E - SB 1205A, written testimony submitted by Steve Telfer, Alliance of American Insurers, dated 6/21/99, 1 pg.
F - SB 1205A, written testimony submitted by Terry Witt, Oregonians for Food and Shelter, dated 6/21/99, 1 pg.
G - SB 1205A, written testimony submitted by Paul S. Brown, American International Group, Inc., dated 6/21/99, 2 pgs.
H - SB 1205A, written testimony submitted by Carl Brigada, Jr. Liberty Mutual, dated 6/21/99, 2 pgs.
I - SB 1205A, written testimony submitted by D. E. Bridges, Oregon Water Assoc., dated 6/15/99, 1 pg.

SENATE COMMITTEE ON JUDICIARY

April 19, 1999
6:00 p.m.

Hearing Room 343
Tapes 131-134

MEMBERS PRESENT: Sen. Bryant, Chair
Sen. Courtney, Vice-Chair
Sen. Brown
Sen. Burdick
Sen. Nelson
Sen. Qutub

MEMBER EXCUSED: Sen. Tarno

STAFF PRESENT: Anne Tweedt, Counsel
Judith Minnich, Administrative Support

MEASURE/ISSUES HEARD: SB 1205 – 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
Tape131, A		
012	Chair Bryant	Calls meeting to order at 6:10 p.m. Opens public hearing on SB 1205.
SB 1205 PUBLIC HEARING		
035	John DiLorenzo	Attorney, ICN Pharmaceuticals Inc. Submits written testimony and testifies in support of SB 1205 which prescribes the rules of construction applicable in the interpretation of general liability insurance policies involving environmental claims (EXHIBIT A). Discusses the difficulties ICN Pharmaceuticals, Inc., had with insurance claims for pollution clean up. SB 1205 does not alter contracts made between insured and insurers. Only where the insurance policy terms are not stated, or are ambiguous, will SB 1205 apply. Describes and discusses Exhibit A, which details the history and difficulties ICN Pharmaceuticals had in recovering an insurance claim.
463	Chair Bryant	You cited the *McCormick v. Baxter* case where the courts said a voluntary clean up agreement has the same significance as being sued by the DEQ or the EPA?
475	DiLorenzo	The case stated that a response to an administrative order was equally coercive as a response to a court order. It did not speak to a voluntary clean up. SB 1205 codifies the findings in *McCormick v. Baxter* and covers voluntary clean up as well.

488	Chair Bryant	That was my question. A voluntary clean up is not due to an administrative ruling or court order.
Tape 132, A		
047	DiLorenzo	DEQ has adopted administrative rules that pertain to the voluntary program. Waiting for the administrative order to be issued could lead to the existing pollution getting worse and worse.
057	Chair Bryant	Would the same type of apportionment plan we used in SB 601 in the 1995 session work here, rather than joint and several liabilities?
061	DiLorenzo	The only way that would work in this context is if the underlying liability was also several, not joint, yet subject to reallocation.
072	Sen. Courtney	On page 2, Section 4 (1) of SB 1205, lawsuits are defined in detail preceded by the phrase "includes but is not limited to". What other possibilities are there?
079	DiLorenzo	This covers any unanticipated circumstances.
088	Sen. Courtney	Does SB 1205 cover pollution on federal and reservation lands?
091	DiLorenzo	I can't answer that, but I will find out.
093	Sen. Courtney	On page 3, Section 7, it says that if any part of this bill is found to be unconstitutional, the remaining parts remain in force.
104	DiLorenzo	Explains the concept of severability which is assumed in all legislation. SB 1205 makes the concept explicit.
117	Sen. Brown	On page 3, lines 37 and 38, the phrase "contrary to the mutual intent of the parties", will allow the court to go behind the contract language and look at what the parties intended instead of what the contract says. Was this your intent?
124	DiLorenzo	We meant this to protect the insurers. If the insurance policy is clear, this would not apply.
142	Sen. Brown	Both parties would be protected and both parties would have to abide by their mutual intent wouldn't they?
143	DiLorenzo	Yes.
146	Sen. Qutub	Asks about the nature of the pollutant called TCE.
151	DiLorenzo	Discusses the TCE clean-up.
174	Sen. Qutub	Asks whether insurance rates in Washington State have gone up.
180	DiLorenzo	We have made inquiries, but the information we have received is not definitive. We heard the competition is quite brisk, and that may have kept premiums down.
192	Sen. Courtney	Discusses the language of SB 1205 which appears to be language from a law review article.
203	DiLorenzo	Some felt this was a little literary, but we wanted to have legislative intent in the statute. It is within your prerogative to change it, of course.
213	Sen. Courtney	Legislative intent is more than just the statute language.
218	DiLorenzo	Courts have recently been very strict in assessing legislative intent from the context of the statute itself. This is a safeguard in reaction to that

		trend.
224	Sen. Burdick	You have discussed horizontal and vertical exhaustion of insurance coverage. How does this relate to the problem you are trying to solve?
231	DiLorenzo	Oregon does not have a clear law as to whether there should be horizontal or vertical exhaustion. The court decided in ICN Pharmaceutical, Inc. that since the policies were written in California, that state's law would apply. However, we would argue that Oregon certainly has an interest in cleaning up pollution on property located in Oregon.
274	Jack Munro	**American Insurance Association** Testifies in opposition to SB 1205. Environmental claims are always complicated situations. We do need to be very careful of the language we use in this bill. Usually there are multiple insurance policies involved.
337	Tom Gordon	**Attorney, Environmental Law** Submits written testimony and testifies in opposition to SB 1205 (**EXHIBITS B & C**). On its face, SB 1205 is unconstitutional. It vastly expands the insurers liability in an area for which they have received no premium and for which they undertook no risk. Any company that wrote liability policies will be liable for clean up under joint and several liability. The older insurance contracts have expired and SB 1205 goes back and resurrects and rewrites them.
Tape 131, B		
011	Gordon	Discusses Exhibit C which details potential effects of SB 1205, section by section.
172	John Powell	**State Farm and CGU North Pacific Insurance** Submits written testimony and testifies in opposition to SB 1205 (**EXHIBITS D, E, & F**).
270	Chair Bryant	Asks if Oregon has ruled on the applicability of horizontal versus vertical exhaustion?
272	Gordon	No, not at the appellate court level.
275	Chair Bryant	I would have expected the issue would have been heard at that level. How many states are horizontal and how many states are vertical in their exhaustion requirements?
282	Gordon	Exhibit B has information on the trends, but I don't have the exact numbers. The majority of the states are probably horizontal.
292	Chair Bryant	Is there any Oregon law currently on the recovery of investigations and preparatory clean up activity?
296	Gordon	Yes, at the trial court level, but not at the appellate level.
299	Sen. Burdick	Mr. Gordon, do you have a comment on the Rand Corporation study submitted by John DiLorenzo? What do you think about an average of 88 cents of every dollar being used for transaction costs not indemnity costs?
304	Gordon	What that really means is that 88 cents out of every dollar is already going to a policy holder to defend itself. Half of that amount was going

		toward litigation against policy holders but that has gone down since the study was published.
327	Sen. Burdick	Why would the litigation go down?
328	Gordon	Because the issues have been solved, the questions have been answered.
331	Sen. Qutub	Could it be that the insured just give up?
332	Gordon	The claim volume has remained pretty steady. The issues are being negotiated out of court. Litigation has gone down.
342	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?
360	Gordon	If you would set policy going forward, that seems fair. SB 1205 goes back in time and interprets policies that have lapsed.
363	Sen. Brown	Isn't it true that some of these old policies are still being litigated today?
365	Gordon	That's correct.
400	Terry Witt	Executive Director, Oregonians for Food and Shelter (OFS) Submits written testimony and testifies in support of SB 1205 (EXHIBIT G). Indicates that the members of OFS are mainly from the agricultural products business and buy liability insurance to insure against any and all risks.
463	Jayne Bond	President and CEO, Permapost Products Company Submits written testimony and testifies in support of SB 1205 (EXHIBIT H). Discusses the effect of inadvertent environmental damage on small businesses such as Permapost when insurance carriers refuse to meet their obligations.
Tape 132, B		
020	Bond	Continues discussing the costs of environmental clean up and their insurance carrier's refusal to meet their obligations.
072	Tom Zelenka	The Schnitzer Group Submits written testimony and testifies in support of SB 1205 (EXHIBIT I). Provides comments on the general situation Oregon property owners face when submitting claims to their insurance carriers. Specifically discusses the 20 acre downtown Portland waterfront redevelopment project by Schnitzer, near the Markham Bridge.
196	Bruce Bosch	Temco Metal Products Testifies in support of SB 1205. Discusses the history of Temco and the pollutant TCE. Once it was discovered cleanup was needed, our insurance carrier simply stonewalled our claims. The estimated first phase is $500,000. We can't do this without our insurance company meeting their obligations. Our only recourse is to sue. Insurance companies can afford to wait out the lawsuit as a cost of business, small business cannot. Business in Oregon needs a different option besides suing insurance companies.

267	Sen. Brown	It is my understanding that, since 1996, insurers that offer farm insurance have specifically excluded pollution damage.
274	Witt	There is one company that will insure for all risks.
277	Sen. Brown	Will insurance premiums go up?
280	Zelenka	I don't believe so.
301	Sen. Brown	How would you distinguish this from a health care mandate?
307	Zelenka	I think there are distinctions. Health care coverage is going forward. Liability insurance has been bought and paid for to cover those possibilities.
321	Sen. Brown	I assume the policies did not have exclusions for pollution clean up?
323	Bosch	In our case, there were no exclusions. We are not trying to rewrite the policies, we are just looking for the insurance companies to meet their obligations under the policy as written.
343	Bond	Discusses a product liability claim recently made by Permapost on a product sold under pre-1987 policies.
357	Sen. Qutub	SB 1205 would not mandate coverage for anything which is specifically excluded.
380	Brian Boe	Oregon Petroleum Marketers (OPM)
		Submits written testimony and testifies in opposition to SB 1205 (EXHIBIT J). OPM represents petroleum distributors in Oregon as well as approximately one-half of the retail gasoline outlets.
008	Lana Butterfield	Safeco
		Testifies in opposition to SB 1205.
025	Jim Perucca	Safeco
		Submits written testimony and testifies in opposition to SB 1205 (EXHIBIT K). SB 1205 changes long established ground rules and could damage not only insurance agencies but other businesses as well.
066	Dianne Dailey	Attorney, Bullivant Houser
		Testifies in opposition to SB 1205. Discusses the provisions of SB 1205 regarding excess insurance coverage. Discusses liability for environmental damages and third party property damage.
164	Sen. Qutub	Discusses health insurance in relation to liability policies. Don't insurance companies assess the risk and base their premiums on that risk?
178	Perucca	Yes, however, the laws change and some events are not predictable.
191	Sen. Qutub	But don't you look at all the risk? I'm assuming you are able to assess the risk. Mr. Boe is talking about pre-paid coverage for a known problem.
220	Boe	The retroactive aspects of the bill are a concern because they assess a liability for a risk that was not underwritten. No one realized that dumping oil on the ground was a hazard.
234	Sen. Qutub	There was some awareness based on the documents in Exhibit A.
237	Chair Bryant	The biggest risks are for a change in the law or technology.

		Environmental risks were not anticipated by either the insurer or the insured. We are considering the assessing of responsibility as a matter of public policy.
270	Jim McDermott	Partner, Ball Janik LLP
		Submits written testimony and testifies in support of SB 1205 (EXHIBIT L). Discusses the history of court findings in environmental clean up cases.
338	Sen. Brown	Since the court findings have been moving toward assigning some liability to the insurers, why should the legislature be involved?
340	McDermott	It is much more expensive and much less efficient to litigate instead of legislate. The advantage in litigation is in favor of the insurance companies who retain staff attorneys. Discusses the award of attorney fees to the insured.
393	Jerry Bitz	Cascade Corporation
		Submits written testimony and testifies in support of SB 1205 (EXHIBIT M). The solvent TCE was used for cleaning metal parts from 1956. It was no longer used after 1975. When we needed to use our liability insurance the insurance companies refused to pay and we had to sue. The case is still in the courts.
Tape 134, A		
083	Bitz	Continues to discuss the litigation of pollution liability for the insurers of Cascade Corporation.
160	Richard Pope	Attorney, Cascade Corporation
		Submits written testimony and testifies in support of SB 1205 (EXHIBIT N). SB 1205 would remove a huge disincentive for businesses to enter voluntary clean up programs.
345	Chris Hermann	Attorney, Stoel Rives LLP
		Testifies in support of SB 1205. Discusses what is meant by a "voluntary" clean up. When a potential environmental clean up site is identified, the Department of Environmental Quality (DEQ) sends a letter that outlines three options for the property owner. The owner can do the cleanup under DEQ oversight, DEQ can do the cleanup under a consent order, or nothing can be done and the firm will be sued. The first option is the most "voluntary", and insurance companies penalize firms that choose this option. Insurance companies deny coverage based on cooperation with DEQ. It is not true that case law has solved these problems.
Tape 133, B		
063	Chair Bryant	Indicates the remaining three witnesses, John Telfer, Lauri Aunen and John Ledger will be asked to testify at the next meeting on SB 1205. Adjourns the meeting at 9:05 p.m.

Submitted By,

Judith Minnich,
Administrative Support

Reviewed By,

Anne Tweedt,
Counsel

EXHIBIT SUMMARY

A – SB 1205, written testimony of John DiLorenzo, Jr, dated April 19, 1999, 22 pp
B - SB 1205, written testimony of Tom Gorden, 6 pp
C - SB 1205, written testimony of Tom Gorden, 2 pp
D - SB 1205, documents submitted by John Powell, 4 pp
E - SB 1205, reprint submitted by John Powell, 1 pp
F - SB 1205, letter from Larry Becker submitted by John Powell, 1 pp
G - SB 1205, written testimony of Terry Witt, 1 pp
H - SB 1205, written testimony of Jayne C. Bond, 3 pp
I - SB 1205, written testimony of Tom Zelenka, 11 pp
J - SB 1205, written testimony of Brian Boe, 6 pp
K - SB 1205, written testimony of Jim Perucca, 3 pp
L - SB 1205, written testimony of James T. McDermott, 7 pp
M - SB 1205, written testimony of Gerald Bitz, 4 pp
N - SB 1205, written testimony of Richard S. Pope, 53 pp
O - SB 1205, written testimony of Joe Gilliam, 2 pp
P - SB 1205, written testimony of Everett Cutter, 1 pp
Q - SB 1205, written testimony of D. E. Bridges, 1 pp
R - SB 1205, written testimony of Don Griffin, 3 pp
S - SB 1205, written testimony of Steve Telfer, 2 pp

MEASURE: SB 1205
EXHIBIT: I
SENATE JUDICIARY COMMITTEE
DATE: 4-19-99 PAGES: 11
SUBMITTED BY: Tom Zelenka

TESTIMONY on S.B. 1205 by
TOM ZELENKA
The Schnitzer Group

before

SENATE JUDICIARY COMMITTEE
APRIL 19, 1999

I. Introduction

My name is Tom Zelenka and I am the Manager of Legislative, Environmental and Public Affairs for the Schnitzer Group of companies. I am here to testify in favor of S.B. 1205.

By way of background, the Schnitzer Group of companies, with corporate headquarters in Portland, have business interests which are diverse and geographically spread out; we're involved in scrap metal recycling and steel manufacturing, real estate investment and development, ocean shipping, bulk marine terminal dock operations and industrial gas production and distribution. Our scrap recycling operations, as an example, have been in business in Oregon for over ninety years.....and over time, the various Schnitzer business interests have owned and/or operated on a significant amount of commercial and industrial property in Oregon, as well as elsewhere. As a result of that economic growth and property acquisitions our company has had first hand experience with the frustrating circumstances that have led to the introduction of this bill.

During the past few years I have supervised, for Schnitzer Group companies, environmental site assessment activities at over 100 sites across the U.S., as well as providing environmental corporate due diligence work associated with property

acquisitions at a number of sites. I have been involved in numerous remedial investigations and site clean-ups, including Schnitzer's remedial study, consent decree negotiations and site clean-up of our 20 acre downtown Portland waterfront redevelopment near the Marquam Bridge.

For my testimony today what I'd like to provide you with are some comments on the general situation Oregon property owners face when submitting claims to their insurance carriers; then describe for you a specific example of how "the system" works -- using our downtown Portland redevelopment site as the illustration; and, then, highlight for you the importance of and benefits to Oregon environmental clean-ups that will occur with just a couple of the specific sections of S.B. 1205.

II. General Explanation of Need for Legislation

S.B. 1205 offers the State a real chance to bring to bear the resources needed to clean up contaminated industrial and commercial property in Oregon. When you look at properties that have historically been used for industrial and commercial purposes it's not surprising to find that a significant number of these properties have some level of soil and/or groundwater contamination. Most often, that pollution did not occur due to any illegal or purposeful conduct. It often occurred over twenty years ago, during a time when there were less specific environmental regulations and when we did not know as much as we do today about the fate of chemical substances emitted into air, discharged into water or disposed of on soil.

Just as an example, one solvent that currently contaminates groundwater underlying many industrial properties in Oregon (and nationwide) is trichloroethylene, or TCE. TCE is a solvent that evaporates very readily. Up until the 1970s and early 1980s, it was common practice to dispose of TCE by pouring small amounts on the ground to allow it to

evaporate. Not only was this an accepted practice, but it was a practice encouraged by the insurance industry. One service that insurance companies provided to the companies they insured was loss prevention assistance. There are written loss prevention materials from these early days that insurance companies provided to their insureds specifically telling them that the proper method for disposal of such solvents was to pour them onto the ground. No one knew at the time that a portion of the solvent did not evaporate and could go into the groundwater where, as we now know, it can remain for years and years.

During the time that these events were occurring, most of these companies were purchasing insurance programs that were designed to protect them. Those policies, for the most part, specifically provide for the coverage of property damage and personal injury arising out of events that occurred during the years the policies were in effect.

So now, when Oregon companies discover that occurrences during the 1960s or 1970s, or sometimes earlier or later, have caused contamination, and when they learn that Oregon law requires them to clean it up, they do what they do with all other kinds of insured claims--Oregon companies tender the claim to their insurance companies to handle. Only, what we've all discovered is that insurance companies don't treat environmental claims as they do other claims.

Rather than getting a call from a claims adjuster whose job it is to resolve the claim for you, insureds who tender environmental claims either get no response or get a call from someone in a division called something like the "Environmental Claims Unit." Typically, this person from the "Environmental Claims Unit" will ask innumerable questions about the property and make you or your lawyer spend days answering specific questions about the property. Then, if you get any response at all, it will be a denial of the claim. The denial will, typically, be a form letter asserting ten or more reasons why, based on the

information you have provided, the insurance company contends the claim is not covered by the policy.

This practice of no response, requests for lengthy detailed information reports and form letter denials of coverage is not a practice specific to one insurance company and, although some are better than others, it is the common practice of almost all companies. Of the environmental claims that the Schnitzer Group companies have tendered to insurers in the past ten years, I do not believe the insurers have ever initially accepted any environmental claim. I would estimate that, after receiving calls or correspondence from our lawyers, insurers have stepped up to the plate in less than twenty-five percent of the cases. In the others, we have been forced to file suit or threaten to file suit against the insurance companies in order to obtain the coverage we paid for.

What is the effect of what these insurers are doing in Oregon? Why are these insurers putting up such a fight? It is not because they expect to ultimately prevail against companies like the Schnitzer Group. Our companies, obviously, are relatively sophisticated. When these insurance companies have tried to tell us that we do not have coverage for environmental contamination that occurred years ago, we are sophisticated enough to know they are wrong. And we have the resources to hire lawyers, file lawsuits and pursue those lawsuits to a conclusion.

It appears that the reason the insurance companies put up such a fight is because they want to do everything they can to discourage a whole group of potential insureds in Oregon from pursuing their right to collect on the insurance that was bought and paid for years ago.

When the Schnitzer Group companies get a letter from the "Environmental Claims Unit" of an insurer telling them that there is no coverage for environmental contamination for

ten different reasons, we hire a lawyer and we tell the insurance company why there in fact is 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 and 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). How many Oregon companies have the resources to do that?

You have to have the knowledge and the resources to hang in there -- to the point of performing a clean-up and filing and following through to conclusion a lawsuit. Unfortunately, for many Oregon companies, I'm afraid many don't even pursue a claim or get beyond the first no-response or denial letter, while others are pressured into accepting a settlement for cents on the dollar of coverage.

So the net effect for Oregon is just what the insurance companies calculate it will be. This may look good on the insurance company balance sheets, but the end result is contaminated properties that should be cleaned up are not being cleaned up. Oregon companies that thought they provided for unexpected losses by purchasing insurance are finding that their insurance is not stepping up to the plate to cover these losses. Often those companies don't have enough resources to address the scope of the problem so either no cleanup is occurring or, worst case, it might have to some day be done with money out of the Orphan Site fund.

S.B. 1205 is a start at the reforms needed to correct this situation.

III. Example Highlighting the Need for S.B. 1205

Let me turn to one example to show the need for S.B. 1205. It relates to property owned by Schnitzer Investment Corp. on Moody Avenue near the Marquam Bridge in Portland. In the early 1990s, Schnitzer learned that its Moody property was contaminated with certain hazardous substances. Some of that contamination was caused by predecessor companies that had operated a metals recovery operation. Some was caused because, unknown to Schnitzer, a company from whom Schnitzer had purchased part of the property had left contamination on site.

Schnitzer did what it was required by law to do. It investigated the contamination and reported it to the Oregon Department of Environmental Quality ("DEQ"). DEQ then sent Schnitzer a letter in the summer of 1991, telling it that its property required further investigation and possibly remediation.

Schnitzer tendered the matter to its insurance companies in 1991, asking them to take over the process of working with DEQ and instituting whatever remedy DEQ required. All but one of Schnitzer's insurance companies refused to do anything. One insurer accepted the defense of the matter, but then only agreed to pay a very small portion of legal costs related to negotiations with DEQ, totally refusing to pay the substantial consultant costs associated with analyzing feasible remediation strategies and making recommendations to DEQ.

Schnitzer continued to work with DEQ, with absolutely no assistance from its insurance companies. It ultimately entered into three Consent Decrees governing investigation and remediation and paid for the remediation called for by DEQ and by the Oregon superfund statute. Schnitzer has spent over $3 million, and still has to pay for an engineered cap to be placed over the site concurrent with redevelopment.

After Schnitzer had done all the work, the insurance companies, who had been noticeably absent during the entire time Schnitzer worked through the DEQ process, came to Schnitzer and wanted to negotiate a settlement of Schnitzer's claim. They did not want to pay the claim; they wanted to negotiate to pay only part of it. The insurance companies said they would only pay on the policies if Schnitzer agreed to pay for a large part of the cleanup itself. They also have asked, as a condition of settlement, that Schnitzer agree to give up all other rights under its policies and, after Schnitzer refused that, have asked for a guarantee that Schnitzer will never bring any more claims under the policies relating to the same facility.

Now, that is not the way insurance is supposed to work! Schnitzer and its predecessors paid very large premiums so that, if anything like this every happened to them, their insurance would take care of it. Schnitzer is not supposed to have to handle large, complex environmental claims itself. That is why it paid the premiums, so the insurance company would take care of it. Moreover, the insurance companies are not supposed to demand policy concessions out of their insureds as a condition of fulfilling what is already their obligation under the terms of the policy.

Again, looking at what this insurance industry practice means, statewide, you have to realize that for every company willing and sophisticated enough to proceed with an environmental investigation and cleanup, there are probably 50 companies that don't have the money or other resources to do it themselves. They do have insurance, and if that insurance was being used the way it was intended, the money would be available to perform these necessary cleanups.

IV. How S.B. 1205 Would Start to Remedy the Existing Problem

Let me explain how some of the specific provisions of S.B. 1205 would result in bringing existing insurance to bear on Oregon site cleanups. While others may speak to the bill as a whole, I want to focus on those provisions that would make a difference in the kind of case I have described above.

Section 4(2)(b) and (c):

Among the many reasons given to Schnitzer by the insurance companies as to why they refused to provide coverage of the Moody Avenue claim, one stands out as probably most destructive of what the State is trying to achieve through the State clean-up program. That is, the reason given by our insurers, was that we were not entitled to any insurance coverage because Schnitzer "voluntarily" agreed to perform the work at the Moody site. That is, we did it by negotiated agreement and, ultimately, under Consent Decrees, rather than waiting until DEQ sued us to make us do the work. We totally disagree with the position the insurance companies have taken.

Nonetheless, you can immediately see that their position leaves all insured Oregon companies between a rock and a hard place. If the insurers had their way, apparently the insured Oregon companies would have to refuse all written and oral requests from DEQ to perform any work at any contaminated properties. Insureds would have to drag their heels until DEQ was forced to use state resources to sue these Oregon companies to perform the work. Even then, based on all of the other reasons that the insurance companies gave for not covering Schnitzer's claim, it would still be unclear whether any coverage would be provided. That would be the worst of all worlds: the insured would have DEQ, legitimately, very concerned about the resistance to cleanup and, most likely, the insured would still not have insurance coverage actually provided by its insurer..

Section 4(2)(b) takes care of this circumstance by making it clear that any directions or "requests" from DEQ to perform site work constitute claims under the applicable insurance policies. Section 4(2)(c) makes it clear that the insurance companies cannot deny coverage because work was performed under a Consent Decree, rather than as a result of DEQ actually suing the insured.

Section (4)(2)(f):

As I described above, one of our insurers agreed to accept our tender of defense. That insurer, however, ultimately paid less than five percent of the costs we ultimately incurred in reaching agreement with DEQ on the cleanup to be performed. That is because the insurance company took the position that the only "defense" costs it had to pay were the bills of legal counsel negotiating the Consent Decrees with DEQ. In fact, as many courts that have addressed this issue have realized, the majority of the costs in the "defense" of environmental claims are not the costs of lawyers, but the costs paid to consultants and engineers and other professionals to characterize the contamination, conduct feasibility studies to identify available remedies and apply regulatory criteria to determine which remedy should be implemented. At complex environmental sites, that entire process can be very, very expensive. Yet, if insurance companies have their way, they will pay none of this.

Section (4)(2)(f) corrects this situation by making it clear that costs of defense include all necessary costs, specifically including costs of environmental consultants and contractors performing remedial investigations, feasibility studies and other similar site investigation and remedy selection work.

Section (4)(2)(g):

Another issue that has proven very frustrating is the position taken by excess insurers. For example, Schnitzer has one primary level insurer who has paid out its full property damage limits and has advised Schnitzer and its excess carriers of that fact. Schnitzer and its predecessors had carefully insured against the risk of this happening by procuring excess insurance coverage to drop down and provide coverage in the event that the primary layer of insurance was exhausted. Now, however, Schnitzer's excess insurers have taken the position that they are not required to drop down and provide coverage, even though the primary insurance underlying their policy has been exhausted. They argue that they do not have to provide coverage until Schnitzer has exhausted all its primary coverage for all years, even though its policy has no relation to those other policy years. Not surprisingly, the other primary insurers argue that the excess carriers' position is wrong and that the excess carriers should provide coverage. The entity who really loses in this battle is Schnitzer, because the result is that none of the carriers will agree to pay the claim.

Section (4)(2)(g) solves this issue by clarifying that the excess policy will be triggered when the coverage limits of the primary or underlying policy of the same policy period has been exceeded.

V. Conclusion

S.B. 1205 addresses some specific practices which discourage Oregon companies from pursuing their rights to submit claims and obtain the coverage from insurance policies purchased. We firmly believe passage of S.B. 1205 will also, in fact, assist in the clean-up of contaminated sites in Oregon.

We urge passage of S.B. 1205.

Thank you for the opportunity to provide these comments.

MEASURE: SB 1205
EXHIBIT: H
SENATE JUDICIARY COMMITTEE
DATE: 4-19-99 PAGES: 3
SUBMITTED BY: Jayne Bond

Judiciary Committee Testimony
Regarding Senate Bill 1205
April 19, 1999

Jayne C. Bond
President & CEO of Permapost Products Company

Introduction:

My name is Jayne Bond. I am the President and CEO of Permapost Products Company, a wood treating and manufacturing company located in Hillsboro, Oregon.

Permapost was founded in 1957 by my parents and is now operated by my brother and myself. We employ 25 employees from the Hillsboro area. The average length of employment is 18 years and the average age of my employees is 45 years.

As a wood treater, we pressure treat lumber, plywood, and posts with oil and water based wood preservatives to inhibit fungus and insect infestation thus allowing a longer service life to a renewable resource. We manufacture products for parks and recreation (picnic tables and shelters), federal, state, and local highway and pedestrian systems (bridges), and national forests systems (forest service bridges and trail head signs). We are relatively small in comparison to other wood treating plants at approximately $5 million in annual sales.

I am here this evening to comment on Senate Bill 1205 and its effects on small business, particularly companies like mine. First, I would like to give you a brief history on Permapost's clean-up efforts and our experience in dealing with our insurance carriers regarding this clean-up. Second, I will report to you the obstacles Permapost faces in trying to receive policy coverage.

History:

During the 1960's and early 1970's, Permapost's treating activity consisted mostly of two chemicals; pentachlorophenol (Penta) and copper chromate arsenate (CCA). The normal and accepted operating practice at that time resulted in contamination of part of our site and underlying groundwater. In the late 1970 and early 1980's, Oregon DEQ and US EPA determined that Permapost use of surface

impoundments for process water control should be reviewed and directed Permapost to initiate extensive investigation and subsequent clean-up of contaminated soils and groundwater. It became clear as to the source of the pollution and the type of contaminants involved.

My father, William Bond, discussed coverage with his insurance agent/broker who told him their was no coverage for pollution. He believed his agent. Thus, all consulting costs for site investigation, pollution remediation design, and remediation remedy were borne by Permapost at a cost of $2.9 million. All of our company's profits, and more, were directed into the costly investigation and clean-up; crippling the company in its operations and draining all our resources. No moneys were available for equipment upgrades. In fact, fixed assets had to be sold and salaries cut. In addition, the speed at which the clean-up activity could progress was limited to the amount of money the corporation could generate either in profits or money we could borrow.

In the early 1990's, Oregon's court expressly recognized insurance coverage responsibility in the McCormick and Baxter case. We recognized this to be of similar circumstances as our clean-up. We revisited our insurance carriers regarding coverage under policies, which Permapost purchased. The response from the carriers to date has been for them to request "mountains" of documentation. After we responded to their request, their answer is that they are not going to pay.

Bill 1205 Critical to Small Business

Anyone who tells you that this bill only helps big business, is grossly mistaken. 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 door on us, calculating (and usually correctly so) that we small businesses do not have the resources to fight a long, expensive battle.

Our interest in Senate Bill 1205 is two-fold. Permapost has already spent $2.9 million in clean-up investigation and remediation solely out of our operations. We are anticipating the future burden of ongoing clean-up activity, as indicated by Oregon DEQ, for the next 30 years at an approximate cost of $2.5 million. The need for the insurance carriers to take responsibility and pay their policy

coverage for money spent on clean-up is critical to the continuation of our business. Senate bill 1205 clarifies the responsibility of the carriers to provide coverage.

Senate bill 1205 does not let the insurance carriers hide behind the defense of "late notice". My father was told by his agent that our coverage did not included pollution when it actually did. After the McCormick and Baxter decision renewed our interest in pursuing this coverage did the issue of delayed notice arise. However, the source of pollution should only be the surface impoundment and the contaminants could only have come form Permapost's treating activity. Delayed notice by insured should not be a defense for carriers if the businesses were unaware or mislead that the coverage existed and if the delay does not prejudice the insurer.

Thank you for the opportunity to present our comments.

MEASURE: SB 1205
EXHIBIT: N
SENATE JUDICIARY COMMITTEE
DATE: 4-19-99 PAGES: 33
SUBMITTED BY: Richard Pope

SB 1205
Testimony of Richard S. Pope
Senate Judiciary Committee
April 19, 1999

I am a partner in the Portland law firm of Newcomb, Sabin, Schwartz & Landsverk LLP, and was lead trial lawyer for the policyholder in the case of *Cascade Corporation v. American Home Assurance Co. et al.*, Multnomah County Circuit Court. This is a report from the trenches of environmental insurance coverage litigation. I am grateful for the chance to testify for this Committee.

With rare exceptions, the insurance companies approach these cases as house to house combat. Normally, insurance companies handling claims assume there is coverage. As one expert explained in his course text, "the claim representative's chief task is to seek and find coverage, not to seek and find coverage controversies or to deny or dispute claims." *James Markham, The Claims Environment* p. 13 (Insurance Institute of America 1993). In environmental insurance matters, however, the insurance companies' response to the claims of their policyholders has been the opposite. Their environmental claims units routinely set up 50 or so obstacles to recovery - the 50 or so affirmative defense 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.

SB 1205 is a good bill. If it had been enacted when our coverage litigation began seven years ago, we would probably have finished it by now, at much less cost to the policyholder. Both the insurance companies and the policyholder would have had a much

better idea where they stood right from the beginning.

The impact of the bill can be seen in today's headlines, which report that EPA is reluctant to let our DEQ oversee a cleanup of the Willamette River Harbor, and instead may declare that part of the river a Federal Superfund Site (Tab 1). Why? Because the DEQ intends to rely on voluntary clean up efforts, and the EPA fears voluntary clean up will not be effective enough. Under current law, EPA has grounds to be concerned. Any business that goes into DEQ's voluntary clean up program jeopardizes all of its insurance coverage, because of a voluntary payments exclusion argument by the insurance companies. SB1205 would eliminate that concern, and make DEQ's voluntary clean up program much more attractive.

Mr. Bitz has told you the story of Cascade's coverage case. As an attorney, I must say the insurance companies in environmental coverage cases seem to live and breathe technicalities, and we must be very concerned about those technicalities in order to make sure SB 1205 does what is intended.

Our first concern is the effective date of the bill, which applies to all cases not reduced to judgment as of its enactment. Cascade's case has not been reduced to judgment, but has been decided by the jury. The jury went over 69 pages of Cascade's environmental expenses, and allocated them to defense or indemnity under instructions the judge gave them. The jury found the vast majority of expenses, including investigation and RI/FS expenses, were covered indemnity costs, not defense costs. SB 1205, as now written, could unintentionally take that jury verdict away from Cascade. To avoid such a serious

constitutional problem, we recommend that you either make the bill effective on cases not submitted to the jury at the time of enactment, or better yet, use the careful approach described in our draft marked up bill at Tab 2, page 6.

Next, there are three sections of the bill in which further clarification will prevent extended litigation.

The first is Section 4(2)(g) on allocation. As written now, it applies only to settlements. With slight additional amendment, described at Tab 2, page 5, it would apply to cases tried to verdict and judgment as well. It would end the possibility of insurance companies arguing – and they do – that some other insurance company, not them, is responsible to cover the policyholder. It would adopt the only really workable approach, which is to make the insurance companies jointly and severally liable to their policyholder for coverage of environmental contamination which, in many cases, has been spreading silently and unseen for many years.

Didn't the legislature just abolish joint and several liability? Not for environmental liabilities, which remain joint and several. Liability insurance coverage has to cover the policyholder's liability as it exists. When the policyholder's liability is ongoing, joint and several, so is its insurance coverage. As Professor Richard Roddis testified in Cascade's coverage trial, that is the meaning of the coverage promise that the insurance company will pay "all sums" for which the insured becomes liable because of property damage (Tab4). Professor Roddis's credentials could not be more outstanding. He is a former Insurance Commissioner of the State of California, professor of insurance law at the University of

Washington, Dean of the University of Washington Law School, and former President of Uniguard Insurance Company in Seattle. We commend his testimony to you.

Next, Section 4(2)(h) on the owned property exclusion: An Oregon case involving the City of Corvallis holds that ground water is property of a third party, so liability coverage may apply, at least where the policyholder has no well. The insurance companies now argue that anyone who has a well is subject to the "owned property" exclusion for liability coverage, no matter how far away from the well the contaminated water extends. The slight changes we propose at Tab 2, pages 5-6 would put well owners back among the ranks of the covered, at least to the extent they are cleaning up ground water they are not actually using themselves.

Third, late notice, Section 4(2)(e): Here, we would emphatically recommend the changes stated at Tab 2, pages 4-5, and explained at Tab 3, pages 1-3. Existing Oregon law contains many protections on late notice already, which the bill does not acknowledge. Absent these necessary changes, policyholders may be better off, and would certainly not be worse off, relying on existing case law, which already requires prejudice to the insurance company, and unreasonable delay by the policyholder. With the statutory changes we have proposed, however, the late notice issues would be much clearer, and result less often in a forfeiture of coverage that the policyholder has paid for, and would otherwise be entitled to.

Next, some comments on three insurance company affirmative defenses that SB 1205 does not address, that it really should in order to decrease the time and expense of

environmental insurance coverage litigation.

First, the qualified or limited pollution exclusion. Here, we are talking about the exclusion in effect from about 1970 to 1983, which allows coverage if the discharge, dispersal, release or escape of contamination was "sudden and accidental." Our state supreme court has, in my and many others' opinion, held that the qualified pollution exclusion permits coverage where the resulting contamination was "unexpected and unintended." See Tab 5. The insurance companies continue to raise this issue, though, and a split now exists in the Multnomah County Circuit Court, which holds that leaks from an underground storage tank are covered, but perhaps not unintentional releases to ground water from then-recommended land disposal practices. Language clarifying this interpretation of the pollution exclusion would avoid numerous appeals, and would expedite the availability of clean up funds now tied up in insurance litigation.

Second, loss mitigation. A recent court of appeals case holds that clean up of soil only is not covered, because it is the insured's own property. But insurance policies have long paid for loss mitigation, or expenses incurred by the policyholder to prevent additional covered loss. A good example is, if your house is on fire in a windstorm, bulldozing the house next door in order to prevent the spread of fire to the rest of the neighborhood. We need a provision that clearly says if the policyholder shows clean up of the soil was reasonably necessary to prevent migration of the contamination into ground water, the policyholder is covered.

Third, "as damages." The policies defend "suits," and reimburse for expenses paid

"as damages." If we are going to say voluntary DEQ clean ups are "suits," we also need to say the expenses incurred in them are "damages." Otherwise, we'll simply have moved the fight from one issue to another.

Finally, attorney fees for the prevailing policyholder: Existing ORS 742.061 awards them in any insurance coverage action. As described in Tab 6, the court of appeals has recently decided two cases which permit the insurance company to stonewall the policyholder for years, then pay the claim on the courthouse steps, and avoid paying any attorney fees. One of the judges lodged what he called a "Primal Scream concurrence," and invited legislative amendment of the statute. We ask that you do so in this bill, along the lines described in Tab 6, pages 1-2.

Thank you very much for considering our testimony. We urge the Committee to permit some linguistic and additional improvements to what starts out as a very good effort.

CGU | North Pacific

North Pacific Insurance Company
1675 SW Marlow Avenue (97225-5103)
PO Box 74 • Portland, OR 97207-0074

Tel: 503-643-7661

MEASURE: SB 1205
EXHIBIT: F
SENATE JUDICIARY COMMITTEE
DATE: 4-19-99 PAGES: 1
SUBMITTED BY: John Powell

April 19, 1999

Senator Neil Bryant
Chair, Judiciary Committee
Oregon Senate
Salem, Oregon

Re: Senate Bill 1205

Dear Senator Bryant:

This letter is to express opposition to Senate Bill 1205, which relates to actions to determine insurance coverage for environmental contamination. This bill is plainly unfair to insurers, particularly Oregon insurers such as North Pacific Insurance Company and Oregon Automobile Insurance Company which have written commercial insurance in this state for many years.

By re-writing insurance contracts the bill would create bad law from a public policy perspective. The bill would adversely affect the availability of commercial liability insurance coverage, especially in classes of business such as farmers and small business entities. With the added exposure for indemnity and defense costs we would face North Pacific, now CGU North Pacific, would be very cautious in offering liability coverage in these classes and might well choose not to offer such coverage. If we did elect to offer it, the unprecedented indemnity and defense costs resulting from this bill would inevitably cause an increase in the cost of commercial liability coverage.

Senate Bill 1205 would make bad law and bad policy. I urge you not to support this bill.

Very truly yours,

Larry W. Becker
President
CGU North Pacific

MEASURE: SB 1205
EXHIBIT: N
SENATE JUDICIARY COMMITTEE
DATE: 5-13-99 PAGES: 2
SUBMITTED BY: S. Telfer

Alliance of American Insurers

Steve Telfer
Oregon Legislative Counsel
Alliance of American Insurers
503.239.0901
April 18, 1999

TESTIMONY IN OPPOSITION
SB 1205

The Alliance of American Insurers is a national property and casualty trade association with about 300 members around the country. The Alliance opposes SB 1205 (Oregon Environmental Cleanup Assistance Act), because we believe it will have a detrimental effect on the availability and cost of general liability insurance in Oregon. The OECAA will alter and expand the obligations of insurers under general liability policies. This expansion will increase costs to insurers which in turn will be passed on to the purchasers of those policies. The exact amount of the price increases is not currently known. However, as currently drafted SB 1205 if enacted, will potentially lead to significant cost increases.

Because general liability policies do not provide coverage for environmental liabilities, there are specialized environmental liability policies available. Businesses with special environmental coverage needs have been able to purchase those additional coverages as necessary. This separation of environmental coverage from general liability coverage has helped to maintain the affordability of general liability coverage for all types of business. SB 1205 would put the burden of environmental liability on all purchasers of insurance rather than those who have specific environmental liability exposures.

In addition to the cost issues, SB 1205 raises serious constitutional questions. This legislation attempts not only to change how future policies are written and interpreted but seeks to impose those interpretations on past insurance contracts. We believe the attempt to change the meaning of past contracts is a violation of the constitutional prohibition on impairment of contracts. For example Section 4 (1) of the bill, includes in the definition of "suit," actions taken pursuant to voluntary agreements, independent action cleanups, consent decrees and consent orders. General liability policies clearly define "suit" as "a civil proceeding in which damage (to covered persons or properties) is alleged." Independent action cleanups for example, are not suits as defined in most liability policies.

Generally "claims made" liability policies have an express provision excluding coverage where the insured fails to provide timely notice of the claim to the insurer. This is to preserve the insurer's ability to investigate whether a covered claim exists. Section 4 (2)(e)of the bill states that the insured shall have provided timely notice under a general liability policy if: "(A) the insurer has not suffered actual prejudice...or (B) In the event actual prejudice has occurred, it was reasonable under the circumstances for the insured not to give notice at an earlier date. For purposes of this subparagraph, actual prejudice shall exist only where, because of the delay in notification, the insurer is unable to determine the source and timing of the release of the contaminants at issue and therefore cannot respond effectively to the insured's coverage claim or the underlying liability claim." How does this provision not impair the contractual terms of past policies or existing policies?

Testimony against SB 1205 Page two

The Alliance believes that this legislation is a bad idea because:

- It shifts the burden of paying for environmental liability coverage from those who have specific need to the general population.
- It will reward those who failed to purchase environmental liability insurance in the past by providing them with coverages they specifically chose not to purchase. This in effect penalizes those who made the decision to insure their environmental liabilities by paying the extra premiums.
- It retroactively provides coverage where no premium was collected.
- It raises serious constitutional problems, including but not limited to, rewriting existing liability insurance contracts which contain terms, conditions, exclusions and definitions different from the proposed Act.
- It is likely to significantly raise costs and availability of general liability policies.

The Alliance of American Insurers urges the committee to vote against this bill.

MEASURE: SB 1205A
EXHIBIT: G
HOUSE JUDICIARY - CIVIL LAW
DATE: 6-21-99 PAGES: 2
SUBMITTED BY: Paul S. Brown

AMERICAN INTERNATIONAL GROUP, INC.
180 WATER STREET, 24TH FLOOR
NEW YORK, N.Y. 10038

PAUL S. BROWN
ASSISTANT GENERAL COUNSEL
STATE REGULATORY AFFAIRS
DOMESTIC BROKERAGE GROUP

(212) 820-4679
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June 21, 1999

BY HAND
The Honorable Lane Shetterly
Chair, Committee on Judiciary – Civil Law
Oregon House of Representatives
State Capitol
Salem, OR 97310

RE: Senate Bill 1205, Relating to Actions to Determine Insurance Coverage for Environmental Contamination

Dear Chairman Shetterly:

The American International Group, Inc. (AIG), through its various member companies, writes a significant amount of insurance in the State of Oregon. Accordingly, AIG is quite concerned about the above-referenced legislation, which was recently passed by the Oregon Senate and which is currently the subject of hearings before your committee. For the reasons stated below, I urge you and the other members of your committee to oppose this measure.

Senate Bill 1205, is problematic for several reasons. The bill would alter existing contractual agreements and would abrogate "choice of law" rules by mandating that Oregon law apply to any litigation regarding allegedly contaminated property within the State of Oregon. It would also abrogate the long-standing rules regarding the payment of attorneys' fees. The legislation takes certain property rights from the contracting parties without due process and thereby treads dangerously on well-established constitutional limitations.

The proposed legislation would override contractual terms by, for example, redefining what would constitute a "suit" under the insurance policy, thereby dictating when policy obligations arise. Likewise, the proposed legislation seeks to change those provisions of the insurance contract relating to an insurers right to deny payment of remediation or investigation costs on the grounds that such costs constitute voluntary payments by insureds. These contract provisions, like any others, were previously agreed upon through arms length negotiations between insurer and insured and the scope and provisions of the insurance contract should not be altered by an act of the legislature.

Legal challenges to the constitutionality of this legislation and the newly imposed coverage liabilities resulting from it, as well as additional environmental coverage disputes, in general, will substantially increase the amount of litigation over environmental matters in the state, which is the opposite of the goal of this legislation. We do not believe that this proposal will facilitate fair, principled and equitable resolution of environmental claims in the State of Oregon. Instead, the proposal will interfere with basic contractual rights and provide opportunities for additional litigation not currently found in Oregon law, and may, therefore, increase commercial general liability rates in the state. None of these results will benefit the people of Oregon and, in fact, will ultimately harm them via even longer delays for environmental cleanups and higher insurance rates.

We, therefore, urge you and the other members of the Judiciary Committee to oppose this legislation.

Thank you very much for the opportunity to provide these comments.

Sincerely,

Paul S. Brown

Paul S. Brown

** TOTAL PAGE.03 **

Contents of Tab 4 removed to limit size of exhibit

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CERTAIN UNDERWRITERS AT LLOYD'S LONDON AND EXCESS INSURANCE COMPANY LIMITED, Plaintiffs, v. MASSACHUSETTS BONDING AND INSURANCE COMPANY, et al. Defendants.	)	Case No. 0304-03995 ORDER REGARDING APPLICATION OF ORS 465.480(4)

The parties seek a ruling on whether ORS 465.480(4) applies to this case. Defendants argue that it does and plaintiffs argue that it does not. The court rules that it does not, as explained below.

ORS 465.480(4) provides as follows:

> (4) An insurer that has paid an environmental claim may seek contribution from any other insurer that is liable or potentially liable. If a court determines that the apportionment of recoverable costs between insurers is appropriate, the court shall allocate the covered damages between the insurers before the court, based on the following factors:
>
> (a) The total period of time that each solvent insurer issued a general liability insurance policy to the insured applicable to the environmental claim;
>
> (b) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable;
>
> (c) The policy that provides the most appropriate type of coverage for the type of environmental claim; and
>
> (d) If the insured is an uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for purposes of allocation.

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

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

(2) [The amendments] do not apply to any claim for which a final judgment, after exhaustion of all appeals, was entered before the effective date of this 2003 Act.

(3) Nothing in [the amendments] may be construed to require the retrying of any finding of fact made by a jury in a trial of an action based on an environmental claim that was conducted before the effective date of this 2003 Act.

(4) Notwithstanding any other provision of law, an insurer that is a party to an action based on an environmental claim for which a final judgment as to all insurers has not been entered by the trial court on or before the effective date of this 2003 Act and in which a binding settlement has been reached on or before the effective date of this 2003 Act between the insured and at least one insurer that was a party to the action may not seek or obtain contribution from or allocation to:

(a) The insured; or

(b) Any other insurer that prior to the effective date of this 2003 Act reached a binding settlement with the insured as to the environmental claim.

In *State v. Gaines*, 346 Or 160 (2009), the Oregon Supreme Court set forth the appropriate methodology for interpreting a statute. The court first examines the text and context of the statute. *Id.* at 170. The court then considers any proffered legislative history, "even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis." *Id.* at 172. "[T]he extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." *Id.* In the third and final step, "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

Here, when the text and context of the legislation is examined, it supports plaintiffs' position. ORS 465.480(4) specifically states that "[a]n insurer that has paid *an environmental claim* may seek contribution from any other insurer that is liable or potentially liable." (Emphasis added.) The retroactivity provisions of the 2003 Act state that the statute applies to "all *claims* whether arising before, on or after the effective date" of the Act. (Emphasis added.) When examined in context, the term "*claims*" in the retroactivity provisions appears to refer to the parallel term "environmental *claim*" in ORS 465.480(4). Moreover, as plaintiffs argue, ORS 465.480(4) refers to an insurer's right to "seek contribution" and does not refer to a "contribution claim." It is reasonable to conclude, as plaintiffs contend, that the legislature did not use the words "claim" or "claims" in referring to contribution "because it wanted to be consistent in 'claim' meaning or referring to an environmental claim." (London's Memorandum Regarding ORS 465.480(4), 3).

Section (2) of the retroactivity provisions is also instructive. It states that the retroactivity provisions "do not apply to any claim for which a final judgment, after exhaustion of all appeals, was entered before the effective date of this 2003 Act." Clearly, this refers to "environmental claims" and not contribution claims. As plaintiff contends, "Section 2(3) is meaningless in the context of an environmental claim that *has been paid.*" (*Id.*, 4).

Finally, ORS 465.480(4) does not apply because, under Section (2), the underlying environmental claim was adjudicated in a final judgment on April 7, 2003. As plaintiffs contend, this exception to the application of ORS 465.480(4) makes sense because the legislature reasonably "would have no interest in retroactively applying the amendments to a claim that had been adjudicated."

For the reasons discussed above, the court finds that ORS 465.480(4) does not apply to this case.

IT IS SO ORDERED.

Dated this 31st day of January, 2013.

Youlee Yim You, Circuit Court Judge

*2011 U.S. Dist. LEXIS 65755, **

ASH GROVE CEMENT COMPANY, a Delaware corporation, Plaintiff, vs. LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts insurance company, TRAVELERS INSURANCE COMPANY, a Connecticut insurance company; HARTFORD ACCIDENT and INDEMNITY COMPANY, a Connecticut insurance company; and UNITED STATES FIDELITY & GUARANTY COMPANY, a Maryland insurance company, Defendants.

3:09-cv-00239-KI

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, PORTLAND DIVISION

2011 U.S. Dist. LEXIS 65755

June 20, 2011, Decided
June 20, 2011, Filed

PRIOR HISTORY: Ash Grove Cement Co. v. Liberty Mut. Ins. Co., 2011 U.S. Dist. LEXIS 2777 (D. Or., Jan. 10, 2011)

CORE TERMS: insurer, epa, insured, site, duty to defend, notice, cleanup, summary judgment, environmental, superfund, entity, convening, voluntary payment, responsible parties, settlement, factual issues, occurrence, reimburse, matter of law, civil litigation, responding, obligated, inform, waived, triggered, tolling, intends, incur, Liability Act, insurers' duty to defend

COUNSEL: **[*1]** For Plaintiff: Michael E. Farnell, Spencer S. Adams, Seth H. Row, Parsons Farnell & Grein, LLP, Portland, Oregon; Daniel A. Zariski, Michael R. Wrenn, Wolfe Wrenn & Zariski, Seattle, Washington.

For Liberty Mutual Insurance Company, Defendant: Kevin G. McCurdy, McCurdy & Fuller, Menlo Park, California; Kimberly R. Griffith, Thomas M. Christ, Cosgrave Bergeer Kester, LLP, Portland, Oregon.

For United States Fidelity & Guaranty Company, Defendant: Thomas A. Gordon, Andrew S. Mosses, Gordon & Polscer, LLC, Portland, Oregon.

JUDGES: Garr M. King, United States District Judge.

OPINION BY: Garr M. King

OPINION

OPINION AND ORDER

KING, Judge:

Plaintiff Ash Grove Cement Company ("Ash Grove") filed this action seeking a declaratory judgment that its insurers, defendants Liberty Mutual Insurance Company ("Liberty Mutual") and United States Fidelity and Guaranty Company ("USF&G") have a duty to defend and indemnify Ash Grove concerning contamination at the Portland Harbor Superfund Site ("Site"). I previously held that the insurers had a duty to defend Ash Grove. The parties now dispute the

scope of the duty to defend and have filed cross motions for summary judgment. As discussed below, I am able to determine what law I will follow **[*2]** but factual issues preclude me from applying the law to the facts.

FACTS

On January 11, 2008, David Batson wrote Ash Grove as a convening neutral to invite the company to an informational meeting of parties associated with the Site. Batson explained that he would:

> serve as a confidential neutral professional and assist parties to prepare for eventual negotiations with federal and state agencies through organizing into a group of potentially responsible parties (PRPs) and conducting an allocation of site costs among parties associated with the Site. I serve at the discretion of an initial group of parties (the Convening Group) brought together by the U.S. Environmental Protection Agency (EPA) for the purpose of exploring the creation of a PRP Group.
>
> . . . .
>
> . . . There are no preconditions or commitments required for your attendance at the convening meeting; just your desire to learn about how to take advantage of the opportunity of joining other similarly situated parties in meeting your common interests.

McCurdy Decl. Ex. 4, at 1, 3.

Ash Grove joined the ADR process explained in Batson's letter, also known as the allocation process. Approximately 70 entities are taking part in this process. **[*3]** Ash Grove retained Leslie Nellermoe to represent it in connection with the Site. Nellermoe states that the EPA informed companies participating in the ADR process that it intends to negotiate only with entities that participated.

Ash Grove's expert witness, J.W. Ring, is an attorney who has dealt with Superfund sites in more than 15 states. He currently represents two clients in conjunction with the Portland Site which are not involved in the litigation before me. According to Ring, convening neutrals, such as Batson, are EPA employees assigned to gather private parties together to begin a group ADR process. The convening neutral does not use EPA letterhead because he is not formally advocating for the EPA's position in the process. The EPA compensates the neutral at first but conditions approval of a settlement on the private parties reimbursing the EPA for the neutral's costs. In Ring's experience, an entity that receives an invitation from a convening neutral should consider itself as having been identified by the EPA as a potentially responsible party. In Ring's opinion, an entity that does not participate in the ADR process severely limits its options for opposing full joint and **[*4]** several liability for the cleanup.

The EPA sent Ash Grove a 104(e) request[1] on January 18, 2008. The EPA sent such requests to 326 entities seeking information about activities that could have resulted in releases of hazardous substances at the Site. The EPA uses the information it obtains to determine the need for any response action at the Site and to identify additional potentially responsible parties for performing the cleanup. The EPA sent General Notice Letters[2] to 141 entities identified as potentially responsible parties at the Site.[3]

FOOTNOTES

1 "Under section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund), EPA is authorized to seek information involving sites containing hazardous substances. Early in the cleanup process, EPA conducts a search to find all of the potentially responsible parties (PRPs). EPA looks for

evidence to determine liability by matching wastes found at the site with parties that may have contributed wastes to the site. EPA uses many approaches to do this research, including the use of 'information request letters' to gather information." http://www.epa.gov/compliance/resources/publications/cleanup/superfund/104e/ **[*5]** (last visited June 20, 2011).

2 "General notice letters inform recipients that they are: identified as PRPs at Superfund sites, that they may be liable for cleanup costs at the site, and explains the process for negotiating the cleanup with EPA. The letter also includes information on Superfund, the site, and may include a request for additional information." http://www.epa.gov/compliance/cleanup/superfund/notice.html (last visited June 20, 2011).

3 Kevin McCurdy, counsel for Liberty Mutual, supplied these figures; he obtained the data from the EPA's web site on May 4, 2011. Leslie Nellermoe, counsel for Ash Grove, reported the EPA sent 278 section 104(e) requests and 103 General Notice Letters. The slight differences are insignificant for this argument.

On January 29, 2008, Ash Grove sent USF&G a copy of the 104(e) request it received, along with: (1) copies of letters the Lower Willamette Group ("LWG") sent Ash Grove naming it as an alleged potentially responsible party and threatening to file suit for contribution; and (2) a tolling agreement Ash Grove entered into with the LWG. Ash Grove informed USF&G that it had no time to notify it prior to signing the tolling agreement, but that **[*6]** Ash Grove believed the tolling agreement also benefitted its insurers. Ash Grove also stated, "Please accept this notice as a first report of claim." Rose Decl. Ex. 1.

Also on January 29, 2008, Ash Grove sent Liberty Mutual a copy of the 104(e) request but did not attach the other documents. The cover letter was very brief, advising that the company had a policy which would apply to "this claim" and stating that the company would keep the insurer informed of any further developments. Pearson Decl. Ex. 1, at 1.

USF&G wrote Ash Grove on February 25, 2008 to acknowledge receipt of the January 29 letter and to state that it was searching for potentially applicable policies. The insurer explained it would review the policies to determine if USF&G had a duty to pay some or all of the costs for a lawyer to represent Ash Grove in the Site dispute and if USF&G had a duty to indemnify Ash Grove for some or all of the costs associated with the resolution of the matter. USF&G also told Ash Grove that it should take any steps necessary to fully protect its rights in the matter but, "Should it be determined that we will participate in representation of Ash Grove Cement Company under any alleged policies, **[*7]** only fees incurred on or after the date of tender will be considered for reimbursement." Id. Ex. 3, at 2. USF&G also reserved all rights and stated that the letter should not be construed as a waiver of any right or defense.

On February 25, 2008, Liberty Mutual wrote Ash Grove to document a telephone conversation in which Ash Grove advised that it would provide notice to the insurer of potential claims but that it was not involved in any litigation and was not presenting a formal claim.

On March 25, 2008, Ash Grove sent USF&G a letter informing the insurer that Ash Grove had retained Leslie Nellermoe to defend it in connection with the Site.[4]

FOOTNOTES

4 The court does not have a copy of this letter.

On May 27, 2008, Ash Grove wrote Liberty Mutual to explain the history of the LWG and to note that the EPA sent 104(e) requests to 280 entities. Ash Grove also stated Liberty Mutual was

responsible for payment of the significant expense Ash Grove incurred to respond to the 104(e) request. This letter was the first time Ash Grove informed Liberty Mutual that it was incurring costs to respond to the EPA's inquiries or asked Liberty Mutual to reimburse those costs.

Ash Grove submitted its initial response **[*8]** to the 104(e) request on October 24, 2008 and has not received any written communication from the EPA since. Ash Grove intends to supplement its response and has put some effort into the supplement.

In November 2008, Ash Grove sent invoices to USF&G listing costs Ash Grove incurred responding to the 104(e) request. This was the first time USF&G learned Ash Grove expected USF&G to reimburse defense costs.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The initial burden is on the moving party to point out the absence of any genuine dispute of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains a fact dispute to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On a motion for summary judgment, the court "must view the evidence on summary judgment in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party." Nicholson v. Hyannis Air Service, Inc., 580 F.3d 1116, 1122 n.1 (9th Cir. 2009) **[*9]** (internal quotation omitted).

DISCUSSION

On September 30, 2010, I filed an Opinion and Order in which I held that the 104(e) request for information the EPA sent to Ash Grove, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9604(e), constituted a "suit" under the terms of the insurance policies and the Oregon Environmental Cleanup Assistance Act ("OECAA"), ORS § **465.480**, thus triggering the insurers' duty to defend Ash Grove.

In these cross motions, the parties dispute when liability under the duty to defend began and when it ends.

I. Defense Costs Prior to Ash Grove's Tender of the Defense

Based on Ash Grove's failure to tender earlier, and Ash Grove's failure to get permission to incur costs prior to the tender dates, the insurers ask the court to conclude as a matter of law that they have no obligation to reimburse Ash Grove for any defense costs incurred prior to the tender dates.

A. Date of Tender

The tender dates themselves are at issue. Thus, I must determine whether putting the insurers on notice of the 104(e) request is sufficient to trigger the duty to defend.

The insurers argue that the duty to defend Ash Grove did not **[*10]** begin until the company tendered the 104(e) request to them, specifically May 27, 2008 for Liberty Mutual and November 2008 for USF&G. Prior to those dates, the insurers contend that Ash Grove informed them of the 104(e) request but did not ask the insurers to take any action and did not ask for a defense.

Ash Grove contends the insurers' duty to defend was triggered when Ash Grove forwarded the 104(e) request to Liberty Mutual and USF&G on January 29, 2008. Ash Grove argues that the policies do not make the tender of the defense an additional step after providing notice of a claim. According to Ash Grove, once it sent the 104(e) request to the insurers, the insurers had

a duty to investigate whether coverage existed unless Ash Grove specifically asked the insurers not to defend. Ash Grove argues that case law from other jurisdictions which requires the insured to make an affirmative request for a defense, beyond simple notification of a claim, should not be applied here because the policy language does not put that burden on the insured.

"An insurer is not obligated to defend any action not tendered to it." Am. Cas. Co. v. Corum, 139 Or. App. 58, 63 n.3, 910 P.2d 1151 (1996). Ash Grove **[*11]** argues this is dicta but the rule is followed in other jurisdictions. See Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 983 P.2d 1155, 1160 (Wash. Ct. App. 1999) ("the insured must affirmatively inform the insurer that its participation is desired"); Purvis v. Hartford Accident and Indem. Co., 179 Ariz. 254, 877 P.2d 827, 830 (Ariz. Ct. App. 1994) ("What is required is knowledge that the suit is potentially within the policy's coverage coupled with knowledge that the insurer's assistance is desired.") (internal quotation omitted).

Importantly, however, the Oregon case does not explain what conduct is necessary to tender a claim or suit. Gaining no guidance from Corum, I turn to the policies, which state:

Insured's Duties in the Event of Occurrence, Claim or Suit

> (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place, . . . shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. The named insured shall promptly take at his expense all reasonable steps to prevent other bodily injury . . . .
>
> (b) If claim is made or suit is brought against the insured, **[*12]** the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
>
> (c) The insured shall cooperate with the company and, upon the company's request, assist in making settlements . . . ; and the insured shall attend hearings and trials . . . . The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

Row Decl. Ex. B, at 32, Conditions—Insured's Duties in the Event of Occurrence, Claim or Suit. There are no other duties listed for the insured. The policies further state: "[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . and may make such investigation and settlement of any claim or suit as it deems expedient . . . ." Id. at 30.

The Oregon legislature also weighed in on what the insurer must do after receiving notice: "Failing to adopt and implement reasonable standards for the prompt investigation of claims" is an unfair claim settlement practice under ORS 746.230(1)(c).

Ash Grove's argument **[*13]** is convincing. As far as I know, the policies do not define a tender and do not make it a separate obligation from the duty to provide notice, which Ash Grove provided on January 29, 2008. After receiving notice, the insurers have a statutory duty to investigate. Without clear Oregon case law or policy language requiring a tender to be something beyond notice, I have to conclude that the duty to defend may have been triggered as early as January 29, 2008. I agree with Ash Grove, however, that an insured can tell its insurer that it does not yet want a defense. The record before me creates a factual issue on whether Ash Grove asked the insurer to wait. Consequently, I cannot grant summary judgment on when the duty to defend began.

B. Voluntary Payment Condition

The insurance policies include a voluntary payment policy, with Liberty Mutual's policy effective January 1, 1969, stating: "The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident." Row Decl. Ex. B, at 32, Conditions—Insured's Duties in the Event of Occurrence, Claim or Suit. Liberty Mutual's other policies, **[*14]** as well as the policies from USF&G, include a substantially similar condition. The insurers claim they are not obligated to reimburse any expenses Ash Grove incurred prior to the dates of tender because the payments are voluntary ones prohibited by the policies.

Ash Grove argues that the insurers waived the voluntary payments condition by refusing to defend Ash Grove. Ash Grove relies on Holloway v. Republic Indem. Co. of Am., 201 Or. App. 376, 119 P.3d 239 (2005), rev'd on other grounds, 341 Or. 642, 147 P.3d 329 (2006), in which the insurer denied a defense to its insured in an employee's sexual harassment suit. After the insurer denied a defense by never responding to the request, the insured settled the suit by stipulating to entry of a $50,000 judgment in exchange for a $6,000 payment by the insured and assignment of the insured's rights against the insurer. The court held that the insurer waived the no voluntary payment condition by refusing to defend the insured. Id. at 380-81.

Because there are factual issues on when the duty to defend began, there are also factual issues on when the insurers refused to defend Ash Grove. Thus, I cannot determine until trial if the insurers waived **[*15]** the voluntary payment condition.

II. Costs for the Alternate Dispute Resolution Process

The insurers ask the court to limit their defense obligation to the costs Ash Grove reasonably and necessarily incurred to respond to the 104(e) request. Specifically, the insurers argue they are not obligated to pay for Ash Grove's participation in the ADR process Batson initiated in January 2008, prior to Ash Grove's receipt of the 104(e) request. According to the insurers, the Batson letter is merely an invitation to attend a voluntary informational meeting, with no requests to perform a task, produce a document, conduct an investigation, and no penalty for nonattendance. The insurers note the number of recipients of the Batson letter who are not taking part in the ADR process. The insurers also rely on my previous ruling that the 104(e) request triggered their duty to defend. Thus, they contend that the defense obligation is limited to action Ash Grove took to comply with that request, which the insurers believe ended when Ash Grove filed its response with the EPA on October 24, 2008. The insurers maintain that actions Ash Grove took and will take in anticipation of future claims or suits, which **[*16]** may or may not transpire, are not defense costs even though participation in the ADR process may be a prudent business decision.

Ash Grove argues that the duty to defend includes the ongoing ADR process until the liability is resolved. The company contends that the duty to defend is a duty to defend against a covered liability and not against a document such as the 104(e) request. In environmental cleanup actions in particular, Ash Grove contends, Oregon courts recognize that a defense involves activities broader than those in typical civil litigation. Ash Grove argues that responding to the 104(e) request is part and parcel of a defense to liability for the Site cleanup and is only the start of a compulsory administrative process. According to Ash Grove, the ADR process is intertwined with the 104(e) request and is focused on Ash Grove's liability. Most importantly, Ash Grove argues that its participation in the ADR process is essential to limiting its liability because it can advocate for a lower allocation prior to the EPA issuing a unilateral order which is nearly impossible to challenge. Ash Grove claims that the EPA will not negotiate resolutions outside the ADR process. Ash Grove **[*17]** reasons that the duty to defend continues until no set of facts exists under which the insurers may be responsible for indemnifying Ash Grove.

It is true that the OECAA defines a "suit" to include activities well beyond formal judicial proceedings:

> "Suit" or "lawsuit" includes but is not limited to formal judicial proceedings, administrative proceedings and actions taken under Oregon or federal law, including actions taken under administrative oversight of the Department of Environmental Quality or the United States Environmental Protection Agency pursuant to written voluntary agreements, consent decrees and consent orders.

ORS **465.480(**1)(a). This definition makes determining the end of liability for defense costs far murkier than if the EPA sued Ash Grove in court. Consequently, this issue is better framed as whether the ADR process is a reasonable and necessary defense cost.

I am persuaded by Ash Grove's argument that the ADR process might be a reasonable and necessary defense cost because, in a practical sense, Ash Grove must take part in the ADR process to have any chance of influencing its ultimate responsibility for cleanup costs at the Site. This is in spite of the fact that participation **[*18]** in the ADR process is completely voluntary. I view the 104(e) request as equivalent to the Complaint filed in typical civil litigation. The duty to defend in court is not limited to costs incurred to draft and file an Answer, and I cannot decide as a matter of law that defense costs here are limited to the response to the 104(e) request.

ORS **465.480(**6)(a) also provides a much broader definition of defense costs than is generally seen in a typical civil litigation:

> There is a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments or other necessary investigation, as those terms are defined by rule by the Department of Environmental Quality, are defense costs payable by the insurer, subject to the provisions of the applicable general liability insurance policy or policies.

Based on the briefing before me, I have little sense of what is taking place in the ADR process. I conclude that this is a factual issue which requires resolution at trial. If Ash Grove believes that portions of the ADR process, or all of it, are reasonable and necessary defense costs, Ash Grove can attempt to prove it at the court trial. I caution both sides, however, **[*19]** that they cannot paint the process with a broad brush. I might decide that certain activities in the ADR process are covered defense costs and others are not. Thus, I will need details on what categories of activities are occurring and what costs are incurred for each category.

Ash Grove raises another issue which more clearly extends the duty to defend past Ash Grove's October 2008 response to the EPA. Ash Grove states that it has a continuing obligation to supplement its response if it obtains new information. Ash Grove obtained such new information while investigating how to respond to an ADR questionnaire, and it is working on and intends to submit a supplemental 104(e) response to the EPA. If Ash Grove does submit a supplemental response, the duty to defend would cover all reasonable and necessary costs to prepare it.

CONCLUSION

Defendant Liberty Mutual Insurance Company's Motion for Partial Summary Judgment [175], United States Fidelity and Guaranty Company's Joinder in Liberty Mutual Insurance Company's Motion for Partial Summary Judgment [180], Plaintiff's Cross-Motion for Partial Summary Judgment Against Liberty Mutual Insurance Company [186], and Plaintiff's Cross-Motion for **[*20]** Partial Summary Judgment Against United States Fidelity and Guaranty Company [191] are denied.

Three motions to compel are pending. I ask counsel to confer and inform the court by July 15 which subparts of the motions still require resolution in light of this ruling. After I rule on the motions to compel, I will hold a conference to reschedule the trial.

IT IS SO ORDERED.

Dated this 20 day of June, 2011.

/s/ Garr M. King

Garr M. King

United States District Judge

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*235 Ore. App. 99, *; 230 P.3d 103, **;*
*2010 Ore. App. LEXIS 467, ****

CERTAIN UNDERWRITERS AT LLOYD'S LONDON AND EXCESS INSURANCE COMPANY, LIMITED, Plaintiffs-Appellants, v. MASSACHUSETTS BONDING AND INSURANCE COMPANY succeeded in interest by Hanover Insurance Company; MAINE BONDING AND CASUALTY COMPANY, a Maine corporation, dba Maryland Casualty Company, dba Zurich Insurance Company; RLI INSURANCE COMPANY, an Illinois corporation; THE HOME INDEMNITY COMPANY, succeeded in interest by The Home Insurance Company, a New Hampshire corporation; HIGHLANDS INSURANCE COMPANY, a Texas corporation, dba Cigna Property and Casualty Insurance Company, aka Cigna Insurance Company of North America, a Pennsylvania corporation, succeeded in interest by CCI Insurance Company, succeeded in interest by Century Indemnity Company, dba Cigna Specialty Insurance Company, aka Cigna; CENTURY INDEMNITY COMPANY, a Pennsylvania corporation, dba Cigna Property and Casualty Insurance Company, aka Cigna, individually and as successor in interest to CCI Insurance Company, the successor in interest to Insurance Company of North America, Defendants, and BENEFICIAL FIRE AND CASUALTY INSURANCE COMPANY, succeeded in interest by JC Penney Life Insurance Company, then succeeded in interest by Stonebridge Life Insurance Company, a Vermont corporation; CONTINENTAL INSURANCE COMPANY, a New Hampshire corporation, dba CNA Insurance Companies and as successor in interest to Glens Falls Insurance Company, a Delaware corporation, dba CNA Insurance Companies; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, a Pennsylvania corporation; and INDUSTRIAL INDEMNITY COMPANY, succeeded in interest by United States Fire Insurance Company, a New York corporation, Defendants-Respondents.

A129974

COURT OF APPEALS OF OREGON

235 Ore. App. 99; 230 P.3d 103; 2010 Ore. App. LEXIS 467

June 3, 2009, Argued and Submitted
April 28, 2010, Filed

SUBSEQUENT HISTORY: Review denied by Certain Underwriters at Lloyd's London v. Mass. Bonding & Ins. Co., 349 Ore. 173, 243 P.3d 468, 2010 Ore. LEXIS 808 (2010)
Modified by, in part, Adhered to, in part, Reconsideration granted by Certain Underwriters at Lloyd's London v. Mass. Bonding & Ins. Co., 2011 Ore. App. LEXIS 1141 (Or. Ct. App., Aug. 17, 2011)

PRIOR HISTORY: [*1]**
Multnomah County Circuit Court 030403995. David Gernant, Senior Judge.

DISPOSITION: Reversed in part and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The Multnomah County Circuit Court, Oregon, granted summary judgment in favor of plaintiff insurers on their contribution action against defendants, the settling insurers. The insurers argued that the duty to defend an insured from an environmental cleanup action was an obligation owed by all parties jointly. The insurers appealed.

OVERVIEW: The appellate court found that the trial court erred in ruling that the insurers' claims were barred by the doctrine of issue preclusion because the prior judgment did not parse out the obligation of individual insurers or purport to resolve the issue in the case. The right to equitable contribution among insurers was grounded in principles of equity and was a right that inured to the benefit of the insurers and not the insured. The settling insurers'

settlements with the insured did not extinguish the insurers' right to equitable contribution for defense costs paid prior to the settlement. An equitable contribution action was not the type of action for which the legislature intended to extend a right to attorney fees. The trial court erred in ruling in favor of two of the settling insurers and against the insurers on the parties' cross-motions for partial summary judgment regarding the duty to defend. The trial court did not err in denying a settling insurer's motion for summary judgment, finding that statutory amendments to the Oregon Environmental Cleanup Assistance Act, Or. Rev. Stat. §§ 465.475 to **465.480**, retroactively extinguished the insurers' contribution claims.

OUTCOME: The judgment was reversed and remanded as to the summary judgment dismissing the insurers' contribution claims and in ruling in favor of two settling insurers on cross-motions for partial summary judgment regarding the duty to defend; the judgment was affirmed as to partial summary judgment regarding the insurers' entitlement to attorney fees.

CORE TERMS: insurer, insured, settlement, potentially liable, environmental, summary judgment, equitable, duty to defend, attorney fees, coverage, assignments of error, contamination, extinguished, cleanup, partial, issue preclusion, insurance policies, settling, sentence, subrogation, groundwater, site, settlement agreements, right to contribution, final judgment, extinguish, indemnity, moot, policy limits, cross-assignment

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel

HN1 In general, under the doctrine of issue preclusion, a party is barred from relitigating an issue of law or fact that was adjudicated in a prior proceeding.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel

HN2 Issue preclusion requires that the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.

Insurance Law > Claims & Contracts > Coinsurance > Contribution

HN3 The right to equitable contribution among insurers is not based on a subrogation or contract theory, whereby an insurer stands in the shoes of its insured. Rather, the right is grounded in principles of equity and is a right that inures to the benefit of the insurer and not the insured.

Insurance Law > Claims & Contracts > Coinsurance > Contribution

HN4 Unlike subrogation, the right to equitable contribution exists independently of the rights of the insured. It is predicated on the common sense principle that where multiple insurers or indemnitors share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant, and no indemnitor should have any incentive to avoid paying a just claim in the hope the claimant will obtain full payment from another coindemnitor.

Insurance Law > Claims & Contracts > Coinsurance > Contribution

HN5 A public policy favoring settlements does not merit a departure from the common-law rule governing equitable contribution.

Insurance Law > Claims & Contracts > Costs & Attorney Fees > General Overview

HN6 See Or. Rev. Stat. § 742.061(1).

Insurance Law > Claims & Contracts > Costs & Attorney Fees > Failure to Settle

HN7 Based on the plain text of Or. Rev. Stat. § 742.061(1), it is readily apparent that an equitable contribution action is not the type of action for which the legislature intended to extend a right to attorney fees. First of all, the triggering events in § 742.061(1) pertain to the relationship between an insured and its insurer. One of the predicates to an award of attorney fees under the statute--that settlement is not made within six months from the date proof of loss is filed with an insurer--plainly refers to an insured's proof of loss under an insurance policy.

Insurance Law > Claims & Contracts > Costs & Attorney Fees > Failure to Settle

HN8 The public policy considerations driving Or. Rev. Stat. § 742.061--encouragement of settlement of insurance claims and reimbursement of insureds who are forced to litigate to recover on their policies --are simply different from those at play in interinsurer disputes about equitable contribution, and nothing in the statutory text or context suggests that the legislature intended § 742.061 to apply to those types of disputes.

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend

HN9 The basic rules pertaining to an insurer's duty to defend are well established: Whether an insurer has a duty to defend an action against its insured depends on two documents: the complaint and the insurance policy. An insurer has a duty to defend an action against its insured if the claim against the insured stated in the complaint could, without amendment, impose liability for conduct covered by the policy. In evaluating whether an insurer has a duty to defend, the court looks only at the facts alleged in the complaint to determine whether they provide a basis for recovery that could be covered by the policy. An insurer should be able to determine from the face of the complaint whether to accept or reject the tender of the defense of the action. The insurer has a duty to defend if the complaint provides any basis for which the insurer provides coverage. Even if the complaint alleges some conduct outside the coverage of the policy, the insurer may still have a duty to defend if certain allegations of the complaint, without amendment, could impose liability for conduct covered by the policy. Any ambiguity in the complaint with respect to whether the allegations could be covered is resolved in favor of the insured.

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend

HN10 An 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.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements

HN11 Or. Rev. Stat. § **465.480**(4) provides, in part, that an insurer that has paid an environmental claim may seek contribution from any other insurer that is liable or potentially liable.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements
Governments > Legislation > Interpretation

HN12 The appellate court's task is to determine the legislature's intent in enacting Or. Rev. Stat. § **465.480**(4), which the appellate court gleans from the text, context, and legislative history of the statute, resorting if necessary to maxims of statutory construction. The appellate court begins, as always, with the text of the statute.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements

HN13 See Or. Rev. Stat. § **465.480**(4).

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > General Overview

HN14 Oregon's environmental cleanup statutes set up a scheme of strict liability for owners, operators, and others regarding investigation and cleanup of environmental contamination, Or. Rev. Stat. § 465.255(1). At the same time, the statutory scheme is designed to encourage the prompt cleanup of environmental contamination, short of an enforcement action. For example, Or. Rev. Stat. § 465.325 authorizes the Department of Environmental Quality (DEQ) to enter into an agreement with "potentially responsible persons" to perform remedial action. The agreement may be entered (in circuit court as a consent judgment) without any admission of liability. Or. Rev. Stat. § 465.327 likewise allows DEQ, through a written agreement, to provide a party with a release from potential liability to the state under § 465.255 if certain conditions are met. Thus, the scheme as a whole regulates parties who are liable for environmental contamination as well as those who are only potentially liable.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements
Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > General Overview

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

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements
Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > General Overview

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

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements
Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > General Overview

HN17 The first sentence of Or. Rev. Stat. § 465.325(6)(a) provides, in the context of consent agreements with the Department of Environmental Quality, that any person

may seek contribution from any other person who is liable or potentially liable under Or. Rev. Stat. § 465.255. The second sentence, however, provides, In resolving contribution claims, the court shall allocate remedial action costs among liable parties in accordance with Or. Rev. Stat. § 465.257--again leaving it to the court to allocate costs among liable parties.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements
Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > General Overview

HN18 The structure of Or. Rev. Stat. § **465.480(**4) parallels that of the other contribution statutes. The first sentence of § **465.480(**4) provides that a paying insurer may seek contribution from any other insurer that is liable or potentially liable. The second sentence leaves the merits of the claim to court determination: If a court determines that the apportionment of recoverable costs between insurers is appropriate, the court shall allocate the covered damages between the insurers before the court, based on certain enumerated factors.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements
Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > General Overview

HN19 The structure of Or. Rev. Stat. § **465.480(**4) suggests that the legislature simply intended to provide that insurers that pay environmental claims can "seek" contribution from other insurers that covered the same risk, whether or not the liability of those other insurers has already been determined (i.e., even if the other insurers are only "potentially liable").

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements

HN20 The 2003 amendments to Or. Rev. Stat. § **465.480(**4) expressly cut off contribution claims against insurers who reached a binding settlement with the insured as to the environmental claim. Section 5(4)(b) only cuts off contribution claims against settling insurers in a narrow window of cases--those in which a final judgment as to all insurers has not been entered by the trial court on or before the effective date of this 2003 Act. Section 5(4)(b) of the 2003 amendments is significant for two reasons. First, it demonstrates that the legislature was both aware of the settlement issue and knew how to address it explicitly when that was its desire. Section **465.480(**4) expressly applied to all claims, whether arising before, on or after the effective date of this 2003 Act, except where a final judgment, after exhaustion of all appeals, was entered before the effective date of this 2003 Or Laws ch 799, § 5 (1), (2). If, under § **465.480(**4), a settlement between an insured and its insurer barred a contribution claim against that insurer in all pending cases, the act would have already accomplished everything that section 5(4)(b) does, thereby rendering the provision entirely redundant.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements
Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Settlements

HN21 A related statute, Or. Rev. Stat. § 465.325(6)(b), deals specifically and expressly with the effect of a settlement by a party that otherwise might be "liable or potentially liable" for purposes of contribution: A person who has resolved its liability to the state in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible persons unless its terms so provide, but it reduces the potential liability of the others by the

amount of the settlement.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements
Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > General Overview

HN22 Or. Rev. Stat. § 465.257 describes the party seeking contribution in terms of liability or potential liability: Any person who is liable or potentially liable under Or. Rev. Stat. § 465.255 may seek contribution from any other person who is liable or potentially liable under § 465.255.

COUNSEL: John Folawn argued the cause for appellants. With him on the briefs was Kirklin Folawn LLP.

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JUDGES: Before Wollheim, Presiding Judge, and Brewer, Chief Judge, and Sercombe, Judge. *

* Brewer, C. J., *vice* Edmonds, P. J.

OPINION BY: SERCOMBE

OPINION

[106]** **[*102]** SERCOMBE, J.

Plaintiffs and defendants issued various insurance policies to a common insured, Zidell, [1] which operated a scrapping business along the Willamette River. Zidell later became the target of an environmental cleanup action and eventually filed claims against its insurers, including plaintiffs and defendants, seeking a declaration of coverage related to the cleanup action, as well as reimbursement for defense and indemnity costs already incurred. Defendants settled **[***2]** with Zidell and were dismissed from the case. Plaintiffs, meanwhile, proceeded to trial, and the court entered a judgment in Zidell's favor.

FOOTNOTES

1 More accurately, the parties insured a number of related entities, including ZRZ Realty Co. and others. For ease of reference, we refer to those entities collectively as Zidell.

Following the entry of that adverse judgment, plaintiffs filed this contribution action against defendants, the settling insurers. Plaintiffs alleged that the duty to defend Zidell from an environmental cleanup action was an obligation owed by plaintiffs and defendants jointly. Having paid a disproportionate share of that common obligation, plaintiffs alleged, they were entitled to pro rata contributions from defendants. Defendants moved for summary judgment on a number of grounds, including (1) that the allocation of defense costs had already been litigated in the underlying coverage action, and (2) that defendants' settlements with Zidell extinguished any common liability for purposes of a contribution claim. The trial court granted defendants' motions, and plaintiffs appeal. We reverse in part and remand.

I. BACKGROUND

The relevant facts are procedural and largely undisputed. **[***3]** From the 1950s through the early 1980s, plaintiffs and defendants insured Zidell under various insurance policies. In 1994, Zidell became the subject of a Department of Environmental Quality (DEQ) cleanup action based on environmental contamination on its property at Moody Avenue. After receiving a demand letter from DEQ in May 1994, Zidell sought coverage under its various insurance policies, **[*103]** on the theory that the pollution occurred and persisted during the relevant policy periods. In August 1997, after its insurers denied coverage, Zidell commenced an action against plaintiffs and defendants, as well as other insurers, alleging that the insurers had "refused or otherwise failed to provide Zidell with a defense of the DEQ action, to pay defense, investigation and loss mitigation costs and/or to pay Zidell for all liabilities and damages Zidell ha[d] been legally obligated to incur * * *." For purposes of this opinion, we refer to that underlying coverage action as the "*Moody Avenue*" action.

During the course of the *Moody Avenue* action, several insurers settled out. Defendants Beneficial Fire, National Union, and Industrial Indemnity Company (U.S. Fire) were among those who settled **[***4]** first, which left defendants Glens Falls and Continental Insurance Company (collectively CNA), defendant **[**107]** Century Indemnity Company (CIGNA), and plaintiffs as the only remaining insurers in the coverage case.

In October 1999, the *Moody Avenue* court ruled on a series of summary judgment motions filed by Zidell and the remaining insurers. The court ruled that "the duty to defend is a joint and several obligation, which will be allocated among the Defendant Insurers. Allocation should not be any hindrance to the duty to defend." The court further ordered that "the Defendant Insurers"--at that time, CNA, CIGNA, and plaintiffs--were to "make payment of past defense costs submitted by [Zidell] to date" and that, "with respect to ongoing defense costs," the parties were to put in place a "reasonable system for submission, review and payment of these costs."

The remaining insurers paid Zidell's accrued defense costs--approximately $ 771,000--as ordered. Of that amount, plaintiffs paid approximately $ 578,000, and CNA and CIGNA paid the rest. The payments were made by plaintiffs with the understanding that they were "subject to a full reservation of each insurer's rights."

After the start of trial **[***5]** in the *Moody Avenue* action, CNA settled out. The settlement then left plaintiffs and CIGNA as the only insurers subject to the court's order to pay **[*104]** Zidell's remaining defense costs. Together, plaintiffs and CIGNA paid another $ 619,982 in defense costs, with plaintiffs again paying the lion's share--approximately $ 566,000. Then, after trial but while the court was still preparing its findings of fact and conclusions of law, CIGNA settled with Zidell. Plaintiffs were the last insurers standing.

In April 2003, the trial court entered judgment against plaintiffs. With respect to the issue of defense costs, the judgment provided, in part, that plaintiffs were "jointly and severally obligated to pay Zidell's costs of defense, that is, attorney fees, costs and disbursements, and investigative costs, incurred in connection with claims asserted" in the DEQ action. The judgment also contained the following paragraph:

> "19. [Plaintiffs], together with dismissed defendants CNA and CIGNA (who shared the joint and several obligation to pay Zidell's defense costs prior to their dismissal from this case), have satisfied their obligation for defense costs of $ 1,390,658.65 incurred by Zidell through **[***6]** August 31, 2001, with respect to the DEQ Action and the prejudgment interest of $ 37,768.35 thereon. [Plaintiffs] are now responsible only for defense costs submitted by Zidell subsequent to August 31, 2001."

As far as plaintiffs' indemnity obligations (*i.e.*, the costs of remediation as a result of the DEQ claims rather than defending against them or investigating them), the *Moody Avenue* judgment

incorporated the trial court's earlier findings of fact and conclusions of law, which allocated indemnity costs to particular policies. The trial court also awarded Zidell its attorney fees as the prevailing party in the coverage action, pursuant to ORS 742.061--an additional $ 1,379,119.

Immediately after the April 2003 judgment was entered, plaintiffs filed this contribution action. In their complaint, plaintiffs alleged:

> "On and after July 26, 1994, [when Zidell notified plaintiffs and defendants of the DEQ action,] Zidell incurred reasonable and necessary defense costs in defending the DEQ claim. None of Zidell's defense costs were paid until on or about August 1999, when plaintiffs paid $ 578,007.35, the **[*105]** CIGNA defendants paid $ 77,067.64 and the CNA defendants paid $ 115,601.47. Since that **[***7]** time, plaintiffs have paid $ 1,157,317.10 for additional defense costs incurred by Zidell in defending the DEQ claim. Except for payments made by the CIGNA and CNA defendants as stated herein, no other payments of Zidell's defense costs have been made by any defendant."

Plaintiffs similarly alleged that they had been held liable for attorney fees pursuant to ORS 742.061, as well as prejudgment interest on the unpaid defense costs, for which defendants would have been liable had they not settled with Zidell before the *Moody Avenue* judgment was entered. The complaint summarized the contribution theory in this way:

> **[**108]** "Plaintiffs have paid or incurred liabilities to Zidell for defense costs, prejudgment interest and statutory attorney fees and costs, which liabilities are disproportionate to the insurance coverage provided by them when compared to the insurance coverage provided by defendants. Plaintiffs will continue to pay Zidell defense costs until the DEQ claim is resolved. Plaintiffs are entitled to contribution from defendants and each of them for a proportionate share of Zidell's defense costs, prejudgment interest and statutory attorney fees and costs as follows:
>
> "a. To the extent the **[***8]** respective insurance policies contain 'other insurance' clauses which are mutually repugnant, on the basis of policy limits.
>
> "b. To the extent the respective insurance contracts do not contain mutually repugnant 'other insurance' clauses, on the basis of the number of insurance policies at issue."

Plaintiffs also alleged an entitlement to attorney fees pursuant to ORS 742.061, in the event that they prevailed on their contribution claims.

The parties then filed a slew of summary judgment motions. Defendants (all of them) moved for summary judgment on two grounds: first, that plaintiffs' claims were barred by issue preclusion because the *Moody Avenue* action already decided the parties' obligations for defense costs; and second, that any contribution claims were extinguished by defendants' settlements with Zidell. Defendants (again, all of them) alternatively moved for partial summary judgment on **[*106]** other issues, namely (1) whether plaintiffs could obtain contribution for attorney fees that were awarded to Zidell under ORS 742.061; and (2) whether plaintiffs themselves could seek statutory attorney fees under ORS 742.061 as part of a contribution action against other insurers.

Certain defendants **[***9]** also filed alternative summary judgment motions in which others did not join. Defendants Beneficial and U.S. Fire moved for summary judgment on the ground that they never had any duty to defend Zidell to begin with, because the notice of the DEQ action was insufficient to trigger such a duty. Defendant National Union moved for summary judgment on the ground that plaintiffs' contribution claims were barred by amendments to Oregon's Environmental Cleanup Assistance Act, which retroactively addressed the issue of inter-insurer contribution. Under those amendments, according to National Union, an insurer who had settled with its insured was not "liable or potentially liable" to the insured and therefore not subject to

contribution claims.

Plaintiffs, meanwhile, filed their own summary judgment motions. They sought partial summary judgment on two issues: (1) that defendants, like plaintiffs, had a duty to defend Zidell under their policies; and (2) that any contribution would be determined on a pro rata basis, according to the *Lamb-Weston* rule. *See Lamb-Weston et al v. Ore. Auto. Ins. Co.,* 219 Ore. 110, 119, 341 P2d 110, *reh'g den,* 219 Ore. 110, 117, 341 P.2d 110 (1959).

At a hearing on the **[***10]** various motions, the trial court explained that it was "in agreement with every point made by every defendant in all of defendants' papers," with the exception of National Union's argument regarding the effect of amendments to Oregon's Environmental Cleanup Assistance Act. The court then entered an order consistent with its preliminary view, which denied plaintiffs' motions and granted all of defendants' motions, except National Union's separate, alternative motion. The order was reduced to a judgment dismissing plaintiffs' claims; plaintiffs appealed that judgment, which is the case before us now.

Before turning to the merits of this appeal, we note that, while plaintiffs were litigating their contribution claims, they had also appealed the underlying *Moody Avenue* **[*107]** judgment. In that appeal, plaintiffs argued, among other things, that the trial court had incorrectly allocated the burden to plaintiffs to prove that Zidell's pollution was neither "unexpected nor unintended." We agreed with plaintiffs on that issue and ultimately reversed and remanded the case; as a result, we also vacated the statutory attorney fee award against plaintiffs. *ZRZ Realty v. Beneficial Fire and Casualty Ins.,* 222 Ore. App. 453, **[**109]** 194 P3d 167 (2008), **[***11]** *modified on recons,* 225 Ore. App. 257, 201 P3d 912, *rev allowed,* 346 Ore. 363, 213 P.3d 577 (2009). That decision affects--and moots--certain but not all issues in this case. Rather than further complicate the case at this juncture, we will discuss the effect of that decision with respect to particular assignments of error.

II. ANALYSIS

A. *Plaintiffs' Assignments of Error*

1. *Issue preclusion*

In their motions for summary judgment, defendants contended that the trial court's rulings in the *Moody Avenue* action conclusively adjudicated defendants' liability for defense costs. Thus, according to defendants, under the doctrine of issue preclusion, plaintiffs were barred from relitigating that issue in a separate contribution action. The trial court expressed its "agreement with every point made by every defendant in all of defendants' papers," presumably including defendants' issue preclusion argument. Plaintiffs, in their first assignment of error, contend that the trial court erred in granting summary judgment on that ground.

In a supplemental brief filed after this court decided *ZRZ Realty,* defendants contend that plaintiffs' first assignment of error no longer presents a live controversy because, as a **[***12]** result of our decision in *ZRZ Realty,* plaintiffs no longer have an adverse judgment against them in the underlying coverage action. Plaintiffs, in response, submit that their contribution claims are not predicated on the existence of an adverse judgment in the *Moody Avenue* action; rather, they arise out of the fact that plaintiffs satisfied a debt--payment of defense costs--that should also have been borne by defendants.

We are not persuaded that plaintiffs' first assignment of error is moot. There is no dispute that plaintiffs have, **[*108]** in fact, paid Zidell's past defense costs, and our decision in *ZRZ Realty* does not change that fact or otherwise address plaintiffs' liability for previously paid defense costs; that was not an issue on appeal in *ZRZ Realty.* Accordingly, we turn to the merits of the parties' arguments regarding plaintiffs' first assignment of error. [2]

FOOTNOTES

2 Although the appeal in the *Moody Avenue* case does not "moot" this assignment of error, the pendency of the appeal does not strike us as entirely irrelevant to the merits of the assignment. For issue preclusion to apply, the issue must have been essential to a *final* decision on the merits in the prior proceeding. *See Nelson v. Emerald People's Utility Dist.,* 318 Ore. 99, 103-04, 862 P2d 1293 (1993) **[***13]** (setting out the requirements for issue preclusion). The mere fact that the *Moody Avenue* judgment was on appeal--and later reversed--causes us to question whether defendants can demonstrate the existence of a "final" decision for purposes of issue preclusion. *Cf. Drews v. EBI Companies,* 310 Ore. 134, 149, 795 P2d 531 (1990) (for purposes of issue preclusion, "[a] claim determination is not final until hearing and judicial review rights are barred or exhausted"); *see also Liberty Northwest Ins. Corp. v. Koitzsch,* 155 Ore. App. 494, 500, 964 P2d 1071 (1998) ("As a general proposition, as long as an appeal is pending, finality does not attach piecemeal to the parts of a judgment or order that are not placed in direct controversy by the parties' assignments or arguments in the appeal; it attaches to the case as a whole after the appellate process is complete."). Plaintiffs, however, do not make that argument, and we do not address it further.

HN1 In general, under the doctrine of issue preclusion, a party is barred from relitigating an issue of law or fact that was adjudicated in a prior proceeding. *See generally Nelson v. Emerald People's Utility Dist.,* 318 Ore. 99, 103-04, 862 P2d 1293 (1993) **[***14]** (setting out the requirements for issue preclusion). According to defendants, their liability for Zidell's defense costs--the subject of plaintiffs' contribution claims--was actually litigated in the *Moody Avenue* action. Specifically, defendants rely on a number of statements made by the trial court during the course of the *Moody Avenue* action regarding defense costs, statements that defendants contend were then incorporated in the trial court's written judgment. Plaintiffs respond that the excerpts are taken out of context and that the trial court never intended to decide how defense costs should be allocated among Zidell's various insurers.

The statements relied on by defendants were made by the court during attorney **[**110]** fee hearings in October 2002--hearings at which the court stated an intent to resolve the "whole allocation between non-attorney fee and attorney fee issues and between other carriers and this carrier, et cetera." During the course of the hearings, the court made certain **[*109]** statements that reflected its understanding that the settling defendants had extinguished their duties to defend as of the date of settlement; the court also signaled its intent to reduce plaintiffs' **[***15]** attorney fee liability after taking into account the settlements. However, even assuming that the court's statements at the attorney fee hearings have some bearing on the issues in this contribution case, there is nothing in the record to suggest that the court intended those statements to be elevated to the status of findings or rulings that would be incorporated in the judgment. In fact, plaintiffs and Zidell ultimately stipulated to an amount of attorney fees, thereby resolving the issues discussed during the October hearings. Neither the stipulation nor the *Moody Avenue* court's award of attorney fees based on that stipulation makes any mention of defense costs or allocation.

Given the fact that the court never actually made a ruling on the allocation issues raised in October 2002, defendants' reliance on the court's statements during those hearings is unavailing. HN2 Issue preclusion requires that "[t]he issue was actually litigated and was essential to a final decision on the merits in the prior proceeding." *Nelson,* 318 Ore. at 104. On the record before us, defendants have not demonstrated that the issues raised by plaintiffs' contribution claims were actually decided by the *Moody* **[***16]** *Avenue* court in October 2002, and the trial court's grant of summary judgment cannot be upheld on that basis.

Alternatively, defendants contend that plaintiffs' contribution claims were necessarily extinguished by paragraph 19 of the *Moody Avenue* judgment, set out above. *See* Ore. App. at (slip op at 3-4). That paragraph, once again, states that plaintiffs,

> "together with dismissed defendants CNA and CIGNA (who shared the joint and

> several obligation to pay Zidell's defense costs prior to their dismissal from this case), *have satisfied their obligation for defense costs* of $ 1,390,658.65 incurred by Zidell through August 31, 2001 * * *. [Plaintiffs] are now responsible only for defense costs submitted by Zidell subsequent to August 31, 2001."

(Emphasis added.) According to defendants, the use of the past tense is significant: Any "shared" obligation owed to **[*110]** Zidell was "satisfied," and any contribution claim thereby extinguished, when defendants settled out of the case.

Defendants read too much into the judgment. Paragraph 19 addresses claims between Zidell and its insurers (plaintiffs, CNA, and CIGNA). And, as between Zidell and its insurers, the judgment states that any defense **[***17]** obligation for costs incurred through August 31, 2001, had been satisfied. That is, the judgment states that the "shared" obligation was discharged by its insurers *collectively;* the judgment does not parse out the obligation of individual insurers or purport to resolve the issue in this case--*i.e.,* whether plaintiffs paid a disproportionate amount in satisfying that "shared" obligation.

In sum, the trial court erred in ruling that plaintiffs' claims were barred by the doctrine of issue preclusion.

2. *Effect of settlement agreements*

In their second assignment, plaintiffs argue that the trial court erred in concluding that defendants' settlements with Zidell foreclosed any subsequent contribution claims as a matter of law. Again, preliminarily, defendants contend that this assignment of error is moot in light of our decision in *ZRZ Realty.* For the same reasons discussed regarding plaintiffs' first assignment of error, we disagree with that contention and turn instead to the merits of the parties' arguments.

In addition to their issue preclusion arguments, defendants moved for summary judgment on the ground that, once Zidell released them from any and all liability under settlement agreements, **[***18]** defendants were no longer subject to a contribution claim. They reason as follows: The duty to defend is a contractual **[**111]** obligation between an insurer and its insured, *Northwest Pump v. American States Ins. Co.,* 144 Ore. App. 222, 226, 925 P2d 1241 (1996), which can be extinguished by a settlement agreement. Once the duty to defend is extinguished by settlement, the insurer no longer has any obligation or debt to the insured. Hence, the settling insurer no longer has a "common debt" or "joint obligation" with nonsettling insurers and cannot be liable for contribution.

[*111] Plaintiffs, meanwhile, argue that their right to equitable contribution from defendants arose before defendants settled with Zidell and exists independently of any rights that Zidell might have surrendered in those settlements. In other words, plaintiffs contend that the right to contribution was *theirs* and could not be surrendered by Zidell. [3]

FOOTNOTES

3 Defendants argue that plaintiffs failed to preserve the argument that the right to equitable contribution is independent of the insured's rights and cannot be extinguished by the insured's settlements with other insurers. We disagree. Although plaintiffs did not focus on that issue **[***19]** during oral argument in the trial court, or brief it as cogently below as they do on appeal, plaintiffs' brief in opposition to summary judgment did argue that an agreement between the settling insurer and the insured "cannot unilaterally change the other insurers' rights to contribution"--the argument they now assert. Plaintiffs further argued that the settlements were never intended to extinguish contribution rights, an argument they reprise on appeal. Given our conclusion that the settlements could not extinguish plaintiffs' independent rights to contribution, we need not reach plaintiffs' alternative contention regarding the scope of the settlements.

So framed, the parties' dispute reduces to whether plaintiffs' right to contribution exists independently of the rights of Zidell, the insured. Although that particular question appears to be one of first impression in this state, we are not without guidance on the subject. On a number of occasions, our Supreme Court has explored the nature and origin of equitable contribution among insurers, shedding some light on the issue before us. *See generally Farmers Ins. Co. v. St. Paul Fire and Marine Ins.*, 305 Ore. 488, 491-92, 752 P2d 1212 (1988) **[***20]** (describing Supreme Court's past treatment of equitable contribution claims).

In *Lamb-Weston,* the court considered the relative financial responsibility of insurers who were liable for the same occurrence under their respective policies. One insurer (along with its insured) settled a claim against the insured, and then sought payment from another insurer. The policies at issue, however, each contained "other insurance" clauses that required the insured to first exhaust the limits of other insurance before collecting on the policy. The court explained that,

> "in such a situation, the court is faced with determining which company shall be considered primarily liable, or treating the 'other insurance' clause in each insurer's policy as so repugnant that they must both be ignored, *and apply* **[*112]** *the rule that the loss shall be equally prorated between them.*"

219 Ore. at 119 (emphasis added). In the process of endorsing the latter approach, the court quoted extensively from *Amer. Auto. Ins. Co. v. Seaboard Surety Co.,* 155 Cal App 2d 192, 318 P2d 84 (1957), regarding the nature of the insurers' reciprocal rights:

> "'[T]heir agreements are not with each other. * * * Their respective obligations flow **[***21]** from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden. As these principles do not stem from agreement between the insurers their application is not controlled by the language of their contracts with the respective policy holders. The Minnesota Supreme Court, dealing with policies covering two insured persons whose liability for an accident was primary and secondary between themselves, said in *Commercial Casualty Ins. Co. v. Hartford Accident & Indemnity Co.,* 190 Minn. 528, 252 N.W. 434, 435 [(1934)]: "*The two contracts of insurance and their interpretation must be the factual basis of decision. But there was no contract and so no contractual relation between the insurers. Neither was beneficiary of the other's contract. Neither having any contract right against the other, but both being under contractual obligations in respect to the* **[**112]** *same risk, it remains only to determine the respective equities. If they are concurrently liable for the same risk, it is but obvious equity that there should be contribution.*"'"

219 Ore. at 124-25 (emphasis added).

In denying the defendant insurer's petition for rehearing in *Lamb-Weston,* the court **[***22]** further explored the source of pro rata contribution among insurers, tracing those principles from admiralty and the settlement of marine insurance claims in merchant courts to equitable maxims concerning joint insurers of a single risk. *Id.* at 132-37; *see also Farmers Ins. Co.,* 305 Ore. at 491 (so describing *Lamb-Weston*). Based on those settled principles, the court concluded that the loss as between insurers should be "prorated in the ratio which the limits of the policies bear to the total coverage." *Lamb-Weston,* 219 Ore. at 137.

Later, in *Carolina Casualty v. Oregon Auto.,* 242 Ore. 407, 417, 408 P2d 198 (1965), the court further clarified the **[*113]** nature of equitable contribution among insurers. The court distinguished the doctrine of equitable contribution from contract-based subrogation rights:

> "An insurer's rights against its co-insurer for contribution arise[ ] out of the equitable doctrine which holds that one who pays money for the benefit of another is entitled to be reimburse[d]. *Van Winkle v. Johnson,* 11 Ore. 469, 471, 5 P 922, 50 Am Rep

495 (1884); [4] *American Auto. Ins. Co. v. Seaboard Sur. Co.*, 155 Cal App 2d 192, 196, 318 P2d 84 (1957); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 129, 133-135, 346 P.2d 643, 76 ALR2d 485 (1959); **[***23]** 6 Appleman, *Insurance Law and Practice,* § 3902 (1942). Such rights do not arise by way of subrogation."

242 Ore. at 417.

FOOTNOTES

[4] In *Van Winkle,* a case involving sureties on a promissory note, the court stated, "The right to it did not depend upon contract, but sprung from equitable considerations arising out of the relation of the parties to each other, and the fact of a common interest and a common burden to bear." 11 Ore. at 471.

In light of the foregoing case law, it is apparent that HN3 the right to equitable contribution among insurers is not based on a subrogation or contract theory, whereby an insurer stands in the shoes of its insured. Rather, the right is grounded in principles of equity and is a right that inures to the benefit of the insurer--in this case, plaintiffs--and not the insured, Zidell.

For that reason, we conclude that defendants' settlements with Zidell did not operate to extinguish plaintiffs' right to equitable contribution for defense costs paid prior to the settlement. If plaintiffs and defendants had the same obligation to defend Zidell, [5] and plaintiffs discharged a disproportionate share of that obligation, then their right to equitable contribution arose at that point **[***24]** in time. Although Zidell was able to release its own claims against defendants for defense costs, Zidell was not in a position to release *plaintiffs' claims* against defendants.

FOOTNOTES

[5] For purposes of this opinion, we assume that the duty to defend was, in fact, a shared obligation; the parties do not argue otherwise.

Other courts have reached that same conclusion when considering equitable contribution among insurers. For example, in *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal App 4th 1279, 1294, **[*114]** 77 Cal Rptr 2d 296 (1998), the court explained that the right of "equitable contribution belongs to each insurer individually. It is not based on any right of subrogation to the rights of the insured, and is not equivalent to 'standing in the shoes' of the insured." (Internal citation omitted.) In distinguishing equitable contribution from subrogation (as the Oregon Supreme Court has done), the court explained:

> HN4 "Unlike subrogation, the right to equitable contribution exists *independently* of the rights of the insured. It is predicated on the common sense principle that where multiple insurers or indemnitors share **[**113]** equal contractual liability for the primary indemnification of a loss or the discharge **[***25]** of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant, and no indemnitor should have any incentive to avoid paying a just claim in the hope the claimant will obtain full payment from another coindemnitor."

Id. at 1295 (emphasis in original). Accordingly, the court held that "one insurer's settlement with the insured is not a bar to a separate action against that insurer by the other insurer or insurers for equitable contribution or indemnity." *Id.* at 1289; [6] *accord Rhone-Poulenc Inc. v. International Ins. Co.*, 71 F.3d 1299, 1305 (7th Cir 1995) ("The right [to equitable contribution] is not the insured's to disclaim. It is a right of other insurers, who are not parties to the insurance policy, and it is a right founded not on the concept of third-party beneficiaries of

contracts and hence not on the wishes of the insured but rather on notions of equity and unjust enrichment." (Internal quotation marks omitted.)).

FOOTNOTES

6 The court revisited the same issue in *Employers Ins. Co. of Wausau v. Travelers Indemnity Co.*, 141 Cal App 4th 398, 405, 46 Cal Rptr 3d 1 (2006), again holding that an insurer's equitable **[***26]** contribution rights are independent of the insured's rights and survive an insured's release of another insurer.

Defendants do not direct us to any cases from Oregon or other jurisdictions in which an insured's release has been held to extinguish a nonsettling insurer's right to equitable contribution. [7] Rather, they rely on a footnote in this **[*115]** court's opinion in *Cascade Corp. v. American Home Assurance Co.*, 206 Ore. App. 1, 10 n 6, 135 P3d 450 (2006), *rev dismissed,* 342 Ore. 645 (2007), as well as the public policy favoring settlements. Neither argument is persuasive.

FOOTNOTES

7 In their response brief, defendants suggest that *Fireman's Fund Ins. Co. v. Ed Niemi Oil Co., Inc.*, 436 F Supp 2d 1174, 1177 (D Ore 2006), supports their position. That case involved the application of a statute to cut off the plaintiffs' right to contribution--an issue discussed later in this opinion with respect to defendant National Union's cross-assignment of error. In any event, the district court's decision has since been reversed by the Ninth Circuit in an unpublished disposition. 317 Fed Appx 623 (9th Cir 2008).

In a footnote in *Cascade Corp.*, we stated that "[t]he [*Lamb-Weston*] proration, of course, was between **[***27]** insurers who had not settled with the insured and who thus remained potentially liable for the loss to the extent of their policy limits." 206 Ore. App. at 10 n 6. Defendants contend that, in the words of *Cascade Corp.*, defendants *have* settled and are no longer "potentially liable"; thus, the *Lamb-Weston* rule does not apply. Simply put, our footnote in *Cascade Corp.* says nothing about the issue before us. The footnote immediately followed a quote from a later case, *Smith v. Pacific Auto. Ins. Co.*, 240 Ore. 167, 173, 400 P2d 512 (1965), in which the Supreme Court stated that, "[u]nder the *Lamb-Weston* formula, the various carriers must prorate their share of the loss, not their share of one carrier's limits." Read in context, we cited *Smith* for the proposition that the *Lamb-Weston* allocation does not excuse insurers from complying with their obligations toward their insured. The footnote merely noted that, in *Smith,* neither insurer had ever discharged its obligation to the common insured; it cannot be read for more than that.

As for the public policy argument, defendants do not explain why a public policy favoring settlement should trump the equitable considerations that underpin the **[***28]** right to contribution among insurers. In rejecting a public policy argument similar to the one advanced by defendants, the California Court of Appeals explained:

> "Defendants contend that applying *Fireman's Fund* here will contravene public policy by discouraging insurers from settling with their insureds. But balanced against the societal interest in encouraging settlements are other public policy interests and the equitable concerns underlying the well-established rule of contribution between insurers. * * * Defendants provide no authority for their *ipse dixit* **[*116]** claim that policies favoring the encouragement of settlements militate a rule that would permit a coinsurer to evade its share of the defense burden by separately settling with its insured. Nor is there evidence **[**114]** before us that the *Fireman's Fund* rule in fact discourages settlement. Here, defendants settled with their insurer and anticipated the possibility they could be held liable for contribution. They included in

> the settlement agreements provisions that require [the insured] to indemnify them for such claims. * * * We are not persuaded to create an exception to the rule in this case."

Employers Ins. Co. of Wausau v. Travelers Indemnity Co., 141 Cal App 4th 398, 406, 46 Cal Rptr 3d 1 (2006). **[***29]** We, similarly, are not persuaded that HN5 a public policy favoring settlements merits a departure from the common-law rule governing equitable contribution.

For all of those reasons, we conclude that the trial court erred in granting summary judgment on the ground that plaintiffs' contribution claims were extinguished by defendants' settlements with Zidell. [8]

FOOTNOTES

8 We emphasize the narrow scope of our holding in that regard. The question raised by defendants' summary judgment motions is whether their settlement agreements extinguished plaintiffs' contribution claims. Plaintiffs' claims seek contribution for defense costs that plaintiffs paid and that Zidell incurred beginning in July 1994. For purposes of resolving the issues raised on summary judgment, we assume that plaintiffs' claims seek contribution for defense costs that Zidell incurred before the settlements. We express no opinion regarding the effect, if any, that the settlement agreements had with respect to contribution liability for defense costs that Zidell incurred *after* the date of the settlements.

3. *Cost-sharing agreements*

In their third assignment of error, plaintiffs contend that the trial court erred in ruling that certain language **[***30]** in a cost-sharing agreement between plaintiffs and CIGNA precluded a later contribution action. Plaintiffs have since settled with CIGNA, and this issue is now moot.

4. *Contribution for statutory attorney fees*

In their fourth assignment, plaintiffs contend that the trial court erred in ruling that plaintiffs are not entitled to contribution for attorney fees awarded to Zidell as the prevailing party in the coverage action. In *ZRZ Realty,* we **[*117]** vacated the underlying award of attorney fees that is the basis for this assignment of error. 222 Ore. App. at 459. Accordingly, we do not reach plaintiffs' fourth assignment.

5. *Plaintiffs' claim for attorney fees incurred in this action*

In their complaint, plaintiffs alleged a right to any attorney fees incurred as part of this contribution action. According to plaintiffs, the contribution action is an action "upon [a] policy of insurance," and, thus, if plaintiffs are to prevail, they would be entitled to their attorney fees pursuant to ORS 742.061(1). Defendants moved for partial summary judgment on that issue, arguing that an equitable contribution action is not the type of action that gives rise to an attorney fee entitlement under the statute. **[***31]** The trial court granted defendants' motion, and plaintiffs' fifth assignment of error is directed at that ruling.

The question raised in this assignment involves a question of statutory construction--namely, whether an equitable contribution action fits within the scope of ORS 742.061(1). That statute provides, in part:

> HN6 "Except as otherwise provided in subsections (2) and (3) of this section, if settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed

by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon."

HN7 Based on the plain text of the statute, it is readily apparent that an equitable contribution action is not the type of action for which the legislature intended to extend a right to attorney fees. First of all, the triggering events in ORS 742.061(1) pertain to the relationship between an insured and its insurer. One of the predicates to an award of attorney fees under **[***32]** the statute--that settlement is **[**115]** not made "within six months from the date proof of loss is filed with an insurer"--plainly refers to an insured's proof of loss under an insurance policy. *See Dockins v. State Farm Ins. Co.,* 329 Ore. 20, 28, 985 P2d 796 (1999) (explaining that the purpose of the **[*118]** proof of loss is "to afford the insurer an adequate opportunity for investigation, to prevent fraud and imposition upon it, and to enable it to form an intelligent estimate of its rights and liabilities before it is obliged to pay" (internal quotation marks omitted)).

Second, plaintiffs acknowledge that their equitable contribution claims are distinct from a subrogation claim or an assignment--that is, they are not standing in the shoes of the insured or enforcing the insured's contractual rights. Rather, they are enforcing their own equitable right to contribution that exists independently of the insured's rights. *Cf. Fick v. Dairyland Insurance,* 42 Ore. App. 777, 781, 601 P2d 868 (1979) (insurance company enforcing rights of insured by way of assignment entitled to statutory attorney fees; "there is nothing compelling in the words of the statute itself that limits recovery of attorney fees to **[***33]** the insured or injured party or that excludes insurance companies from being entitled to the benefit of the public policy"). HN8 The public policy considerations driving ORS 742.061--encouragement of settlement of insurance claims and reimbursement of insureds who are forced to litigate to recover on their policies [9] --are simply different from those at play in interinsurer disputes about equitable contribution, and nothing in the statutory text or context suggests that the legislature intended ORS 742.061 to apply to those types of disputes. [10] The trial court did not err in granting defendants' motion for partial summary judgment regarding plaintiffs' entitlement to attorney fees under ORS 742.061.

FOOTNOTES

[9] *See Chalmers v. Oregon Auto. Ins. Co.,* 263 Ore. 449, 452, 502 P2d 1378 (1972) (ORS 742.061(1) was intended "to encourage the settlement of [insurance] claims without litigation and to reimburse successful plaintiffs reasonably for moneys expended for attorney fees in suits to enforce insurance contracts").

[10] Nor have plaintiffs offered any legislative history that suggests that the legislature intended ORS 742.061 to apply in the context of equitable contribution claims among insurers.

6. *Duty* **[***34]** *to defend under Zidell's policies with Beneficial and U.S. Fire*

Plaintiffs' sixth assignment of error concerns the trial court's rulings on cross-motions for summary judgment by plaintiffs and defendants Beneficial and U.S. Fire on the **[*119]** question whether those defendants had a duty to defend Zidell. [11] Plaintiffs moved for partial summary judgment on the question whether DEQ's demand letter to Zidell in May 1994, which was then forwarded to defendants, triggered the duty to defend in each of the relevant policies. Beneficial and U.S. Fire opposed that motion and filed their own motions for summary judgment on the same issue, arguing that the DEQ letter was not a "complaint" that triggered their duty to defend a "suit" against Zidell. The trial court granted summary judgment in favor of Beneficial and U.S. Fire and against plaintiffs.

FOOTNOTES

11 Although plaintiffs moved for partial summary judgment against the other defendants on the same grounds, those defendants did not file cross-motions for summary judgment. Thus, only the denial of plaintiffs' motion for partial summary judgment against Beneficial and U.S. Fire is reviewable at this stage. *See Central Oregon Independent Health Serv. v. OMAP,* 211 Ore. App. 520, 528, 156 P.3d 97, **[***35]** *rev den,* 343 Ore. 159, 164 P.3d 1160 (2007) ("[A]lthough the denial of a motion for summary judgment generally is not reviewable, in an appeal from a final judgment entered after the granting of summary judgment, the court will review the trial court's denial of a cross-motion for summary judgment." (Citation omitted.)).

Plaintiffs' sixth assignment of error requires us to determine whether the documents that Zidell provided to its insurers--the May 1994 DEQ letter and accompanying documents--were sufficient to trigger the duty to defend Zidell under Beneficial's and U.S. Fire's policies. [12] As we explained in *Schnitzer Investment Corp. v. Certain Underwriters,* 197 Ore. App. 147, 155, 104 P3d 1162 (2005), *aff'd,* 341 Ore. 128, 137 P3d 1282 (2006):

> HN9 **[**116]** "The basic rules pertaining to an insurer's duty to defend are well established:
>
> "'Whether an insurer has a duty to defend an action against its insured depends on two documents: the complaint and the insurance policy. * * * An insurer has a duty to defend an action against its insured if the claim against the insured stated in the complaint could, without amendment, impose liability for conduct covered by the policy. * * *
>
> "'In evaluating whether an insurer **[***36]** has a duty to defend, the court looks only at the facts alleged in the complaint to determine whether they provide a basis for **[*120]** recovery that could be covered by the policy[.] * * * An insurer should be able to determine from the face of the complaint whether to accept or reject the tender of the defense of the action.
>
> "'The insurer has a duty to defend if the complaint provides *any basis* for which the insurer provides coverage. * * * Even if the complaint alleges some conduct outside the coverage of the policy, the insurer may still have a duty to defend if certain allegations of the complaint, without amendment, could impose liability for conduct covered by the policy. * * * Any ambiguity in the complaint with respect to whether the allegations could be covered is resolved in favor of the insured.'
>
> "*Ledford v. Gutoski,* 319 Ore. 397, 399-400, 877 P2d 80 (1994) (citations omitted; emphasis in original)."

FOOTNOTES

12 This assignment of error, for the reasons addressed with respect to the first and second assignments, is not moot.

Furthermore, we have held that HN10 "[a]n administrative agency's requirement that a property owner clean up environmental contamination constitutes a 'suit' within the terms **[***37]** of an insurer's duty to defend." *Schnitzer Investment Corp.,* 197 Ore. App. at 155 (citing *St. Paul Fire v. McCormick & Baxter Creosoting,* 126 Ore. App. 689, 700-01, 870 P2d 260, *modified on recons,* 128 Ore. App. 234, 875 P2d 537 (1994), *aff'd in part, rev'd in part on other grounds,* 324 Ore. 184, 923 P2d 1200 (1996)).

Thus, for purposes of assessing whether the May 1994 letter triggered the duty to defend, we must answer 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 policies? With respect to the second issue, any doubt is resolved in favor of the insured. *Schnitzer Investment Corp.,* 197 Ore. App. at 155.

To start, we agree with plaintiffs that the DEQ proceedings against Zidell, as described in the May 1994 DEQ letter, constitute a "suit" for purposes of the duty to defend under Beneficial's and U.S. Fire's policies. The May 1994 letter explains that DEQ has completed a "Preliminary Assessment Equivalent" for Zidell and reviewed "various documents **[***38]** covering the past 35 years, including an August **[*121]** 1972 Engineering Report, and a September 1987 federal Preliminary Assessment." The letter indicates that a "Strategy Recommendation" is enclosed and states that "further action is required at [Zidell's site] to address past releases of hazardous substances that may continue to threaten public health or the environment." The letter further provides that representative soil and groundwater samples must be taken to determine the "extent of the residual contamination suspected to be present at the site" and that owners and operators of sites, like Zidell, would be held strictly liable for contamination. Zidell was asked to respond within 30 days of the receipt of the letter as to how it planned to proceed. Under any of the proposed options, the letter explained, "DEQ will either require an agreement to pay its oversight costs as work proceeds, or will track its costs and seek to recover them later from responsible parties." In effect, DEQ told Zidell to investigate and remediate contamination at the site or pay for 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. **[***39]** *Schnitzer Investment Corp.,* 197 Ore. App. at 155; *McCormick & Baxter Creosoting,* 126 Ore. App. at 700-01.

[117]** Nonetheless, Beneficial and U.S. Fire contend that our decisions in *Schnitzer Investment Corp.* and *McCormick & Baxter Creosoting* have "no relevance" because this case "involves different facts and policies." Both defendants contend, instead, that their "policy's text and context make clear that 'suit' refers to court actions seeking damages for injury to or destruction of property." (Emphasis by defendants.) We do not see how that is so. Like the policies at issue in *Schnitzer Investment Corp.* and *McCormick & Baxter Creosoting,* the policies here do not define "suit." Nor are we persuaded that any of the other terms of the policies provide sufficiently clear contextual guidance regarding the parties' intended meaning. Accordingly, we see no reason to reach a different interpretation of the term "suit" than we reached in our previous cases. [13]

FOOTNOTES

13 We note that the legislature has codified that same construction of the term. *See* ORS **465.480(**2)(b) ("Any action or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency against or with an **[***40]** insured in which the Department of Environmental Quality or the United States Environmental Protection Agency in writing directs, requests or agrees that an insured take action with respect to contamination within the State of Oregon *is equivalent to a suit or lawsuit as those terms are used in any general liability insurance policy.*" (Emphasis added.)).

[*122] The remaining question is whether the May 1994 letter and accompanying documents contained allegations that, without amendment, could impose liability for conduct covered by the policies. Beneficial and U.S. Fire argue that their policies covered only third-party property damage to groundwater--not soil. In their view, nothing in the May 1994 letter or accompanying documents indicated the existence of groundwater pollution requiring remediation; rather, the documents were aimed at determining whether remediation was required. Plaintiffs, meanwhile, contend that Beneficial and U.S. Fire read the DEQ letter and documents too narrowly--and inconsistently with the way courts have construed the duty to defend. *See National Union Fire*

Ins. Co. v. Starplex Corp., 220 Ore. App. 560, 583-84, 188 P3d 332 (2008), *rev den*, 345 Ore. 317, 195 P.3d 65 (2009) (*Starplex*) **[***41]** (reasoning that courts "determine whether there is a 'possibility' that the allegations stated in any or all of those complaints is covered under the policy; if a reasonable interpretation of the allegations would bring them within coverage, there is a duty to defend, at least so long as such allegations remain operative" (citing *Paxton-Mitchell Co. v. Royal Indemnity Co.*, 279 Ore. 607, 611, 569 P2d 581 (1977))).

We agree with plaintiffs. The DEQ letter referenced an attached document entitled "Site Assessment Program--Strategy Recommendation." That document traced Zidell's "long history of waste disposal activities at this site," including spills related to ship dismantling. 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 soil **[***42]** and groundwater 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. *Starplex,* 220 **[*123]** Ore. App. at 584 ("If any allegation or claim gives rise to coverage, even if other allegations or claims are excluded from coverage, the insurer must defend against all claims asserted.").

For all of those reasons, the trial court erred in ruling in favor of Beneficial and U.S. Fire and against plaintiffs on the parties' cross-motions for partial summary judgment regarding the duty to defend.

7. *Proration of defense costs*

Plaintiffs next assign as error the trial court's denial of their motion for partial summary judgment regarding proration of defense costs based on defendants' respective policy limits. Plaintiffs now concede that the ruling denying their motion is not reviewable; for that reason, we do not reach it.

[118]** B. *National Union's cross-assignment of error*

Finally, we turn to defendant National Union's cross-assignment of error. In addition to the motions discussed above, National Union moved for summary judgment on the ground that statutory amendments to the Oregon Environmental **[***43]** Cleanup Assistance Act (OECAA), ORS 465.475 to **465.480**, retroactively extinguished plaintiffs' contribution claims. The trial court denied that motion, and National Union now cross-assigns that ruling as error as an alternative basis for upholding the trial court's judgment. [14]

FOOTNOTES

14 If correct, the ruling would provide an alternative basis for affirming the judgment as to the other defendants as well, even though they did not join National Union's motion below. *See Outdoor Media Dimensions Inc. v. State of Oregon,* 331 Ore. 634, 659-60, 20 P3d 180 (2001) (describing requirements for applying the "right for the wrong reason" principle to affirm the trial court's judgment).

National Union's argument is premised on ORS **465.480**(4), a provision of the OECAA that was enacted during the 2003 legislative session--after plaintiffs filed their contribution claims. ***HN11*** ORS **465.480**(4) provides, in part, that "[a]n insurer that has paid an environmental claim may seek contribution from any other insurer that *is liable or potentially liable.*" (Emphasis added.) National Union argues that, as a result of its settlement with Zidell, National Union no longer "is liable or potentially liable" for an environmental **[***44]** claim; hence, plaintiffs cannot seek contribution from National Union under the plain language of the statute. The

[*124] fact that plaintiffs' contribution claims were filed before the effective date of ORS **465.480(**4) is of no concern, National Union argues, because the amendments were expressly retroactive, applying to "all claims, whether arising before, on or after the effective date [January 1, 2004]." 2003 Or Laws, ch 799, § 5(1).

Plaintiffs, not surprisingly, read ORS **465.480(**4) differently. In their view, the text "is liable or potentially liable" refers to liability *between insurers--i.e.,* contribution liability. And, as discussed above, contribution liability between insurers is not automatically extinguished by way of a settlement between the insured and its insurer. Thus, plaintiffs contend, National Union "is liable or potentially liable" for contribution at this very moment, despite its settlement with Zidell. And in any event, plaintiffs argue, it is unconstitutional to apply a statute retroactively to extinguish their common-law contribution claims.

HN12 Our task is to determine the legislature's intent in enacting ORS **465.480(**4), which we glean from the text, context, and legislative **[***45]** history of the statute, resorting if necessary to maxims of statutory construction. *State v. Gaines,* 346 Ore. 160, 171-72, 206 P3d 1042 (2009). We begin, as always, with the text of the statute, which provides:

> *HN13* "(4) An insurer that has paid an environmental claim may seek contribution from any other insurer that is liable or potentially liable. If a court determines that the apportionment of recoverable costs between insurers is appropriate, the court shall allocate the covered damages between the insurers before the court, based on the following factors:
>
> "(a) The total period of time that each solvent insurer issued a general liability insurance policy to the insured applicable to the environmental claim;
>
> "(b) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable;
>
> "(c) The policy that provides the most appropriate type of coverage for the type of environmental claim; and
>
> **[*125]** "(d) If the insured is an uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for **[***46]** purposes of allocation."

ORS **465.480(**4).

As set out above, the parties disagree about the meaning and effect of the first sentence of the statute and, in particular, the phrase "is liable or potentially liable." National Union contends that the "legislature intended ORS **465.480(**4) to protect insurers **[**119]** who had settled environmental claims with their insureds, from contribution actions by insurers who refused to settle." That is, National Union argues that the first sentence bars a contribution claim against an insurer who, as a result of settlement, no longer "*is* liable or potentially liable" to its insured. (Emphasis added.) Thus, National Union's cross-assignment of error turns on whether the phrase "is liable or potentially liable" precludes a contribution claim against an insurer who, as a result of a settlement, is no longer liable to its insured for an environmental claim.

Reading the text of ORS **465.480(**4) in context, we are not persuaded that the legislature intended the phrase "is liable or potentially liable" to operate as National Union contends. By way of context, *HN14* Oregon's environmental cleanup statutes set up a scheme of strict liability for owners, operators, and others regarding **[***47]** investigation and cleanup of environmental contamination. *See* ORS 465.255(1) (imposing "strict liab[ility] for those remedial action costs incurred by the state or any other person that are attributable to or associated with a facility and for damages for injury to or destruction of any natural resources caused by a release"). At the