occurred, namely a settlement or judgment, from which to apportion lost adjustment expenses and, therefore, TPPs motion on this point is premature and not justiciable. Finally, INA argues that there are questions of fact regarding whether there has been an "occurrence" or there is "property damage" sufficient to satisfy the policy terms in this case.

TPPs acknowledge the existence and applicability of the deductible endorsement but argue that, under the facts before the court, it does not relieve INA of liability as a matter of law. First, TPPs argue that where there is no agreement between the insured and a claims processing service, the endorsement does not relieve INA of its duty to defend. TPPs cite the language of the endorsement that provides for this exclusion from coverage, "so long as such agreement with the claims servicing organization remains in effect." (Rycewicz Decl., Ex. 1 at 21; Ex. 2 at 18.) Second, TPPs submitted the declaration of Resa Boxell, who testified that she served a subpeona on the purported claims servicer, ESIS, and that ESIS responded that its "internal search had discovered no relevant records." (Boxell Decl. ¶ 3-4.) Boxell later followed up on the inquiry and was again "advised via email that [the] further search efforts had found no responsive documents and that there was no evidence of a claims servicing agreement between ESIS and Northwest Marine Iron Works." (Boxell Decl. ¶¶ 5-6.) TPPs observe that, as the moving party, they need only point to the absence of evidence that such an agreement was in place, citing the analysis set forth by the Ninth Circuit in *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001): "When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'" (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). TPPs argue that because there is no evidence of such an agreement, INA has failed to

establish this necessary fact and thus cannot rely on the exclusion.[4]

The court concludes that, to the extent the deductible endorsement modifies the relationship between the insurer and the insured by establishing a deductible and creating a system of payment based on that deductible, the deductible endorsement does not interfere with the duty to defend set forth under the original policy. The provision regarding the claims processing service is another matter, however, because it potentially extinguishes INA's duty to defend. Under the provision, where a claims processing agreement is in place, INA has no duty to defend "so long as such agreement with the claims servicing organization remains in effect." (Rycewicz Decl., Ex. 1 at 21; Ex. 2 at 18.) Although this produces a somewhat unusual result, with the duty to defend premised on the insured's continued maintenance of a claims servicing agreement, the provision's language is clear: if no agreement with a claims servicing organization is in place, the duty to defend is placed on INA. Thus, in the absence of a claims servicing agreement, the insurer's duty to defend claims against the insured remains in place.

INA contends that the recital itself confirms the existence of the claims servicing agreement, or at least the intent of the parties that NWMIW would enter into one. INA reads the subject clause to mean that the parties left open the possibility of the relationship changing but did not require INA to assume a duty to defend in the absence of such agreement. TPPs respond that INA has failed in

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[4] Century, the plaintiff here but not a party to the current motion, moved to strike Boxell's declaration based on lack of personal knowledge, as inadmissible hearsay, as unsupported by evidence in the summary judgment record, and for failure to establish that ACE and ESIS were the proper sources of the information allegedly sought. TPPs respond that the declaration was submitted to demonstrate the diligence of Boxell's attempts to locate a claims servicing agreement and, as such, does not suffer from the defects asserted by Defendants. The court accepts the declaration as admissible for the purpose of establishing the diligence of Boxell's search efforts, and nothing more. Accordingly, Century's motion to strike (#334) is denied.

its burden to establish the exclusion and that the exclusion is properly read to make the duty to defend contingent on the existence of a claims servicing agreement. TPPs also submit evidence of a search on their part to come up with just such a document, and the failure of that search. They emphasize that the burden is on INA to produce evidence of the agreement and, INA having failed to do so, TPPs are entitled to summary judgment on this particular issue.

On the record before it, the court agrees that TPPs are entitled to summary judgment that INA failed to create a genuine issue of material fact as to the existence of a claims servicing agreement. As such, TPPs are entitled to summary judgment that INA's duty to defend is not extinguished by a claims servicing agreement. Although the recital in the insurance policy represents evidence that the parties contemplated the inclusion of a claims servicing agreement, it is not evidence that such agreement existed. Here, the absence of evidence of a claims servicing agreement, the existence of which would be INA's to prove at trial, supports summary judgment that the claims servicing agreement exclusion does not apply.

TPPs next argue that the provisions in the deductible endorsement that allocate loss adjustment expenses do not limit or eliminate the duty to defend found in INA's policies. TPPs point out that the allocation of defense costs does not modify the duty to defend, but rather that it presumes a defense was tendered as it "anticipated the allocation of deductible amounts after the claim has been defended to conclusion, either by settlement of judgment." (TPPs' Reply 37 (emphasis omitted).) Instead, TPPs argue, the question of whether a duty to defend exists under the policy hinges on the claims servicing organization provision. Finally, TPPs refute INA's argument that there are questions of fact as to whether defense costs in this case will exceed the deductible amount and trigger INA's duty to defend, arguing that it is exceptionally unlikely that defense costs

in this substantial environmental cleanup action will be less than the deductible.[5]

The court agrees that the sharing and allocation of loss adjustment expenses via the deductible endorsement do not extinguish the duty to defend. With respect to whether the issue is premature because the amount of defense costs has not been established and, therefore, the threshold to trigger payment of defense costs has not been reached, the court is unpersuaded. The duty to defend does not depend on the ultimate amount expended in defense of a claim. The language of the deductible endorsement itself contemplates that the insurer will pay defense costs up front and, if appropriate, be entitled to seek reimbursement up to the deductible amount. Furthermore, premising the duty to defend on the amount ultimately spent in defense would nullify the policy language that establishes a duty to defend in the first place.

In conclusion, the court concludes that there are no genuine issue of material fact as to whether the deductible endorsement exempts INA from its duty to defend under the policy and that TPPs are entitled to summary judgment on this issue.

B. Existence of a Suit

TPPs argue that the claims made under CERCLA against the insureds comprise a "suit" which triggers INA's duty to defend. Specifically, TPPs cite the Batson letters, the 104(e) information requests, the General Notice Letters, and the NRDA letters from January 2008 and September 2010, and assert that these documents are the functional equivalent of a complaint that triggers a duty to defend. TPPs also cite the OECAA to support its position that such communications amount to a suit sufficient to trigger an insurer's duty to defend. Defendants do not dispute their duty to defend a suit against an insured, but argue that there is no suit to trigger this duty

[5] The deductible amount at issue is $100,000.

in the present matter.

The OECAA provides that a "suit" or "lawsuit" includes, "but is not limited to formal judicial proceedings, administrative proceedings and actions taken under Oregon or federal law, including action 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." OR. REV. STAT. 465.480(1)(a) (2009). The OECAA sets forth several rules of construction that govern actions between insureds and insurers for coverage of an environmental claim, "whether in response to governmental demand or pursuant to a written voluntary agreement, consent decree or consent order," for which the insured seeks coverage under a general liability insurance policy. OR. REV. STAT. 465.480(2) (2009). One such rule states that an "action or agreement" of DEQ or the EPA "against or with an insured" wherein the agency "directs, requests or agrees that an insured take action with respect to contamination with 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) (2009). The OECAA is explicit, however, that the rules of construction, which include this definition of suit or lawsuit, "do not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy." OR. REV. STAT. 465.480(7) (2009).

This same question arose in *Ash Grove Cement Co. v. Liberty Mutual Ins. Co.*, No. 09-239-KI, 2010 WL 3894119 (D. Or. Sept. 30, 2010), a recent decision from this district, specifically "whether a request for information from the United States Environmental Protection Agency ("EPA") to Ash Grove, pursuant to section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9604(e), constitutes a 'suit' under the

terms of the insurance policies, triggering the insurers' duty to defend Ash Grove." *Ash Grove*, 2010 WL 3894119, at *1. The court cited OR. REV. STAT. 465.480, as well as *Schnitzer Investment Corp. v. Certain Underwriters*, 197 Or. App. 147, 155, 104 P.3d 1162, 1168 (2005), *aff'd*, 341 Or. 128, 137 P.3d 1282 (2006), for its holding that "[a]n administrative agency's requirement that a property owner clean up environmental contamination constitutes a 'suit' within the terms of an insurer's duty to defend." *Ash Grove*, 2010 WL 3894119, at *4. The court rejected the insurers' arguments that the letter Ash Grove received from the EPA constituted only a "voluntary" request that was "not adversarial" and that imposed no obligations on Ash Grove to do anything in response. *Id.* The court observed that Ash Grove's compliance with the letter requests "'is required by law,'" and that "[t]he letter is not merely a request that Ash Grove provide information; it contains a threat of legal action and substantial penalties for failure to comply with the request under penalty of civil action and possible monetary penalties." *Id.* The court concluded that the 104(e) letter imposed an obligation on the plaintiff sufficient to trigger the duty to defend set forth in the policy, as a matter of law.

A similar conclusion resulted in *Certain Underwriters at Lloyd's London and Excess Ins. Co., Ltd. v. Massachusetts Bonding and Ins. Co. ("Massachusetts Bonding")*, 235 Or. App. 99, 230 P.3d 103 (2010), a recent Oregon Court of Appeals decision, where the duty to defend was premised on a letter and accompanying documents sent by DEQ to the common insured, Zidell. The court outlined its analysis with respect to whether the DEQ letter was sufficient to trigger the duty to defend, posing two questions: "(1) Did the letter and accompanying documents demonstrate the existence of a 'suit' within the meaning of the insurance policies? (2) Did the letter and accompanying documents contain allegations that, without amendment, could impose liability for

conduct covered by the policy?" *Id.* at 120. The court also noted that where there were doubts on the second question, such doubts would be resolved in favor of the insured. *Id.*

The court found, first, that the DEQ letter gave rise to a "suit" within the meaning of the policies. The letter stated that DEQ had performed a preliminary assessment, that further action was required, that samples would be taken to determine the extent of contamination, and that site owners would be held strictly liable. The letter directed Zidell to inform DEQ as to how it planned to proceed and informed Zidell that, regardless, DEQ would seek to recover its costs. The court characterized the letter: "In effect, DEQ told Zidell to investigate and remediate contamination at the site or pay DEQ to do it – the type of agency ultimatum that we have previously held to constitute a 'suit' for purposes of the duty to defend." *Id.* at 121 (citing *Schnitzer Investment Corp.*, 197 Or. App. at 155). The court noted that the insurance policies in question did not themselves define the term "suit" and it thus "[saw] no reason to reach a different interpretation of the term 'suit' than [it] reached in [its] previous cases." *Id.*

As to the second question, whether the allegations in the letter could alone impose liability under the policies, the court reasoned:

> The facts alleged in the letter and attached document could be read narrowly as Beneficial and U.S. Fire contend – as merely recommending further investigation. But it is reasonable to read them as more than that. In light of the facts in the "Site Assessment Program–Strategy Recommendation," including the long history of Zidell's waste disposal activities and the fact that adjacent property "is known to have soil and groundwater contamination," it is reasonable to read the DEQ letter as requiring further samples to determine the *extent* of groundwater contamination–that is, not *whether* there is groundwater contamination, but *how much*. That is sufficient to trigger the duty to defend.

Id. at 122 (emphasis in original) (citing *National Union Fire Ins. Co. v. Starplex Corp.*, 220 Or. App. 560, 584, 188 P.3d 332 (2008)). Thus, the Oregon Court of Appeals found a duty to defend where,

although further tests were needed to determine the extent of the contamination, there were sufficient factual allegations establishing that there was contamination at the site and of the insured's history with respect to the waste disposal at the site.

Based on these precedents, TPPs argue that INA's duty to defend was triggered by the relevant agency communications because the communications allege TPPs' liability under CERCLA, TPPs were directed to participate in the process to allocate liability for contamination and damage, and TPPs were directed to respond to the EPA's 104(e) Information Request. Thus, TPPs argue, the claims amount to a "suit" under the policy and Defendants are required to tender a defense on their behalf. Defendants respond that there is no "suit" by which a duty to defend is triggered. They characterize Oregon law on this point: "The common thread of the foregoing Oregon decisions is that in order for administrative action to serve as the functional equivalent of a lawsuit, it must be adversarial in nature; it must recite facts supporting the agency's intent to assess liability against the insured; and it must charge the insured with undertaking remedial measures and/or paying the costs of clean up." (St. Paul's Response Memo at 24.)

Defendants cite *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 126 Or. App 689, 870 P.2d 260 (1994), wherein the Oregon Court of Appeals held generally that administrative proceedings may qualify as a suit sufficient to invoke coverage under an insurance policy. The court described its analysis: "We sought to ascertain the intent of the parties, and we considered that 'suit' was subject to more than one interpretation. After doing so, we arrived at the conclusion that 'suit' was sufficiently broad to cover administrative proceedings." *Id.* at 701. The court assumed that not all administrative actions would trigger a duty to defend, but concluded that the case before it did in fact trigger such a duty:

> Assuming there are administrative actions that do not obligate the insurers to respond, we agree with M & B that this is not such an instance. Under the statutes governing cleanup of environmental damage, M & B was going to have to pay. The fact that it chose to try to gain a more favorable resolution by cooperation instead of litigation does not mean that the agency was not making a claim that M & B was responsible for damages.

Id.

According to Defendants, the administrative action must *require* that the insured act in a particular manner in order to give rise to a suit and thus trigger a duty to defend. They also cite *Schnitzer Investment Corp.*, 197 Or. App. 147. In *Schnitzer*, the Oregon Court of Appeals wrote in its introductory paragraph that "[t]he Department of Environmental Quality (DEQ) required plaintiff to remedy the contamination at significant expense to the plaintiff." *Id.* at 150. The court, however, went on to describe the facts which gave rise to the insurers duty to defend. The plaintiff, having discovered contamination on its own, informed DEQ of the contamination. The plaintiff agreed to investigate the contamination further, which investigation recommended remedial action on contamination of the soil, and continued monitoring of groundwater contamination. In a letter dated June 7, 1991, DEQ informed the plaintiff of its intent to list the plaintiff's property as contaminated and requiring cleanup. DEQ would remove the property from the list when the remedial action was complete. At this point, the plaintiff requested the insurer provide a defense, but the insurer denied the request. In evaluating whether and when the duty to defend arose between the plaintiff and the insurer, the court concluded that the communications between the plaintiff and DEQ up to and including the June 7, 1991, amounted to the functional equivalent of a judicial complaint and, thus, a "suit." *Id.* at 157. The Court of Appeals characterized those communications: "When read together, they described the factual basis on which DEQ sought to hold plaintiff liable for the cost

of the environmental cleanup on its property." *Id.* Defendants distinguish this case on the ground that the documents cited in this case, read together, do not describe the factual basis upon which the agencies sought to base liability.

In *GE Property & Casualty Inc. Co. v. St. Paul Fire & Marine Ins. Co.*, No. CV 04-727-HU, 2005 U.S. Dist. LEXIS 40189 (D. Or. Nov. 17, 2005), the plaintiff and DEQ entered into a voluntary cleanup agreement, which agreement stated explicitly that it was neither an admission of liability by plaintiff nor a waiver of future claims by DEQ. It was not disputed that this voluntary agreement was the functional equivalent of a suit and the court concluded that it was "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." *Id.* at *11. Defendants argue that *GE Property* is distinct from the current case because, in *GE Property*, the parties entered into a voluntary agreement regarding the possible contamination whereby liability was presumed. Here, according to Defendants, no presumption of liability is present and so *GE Property's* holding is inapposite.

For these reasons, Defendants contend that the documents TPPs have submitted do not amount to the functional equivalent of a judicial complaint and, thus, there is no "suit" giving rise to the insurers' duty to defend. In particular, Defendants argue that the communications do not attribute contamination to TPPs; that TPPs have not been ordered to remediate the areas in question; that the 104(e) letters explicitly state that they are not designating any entity as a potentially responsible party; and that the letters from the Trustee Council are explicit in that they do not amount to a determination of liability. In sum, the communications "do not articulate any demands, and do not describe any potential loss of right by [TPPs]." (Defendants' Memo. 26.) Defendants also maintain that *Ash Grove* was wrongly decided and its conclusion is inconsistent with the conclusions

other courts have reached.

TPPs contend, in their reply, that the administrative actions and communications amounted to a threat of liability that would ultimately be judicially enforceable. According to TPPs, the Batson letters alleged that they were potentially responsible for contamination at the site, requested their participation in the ADR process, threatened to initiate enforcement actions against those who did not participate in ADR, and further demanded the submission of information, under threat of a fine of upwards of $30,000 per day. TPPs also assert that they were invited to participate in an NRDA proceeding having been identified as potentially liable under CERCLA, and that the GNLs also identified TPPs as potentially liable.

Furthermore, TPPs contend that although couched as voluntary in nature, the agency requests for action and participation were anything but: "Nonparticipation would have severely compromised their ability to protect themselves from CERCLA liability." (TPP Reply Memo. 25.) They argue that, were TPPs unable to participate in the voluntary process and unable to negotiate an agreement through that process, "the EPA could issue a unilateral administrative order to perform remediation with joint and several liability, subject only to arbitrary and capricious review." *Id.* This, TPPs note, would present an undue risk in light of the extremely high stakes involved, with cleanup likely to cost upwards of $1 billion. TPPs point out that the 104(e) letters clearly threaten substantial fines, and the Batson letters clearly threaten enforcement for failure to participate. According to TPPs, although the letters purport to "invite" participation, they actually impose serious consequences for a failure to participate and, as such, are only reasonably read as threatening liability and giving rise to a suit.

The court agrees with TPPs that the relevant agency communications give rise to a suit such

that the's insurers duty to defend is triggered, and finds on point and persuasive the decisions in *Ash Grove* and *Aetna Casualty and Surety Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991). In *Ash Grove*, the court specifically held that a 104(e) letter imposed an obligation sufficient to trigger an insurer's duty to defend. It stated:

> The § 104(e) letter says that while EPA seeks Ash Grove's "voluntary cooperation," compliance with the request is "required by law," and that if Ash Grove fails to respond fully within a certain time, EPA can commence an action for civil penalties of up to $32,500 per day for noncompliance. The letter is not merely a request that Ash Grove provide information; it contains a threat of legal action and substantial penalties for failure to comply with the request.

Ash Grove, 2010 WL 3894119, at *4. The *Ash Grove* court also cited the Ninth Circuit's decision in *Aetna Casualty* for the proposition that a PRP notice exposed an insured to "'immediate and severe implications'" and that "'in a CERCLA case, the PRP's substantive rights and ultimate liability are affected from the start of the administrative process.'" *Ash Grove* at *5 (quoting *Aetna Casualty*, 948 F.2d at 1517). The *Ash Grove* court concluded that the 104(e) letter was subject to the same analysis as that of a PRP notice: "in view of the substantial penalties available to the EPA should Ash Grove not comply with the letter's requests, it is not accurate to say that the letter imposed no obligation on Ash Grove to investigate the contamination." *Id.*

In reaching its decision in *Aetna Casualty*, the Ninth Circuit looked to the nature of CERCLA to determine when an insured's interests would be genuinely in jeopardy. It noted that CERCLA was a coercive statutory scheme that "greatly empowers the government. In order to influence the nature and costs of the environmental studies and cleanup measures, the PRP must get involved from the outset." 948 F.2d at 1517. In addition to the strong incentives to cooperate with the EPA with respect to CERCLA, the court noted that coverage under a CERCLA claim "should not depend on

whether the EPA may choose to proceed with its administrative remedies or go directly to litigation. A fundamental goal of CERCLA is to encourage and facilitate voluntary settlements." *Id.* (citation omitted). The court stated that, in evaluating whether an insured faces liability such that its rights are in jeopardy, "[t]he focus should be on the underlying rationale and not on the formalistic rituals. If the threat is clear then coverage should be provided." *Id.* at 1518.

Here, the agency communications combined to achieve the same "suit" equivalent within the meaning of the subject policies. In January 2008, Batson informed BAE that it had been identified as a possible PRP and invited it to attend an exploratory meeting. That same month, the EPA sent letters to BAE and TMG seeking information to assist in identifying PRPs, invoking section 104(e) of CERCLA, which itself provides that failure to cooperate with the information request authorizes the EPA to pursue enforcement and levy fines. The PHTC also issued letters in January 2008 in which it, first, invited participation and, second, identified TPPs as PRPs. In March 2008, Batson referenced the 104(e) information requests and informed NWM that it was a PRP. In March 2010, GNLs issued to TMG and BAE. In September 2010, the PHTC informed TMG and BAE that had been identified PRPs.

The CGL policies in this case do not define the term "suit." The OECAA sets forth a rule of construction for such term, provided it does not interfere with the intent of the contracting parties. The court finds that finding a "suit" exists here does not interfere with the parties' intent. Relevant and binding precedent counsel that a suit arises when an insured's rights are genuinely in jeopardy and an obligation has been imposed. This can occur at least as early as a request to provide information or otherwise comply with a CERCLA action, even absent an explicit declaration of liability. Indeed, as the Ninth Circuit has observed,

> The terms of an insurance contract dictate the obligations of the parties. Clear and unambiguous terms in insurance policies are construed according to their plain meaning, that is, what an ordinary reasonable lay person would interpret the meaning to be. * * * [A]n "ordinary person" would believe that the receipt of a PRP notice is the effective commencement of a "suit" necessitating a legal defense.

Aetna Casualty., 948 F.2d at 1512, 1517. Here, administrative communications, including the 104(e) letter and notifications of PRP status, provided clear notice of the need to affirmatively defend allegations of liability for environmental contamination and were sufficient to trigger Defendants' duty to defend. Accordingly, the court finds that, at least as early as the 104(e) notices, the agency actions and communications gave rise to a "suit" as a matter of law.

III. Corporate Succession

A. Succession Under Oregon Corporate Law

"Under Oregon law, when a corporation purchases the assets of another corporation, the purchasing corporation generally does not assume the debts and liabilities of the selling corporation." *Cox v. DJO, LLC*, Civ. No. 07-1310-AA, 2009 WL 3855084, at *2 (D. Or. Nov. 16, 2009) (citing *Erickson v. Grande Ronde Lumber Co.*, 162 Or. 556, 92 P.2d 170 (1939)). A corporation's debts and liabilities may transfer if any of four circumstances are present:

> 1) the purchasing corporation expressly or impliedly agrees to assume those liabilities; 2) the transaction constitutes a consolidation or merger of the corporations; 3) the purchasing corporation is a "mere continuation" of the selling corporation; or 4) the corporations effectuated the transaction for fraudulent purposes to escape liability.

Cox, 2009 WL 3855084, at *2 (citing *Erickson*, 162 Or. at 568).

In *Cox*, the plaintiffs sought to recover from an alleged successor corporation for liability that arose prior to the succession on the theory that the liability of the original corporation had transferred to the successor corporation under one of the four exceptions. The district court gave multiple

reasons for rejecting plaintiffs' argument: the merger agreement explicitly stated that the successor would not take on any liabilities arising prior to the closing date of the merger; the merger with the another closely-aligned corporation was not a de facto merger with the original corporation; the merger did not create a mere continuation as the original corporation continued to operate as "an existing, separate corporate entity and an active defendant" and there was "no continuity of management, directors, or shareholders"; and the plaintiffs did not produce evidence that the corporations had colluded in the transaction to avoid liability. *Id.* at *3-4.

In *Dahlke v. Cascade Acoustics, Inc.*, 216 Or. App. 27, 171 P.3d 992 (2007), the Oregon Court of Appeals analyzed the third exception to the "no transfer" rule, where the asset purchase gives rise to a new corporation that is a "mere continuation" of the previous corporation. The court held that there was no continuation where the purchase was less than all of the original corporation's assets:

> Plaintiff argues that, under the third exception quoted in *Erickson*, Drake Management is liable for FMD's debts because Drake Management "is merely a continuation of" FMD. . . . Most notably, Drake Management did not purchase *all* of FMD's assets. Rather, FMD was left with significant assets and continued to operate as a separate corporation for more than a decade. Plaintiff's theory that Drake Management was simply a continuation of FMD ignores the separate legal existence of the two corporations and disregards the legislative policy that corporations are distinct legal entities.

Id. at 37 (emphasis in original). However, the Ninth Circuit, in a case applying California law, has held that an insurance policy's benefits transfer when enough of the predecessor corporation's assets are purchased: "the benefits of an insurance policy, including the right to a defense, issued to a predecessor corporation transferred by operation of law to the successor corporation when it purchased substantially all the predecessor's assets." *Quemetco Inc. v. Pacific Automobile Insurance*

Co., 24 Cal. App. 4th 494, (1994) (citing *Northern Insurance Co. of New York v. Allied Mutual Insurance*, 955 F.2d 1353, 1358 (9th Cir. 1992)).

TPPs argue that they have alleged the succession of TMG and BAE to NWMIW's insurance policies sufficient to entitle them to a defense under those policies. TPPs cite the administrative communications that gave rise to this suit as identifying BAE and TMG as the corporate successors of NWMIW. In particular, they refer to the January 2008 letters from Batston, the 104(e) CERCLA notices, communications from the EPA requesting information about the Site, the General Notice Letters, and letters from the PHTC. TPPs argue that this evidence is sufficient to allege corporate succession such that the duty to defend is triggered.

TPPs cite *Shearer* for the proposition that extrinsic evidence is relevant to determine the identity of an insured, but does not necessarily need to be pleaded where the evidence is not otherwise relevant to the merits of the underlying case:

> The facts relevant to an insured's relationship with its insurer may or may not be relevant to the merits of the plaintiff's case in the underlying litigation. The plaintiff in the underlying case is required to plead facts that establish the defendant's liability; the plaintiff often is not required to establish the nature of the defendant's relationship to some other party or to an insurance company in order to prove a claim.

237 Or. App. at 477. TPPs thus argue that the court may consider extrinsic evidence of facts not alleged in the pleading. They further argue that in two years of discovery the insurers have failed to uncover evidence that rebuts the succession of their policies to BAE and TMG.

Defendants assert that TPPs bear the burden of proving coverage and must establish their identity as insureds and, thus, their entitlement to defense coverage. According to Defendants, TPPs have produced no evidence of the transfer of liabilities and assets from NWMIW to BAE and TMG, and have only produced correspondence which presupposed the corporate succession of

environmental liability. Furthermore, Defendants argue that the 1997 SPA agreement is ambiguous which itself presents genuine issues of fact regarding succession of the insurance policies. Defendants also argue that the insurance policies at issue include anti-assignment clauses and do not otherwise provide for successor coverage, which point TPPs concede, though TPPs contend the policies transferred by operation of law and, as such, any anti-assignment clauses were overridden.

The court agrees that TPPs have the burden to establish coverage and have failed to do so here. Although the evidence cited by TPPs suggests a possible succession of liability from NWMIW to BAE and/or TMG, it does not establish it as a matter of law. In fact, TPPs state in their reply that the 1997 SPA is ambiguous. The parties dispute which of them is entitled to a favorable inference where the corporate succession documents are ambiguous. The court need not answer this question because, even if the inferences are made in favor of TPPs, the documents are themselves still ambiguous regarding which entity, BAE or TMG, is the successor to the insurance policy. Thus, Defendants are correct that there are genuine issues of material fact as to the corporate succession and, more specifically, whether the policies issued by St. Paul and the other insurers were validly transferred by way of corporate succession.

Defendants argue that a duty to provide a defense to more than one potential successor to an insurance policy is a requirement unsupported by law. However, in light of the ambiguity created by the corporate succession documents, the court has determined that there are questions of fact as to whether either BAE or TMG have succeeded to the insurance policies in this case.

B. Succession by Operation of Law

The parties dispute whether there was a transfer of liability under CERCLA by operation of law. TPPs argue that, in the context of CERCLA and principles of equity, coverage for damage

occurring during a policy period transfers to a subsequent owner regardless of the laws of corporate succession. They rely in large part on the holding in *B.S.B. Diversified Co., Inc. v. American Motorists Ins. Co.*, 947 F. Supp. 1476 (W.D. Wa. 1996), a case from the Western District of Washington involving groundwater contamination and subsequent cleanup efforts. The court held that the insurer was liable for coverage under two theories: first, that an assignment transferred all liabilities and assets to a successor corporation and, second, that the liabilities and assets transferred by operation of law. The court relied on a prior decision by the Ninth Circuit, *Northern Ins. Co. of New York v. Allied Mutual Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992), which it described as follows:

> In *Northern Insurance*, the court held that there was no explicit transfer of liabilities in an asset purchase agreement in which Brown-Foreman Corporation purchased California Cooler. The Ninth Circuit, however, relied on Washington and California law to conclude that liability for pre-sale activity "transferred irrespective of any clauses to the contrary in the asset purchase agreement." Then, under "operation of law," the court concluded that the rights under insurance policies to indemnification and a defense followed the liability.

B.S.B. Diversified, 947 F. Supp. at 1481. The district court concluded that "where the events creating liability occurred prior to transfer of liability," the successor assumes responsibility and "the insurance benefits covering liability for those acts" are also transferred to the successor. *Id.* at 1481-1482.

Defendants argue that this case, and the Ninth Circuit precedent it relies on, have since been undermined, as demonstrated by *Quemetco Inc. v. Pacific Automobile Ins. Co.*, 24 Cal. App. 4th 494, 29 Cal. Rptr. 2d 627 (1994). In *Quemetco*, the court surveyed relevant California precedent and the holding in *Northern Insurance*, and considered whether the insurance policy issued to a corporation necessarily transferred to a successor corporation "when it purchased substantially all of the predecessor's assets." *Quemetco*, 24 Cal. App. 4th at 499. The *Quemetco* court cited a 1986

California Court of Appeals decision which cited the *Northern Insurance* holding and had declined to "extend the rule for determining liability to the issue of insurance coverage, instead preferring to look to the contract itself to resolve the issue of coverage." *Id.* at 500. The *Quemetco* court distinguished cases that had validated the transfer of insurance benefits as situations wherein the corporate succession had been established. *Id.* at 501. It also noted that the timing of the succession relative to the liability-inducing occurrence was relevant, in that a liability arising after the corporate transfer would not carry with it the coverage of a pre-existing policy. *Id.* The court concluded:

> In this case, appellant was found to be liable for hazardous waste clean up costs based on an act passed after it purchased Old Quemetco's assets. Thus, unlike the situation in *Northern*, no liability passed as a matter of law at the time of the asset sale as no such liability existed at that time.

Id. Thus, under *Quemetco*, the insurance benefits of a pre-existing policy transfer when the liability transfers under the state's law of corporate succession and where the liability existed at the time of the succession.

The court does not agree that *Quemetco* necessarily undermines the holdings of either *Nothern Insurance* or *B.S.B. Diversified*. In the court's view, the confusion stems from the discussion by the district court in *B.S.B. Diversified*. There, the court presented its duty inquiry as two distinct analyses, rather than a single analysis. The court first determined that liability flowed to the successor corporation under principles of corporate law and so the insurance benefits should also attach. Then, the court determined that liability and insurance benefits transferred to the successor corporation by operation of law, irrespective of anti-assignment language contained in the insurance policy itself. Although seemingly presented as a separate ground for finding coverage under the insurance policy, the "operation of law" argument presupposed that corporate succession

occurred sufficient to transfer liability and merely provided that a successor would be "responsible for environmental cleanup where the events creating liability occurred prior to transfer of liability." *B.S.B. Diversified*, 947 F. Supp. at 1482. The discussion is otherwise sound, except to the extent that it created the appearance of a dichotomy where there is no such difference.

Here, there are questions of fact regarding whether corporate succession occurred sufficient to transfer liability to BAE or TMG, and summary judgment on this point is denied. However, if a finder of fact determines that BAE and TMG did indeed succeed to the liabilities of NWMIW, the benefits of the insurance policies will flow to BAE and TMG just as the liability for an occurrence that took place prior to their tenure does.

III. Constitutionality of the OECAA

St. Paul[6] objects to application of OECAA rules of construction to its policy language as an unconstitutional violation of the Contracts Clauses of both the United States and Oregon Constitutions. The State of Oregon ("the State") intervened in order to defend the OECAA, a position with which TPPs concur. In its responsive briefing, St. Paul makes clear that it does not challenge the OECAA's facial constitutionality, but only the constitutionality of the application proposed by TPPs as overbroad and beyond the intent of the legislature and the contracting parties. St. Paul argues, specifically, that interpreting the agency communications that occurred in this case as a "suit" for purposes of the OECAA would amount to an unconstitutional application.

The United States Constitution provides: "No State shall . . . pass any . . .Law impairing the Obligation of Contracts[.]" U.S. CONST. Art. I § 10. The Oregon Constitution provides: "No . . . law impairing the obligation of contracts shall ever be passed[.]" OR. CONST. Art. I § 21. The

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[6] St. Paul alone objected to the State's motion to intervene.

parties agree generally that to determine whether a law violates either contract clause, a three-step analysis is applied. First, the court considers whether the contract is substantially impaired. Second, the court examines whether the state has a "significant and legitimate public purpose" for the regulation. Third, the court determines whether the resulting adjustment of the contract obligations is reasonable in its conditions and character in light of the underlying public purpose. *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983).

Under the OECAA, when an agency "directs, requests or agrees that an insured take action with respect to contamination with the State of Oregon" such action is considered a "suit" for purposes of a CGL policy, so long as that interpretation does not undermine the intent of the parties to the policy. St. Paul argues that expanding the definition of a "suit" for purposes of the OECAA in the manner proposed by TPPs would render the statute unconstitutional. St. Paul contends such application would interfere with the intent of the contracting parties, as expressed in the policy terms themselves. In particular, St. Paul points to the distinction made in the policy between claims and suits, where the insurer has a duty to defend a suit, but not a claim. In light of this distinction, St. Paul argues, it cannot be required to defend what would qualify as a "claim" under its policy, regardless of whether it would qualify as a "suit" under the OECAA. In other words, the definition of "suit" in the statute is broader than the definition contemplated by the policy, and imposition of the statute's definition on the policy thus would unconstitutionally impair the bargain agreed to by the contracting parties.

St. Paul then turns to the three-step analysis. First, St. Paul identifies the particular right that will be substantially impaired by application of the OECAA, namely its right to deny a defense to a what is merely a claim, and not a suit. This impairment is substantial, it argues, because the terms

of a duty to defend are a central component of a liability insurance policy. Second, St. Paul argues that such an interpretation would bring the OECAA beyond its significant and legitimate public purpose, this because the interpretation would actually benefit a narrow class of interested parties, rather than the people of Oregon. St. Paul argues further that the rules of construction set forth in the OECAA apply only to a narrow class of insurance claims, specifically environmental claims. In St. Paul's view, a rule that applies solely to environmental claims, and not all claims under the policy, would be improper and represent a departure from the purportedly substantial and legitimate public purpose of the OECAA. Third, St. Paul argues that application of the OECAA as urged by TPPs is outside of the substantial and legitimate public purpose of the statute. According to St. Paul, the statute's purpose is to "encourage parties to cooperate with environmental agencies in remedying contamination." (St. Paul Opp. Memo. 35.) In particular, St. Paul notes that the agency communications TPPs seek to introduce as initiating a suit are mere requests for cooperation that do not concern an agreement to remedy contamination by a responsible party. In the absence of an allegation of liability, the agency communications cannot constitute a suit sufficient to trigger St. Paul's duty to defend. Finally, St. Paul urges the court to construe the statute in a manner that avoids a constitutional conflict.

The State argues that the statute is facially constitutional and its uses the history and purpose of the statute to support its argument. First, the State argues that the legislative history and purpose of the statute reveal that it was enacted to allow policy holders to voluntarily comply with environmental cleanup efforts prior to the formal initiation of litigation. In doing so, the law sought to prevent situations where an insurer would deny its duty to defend or the existence of coverage, and thus discourage or at least delay voluntary efforts by policy holders to remedy environmental

damage while such issues were litigated in courts of law. Second, the State argues that the statute was drafted to avoid violating the contracts clause. OECAA's definition of "suit" applies only where the court cannot ascertain the meaning of "suit" from the face of the policy. Furthermore, the rule of construction is not applied if its result would be contrary to the parties' intent. The State notes that where contract terms are ambiguous, courts turn to maxims of construction which are often established by statute. Thus, the inclusion of rules of construction in the OECAA is neither unusual nor unconstitutional.

With respect to the three-step analysis, the State argues first that the statute does not substantially impair the insurance policy by modifying the scope of coverage. Rather, the statute supplies rules with which to evaluate ambiguous contract terms and does not change the underlying contract in any way. And, even if it did modify the contract as St. Paul argues, this would not be considered "substantial" in the context of the heavily regulated insurance industry. Second, the State argues that the purpose of the OECAA is both significant and legitimate in that environmental cleanup benefits all citizens of the State, not any special interest. Furthermore, the State argues, where contract terms are ambiguous, courts ultimately resort to considering policy goals, which goals are appropriately left to elected officials and not to courts. The State also distinguishes *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), as representing a materially different situation wherein a legislative enactment was not broadly applicable and may have been enacted with a single entity in mind. Third, the State argues that the rule of construction currently at issue is reasonable measure and is appropriate to achieve its purpose – it applies only where the contract term is ambiguous and facilitates voluntary compliance in environmental cleanup efforts.

For their part, TPPs defend the constitutionality of the OECAA and its definition of "suit"

as a construction that has been validated by Oregon courts, noting that a contract can hardly be impaired by a statutory definition for a term the insurer did not bother to define in the policy itself.

The court agrees that this application of the OECAA's rules of construction does not violate the contracts clause of the United States or Oregon Constitutions. First, the application does not substantially impair the terms of the policy. The policy requires St. Paul defend the insured in the event of liability for property damage. The OECAA merely provides guidance for courts in determining when a suit has been initiated where determining that occurrence otherwise is ambiguous, provided that determination is not in conflict with the contract terms. As previously discussed, a duty to defend arises where there is a threat of liability, and that threat exists under these facts. OECAA's definition of "suit" does not in any way alter or amplify that duty. Second, the OECAA has a significant and legitimate public purpose in protecting the citizens of Oregon from serious environmental contamination and in holding polluters responsible for environmental degradation. In light of this purpose, and weighed against the purported contractual interference, the readjustment of obligations is reasonable in condition and character. The OECAA seeks to facilitate cleanup efforts and encourage voluntary compliance in these efforts, purposes both legitimate and substantial. And, in light of the coercive nature of CERCLA, the OECAA does not unduly impair the insurance policy by interpreting "suit" to encompass specific administrative actions that seek to identify and impose liability.

TPPs also argue that St. Paul should have pleaded the alleged unconstitutionality of the OECAA as an affirmative defense. TPPs' sole citation in support for this contention is a treatise which states that certain other issues not specifically set forth in Federal Rule of Civil Procedure 8(c) must be "set forth affirmatively in the responsive pleading." Wright & Miller, *Federal Practice and*

Procedure, Civil 3d § 1271. The rule itself does not provide guidance to determine which unspecified issues must be so pleaded, but the cited treatise notes that, in spite of this lack of guidance, "it is possible to formulate some working principles for determining what constitutes a defense contemplated by the final clause of Rule 8(c)." *Id.*

The Wright & Miller treatise cites three cases. Two are from different circuits, namely the Fifth and Tenth Circuits, and they state categorically that a constitutionality challenge must be pleaded. *Kewanee Oil & Gas Co. v. Mosshamer*, 58 F.2d 711, 712 (10th Cir. 1932); *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916, 920 (D.C. Ga. 1964) (citing *Kewanee*). The other case cited is from the Idaho Supreme Court and stands for the opposite proposition: "The constitutionality of a statute, however, is not ordinarily an issue upon which evidence must be presented at trial or about which one must be forewarned in order to prepare evidence for trial. In this case the constitutional question is a matter of law." *Williams v. Paxton*, 98 Idaho 155, 163 n.1 (1976). However, in light of the uncertainty of federal law on this issue and the fact that the court otherwise finds the statute constitutional and the pleading issue thus moot, the court declines to rule on this issue.

Conclusion

For the reasons stated, TPPs motion for summary judgment (#298) is GRANTED in part and DENIED in part. Century's motion to strike (#334) is DENIED. Argonaut's motion to join (#302) is DENIED.

DATED this 27th day of January, 2012.

/s/ John V. Acosta
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United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

CENTURY INDEMNITY COMPANY, a Pennsylvania corporation, Plaintiff, v. THE MARINE GROUP, LLC, et al. Defendants, and STATE OF OREGON Intervenor	Case No. 3:08-CV-01375-AC STATE OF OREGON'S [PROPOSED] MEMORANDUM ON THE CONSTITUTIONALITY OF THE OREGON ENVIRONMENTAL CLEANUP ASSISTANCE ACT

Defendant St. Paul Fire and Marine Insurance Company ("St. Paul") does not want the Court to rely on the Oregon Environmental Cleanup Assistance Act (OECAA) to interpret the term "suit" in an insurance policy. According to St. Paul, applying the law in this way would violate the Contracts Clauses of the Oregon and United States Constitutions. St. Paul's argument

fails. The OECAA provides rules of construction to resolve uncertainty over the meaning of the term "suit" in disputes involving environmental claims on general liability policies. The OECAA rules of construction do not apply where it would result in an interpretation contrary to the intent of the parties. The State takes no position on the policies at issue here, but if this Court cannot ascertain the parties' intent concerning the term "suit" on the face of the policies, then it must turn to the OECAA as the appropriate and binding statutory rule of construction for the term "suit." The OECAA promotes the State's substantial public interest in devoting resources to cleanup and mitigation of contaminated sites in Oregon through cooperation and voluntary compliance, rather than endless litigation. ORS 465.478. Application of the OECAA is constitutional because it does not impair the obligations of contract because the rules of construction only apply where the intent of the parties is not discernible.

I. THE OREGON ENVIRONMENTAL CLEANUP ASSISTANCE ACT.

In 1999, the Oregon Legislature enacted the OECAA to reduce litigation over insurance coverage disputes involving insureds who face potential liability for polluted sites in Oregon. ORS 465.478. The Oregon Legislature found the State has a substantial public interest in promoting fair and efficient resolution of these insurance disputes "while encouraging voluntary compliance and regulatory cooperation." ORS 465.478. The State's ultimate objective is cleanup of contaminated sites in Oregon, which can be achieved by encouraging cooperation and directing more funds to cleanup rather than litigation.

The legislative history shows that there was increasing litigation over whether insurance policies covered certain costs associated with liability for environmental contamination. Many involved disputes over the term "suit." To "unlock[] the door to their insurance policy," policy holders had to hold off on voluntary compliance and cooperating with state or federal regulators and wait for the regulator to file a formal complaint to be a "suit," according to the insurers'

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interpretation[1] The case-by-case adjudication of these disputes delays cleanup and diverts substantial funds that could instead be directed at voluntary and cooperative cleanup efforts.[2]

Rather than leaving the interpretation of ambiguous insurance policy terms to the courts and protracted litigation, the Oregon Legislature provided rules of construction, including the definition of the term "suit." ORS 465.480(1)(a),(2)(b). The Oregon Legislature enacted these provisions to set public policy encouraging cooperation to mitigate environmental damage and because legislating was more efficient and less expensive than litigating the ambiguous insurance terms.[3] To guard against an argument that the OECAA impairs obligations of existing contracts, the OECAA rules of construction do not apply if the application would result in an interpretation contrary to the intent of the parties to the insurance policy. ORS 465.480(7).

II. THE OECAA DOES NOT IMPAIR OBLIGATIONS OF CONTRACT.

The OECAA is constitutional because it applies only where it will not result in an interpretation contrary to the intent of the parties. In interpreting contracts, the court's objective

[1] *SB 1205 Public Hearing Before the Senate Committee on Judiciary*, Exhibit O, at 1, Written Testimony (April 19, 1999) (statement of Joe Gilliam, National Federation of Independent Businesses) (attached hereto as Exhibit 1).

[2] *SB 1205 Public Hearing Before the Senate Committee on Judiciary*, Exhibit A, Written Testimony (April 19, 1999) ("Testimony of John DiLorenzo, Jr. on behalf of INC Pharmaceuticals, Inc. in Support of Senate Bill 1205 before the Senate Judiciary Committee, Tab 10, Lloyd S. Dixon, RAND corporation, Congressional Testimony, "Superfund and Transaction Costs – The Experience of Insurers and Very Large Industrial Firms" May 1992") (excerpts attached hereto as Exhibit 2, see pg. 21).

[3] *See, e.g., Minutes of SB 1205A Public Hearing Before the House Committee on Judiciary – Civil Law* (June 21, 1999) (testimony of Anne O'Neil, Fireman's Fund Insurance Company) (attached hereto as Exhibit 3, see pg. 3) ("Chair Shetterly: "Would you prefer that the courts construe insurance contracts rather than the legislature? O'Neill "Yes" *** Rep. Lowe: Do you agree that it is the province of the legislature to set public policy regarding encouraging people to mitigate environmental damages by cooperating with the Department of Environmental Quality (DEQ)? O'Neill: Yes.***"). *See also, e.g., Minutes of Senate Committee on Judiciary*, April 19, 1999, SB 1205 Public Hearing (attached hereto as Exhibit 4) at p. 4 (Sen. Brown: "You say the issues have been solved by court findings, not by legislation. Why shouldn't we be setting policy? Why should it be left up to the courts?" [Tom] Gordon [testifying in opposition to SB1205]: "If you would set policy going forward, that seems fair. SB 1205 goes back in time and interprets policies that have lapsed" Sen. Brown: "Isn't it true that some of those old policies are still being litigated today?") and at p. 6 ([Jim] McDermott [testifying in support of SB 1205]: "It is much more expensive and much less efficient to litigate instead of legislate.").

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is to determine the intent of the parties. If unable to determine intent of an ambiguous term, courts rely on appropriate maxims of construction. *Yogman v. Parrott*, 325 Or. 358, 364, 937 P.2d 1019 (1997). Maxims of construction may be established by statute.[4] *See, e.g.*, ORS 42.210 – 42.300. If the Court cannot determine the intent of the parties with respect to the term "suit," from the face of the policies, the OECAA rules of construction apply. Such an application of the OECAA does not violate the Contracts Clauses of the Oregon or United States Constitutions.

The Oregon Constitution provides: "No * * * law impairing the obligations of contract shall ever be passed * * *." Or. Const art. I, § 21. The Contracts Clause of the United States Constitution provides: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. "The prohibitions against impairing the obligations of contracts in both the state and federal constitutions are not absolute." *Kilpatrick v. Snow Mountain Pine Co.*, 105 Or. App. 240, 243, 805 P.2d 137 (1991) (*citing United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)). Accordingly, not every state law that has an impact on a private contract is deemed to impair the obligations of that contract.

> Whether the OECAA violates the Contracts Clause is governed by a three-step inquiry:
>
> 1. Whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.
>
> 2. If there is a substantial impairment of a contractual relationship, whether the State has a significant and legitimate public purpose behind the regulation.
>
> 3. If there is a legitimate public purpose, 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.

[4] In the case of a contract for insurance, generally the appropriate maxim of construction is to construe "ambiguous terms . . . against the insurer, who drafted the policy." *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 324 Or. 184, 192-193, 923 P.2d 1200 (1996).

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Energy Reserves Group v. Kansas Power and Light, 459 US 400, 411 (1983) (quotations omitted). Generally, the analysis of the Oregon Contracts Clause is parallel to the federal analysis. *Towerhill Condominium Ass'n v. American Condominium Homes, Inc.*, 66 Or. App. 342, 347, 675 P.2d 1051 (1984).

A. The OECAA Does Not Operate as a Substantial Impairment of a Contractual Relationship.

St. Paul argues that application of the OECAA operates as an impairment "because the statute impacts the scope of the agreement between the parties." St. Paul Opposition at 32 (Dkt #337). The OECAA rules of construction concerning the term "suit" do not apply if application would result in an interpretation contrary to the intent of the parties. ORS 465.480(7). If the intent of parties cannot be determined from the face of the policies, then the scope of the agreement with respect to that term is in dispute. *See Ash Grove Cement Co. v. Liberty Mutual Ins. Co.*, 2010 WL 3894119, *5-6 (D. Or) (application of the OECAA not contrary to the intent of the parties where the intent of the parties cannot be ascertained). The OECAA does not change the scope of the agreement, rather, the Act supplies the rules of construction to interpret and resolve the dispute over the term and scope of the agreement. The application of the OECAA will not change the underlying contract any more than the application of any other rule of construction. For example, it is a well established rule that ambiguous contract terms, including terms in insurance policies, are construed against the drafter. Such rules do not change the contract, and neither does the OECAA.[5]

Even if application of the OECAA rule of construction did impair the contract, that impairment would not be substantial due to the heavily regulated nature of the insurance industry. In evaluating whether the alleged impairment is sufficiently "substantial" to trigger the

[5] Likewise, St. Paul's assertion that application of the OECAA would deprive it of a contractual right "to assert that the insured is not subject to a 'suit' beyond the intent of the parties as expressed in the contract" again ignores that the OECAA only applies when not contrary to the intent of the parties.

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Contracts Clause, courts look to some degree to the reasonable expectations of the complaining party. In determining the extent of the party's reasonable expectations, courts "consider whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves Group*, 459 US at 411. The liability insurance industry is heavily regulated in Oregon. *See, e.g.*, ORS 731-35, 737, 742-44, 746, 748, 750 ("the Insurance Code"); *Lovejoy v. City of Portland*, 95 Or. 459, 474, 188 P. 207 (1920) ("The purpose of [the Insurance Code] is to provide for the entire state a uniform and complete system of regulation and supervision of the insurance business."). Insurers had every reason to anticipate that the state would remain a strong and active regulator.

B. The OECAA has a significant and legitimate public purpose.

Even if the Court finds that applying the OECAA to the term "suit" is a substantial impairment of contract, the OECAA is constitutional because it is reasonably necessary to advance a legitimate public purpose. "[T]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves*, 459 U.S. at 412. The OECAA was enacted to further the State's "substantial public interest in promoting the fair and efficient resolution of environmental claims while encouraging voluntary compliance and regulatory cooperation." ORS 465.478. This purpose, designed to direct more funds to cleanup of contaminated sites as opposed to litigation, is a legitimate public purpose to benefit the citizens of Oregon, not a special interest.

During the legislative hearings on the OECAA, the legislature heard evidence that there were increasing numbers of disputes over whether insurance policies purchased in the 1960s and 1970s covered various costs associated with environmental pollution, and that these disputes were impairing the progress of government-organized environmental remediation efforts.

The legislature heard evidence that insurers were engaging in obstructionist tactics to avoid paying environmental claims. Various insureds testified that whenever they filed an environmental claim, their insurer would stonewall them and bury them with burdensome

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information requests.[6] Lawyers from multiple law firms testified that in environmental coverage cases, insurers would routinely allege 50 or more affirmative defenses, resulting in protracted and expensive battles that substantially delayed cleanup efforts.[7]

Insurers also advanced an excessively narrow definition of the insurers' duty to defend, one which precluded insurance coverage if an insured cooperated with regulators rather than waiting to be sued by those regulators. For example, the State director of the National Federation of Independent Business submitted written testimony to the Senate judiciary committee that explained that "under current laws, small businesses are forced to hold off

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[6] *See, e.g., SB 1205 Public Hearing Before the Senate Committee on Judiciary*, Exhibit I, at 4-5 Written Testimony (April 19, 1999) ("Testimony on S.B. 1205 by Tom Zelenka, The Schnitzer Group before Senate Judiciary Committee") (attached hereto as Exhibit 5, see pg. 4-5) ("***When the Schnitzer Group companies get a letter from the 'Environmental Claims Unit' of an insurer telling them there is no coverage for environmental contamination for ten different reasons, we hire a lawyer and tell the insurance company why there is in fact coverage. How many Oregon companies know to do that, or have the resources to hire a lawyer in these circumstances? When the insurance companies still don't pay, we file suit and hang in there through what is always a difficult an expensive lawsuit (insurance lawsuits are notorious for being extremely expensive due to the tactics employed by the insurance companies, which is enough to make many Oregon insureds vulnerable to a coerced settlement before the case ever gets to trial)"); *see also SB 1205 Public Hearing Before the Senate Committee on Judiciary*, Exhibit H, at 2, Written Testimony (April 19, 1999) ("Judiciary Committee Testimony Regarding Senate Bill 1205, Jayne C. Bond, President & CEO of Permapost Products Company") (attached hereto as Exhibit 6, see pg. 2) ("My business, like many in Oregon, has paid our insurance premiums. We have now asked for coverage on a claim. The insurance companies have closed their doors on us, calculating (and usually correctly so) that we small businesses do not have the resources to fight a long, expensive battle").

[7] Exhibit 4 at p. 6 ("***We have appended . . . a copy of the affirmative defenses asserted by Commercial Union Insurance Company which are representative of the affirmative defenses we were required to rebut during the course of the litigation. You will note that Commercial Union asserted 51 affirmative defense during the course of the lawsuit. These defenses were commonly asserted by the other insurers involved. Many of the 51 affirmative defenses directly pertain, in my view, to the terms of the policies. However, many of those defenses were nothing more than an attempt to avoid coverage where pollution coverage was already present"); *see also SB 1205 Public Hearing Before the Senate Committee on Judiciary*, Exhibit N, at 1, Written Testimony (April 19, 1999) ("SB 1205, Testimony of Richard S. Pope, Senate Judiciary Committee") (attached hereto as Exhibit 7, See pg. 1) ("***[The insurance companies'] environmental claims units routinely set up 50 or so obstacles to recovery – the 50 or so affirmative defenses they routinely file in all these cases – and hope the policyholder gets stopped by just one of them, which can be enough to defeat all recovery").

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voluntary clean up efforts for insurance related reasons." Exhibit 1 at 1. As that director testified:

> Under some court rulings, a small business owner with an identified problem, must wait until the regulator files a lawsuit against the company, before a claim can be made. This scenario forces all parties to being a drawn out and expensive adversarial process to achieve the cleanup. It precludes swift voluntary actions because the small business owner can not avail themselves to the resources of their insurance policy. Instead, small business owners spend their scarce legal resources on legal fees, to create the 'suit' that unlocks the door to their insurance policy.

Id.

Further legislative testimony documented that case-by-case adjudication of these particular disputes was costly and inefficient, and diverted a substantial volume of funds that could be used for cleanup efforts. For example, during the committee hearings, the legislature was presented with a RAND Group study that showed that between 1986 and 1989, insurance companies paid out an average of $17 million per company in costs related to superfund claims, but a staggering 88% of the total was devoted to "transaction costs," with just 12% of the money going to payments to policyholders for site cleanup. These "transaction costs" were "split roughly evenly" between "defense of the policyholder in disputes with the government or other private parties over liability, and disputes with the policyholders over whether a claim is covered under their insurance policies" Exhibit 2 at 21.

The legislature also heard competing views about whether or not the standard general liability policies were or were not originally intended to cover various types of environmental pollution costs. Not surprisingly, insurers vehemently opposed the OECAA and the move away from case-by-case litigation of ambiguous contract terms. They argued that their practices did not impair cleanup, that the law would raise insurance rates, and that businesses, not insurers, should bear the costs associated with cleanup.[8] Despite the objections of the insurers, after

[8] *See, e.g., SB 1205 Public Hearing Before the Senate Committee on Judiciary,* Exhibit F, Written Testimony (April 19, 1999) ("Letter in Opposition to Senate Bill 1205 from Larry W.

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multiple hearings, extensive testimony, and voluminous written exhibits, the Oregon Legislature decided that the best way to advance the goal of cooperative and efficient environmental cleanup was through the enactment of the OECAA.

In addition to these specific public policy reasons for the OECAA, there is a fundamental justification for the OECAA. Where discerning the intent of the parties is no longer possible and the court is resorting to maxims of construction, the court is faced with what amounts to a policy question of how a truly ambiguous contract term should be interpreted. As courts uniformly acknowledge, policy choices are best left to the elected branches of government. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1472 (2009). By enacting the OECAA, the legislature has answered the policy question that would otherwise fall to the courts.

St. Paul argues that the OECAA does not have a legitimate purpose. St. Paul Opposition at 33-34. St. Paul has not provided any evidence that the Act's stated purposes are "suspect." *Id.* at 33 (citing *Western Nat'l Mut. Ins. Co. v. Lennes (In re Workers' Compensation Refund)*, 46 F.3d 813, 821 (8th Cir. 1995)). Moreover, the legislative history demonstrates that the legislature was attempting to rectify a situation that was precluding voluntary compliance and regulatory cooperation. These purposes are not designed to protect the interests of a limited class; they are to benefit the State and its citizens as a whole to reduce litigation, promote voluntary compliance and regulatory cooperation, with the ultimate objective of cleanup of contaminated sites in Oregon. The OECAA protects a broad societal interest, in marked contrast to the Minnesota law at issue in *Allied Structural Steel,* which had "an extremely narrow focus" and was potentially

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Becker, President of CGU North Pacific") (attached hereto as Exhibit 8); *SB 1205 Public Hearing Before the Senate Committee on Judiciary*, Exhibit N, Written Testimony (May 13, 1999) ("Testimony in Opposition, SB 1205, from the Alliance of American Insurers") (attached hereto as Exhibit 9); *SB 1205A Public Hearing Before the House Committee on Judiciary – Civil Law*, Exhibit G, Written Testimony (June 21, 1999) ("Letter in Opposition to Senate Bill 1205 from Paul S. Brown, Assistant General Counsel to American International Group, Inc.") (attached hereto as Exhibit 10).

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directed at only one employer. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247-248 (1978).[9]

Where there is no indication of wrongdoing or improper intent on the part of the legislature, courts are willing to recognize a broad array of public purposes as sufficiently legitimate for the Contracts Clause analysis. Courts have recognized as sufficient interests for the "purpose" prong of the Contracts Clause analysis: "mass transportation, energy conservation, and environmental protection," *United States Trust*, 431 U.S. at 28 (ultimately concluding, however, that the challenged law was not reasonable or necessary to achieve that purpose); protecting consumers from "the escalation of natural gas prices caused by deregulation," *Energy Reserves*, 459 US at 417; and "correcting the imbalance between the interstate and intrastate markets." *Id.* The OECAA has a legitimate public purpose of promoting cooperation and voluntary compliance, rather than litigation, to clean up contaminated sites in Oregon.

C. The OECAA is Reasonable and Appropriate to Achieve the Legitimate Public Purpose.

Where the State is not alleged to have altered its own contractual obligations, courts "properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Group,* 459 U.S. at 412-413; *see also Evans v. Finley,* 166 Or. 227, 238, 111 P.2d 833 (1941). To the extent the court chooses to inquire here, the OECAA rules of construction are reasonable, as they only apply where the intent of the parties is unclear, and they are necessary for the reasons discussed in Section II.B, above, namely, to encourage voluntary compliance in cleanup actions and fairly and efficiently resolve insurance disputes related to those cleanups, with the ultimate goal to clean up contaminated sites in Oregon.

[9] The situation in *Allied Structural Steel* is further distinguishable because the Court found that the Minnesota law nullified express terms of the contract, as compared to the application of the OECAA to interpret the term "suit" where the intent of the parties is indiscernible. 438 U.S. at 247. In addition, Minnesota had entered a field it had never before regulated, whereas here, the State of Oregon has heavily regulated the insurance industry. *Id.* at 249.

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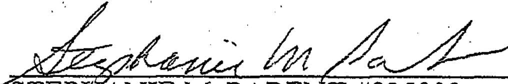
CONCLUSION

As demonstrated above, where the intent of the parties is unclear, applying the OECAA rules of construction to resolve a contract dispute does not violate the Contracts Clause of the Oregon or United States Constitution.

DATED this 1st day of August, 2011.

Respectfully submitted,

JOHN R. KROGER
Attorney General



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MEASURE: SB 1205
EXHIBIT: O
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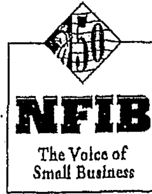
SUBMITTED BY: Joe Gilliam



NFIB Oregon

Joe Gilliam, NFIB/Oregon State Director
Written Testimony in Favor of Senate Bill 1205
Submitted to the Senate Judiciary Committee
April 19th, 1999

NFIB/Oregon is in favor of SB 1205.

Any time a small business is faced with contaminated property caused by their business or a business before them, the cost and process of remediation can literally consume the business. SB 1205 mitigates this situation when a small business owner has contaminated property covered by a previous insurance policy.

When contamination is first discovered, it would the logical assumption that all involved would endeavor to clean it up as quickly as possible. But under the current laws, small businesses are forced to hold off voluntary clean up efforts for insurance related reasons. What triggers the small business owner's right to make a claim is the key issue.

To make a claim, most insurance policies require that the business owner must be engaged in a "suit". The problem is the definition of "suit". Under some court rulings, a small business owner with an identified problem, must wait until the regulator files a lawsuit against the company, before a claim can be made.

This scenario forces all parties to begin a drawn out and expensive adversarial process to achieve the clean up. It precludes swift voluntary actions because the small business owner can not avail themselves to the resources of their insurance policy. Instead, small business owners spend their scarce resources on legal fees, to create the "suit" that unlocks the door to their insurance policy.

I have heard the claims that this legislation will cost insurance premiums to go up drastically because of the increased risk and claims costs. This perplexes me. As I understand the most common scenarios, these claims are made against past policies. The risk has been calculated, the premium charged, and the reserve invested. With the Dow closing at 10,440 today I am sure the prudent reserving practices of the insurance industry, will far exceed their claims costs.

National Federation of Independent Business
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Exhibit 1
Page 1 of 2
Century Indemnity Company, a Pennsylvania Corporation v. The Marine Goup, LLC, et al. and State of Oregon
United States District Court Case No. 3:08-CV-01375-AC

I understand the insurance industry opposition to paying costs unrelated to their policies. Small business owners applaud such efforts because we pay the bills. However, the threat of a rate increase should not be used to force small entities to be sued by their regulator in order to achieve and afford compliance with the law. I don't believe that anyone can argue that these were the expectations of the parties when the insurance was purchased.

I urge your support of SB 1205.

MEASURE: SB 1205
EXHIBIT: A
SENATE JUDICIARY COMMITTEE
DATE: 4-19-99 PAGES: 40
SUBMITTED BY: John DiLor

Testimony of John DiLorenzo, Jr.
on behalf of ICN Pharmaceuticals, Inc. in
Support of Senate Bill 1205
before the Senate Judiciary Committee
April 19, 1999

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tab 1

Testimony of John DiLorenzo, Jr.
on behalf of ICN Pharmaceuticals, Inc. in
Support of Senate Bill 1205
before the Senate Judiciary Committee
April 19, 1999

Good evening Mr. Chairman and Members of the Committee. For the record, my name is John DiLorenzo. I am an attorney with the law firm of Hagen, Dye, Hirschy & DiLorenzo in Portland. Also with me is Mr. Michael Farnell, an attorney with my firm whose practice emphasizes insurance recovery in the environmental context. We are appearing here this evening on behalf of my client, ICN Pharmaceuticals, Inc., in support of SB 1205.

Background

In the mid-'70s ICN purchased the United Medical Laboratories operation near the Portland International Airport. United Medical Laboratories operated the nations largest mail order pathology laboratory at that site beginning in 1961. ICN ran the laboratory facility from approximately 1972 until 1979. All operations were terminated in late 1979. Another business concern by the name of Drum Recovery, Inc. operated a drum recycling and waste disposal business in the early 1980s across the street from the ICN lab. Among other things, Drum Recovery shipped hazardous waste materials generated by others to appropriate landfills. During the course of their operation, Drum Recovery was short of working capital and had been locked out of numerous hazardous waste landfills. As a result, the principals of Drum Recovery began employing creative and illegal ways of disposing of hazardous waste. The principals of Drum Recovery were indicted for federal environmental crimes involving dumping of sodium hydroxide at playgrounds and depositing transformers containing PCBs on the ICN property. On this

indictment, one of the principals served a significant amount of time in federal prison and two others were placed on probation. Drum Recovery happened to have in its possession a significant number of drums containing TCE (trichlorethylene) destined for disposal somewhere.

In the early 1990s, the Portland Development Commission was interested in acquisition of the ICN site and conducted a number of environmental studies which indicated the presence of contaminated soils and other environmental concerns that could be attributed to the laboratory's operations. Because ICN had an interest in selling the property and given the fact that contaminated soils were present, ICN approached the Department of Environmental Quality and volunteered to enter into a cleanup agreement under DEQ supervision. ICN was accepted into the voluntary cleanup program and immediately began addressing the problem. The Department divided the site into five operable units, four of which have been completely remediated to DEQ's satisfaction.

However, during the course of its remedial investigation ICN discovered, much to its horror, that there were significant quantities of TCE, and two of TCE's breakdown products, DCE and vinyl chloride, in the vicinity of ICN's drywell. The large quantities of TCE appeared to have contaminated the Tualatin Gravel Aquifer, a shallow aquifer which is separated by a clay confining layer from the Tualatin Sandstone Aquifer, the aquifer from which the City of Portland derives its backup water supply to the Bull Run Reservoir. ICN did not use TCE or any of its breakdown products in any appreciable quantities in the course of its operations. It was also apparent that ICN's predecessor, United Medical Laboratories, had no use for any appreciable

quantities of TCE in its operations. It was further apparent that Drum Recovery likely dumped large quantities of TCE from their site across the street down ICN's drywell after the lab was closed.

So far, ICN has spent in excess of $2 million on remedial investigations, engineering costs and other expenses as a prelude to remediating the groundwater contamination. At this time, our least cost ground water cleanup alternative will cost approximately $3 million more. If the remediation alternative we will likely select with the Department of Environmental Quality is unavailing, it is possible that our cleanup expenses might be as great as $10 million in addition to what we have already spent.

Upon discovering the drywell contamination problem, we called our insurers together for a meeting in Portland. We called them together at that time because we believed that the acts of vandalism by DRI at the drywell contaminated the groundwater and were within scope of our coverage. Although many of our insurers had excluded pollution, their exclusions were qualified in that they still covered pollution if the release was sudden and accidental. We have attached at Tab 5 an abbreviated form of a coverage page which is representative of the coverages in many of our policies.

Upon convening in Portland, representatives of the insurers met with our engineers, reviewed documents, and were asked to form a committee to advise us on ways to keep costs down while fulfilling our responsibilities with the Department of Environmental Quality. No insurer volunteered to participate; each insurer issued denial letters. We have attached a copy of such a preliminary denial letter at Tab 6 of our materials.

We thereupon filed an action in the Multnomah County Circuit Court against approximately 15 insurers. We have since that time settled all of our claims in principle against those who issued primary coverage.

The insurers asserted numerous defenses during the course of that litigation. We have appended, for your information, at Tab 7 of our materials a copy of the affirmative defenses asserted by Commercial Union Insurance Company which are representative of the affirmative defenses we were required to rebut during the course of the litigation. You will note that Commercial Union asserted 51 affirmative defenses during the course of the lawsuit. These defenses were commonly asserted by the other insurers involved. Many of the 51 affirmative defenses directly pertain, in my view, to the terms of the policies. However, many of those defenses were nothing more than an attempt to avoid coverage where pollution coverage was already present. The methods which the insurance companies chose to avoid coverage did not, in my view, further Oregon's public policy. When it became apparent that we had settled the majority of our claims, we had occasion to compare notes with those from other Portland law firms who had similar experiences in attempting to obtain coverage from insurance companies for their business clients' environmental remediation obligations.

Several of the defenses which were asserted in our case, and to which this bill pertains were as follows:

1. First, the insurers argued that the laws of other states should apply, not the state of Oregon.
2. The insurers uniformly refused to defend on the grounds that there was no suit.
3. The insurers claimed that they had inadequate notice of the claims.

4. The insurers claimed that by working cooperatively with the DEQ, ICN had made voluntary payments to the DEQ thereby depriving itself of coverage.
5. The Insurers argued that ICN had no coverage for the costs of remediating the groundwater because they had access to the groundwater and therefore had such ownership or control as to make the groundwater their own property.
6. In addition, the Insurer asserted other claims designed to avoid coverage where pollution coverage otherwise existed and which this bill addresses.

A complete copy of Senate Bill 1205 appears at Tab 2 of the materials; followed by Tab 3 which is our section by section detailed analysis of the bill.

Without getting into the minutia, it is important to recognize that this bill does not purport to change policy terms. It does not alter contracts made between insurers and insureds. Rather it provides for rules of construction for application by Oregon courts when the policies are themselves not clear or where the court finds that the parties to the insurance contract lacked an understanding concerning the meaning of various policy terms. For instance, if an insurance policy is clear that the company has no duty to defend unless an action is filed in a trial court, then this bill will not control the interpretation of the term "suits" in such a policy. If an insurance policy makes clear that there is no pollution coverage with respect to groundwater, then the terms of that policy govern the claim and this bill would likewise have no application with respect to that issue. It is only where policy terms are ambiguous, or where they are unstated, or where the court finds that the parties do not have a meeting of the minds, that the provisions of this bill apply.

In particular, Section 4, subsection 2(a) provides that unless the policy provides otherwise, issues of interpretation and enforcement of insurance policies with respect to coverage for environmental cleanup costs shall be governed by Oregon law whenever the contaminated property is located in Oregon. The law of other states may not promote cleanup of contaminated property the way Oregon law does. Insofar as the health and safety of Oregonians is paramount and insofar as the law imposes significant obligations upon property owners to facilitate cleanup, it makes sense that Oregon law should dictate the availability of resources to protect its citizens and assist the business community. This rule substantially aligns Oregon law with Washington law.

Subsection 2(b) provides that, unless the terms of the policy are clear, "suit" includes voluntary agreements and responses to agency orders. The manner in which government enforces environmental laws against persons responsible for environmental contamination presents a special situation regarding insurance. Property owners can substantially minimize their liability for cleanup and related costs with a proactive approach to the problem. It is common that many cleanups conducted by government are more expensive than cleanups conducted by the property owner. It may therefore be in everyone's best interest to enter into a voluntary agreement with the DEQ. To do so, will not only reduce the costs to the owner, but may also allow for more prompt cleanups because the DEQ is not required to commence formal enforcement proceedings against the owner prior to cleanup. Many insurers refuse to pay for the costs an owner incurs when negotiating with the DEQ under the voluntary cleanup program or for the cost of investigating the property at the direction of the DEQ because the DEQ has not filed a lawsuit. If an owner cannot afford the costs of site investigation and believes he or she has pollution

coverage, the owner may have to refuse to cleanup the property and wait to be sued by the DEQ in order to obtain coverage for these costs. As a result, the threat to health and safety remains unaddressed and the DEQ's resources are needlessly wasted in unnecessary litigation. The DEQ may also pursue treble damages against an owner in such circumstances. This change recognizes the rule in Oregon's *McCormack & Baxter* case and extends it to voluntary cleanup agreements.

Subsection 2(c) relates to voluntary payments. Many insurers attempt to avoid pollution coverage which is otherwise present merely because an owner of contaminated property has acted responsibly and has negotiated a voluntary cleanup agreement with the DEQ. In these instances, insurers have taken the position that the insured has voluntarily paid for cleanup and consequently refused to cover the cleanup costs. Such defenses were asserted in our case. However, state and federal environmental laws impose strict liability upon all persons responsible for cleaning up contaminated property. An owner therefore is almost always legally obligated to pay cleanup costs and it is the owner's election whether to pay less under a voluntary cleanup agreement or substantially more if DEQ is forced to cleanup the property first and then seek reimbursement from the owner. Together these positions taken by insurers discourage voluntary compliance, encourage regulatory disobedience, and are awful public policy. This section adopts the decisions of several Oregon trial courts and Washington Supreme Court. There is no current appellate rule.

Subsection 2(d) provides in part that, absent a formal pleading filed in a circuit court, it is sufficient notice for an insured to provide a summary of the actions taken against it by the DEQ. There is no current appellate rule on this subject.

Subsection 2(e) pertains to delay and prejudice and unless the policy is otherwise clear, provides that an insurer cannot hide behind lack of notice unless the insurer is clearly prejudiced

and where the insurer shows that failure by the insured to give notice earlier is unreasonable. This section clarifies Oregon case law.

Subsection 2(f) recognizes that defense costs are those costs which are designed to minimize the insured's eventual exposure. They therefore should include costs of investigation, studies, and other expenses for activities preparatory to actual cleanup activities. This section adopts the Washington rule. There is no present Oregon rule.

Subsection 2(g) concerns exhaustion of primary limits. Many times insureds purchase, in addition to their primary coverage, excess policies which cover them for liability beyond the primary policy limits. Most excess insurers take the position that, in an environmental context, an insured must first exhaust all primary coverage for all years effected prior to any one excess policy coming into play. This is known as "horizontal exhaustion". Senate Bill 1205 makes clear that unless the policy otherwise provides, the rule should be one of vertical exhaustion. In other words, if an insured exhausts the primary limits of his primary policy for a particular year, the excess carrier should then step up to the plate. Subsection 2(g) adopts Washington case law. There is no Oregon rule.

Subsection 2(h) relates to owned property and groundwater. The most difficult and expensive challenge in the environmental context is remediating contamination to groundwater. Insurers have argued that the insureds "own" or "control" groundwater because an insured may have state granted water rights to use the groundwater or may be required to divert the groundwater for purposes of a pump and treat cleanup program. Such uses of groundwater should not be tantamount to ownership or control which, of course, then allows the insurance company to escape all liability for the claim. This section basically codifies Oregon case law.

Finally, subsection 2(i) relates to allocation among insurance carriers. This section provides that all carriers found to be liable must be jointly and severally liable (up to their policy limits of course) and must thereupon allocate responsibility for the judgment among themselves instead of burdening the insured with the problem. Many of you may recall the efforts which were made in 1995 tort reform to abolish the doctrine of joint and several liability. Senate Bill 601 from the 1995 session in fact did that in the typical tort context, substituting the doctrine of reallocation. However, Senate Bill 601 clearly exempted liability for environmental claims from the abolition of the doctrine joint and several liability. As long as property owners remain jointly and severally liable for cleanup responsibilities to the government, their insurance should follow their liability. There is no reported appellate case in Oregon on this issue. This subsection adopts Washington law.

Claims of the Insurers

We have already heard much from the insurance community regarding this bill and the dire consequences they predict will follow its passage. I would just like to touch upon a number of those prior to concluding my testimony.

I have received a copy of a memo from one such insurance company addressed to an association which will be meeting next month to determine its position on the bill. For that reason, I will not use names but will review the claims and our responses. First, the insurer states that it is opposed to the bill because the bill will make insurance companies "liable for all costs associated with environmental liability claims regardless of what the insurance contract states." Well, in order to rebut that claim, one merely need look to page 3, line 36 of the bill which clearly states "the rules of construction set forth in subsection 2 of this section shall not apply if the

application of the rule results in an interpretation contrary to the mutual intent of the parties to the general liability insurance policy." If the general liability insurance policy is clear as to a particular term, this bill will have no applicability at all.

Second, the insurer states "if enacted, this bill would force . . . insurance companies to pay for claims which the policy was never intended to cover and for which premiums were never collected."

To rebut this claim, that the insurance was never intended to cover pollution liability, we have appended at Tab 8 a copy from the Insurance Counsel Journal of July 1944 concerning the then new 1944 comprehensive general liability policy utilized uniformly by CGL carriers nationwide. At the second page of that exhibit, the journal states "the objective has been to afford protection against liability for any hazard not excluded. . . The plan reverses the old procedure. Instead of insuring against only hazards enumerated, the insurance is broad enough to embrace all exposures to liability loss except those specifically stated as not covered." (Emphasis added.)

"Coverage B — property damage liability" requires an insurer to pay on behalf of the insured "all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law . . ." The journal further states:

> Summing up, it can readily be seen that, except for the limitations established by the standard insuring clauses and exclusions, all hazards of liability loss . . . are covered, whether such hazards are shown to exist or not. The insurance is no longer limited to only those specified hazards against which an insured might ask for protection.

Therefore, it is readily apparent that our client and many others in the business community purchased all risk policies with the expectation that they would provide insurance for just that, all

risks unless the risks are specifically excluded.

The insurers argue, nevertheless, that no one could have anticipated pollution as a risk even though all risks other than those excluded are covered. At Tab 9 you will also find a speech made by Mr. Gilbert Bean, an author of the 1966 revisions to the standard form CGL policy. In 1966 that standard form, used by all primary liability insurers, was revised. Mr. Bean, in his speech to the Mutual Insurance Technical Conference Joint Meeting stated at page 21 of that exhibit:

> But the most widespread new hazard for manufacturers comes from writing the new policy on an occurrence basis. The operations of some risks may create a substantial gradual injury or gradual property damage exposure to which the insurance did not previously apply. Examples are industries which make serious noise, odor, vibration or dust.
>
> There are also risks which use poisons or toxic or radioactive substances whose operations might create severe hazards to others than employees.

At the next page, he goes on to say:

> Perhaps it is in the waste disposal area that a manufacturer's basic premises — operations coverage is liberalized most substantially. Smoke, fumes, or other air or stream pollution have caused an endless chain of severe claims for gradual property damage.

Mr. Bean made absolutely clear that as early as 1965 insurers knew that the 1966 CGL revisions contemplated coverage for pollution liability which would be spread gradually over many policy periods be within the scope of their insurance coverage.

Finally, this particular insurer states "the impact on the average consumer would probably be premium increases of up to 500% or possibly the inability to find coverage."

That is quite a claim, a 500% increase in policies as a result of this bill. To rebut that

claim, we have several points.

First, almost all the risks from CGL policies issued in the '60s, '70s and '80s were reinsured anyway. We have appended, just by way of example, at Tab 12 the Best Insurance Report, for one company, Country Companies. This report is quite common among many other insurers. You will note at page 1387 of that exhibit, an indication that, with respect to reinsurance programs, the largest amount to which Country Companies is now exposed in any one risk is $600,000. The report states:

> Casualty excess of loss reinsurance affords protection against bodily injury or property damage liability losses exceeding $600,000 up to $6.6 million on an occurrence basis.

Therefore, this company is reinsured for between $600,000 to $6.6 million on each and every claim to which its reinsurance applies.

Secondly, we have attached in our materials at Tab 10, Congressional Testimony by the RAND Corporation which found that on average 88¢ out of every dollar paid out by liability insurers for cleanup related activities were for transactions costs, not indemnity costs. In addition, half of that cost (44¢ out of each dollar) were devoted to litigation with policy holders over whether the insurance even applied. Finally, at Tab 11, we have attached excerpts from an amicus brief from the American Insurance Corporation which states "insurers spend (conservatively) a billion dollars a year in so called 'coverage litigation' typically in the form of declaratory judgment actions."

Mr. Chairman and members of the committee, the issues covered by Senate Bill 1205 are hotly litigated issues precisely because they are ill-defined in policies. It is very possible that if Oregon clarifies its rules in these particular subject areas, insurers will be able to save some of

those 44¢ per dollar paid out in environmental coverage litigation because they will no longer be involved in endless squabbles with their customers who believe they deserve coverage for the premium dollars they have paid.

Most of the provisions of Senate Bill 1205 either reflect codifications of present Oregon case law or reflect codifications of present Washington case law. Last time we checked, insurance was still available in the state of Washington. Prices have not gone through the roof.

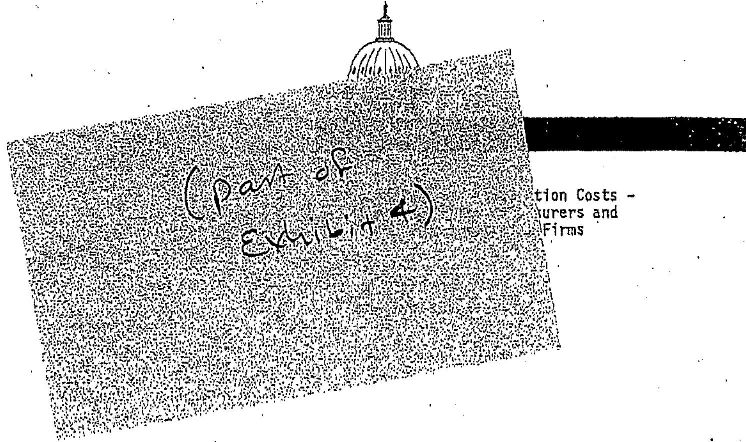
Conclusion

Mr. Chairman and members of the committee, in conclusion I thank you for your patience and attention during this presentation. I believe Senate Bill 1205 is a significant bill which will greatly assist in furthering Oregon's policy towards cleaning up its hazardous waste sites and will further be of assistance to business which merely seeks to do the right thing. There are farmers, gas station owners, dry cleaners and owners of properties which, in the past, were polluted by business activities which were, at the time, legal. There are also those such as ICN who believe they were victims of vandalism. All of these concerns face strict liability for cleanup. Some of them were fortunate enough to have pre-1986 CGL policies which covered pollution if the release was sudden and accidental. Why should these concerns be encouraged to thumb their nose at the regulators and refuse to cooperate for fear of losing their insurance coverage? A DEQ administrative order is just as coercive as a lawsuit. Insurers should not be permitted to avoid otherwise valid claims because the insured seeks to do the right thing.

We urge the committee to approve Senate Bill 1205 and are available to answer any of your questions.

Tab 10

CONGRESSIONAL TESTIMONY



CT-102

May 1992

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PREFACE

This publication is a transcript of written testimony delivered in May 1992 by Lloyd S. Dixon to the Subcommittee on Investigations and Oversight of the United States House of Representatives Committee on Public Works and Transportation. Although Dr. Dixon's testimony is based on his work at *The Institute for Civil Justice*, it does not necessarily reflect the views of the Institute or its research sponsors.

The author addresses the following questions: At how many hazardous-waste sites are various parties involved? How much have they spent at these sites? What proportion of their costs are transaction costs? Do transaction costs vary across sites and, if so, why?

Statement of
Lloyd S. Dixon
on Superfund and Transaction Costs

before the
Subcommittee on Investigations and Oversight
Committee on Public Works and Transportation
U.S. House of Representatives

May 19, 1992

The Institute for Civil Justice
RAND

The views and conclusions are those of the author and should not be interpreted as representing those of RAND or any sponsors of the research.

This statement is not available for public release until it is delivered at 1:00 p.m. (EST), Tuesday May 19, 1992

Statement of Lloyd S. Dixon[1] before the

Subcommittee on Investigations and Oversight
Committee on Public Works and Transportation
U.S. House of Representatives

May 19, 1992

Mister Chairman and Members of the Subcommittee, thank you for inviting me to participate in your hearing on the Superfund program. My name is Lloyd Dixon, and I am an economist at RAND. Research on Superfund at RAND has been underway since 1988. I base my testimony today on a recently released report entitled *Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms*,[2] which I co-authored with Jan Paul Acton.

Many critics of Superfund argue that its broad liability provisions shroud the program in litigiousness and generate steep transaction costs. Transaction costs are expenditures that do not contribute to the understanding or cleanup of a site. They are related to the apportionment of costs among parties and are essentially frictional in nature. Our research attempts to measure these transaction costs. We cannot give you the bottom line on transaction costs yet, but so far we have learned a great deal about two important sets of actors in the Superfund process: insurance companies and very large industrial firms.

Our research addresses the following questions:

- How many sites are these parties involved at?
- How much have they spent at these sites?
- What proportion of their costs are transaction costs?
- Do transaction costs vary across sites, and, if so, why?

[1]The views and conclusions are those of the author and should not be interpreted as representing those of RAND or any sponsors of the research.

[2]Acton, J. P., and L. Dixon with D. Drezner, L. Hill, and S. McKenney, *Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms*, RAND, R-4132-ICJ, 1992.

Our study is based on information collected from four insurance companies and five very large industrial firms. These firms are involved at a substantial number of sites. Because we are interested in the impact of Superfund on all inactive hazardous waste sites, not just those on the NPL, we include in our analysis both NPL and non-NPL sites.

First, I will present our findings for the insurance industry. Then I will turn to the experiences of the very large industrial firms.

Findings on the Insurance Industry

The involvement of the insurers in our study at inactive hazardous waste sites is substantial and growing:

- Between 1986 and 1989, pending claims that involve inactive hazardous waste sites rose from 650 per company to 2,200 per company.
- Over the same period, the average number of policyholders that had filed claims grew from 200 to 1,000 per company.
- Between 1986 and 1989, insurer spending rose from an annual average of $9 million per company to over $17 million per company.

To determine how this money was spent, we broke insurer outlays down into two categories: Indemnity payments and transaction costs. Indemnity payments are made to policyholders and are generally for site cleanup. Transaction costs, on the other hand, finance two main activities: defense of the policyholder in disputes with the government or other private parties over liability, and disputes with policyholders over whether a claim is covered under their insurance policies. Most of these policies were written before Superfund liability was ever envisioned, and coverage issues remain hotly contested.

We found that:

- Insurer transaction costs are high, averaging 88 percent of total expenditures through 1989.

- If the sampled firms are representative of the insurance industry as a whole, insurers spent $410 million on transaction costs in 1989. Using EPA's estimate that it costs between $25 million and $30 million to cleanup an NPL site, these transaction costs would pay for 15 site cleanups a year.
- Transaction costs are split roughly evenly between coverage disputes and defense of policyholders.
- There is no evidence of a substantial difference between the transaction cost shares for NPL and non-NPL sites.
- Transaction cost shares for closed claims were somewhat lower than for claims that were still open. As of 1989, insurers had closed approximately one-third of the claims that they had ever opened. And, the transaction cost share for closed claims was 69 percent.

What is the significance of these findings? Many observers of Superfund expected the costs incurred by insurers and the share of transaction costs in the total to be high. Our analysis confirms this expectation, and indicates that these high transaction costs are split about evenly between costs of defending their policyholders and disputes with policyholders over what the policies cover.

Findings for Very Large Industrial Firms

Now I will turn to the experiences of the five very large industrial firms who are potentially responsible parties, or PRPs, at many inactive hazardous waste sites. The involvement of these PRPs at inactive hazardous waste sites is also substantial and growing.

- These firms had each been contacted by the government or other private parties regarding cleanup at an average of 144 sites.
- Their annual outlays nearly tripled between 1984 and 1989, increasing from $2.6 million to $6.1 million per firm.

We divided PRP outlays into two categories: site investigation and remediation costs and transaction costs. The transaction costs of

the very large industrial firms are predominantly for legal counsel. We found that:

- Between 1984 and 1989, transaction costs averaged 21 percent of the total outlays.
- Transaction costs vary considerably across sites.
- Transaction cost shares are much lower at single-PRP sites than at sites where there are multiple PRPs. The share for single-PRP sites averaged 7 percent while that for multiple-PRP sites averaged 39 percent.
- Transaction cost shares depend strongly on the stage in the cleanup process to which the site has progressed. Sites further through the process have lower shares. The transaction cost share for sites where construction was complete averaged 16 percent.
- The difference in transaction-cost shares at NPL and non-NPL sites was small and not statistically significant.

What is the significance of these findings? First, contrary to what many had expected, transaction cost shares are not uniformly high for all participants in the Superfund process. Second, in situations such as single-PRP sites where liability is clearly defined, firms seem willing to pay and transaction cost shares are low. Third, transaction cost share appear to fall as a site moves through the remedial process. This illustrates that even sizeable transaction costs can be swamped by large remedial payments and raises an important policy question: when evaluating the transaction costs generated by Superfund, what is the most important measure--the overall level of transaction costs or the percent of transaction costs in total costs?

Concluding Comments

Two central questions arise in evaluating transaction costs in Superfund. First, what are the transaction costs TO DATE of the parties involved in the process? We have found some sizeable transaction costs, but the information presented today illuminates only two parts of the

picture, and we still need to determine what the transaction costs are of small and medium-sized PRPs and of federal, state, and local governments. Only when this information is available will we be able to calculate the total transaction costs of Superfund and determine how well the findings reported here characterize the total.

Second, and more important, what will transaction costs be when the dust settles and cleanup is complete at all the nation's inactive hazardous waste sites? We do not yet know. When the period covered by our analysis ended in 1989, cleanup was complete at only 5 percent of NPL sites and only one-third of the claims received by insurers had been closed. Consequently, the experience observed so far may not accurately represent what will happen in the future. Critical questions that must be answered include:

- Will insurance coverage issues be resolved, lowering the transaction costs of both insurers and PRPs?
- Are the sites and claims addressed so far representative, for example in terms of expected cleanup cost and the number of PRPs, of the many more yet to come?
- Will PRPs file more cost contribution lawsuits against non-participating PRPs as the cleanup at a site nears completion?
- Will insurers pursue their reinsurers as their own losses mount?

We need to know the answers to these questions before we can predict what the transaction costs of Superfund will ultimately be.

HOUSE COMMITTEE ON JUDICIARY - CIVIL LAW

June 21, 1999
1:00 p.m.

Hearing Room 357
Tapes 193 - 194

MEMBERS PRESENT: Rep. Shetterly, Chair
Rep. Uherbelau, Vice-Chair
Rep. Williams, Vice-Chair
Rep. Backlund
Rep. Edwards
Rep. Lowe
Rep. Walker
Rep. Wells
Rep. Witt

STAFF PRESENT: Anne Tweedt, Counsel
Rachel Short, Administrative Support

MEASURE/ISSUES HEARD:
SB 1205A – Public Hearing and Work Session

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

TAPE/#	Speaker	Comments
TAPE 193, A		
005	Rep. Shetterly	Calls meeting to order at 1:10 p.m.
SB 1205A PUBLIC HEARING		
016	Counsel Tweedt	SB 1205A establishes rules for interpretation and application of insurance coverage for claims involving environmental contamination at Oregon sites. Discusses the –A10 and –A12 amendments **(EXHIBITS A & B)**.
041	John DiLorenzo	**ICN Pharmaceuticals, Inc.** Testifies and submits written testimony in support of SB 1205A **(EXHIBITS C & D** (oversized). Discusses the problems and great expense incurred when ICN land was found to be contaminated by a nearby business or vandalism and subsequent cleanup was begun. Describes how the insurers of ICN's policies covered contamination. After the insurance companies denied coverage for the contamination, litigation was filed against 15 of the insurers and all claims have been settled. Discusses defenses that were asserted by the insurance companies to deny ICN cleanup coverage as well as other companies in

the area. SB 1205A does not purport to change policy terms or alter contracts made between insurers and insureds. SB 1205A would apply when insurance policies are themselves not clear or parties to the insurance contract lack understanding of the policy. Addresses arguments previously expressed against SB 1205A. My client purchased "all risk" policies with the expectations that all hazards would be covered except for those specified. Discusses the -A10 amendments (EXHIBIT A).

TAPE 194, A

023	**John Powell**	**CGU North Pacific and State Farm Insurance Co.**
		Testifies in opposition to SB 1205A. Discusses a portion of the -A12 amendments dealing with attorney fees. It was discovered that Section 5 of the bill is defective so we have agreed to delete section 5 and allow the current attorney fees provision to govern and let the court decide the operation of this section.
068	Rep. Uherbelau	What are you talking about when you say the current provision of attorney fees? Are you talking about the statutory contract?
070	Powell	Yes, the current statutory scheme for attorney fees.
076	Rep. Uherbelau	Aren't you deleting ORS 742.061 that apply to the statutory attorney fees in the -A12 amendments?
082	Powell	That statute would still govern.
097	**Angela Warren**	**American Insurance Association**
		Testifies in opposition to SB 1205A. Discusses the impact SB 1205A may have if insurance companies have to default to the courts for an interpretation of this legislation.
122	Rep. Uherberlau	Where does this bill give coverage where coverage doesn't exist?
130	Warren	Discusses what she meant when she referred to expanding the language that is in an insurance contract.
142	**Ann O'Neill**	**Fireman's Fund Insurance Company**
		Testifies in opposition to SB 1205A and asks the committee to consider its precedential impact. In its present form, this bill goes further than any insurance law in any other state in the nation by taking the task of private contract interpretation away from the courts and placing it with the legislature. Discusses why contract interpretation belongs in the courts and should stay in the courts. States that insurance companies are writing environmental insurance once again because there is more predictability in the enforcement of environmental laws, and carriers realize their business customers need this kind of insurance.
260	Rep. Uherberlau	When you talk about absolute pollution exclusion, are you saying pollution would not be covered even if it was sudden and accidental?
271	O'Neill	Discusses the Sudden and Accidental Pollution Exclusion rule written into most insurance policies prior to 1985. In 1985 the Absolute Pollution Exclusion was added to policies so that carriers could continue to write commercial liability insurance.

310	Chair Shetterly	Would you prefer that the courts construe insurance contracts rather than the legislature?
312	O'Neill	Yes.
313	Chair Shetterly	But the insurance industry is so heavily regulated by statute and administrative rule, why should the legislature refrain now?
318	O'Neill	We do not want to take the interpretation of contracts out of the courts. This legislation actually legislates the interpretation of contract wording. Carriers are worried that they won't be able to write contracts and have them interpreted in the courts because legislative interpretation is much more far-reaching.
348	Rep. Lowe	Did you have any input into the –A10 and –A12 amendments to SB 1205A?
353	O'Neill	No. Discusses her concerns with lines 32 and 33 on page 2 of the bill. This particular part of our contracts protects us against collusion.
384	Rep. Lowe	Did you have any input into the –A10 and –A12 amendments to SB 1205A?
387	Warren	Yes, in a limited fashion.
403	Rep. Lowe	Do you agree that it is the province of the legislature to set public policy regarding encouraging people to mitigate environmental damages by cooperating with the Department of Environmental Quality (DEQ)?
410	O'Neill	Yes.
413	Chair Shetterly	Discusses the issue of "voluntary payment" as described in Section 4 (2) (c) on page 2 of SB 1205A.
TAPE 193, B		
006	O'Neill	I would ask that in a voluntary payment situation, the carrier be adequately notified and that the claim be tendered to the carrier before the insured incurs costs.
018	Rep. Uherberlau	Did you voice these concerns about notice to the insurer when this bill was on the Senate side?
031	Warren	We were not personally involved in the negotiations on SB 1205A.
041	**Steve Telfer**	**Alliance of American Insurers**
		Testifies and submits written testimony in opposition to SB 1205A **(EXHIBIT E)**. States he is in support of the –A12 amendments.
071	Rep. Lowe	If this bill included the –A12 amendments, would you be in support of SB 1205A?
075	Telfer	No.
085	**Tim Bernasek**	**Oregon Farm Bureau**
		Testifies in support of SB 1205A stating that this legislation helps farmers and business owners work with state and federal agencies to cleanup contamination on their property in a cooperative manner.
134	**Terry Witt**	**Executive Director, Oregonians for Food and Shelter**
		Testifies and submits written testimony in support of SB 1205A **(EXHIBIT F)**.

185	Chair Shetterly	Introduces a letter from Paul S. Brown, American International Group, Inc. in opposition to SB 1205A (EXHIBIT G).
192	DiLorenzo	Replies to previous testimony regarding: 1) the relevance of general CGL premiums not having had an increase in the last five years in the state of Washington; 2) that SB 1205A wouldn't apply if the language in insurance contracts is precise with regards to exclusions; and 3) the provision on voluntary payments.
286	Rep. Lowe	What is the present status of the ICN case? Will this legislation, if passed, affect your case?
287	DiLorenzo	The case been settled and dismissed officially as to all defendants except Traveler's Insurance and we are currently in negotiations with them.
293	Rep. Lowe	So the ICN case is moot and will not be affected by this legislation?
295	DiLorenzo	Yes, but if we have further litigation against the excess carriers, this legislation would affect those cases.
302	Rep. Lowe	Have we heard testimony from any of your excess carriers today?
303	DiLorenzo	We named the excess carriers in the original lawsuit, but were told that we could not name them until we had exhausted the primary layer of coverage. The Judge in the case gave the excess carriers the choice of staying in the lawsuit and monitoring it or being dismissed from the case. They chose to be dismissed.
317	Chair Shetterly	Clarifies that the provision in the bill for coverage of payments made pursuant to a written voluntary agreement, consent decree or consent order doesn't abrogate the obligation a policy holder may have to provide notice to the insurance company of any pending settlement or claim.
331	Rep. Witt	Section 4 (2) (a) on page 2 of SB 1205A states that Oregon law shall apply in all cases where the contaminated property is located within the State of Oregon. What if the lawsuit is being brought in a different state, but the property is located in Oregon? Would Oregon law still be applied to the laws of a different state?
338	DiLorenzo	Discusses that it would depend upon the other states' conflict provisions.
350	Rep. Witt	Section 4 (3) on page 2 of SB 1205A states that the previously mentioned rules shall not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy. Do you think one of the parties could assert that, at the time they entered into an agreement, any one of sections (a), (b) or (c), though not expressly defined in the contract, was clearly the intent of the parties?
364	DiLorenzo	I am sure insurers would make that argument. That is why this provision is designed to encourage an insurance company to clearly specify what is covered in a contract.
386	Rep. Witt	If an insurance policy clearly says that there must be a lawsuit for coverage to be provided, are you saying that Section 4 (3) on page 2 of SB 1205A would not apply, even though that was the parties' intent?

395	DiLorenzo	No. In order to discern the intent of the parties, the court will first look at the contract. If the contract is specific, then clear language in the contract will prevail. The problem here has to do with "what does suit mean" and many courts have varied and said that agency action by the DEQ or EPA is tantamount to a suit?
426	Rep. Witt	On line 22 of page 2, you have "requests" being equivalent to a lawsuit. If the EPA or DEQ "requests" that certain action be taken, will that be interpreted as tantamount to a lawsuit?
434	DiLorenzo	If that "request" is in writing.
TAPE 194, B		
002	Rep. Witt	Couldn't there be a "request" made by the DEQ or EPA where there is no intent to take enforcement action if the "request" is not complied with?
005	DiLorenzo	I have never encountered an agency "request" that work be done and then not follow that up with threats of enforcement action if the work is not done.
009	Chair Shetterly	Refers back to the issue of "notice" under the policy stating that the insurance company will have something to say if a company has received a complaint from the DEQ or EPA.
015	DiLorenzo	The moment that a policyholder receives such a written request, the policyholder should immediately send that notification to the insurer.
018	Rep. Witt	If this bill passes, will it increase recovery on insurance claims for these types of actions?
019	DiLorenzo	Yes. It will prevent insurance companies from avoiding otherwise valid claims.
025	Rep. Witt	Who will fund those additional costs?
026	DiLorenzo	Insurers stated that the price of CGL policies is bound to go up to cover these costs. Discusses that the re-insurers of insurance companies may be the ultimate ones to absorb the cost.
043	**Tom Gordon**	**Portland Attorney** Clarifies an issue on reasonable pre-tender costs since he was a party to the negotiations on SB 1205A. It is our intent that the defense of pre-tender is still available to carriers. That means that all costs spent before it gets tendered by notice to the carrier, can be resisted by the insurance companies.
053	Chair Shetterly	Mr. DiLorenzo agrees with you.
064	Rep. Lowe	Do you think SB 1205A addresses the public policy area of protecting companies that go ahead and work with DEQ on cleanup?
070	Gordon	It just means that the insured needs to immediately notify their insurance carrier as soon as a cleanup request has been made by DEQ.
086	Chair Shetterly	Closes the public hearing on SB 1205A.

SB 1205A WORK SESSION

087	Rep. Williams	MOTION: Moves to ADOPT SB 1205A-10 amendments dated 06/21/99. VOTE: 7-0-2 EXCUSED: 2 - Edwards, Uherbelau
	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
091	Rep. Williams	MOTION: Moves to ADOPT SB 1205A-12 amendments dated 06/21/99. VOTE: 7-0-2 EXCUSED: 2 - Edwards, Uherbelau
	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
094	Rep. Williams	MOTION: Moves SB 1205A to the floor with a DO PASS AS AMENDED recommendation. VOTE: 6-1-2 AYE: 6 - Backlund, Lowe, Walker, Wells, Williams, Shetterly NAY: 1 - Witt EXCUSED: 2 - Edwards, Uherbelau
	Chair Shetterly	The motion CARRIES. REP. WILLIAMS will lead discussion on the floor.
104	Chair Shetterly	Closes the work session on SB 1205A.
104	Chair Shetterly	Adjourns meeting at 2:40 p.m.

Transcribed By,

Patsy Wood

Patsy Wood,
Administrative Support

Reviewed By,

Sarah Watson,
Office Manager

EXHIBIT SUMMARY

A - SB 1205A, –A10 amendments (LC 2971), dated 6/21/99, submitted by John DiLorenzo, 1 pg.
B - SB 1205A, –A12 amendments (LC 2971), dated 6/21/99, submitted by staff, 1 pg.
C - SB 1205A, written testimony submitted by John DiLorenzo, ICN Pharmaceuticals, Inc. dated 6/21/99, 12 pgs.
D - SB 1205A, written testimony submitted by John DiLorenzo (oversized), ICN Pharmaceuticals, Inc., dated 6/21/99, 74 pgs.

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