ORS 734.760, 734.790, 734.800, 734.805, 734.810, 734.815, 734.820, 734.840, 734.870 and 734.880 by sections 1 to 10, [*of this 2011 Act*] **chapter 142, Oregon Laws 2011**, apply to coverage the Oregon Life and Health Insurance Guaranty Association provides in connection with any member insurer first placed under an order of rehabilitation, or first placed under an order of liquidation if no order of rehabilitation was previously entered, on or after [*the effective date of this 2011 Act*] **May 27, 2011**.

(2) The amendments to ORS 734.810 (11)(b)(D) by section 5, chapter 142, Oregon Laws 2011, apply to coverage the Oregon Life and Health Insurance Guaranty Association provides in connection with any member insurer first placed under an order of rehabilitation, or first placed under an order of liquidation if no order of rehabilitation was previously entered, on or after January 1, 2009.

(Material in italics to be deleted from previous enactment; material in bold to be added by proposed measure.) The scope of the specific wording of the amendment means that it applies only to the $300,000 limitation on long-term care insurance benefits presently provided in ORS 734.810(11)(b)(D).

[3] The measure contains a second section, but it is merely one declaring an emergency, so that the proposed measure, if approved, can take effect on its passage.

EFFECT OF PROPOSED MEASURE: There is no doubt about the purpose of the measure: It is intended to impose retroactively the limitation on the maximum amount of the Association's obligations as to that one form of insurance, *viz.*, long term care insurance, which the 2011 legislature chose to make prospective only. The legislative counsel summary in the measure's heading makes the point: "Applies retroactive to January 1, 2009, Oregon Life and Health Insurance Guaranty Association's $300,000 liability limit for long term care insurance." But this begs the question: Can the legislature do this?

CONSTITUTIONAL STANDARD:

1. Article 1, section 21, of the Oregon Constitution

Article 1, section 21, of the Oregon Constitution provides:

> *No ex-post facto* law, or *law impairing the obligation of contracts shall ever be passed*, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested.

(Second italicization added.) The prohibition against *ex post facto* laws is usually understood to apply only to laws creating or punishing crimes. *See Delgado v. Souders*, 334 Or 122, 144, 46 P3d 729 (2002) (so noting). The prohibition against laws impairing the obligations of contracts, however, has its origins, *inter alia*, in the formation of the United States itself. A similar prohibition was inserted in the Constitution of the United States to prevent various states from "clearing the books" for debtors by means of debtor relief laws which were believed to be interfering with the credit of the fledgling republic. *See* United States Constitution Article I, section 10, clause 1 ("No State shall * * * pass any * * * Law Impairing the Obligation of

Contracts"). We turn to the way in which Oregon's obligation of contracts clause has been interpreted.

2. Case Law Construing Article 1, section 21

By rough count, Article 1, section 21, has been cited and/or analyzed in over 200 court opinions in the last 30 years. Many of those opinions have been concerned primarily with other aspects of Article 1, section 21. However, at least five cases have focused on the kind of problem created by the proposed measure in this case. They are described briefly below:

1. Eckles v. State of Oregon, 306 Or 380, 760 P2d 846 (1988)

Eckles was a case in which the legislature, in an attempt to balance the state budget, enacted a statute (the "Transfer Act") ordering the State Treasurer to transfer $81 million to the General Fund from the State Accident Insurance Fund's dedicated Industrial Accident Fund (IAF). That transfer necessarily reduced SAIF's fiscal flexibility, which arguably reduced its ability to pay workers' compensation payments and would require it to increase the contributions that it received from participating employers. Eckles, the petitioner, argued that the legislative act violated Article I, section 21. The Oregon Supreme Court first determined that the statute that set up the IAF was a contract between the state and the contributing employers, and that the substance of that contract was that "the state would not do precisely what it did do in the Transfer Act.". *Id.* at 393. The Court then turned to the question whether the Transfer Act "impaired" the state's contractual

obligation concerning the IAF. The Court held that it did, "insofar as it affects employers with SAIF insurance contracts entered into before the enactment of the Transfer Act."[4]. *Id.*, at 399.

2. *Hughes v. State*, 314 Or 1, 838 P2d 1018 (1992)

Hughes was the first in a series of cases dealing with the Public Employees Retirement System. In all of those cases, the struggle has been over which parts of Oregon's public employee retirement pension scheme are contractual (and therefore may not, under Article 1, section 21, be impaired) and which are not. In *Hughes*, the issue was whether the state could tax public pensions, when such pensions had, for some time, been statutorily free from taxation. The Court held that taxing the pensions (with the concomitant reduction in net benefit to the retiree) impaired the PERS contract. *Id.*, at 24-27. Perhaps the most important part of the opinion, however, was its recognition, based on *Eckles*, that even substantive parts of the PERS contract could be altered or abolished *for persons who first entered public employment after the statutory change or changes went into effect*. *Id.*, at 30-33.

3. *Or. State Police Officers' Ass'n v. State*, 323 Or 356, 918 P2d 765 (1996)

This case, commonly referred to as "*OSPOA*," took the remarkable step of holding that benefits under the PERS system, once granted, could not be later altered or abolished, even with respect to persons who did not join in the PERS system until after the changes became effective.

[4] The Court went on to hold that, despite the impairment, the petitioner was not entitled to relief, because a separate part of the Transfer Act that directed the State Treasurer to make the transfer of $81 million to the general fund was not dependent on the permissibility of the impairment. Instead, the transfer authorization was a breach of the contract which could be made whole by damages. The Court therefore declined to strike down the Transfer Act in its entirety, leaving to further litigation the determination as to how the employers who subscribed to SAIF could be made whole.

The case has been significantly "gutted" by the later *Strunk* and *Moro* decisions, and therefore is mentioned only for historical completeness, because the Court cited and used the *Eckles*/*Hughes* approach in much of its analysis.

4. *Strunk v. Pub. Emples. Ret. Bd.*, 338 Or 145 108 P3d 1058 (2005)

Strunk was another entry in the long-running saga of legislative efforts to lessen the burden of PERS pension payments on government finance without violating Article I, section 21. In this case, the Court invalidated certain technical adjustments to the system, as well as a temporary suspension of cost of living allowances (COLAs) to specified retirees, again relying on *Eckles*/*Hughes* for guidance.

5. *Moro v. State*, 357 Or 167, 351 P3d 1 (2015)

Moro is the last phase (thus far) of the PERS saga, and appears to represent a significant roadblock to those who wish to reform the retirement system in certain ways. With respect to the present inquiry, however, it is a further endorsement of the *Eckles*/*Hughes* methodology, under which the Court continues to strongly enforce Article 1, section 21. Using that analysis, I return to the question that occasioned this memorandum.

ANALYSIS:

1. Is There a Contract?

There are several, at least. My understanding of the facts of the present case is that the Association is a party to numerous contracts that were created in connection with the failure of a Pennsylvania insurance that became impaired and subject to an Order of Rehabilitation on January

6, 2009, nearly one year and five months before the effective date of the legislation increasing the monetary limits the Association must pay—May 27, 2011. Thus, those contracts were, at the time they were entered into, limited by the amount specified by statute *before* May 27, 2011. As noted, the effect of the proposed measure would be to eliminate that old limitation and impose a new, higher limit, thereby altering the Association's obligations to the private parties involved.

2. Does SB 419 Impair that Contract?

It does, in the manner just described. And that impairment has consequences, inasmuch as the Association's previous authority to obtain contributions from its members necessarily was based upon (and limited by) the former statutory limits. The proposed measure unilaterally changes the Association's contracts with the parties in question, to the advantage of the parties and the detriment of the Association.

3. Does SB 419 Violate Article 1, section 21?

In my view, it does. There can be no question that the legislature has the right to alter statutes such as those governing the work of the Association, but such alterations must respect constitutional standards and prohibitions. To select one example of a change that the legislature could make: the legislature might enact a statute that provided that all payments made by the Association would be made on a particular day of each month, even if no such date (or some other date) were used in existing Association contracts. The party affected by that change might be grumpy and inconvenienced, but the payment would not be changed and would still be made every month. In other words, there would be no "impairment." But changing the amount that the

Association could be required to pay, after contracts had already been made, would impair those contracts, whether the statutory amount was increased or decreased. Unilaterally changing the substantive rights and responsibilities between the Association and those with whom it has contracted with respect to an insurance company that became impaired and subject to an Order of Rehabilitation on January 6, 2009—over two years before legislation increasing the amounts the Association must pay--is a classic example of "impairment" in the constitutional sense.

CONCLUSION: Based on the foregoing analysis, I conclude that SB 419 (2019 legislative session) would, if enacted, violate the proscription in Article 1, section 21, of the Oregon Constitution that "[n]o * * * law impairing the obligation of contracts shall ever be passed."

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