May 8, 2013

Representative Paul Holvey, Chair
House Committee on Consumer Protection and Government Efficiency
Oregon State Capitol
99 Court St NE, Room 453
Salem, OR 97301

Re: Opposition to SB 814

Dear Chair Holvey and Members of the Committee:

My name is David Rossmiller and I represent the American Insurance Association (AIA) in opposition to SB 814. As a Portland attorney who represents both insurers and policyholders in insurance coverage disputes, and who represents landowners in environmental enforcement matters in Oregon and Washington, I wish to point out some troubling provisions of this Bill that will in all likelihood do nothing to expedite the clean-up of polluted sites. Instead, the Bill's provisions will merely lead to greater cost, more rounds of litigation and additional delays. Further, the Bill does nothing to address the primary reason clean-up takes so long – in the largest clean-ups, the process created by EPA and DEQ for addressing contamination is extraordinarily complicated and notoriously difficult to bring to an end. Insurers cannot change that regulatory framework.

AIA and its members share a goal with the proponents of SB 814 – cleaning up Portland Harbor and other sites in Oregon with environmental contamination. No one opposes cleaning up contaminated sites. Where insurers owe a duty to defend and a duty to indemnify under policies, my experience has been that they acknowledge those duties. In fact, insurers would be happy to pay the indemnity they owe and get sites cleaned up: in many instances, defense obligations to pay attorneys and consultants hundreds of thousands of dollars per year, over a period of one to two decades or longer, are considerably greater than the indemnity limits of the policy. It is not the lack of insurance money that has led to delays in cleaning up property.

In addition, and most importantly, this Bill fundamentally alters insurance contracts that are 30, 40 and 50 years old, and forbids the enforcement of provisions in these policies that have been held unambiguous by the Oregon Supreme Court. It is important to be clear on this point: the Bill does not offer rules of construction to interpret vague or ambiguous insurance language. The Bill instead removes clauses in these old insurance policies, despite the fact the Supreme Court has stated that the intent of the parties and their agreement on these clauses is clear. These clauses that the Bill negates are at the very heart of the formation of those insurance contracts, and the Bill goes back in time to make a new deal that neither party agreed to at the time the contracts were made. If these contract elements can be negated, any contract can be changed, at any time, and no bargain is ever settled.

Here are some points I hope you will consider:

- At issue in this Bill are general commercial liability policies that are mostly pre-1985. After that date, almost all commercial liability policies contained what is called the Absolute Pollution Exclusion, which has been found to unambiguously preclude coverage for environmental contamination. Many of these older policies instead contained a Limited Pollution Exclusion that was found by the Oregon Supreme Court in *St. Paul Fire v. McCormick & Baxter Creosoting*, 324 Or. 184 (1996) to be ambiguous and to not preclude coverage for pollution damage an insured causes to third parties. However, because these policies were priced on the supposition they did not cover pollution, the premiums paid for them were relatively small – sometimes a few hundred or a few thousand dollars a year – and the payout of defense and indemnity dollars for these policies is greatly disproportionate to the risk as reflected in the premiums. Policyholders are actually receiving insurance coverage much greater than they would have expected.

- SB 814 does not address ambiguous clauses of these old insurance contracts like the Limited Pollution Exclusion. Instead, SB 814 bars the enforcement of insurance clauses in which the Oregon Supreme Court has said the intent of the parties is clear. These clauses include the anti-assignment clause, the owned property exclusion and the insurer's right to approve counsel. Simply put, when the Supreme Court has decided what the parties clearly agreed to in a contract, that is what the contract is and there is nothing left to interpret. The Legislature cannot overturn these decisions of the Court by statute because to do so retroactively changes the contract's clear terms.

- Section 2 of the Bill negates the anti-assignment clause that is found in every insurance policy. This clause exists because it goes to one of the five fundamental elements of formation of an insurance contract – the identity of the insured. (The other elements are the premium to be paid, the policy period, the risk to be insured and the dollar limits of the policy). These anti-assignment clauses are necessary because they allow the insurer to be sure of who it is making a contract with, and to set an appropriate premium in light of the risks that party says it wants to insure against. The Supreme Court, in *Holloway v. Republic Indem. Co. of America*, 341 Or. 642 (2006), held that these clauses are clear and unambiguous.

- Section 4 of SB 814 negates the owned property exclusion. Liability policies contain an owned property exclusion that precludes coverage for harm an insured causes to his own property. Liability policies are for damage done to third parties. Coverage for damage to one's own property is available through property insurance policies. Section 4 bars the enforcement of owned property exclusions in liability policies whenever pollution on the insured's property may conceivably, at some future point, threaten to cause harm to third parties. The Oregon Supreme Court found owned property exclusions to be clear and unambiguous terms of insurance contracts in *Schnitzer Investment Corp. v. Certain Underwriters of Lloyd's of London*, 341 Or. 126 (2006).

- Section 7 of SB 814 bars enforcement of the right of an insurer, when a duty to defend exists, to control the conduct of the defense. The Oregon Supreme Court

has long recognized this fundamental element of the insurance contract in many cases, including *Ferguson v. Birmingham Fire Ins. Co.*, 254 Or. 496 (1969). The Bill provides a right of "independent counsel" in virtually all circumstances, potentially at any rate counsel chooses to charge. There has been little to no evidence presented that insurers are hiring incompetent environmental counsel. Indeed, it would be against insurers' interests to hire incompetent counsel, because insurers can be liable under current law to policyholders for negligent or incompetent conduct of the defense. This right to independent counsel goes far beyond California law, where independent counsel is available only in limited circumstances when the insurer's conduct of the defense would lead to loss of insurance coverage.

- These provisions of SB 814 not only abrogate existing contracts, they greatly add to the expense of investigating and defending environmental contamination cases, with no showing of how this expense could alter the basic cause of delay in clean up: the regulatory process itself and its complexity when dozens of potentially responsible parties, each with their own attorneys and consultants, are participating in every decision. Generally, indemnity money cannot be spent on clean up until many years into the process, following approval of a feasibility study and opportunity for public comment.

- Other troubling aspects of the Bill include the bad faith provisions of Section 6, which allow insureds to elevate every demand into a threat of treble damages if the insurer does not agree. Insureds already have a remedy for breaches of the duty to defend or the duty to indemnify – ORS 742.061 allows an insured to recover not only damages from breaches of insurance contracts but also attorney fees and costs spent in successfully suing an insurer. Also, the "good faith" settlement procedures of Section 4 lack any court procedure under Oregon law, and there is no assurance that settlement money paid long before the feasibility study is approved would actually be used as indemnity toward remediation of pollution, rather than going toward current operating expenses or other general uses.

- Because of the retroactive nature of SB 814 and the provision of Section 6 that gives insureds a right to bring a bad faith lawsuit within two years of "discovery" of an insurer's alleged unfair practice, there is a grave risk that the Bill will reopen cases that are settled or otherwise ended and multiply litigation. Because the Bill creates new causes of action for bad faith, those causes regarding past actions could not be "discovered" until after the Bill becomes law. This potentially abrogates the six-year statute of limitations on contracts as well as the two-year statute of limitations on negligent torts.

Very truly yours,

David P. Rossmiller