Enrolled
Senate Bill 814

Sponsored by Senators SHIELDS, JOHNSON

CHAPTER .....

AN ACT

Relating to insurance for environmental claims; creating new provisions; amending ORS 465.479 and 465.480; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2013 Act is added to and made a part of ORS 465.475 to 465.480.

SECTION 2. (1) A general liability insurance policy that contains a provision that requires the consent of an insurance company before the rights under an insurance policy may be assigned may not prohibit the assignment without consent of an environmental claim for payment under the policy for losses or damages that commenced prior to the assignment. The assignment and any release or covenant given for the assignment may not extinguish the cause of action against the insurer unless the assignment specifically so provides.

(2) The provisions of this section apply without limitation to voluntary assignments, assignments made in settlement of an environmental claim against a policyholder, assignments made as a matter of law and assignments made in the course of a corporate insured reorganization, merger, acquisition or liquidation.

SECTION 3. ORS 465.479 is amended to read:

465.479. (1) If, after a diligent investigation by an insured of the insured's own records, including computer records and the records of past and present agents of the insured, the insured is unable to reconstruct a lost policy, the insured may provide a notice of a lost policy to an insurer.

(2) An insurer must investigate thoroughly and promptly a notice of a lost policy. An insurer fails to investigate thoroughly and promptly if the insurer fails to provide all facts known or discovered during an investigation concerning the issuance and terms of a policy, including copies of documents establishing the issuance and terms of a policy, to the insured claiming coverage under a lost policy.

(3) An insurer and an insured must comply with the following minimum standards for facilitating reconstruction of a lost policy and determining the terms of a lost policy as provided in this section:

(a) Within 30 business days after receipt by the insurer of notice of a lost policy, the insurer shall commence an investigation into the insurer's records, including computer records, to determine whether the insurer issued the lost policy. If the insurer determines that it issued the policy, the insurer shall commence an investigation into the terms and conditions relevant to any environmental claim made under the policy.

(b) The insurer and the insured shall cooperate with each other in determining the terms of a lost policy. The insurer and the insured:

(A) Shall provide to each other the facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to the issuance or existence of a lost policy.

(B) Shall provide each other with copies of documents establishing facts related to the lost policy.

(C) Are not required to produce material subject to a legal privilege or confidential claims documents provided to the insurer by another policyholder.

(c) If the insurer or the insured discovers information tending to show the existence of an insurance policy applicable to the claim, the insurer or the insured shall provide an accurate copy of the terms of the policy or a reconstruction of the policy, upon the request of the insurer or the insured.

(d) If the insurer is not able to locate portions of the policy or determine its terms, conditions or exclusions, the insurer shall provide copies of all insurance policy forms issued by the insurer during the applicable policy period that are potentially applicable to the environmental claim. The insurer shall state which of the potentially applicable forms, if any, is most likely to have been issued by the insurer, or the insurer shall state why it is unable to identify the forms after a good faith search.

(4) Following the minimum standards established in this section does not create a presumption of coverage for an environmental claim once the lost policy has been reconstructed.

(5) Following the minimum standards established in this section does not constitute:

(a) An admission by an insurer that a policy was issued or effective; or

(b) An affirmation that if the policy was issued, it was necessarily in the form produced, unless so stated by the insurer.

(6) If, based on the information discovered in an investigation of a lost policy, the insured can show by a preponderance of the evidence that a general liability insurance policy was issued to the insured by the insurer, then if:

(a) The insured cannot produce evidence that tends to show the policy limits applicable to the policy, it shall be assumed that the minimum limits of coverage, including any exclusions to coverage, offered by the insurer during the period in question were purchased by the insured.

(b) The insured can produce evidence that tends to show the policy limits applicable to the policy, then the insurer has the burden of proof to show that a different policy limit, including any exclusions to coverage, should apply.

(7) An insurer may claim an affirmative defense to a claim that the insurer failed to follow the minimum standards established under this section if the insured fails to cooperate with the insurer in the reconstruction of a lost policy under this section.

(8) The Director of the Department of Consumer and Business Services shall enforce this section and any rules adopted by the director to implement this section.

(9) Violation by an insurer of any provision of this section or any rule adopted under this section is an**:**

(a) Unfair environmental claims settlement practice under section 6 of this 2013 Act; and

(b) Unfair claim settlement practice under ORS 746.230.

(10) As used in this section, "notice of a lost policy" means written notice of the lost policy in sufficient detail to identify the person or entity claiming coverage, including information concerning the name of the alleged policyholder, if known, and material facts concerning the lost policy known to the alleged policyholder.

SECTION 4. ORS 465.480 is amended to read:

465.480. (1) As used in this section:

(a) "Long-tail environmental claim" means an environmental claim covered by multiple general liability insurance policies.

[*(a)*] **(b)** "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 Envi-

ronmental Protection Agency pursuant to written voluntary agreements, consent decrees and consent orders.

[*(b)*] **(c)** "Uninsured" means an insured who, for any period of time after January 1, 1971, that is included in an environmental claim, failed to purchase and maintain an occurrence-based general liability insurance policy that would have provided coverage for the environmental claim, provided that such insurance was commercially available at such time. A general liability insurance policy is "commercially available" if the policy can be purchased under the Insurance Code on reasonable commercial terms.

(2) Except as provided in subsection [*(7)*] **(8)** of this section, in any action between an insured and an insurer to determine the existence of coverage for the costs of investigating and remediating environmental contamination, whether in response to governmental demand or pursuant to a written voluntary agreement, consent decree or consent order, including the existence of coverage for the costs of defending a suit against the insured for such costs, the following rules of construction shall apply in the interpretation of general liability insurance policies involving environmental claims:

(a) Oregon law shall be applied in all cases where the contaminated property to which the action relates is located within the State of Oregon. Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for sites located outside the State of Oregon.

(b) Any action or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency against or with an 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.

(c) Insurance coverage for any reasonable and necessary fees, costs and expenses, including remedial investigations, feasibility study costs and expenses, incurred by the insured pursuant to a written voluntary agreement, consent decree or consent order between the insured and either the Department of Environmental Quality or the United States Environmental Protection Agency, when incurred as a result of a written direction, request or agreement by the Department of Environmental Quality or the United States Environmental Protection Agency to take action with respect to contamination within the State of Oregon, shall not be denied the insured on the ground that such expenses constitute voluntary payments by the insured.

(d) A general liability insurance policy that provides that any loss covered under the policy must be reduced by any amounts due to the insured on account of such loss under prior insurance may not be construed to reduce the policy limits available to an insured that has filed a long-tail environmental claim, or to reduce those policies from which an insurer that has paid an environmental claim may seek contribution. Such provisions may be a factor considered in the allocation of contribution claims between insurers under subsection (4) of this section.

(e) The release of a hazardous substance into the waters of this state, as defined in ORS 196.800, or onto real property owned by a party other than the insured constitutes damage, destruction or injury to property. Any remedial action costs, as defined in ORS 465.200, that an insured incurs as a result of any action taken to cut off a pathway by which a hazardous substance threatens to, or has, migrated, leached or otherwise been released into the waters of this state, as defined in ORS 196.800, or onto real property owned by a party other than the insured are remedial action costs that the insured is legally obligated to pay as damages because of the damage, destruction or injury to such property even though such action also involves the property of the insured.

(3)(a) An insurer with a duty to pay defense or indemnity costs, or both, to an insured for an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy, must pay all defense or indemnity costs, or both, proximately arising out of the risk pursuant to the applicable terms of its policy, in-

cluding its limit of liability, independent and unaffected by other insurance that may provide coverage for the same claim.

(b) If an insured who makes an environmental claim under **one or more** general liability insurance policies that provide that an insurer has a duty to pay all sums arising out of a risk covered by the [*policy*] **policies** has more than one such general liability insurance policy [*insurer*] **that is triggered with one or more insurers**, the insured shall provide notice of the claim to all such insurers for whom the insured has current addresses. If the insured's claim is not fully satisfied and the insured files suit on the claim against [*only one such insurer,*] **less than all the insurers, the insured may choose which of the general liability insurance policies respond to the loss if not all are required to satisfy the insured's claim. The insured or the insurers have a right to contribution as specified in subsection (4) of this section from all other insurers whose policies are triggered, and an insurer that has an obligation to pay may not fail to make payment to the insured on the grounds that another insurer has not made payment, unless the insurer has no obligation to respond to a claim until the limits of the underlying policy have been paid.** The insured must choose that insurer based on the following factors:

(A) The total period of time that an 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; or

(C) The policy that provides the most appropriate type of coverage for the type of environmental claim for which the insured is liable or potentially liable.

(c) If requested by an insurer chosen by an insured under paragraph (b) of this subsection, the insured shall provide information regarding other general liability insurance policies held by the insured that would potentially provide coverage for the same environmental claim.

(d) An insurer chosen by an insured under paragraph (b) of this subsection may not be required to pay defense or indemnity costs in excess of the applicable policy limits, if any, on such defense or indemnity costs, including any exclusions to coverage.

(4)**(a)** An insurer that has paid **all or part of** an environmental claim may seek contribution from any other insurer that is liable or potentially liable **to the insured and that has not entered into a good-faith settlement agreement with the insured regarding the environmental claim**.

(b) There is a rebuttable presumption that all binding settlement agreements entered into between an insured and an insurer are good-faith settlements. A settlement agreement between an insured and insurer that has been approved by a court of competent jurisdiction after 30 days' notice to other insurers is a good-faith settlement agreement with respect to all such insurers to whom such notice was provided.

(c) For purposes of ascertaining whether a right of contribution exists between insurers, an insurer that seeks to avoid or minimize payment of contribution may not assert a defense that the insurer is not liable or potentially liable because another insurer has fully satisfied the environmental claim of the insured and damages or coverage obligations are no longer owed to the insured.

(d) Contribution rights by and among insurers under this section preempt all common law contribution rights, if any, by and between insurers for environmental claims.

(5) 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) The terms of the policies that related to the equitable allocation between insurers; and

[*(d)*] **(e)** 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.

[*(5)*] **(6)** If an insured is an uninsured for any part of the time period included in the environmental claim, an insurer who otherwise has an obligation to pay defense costs may deny that portion of defense costs that would be allocated to the insured under subsection [*(4)*] **(5)** of this section.

[*(6)(a)*] **(7)(a)** 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.

(b) There is a rebuttable presumption that payment of the costs of removal actions or feasibility studies, as those terms are defined by rule by the Department of Environmental Quality, are indemnity costs and reduce the insurer's applicable limit of liability on the insurer's indemnity obligations, subject to the provisions of the applicable general liability insurance policy or policies.

[*(7)*] **(8)** The rules of construction set forth in this section **and sections 2 and 7 of this 2013 Act** do not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy.

SECTION 5. Sections 6 and 7 of this 2013 Act are added to and made a part of ORS 465.475 to 465.480.

SECTION 6. (1) An insurer or any other person may not commit any of the following unfair environmental claims settlement practices:

(a) Failure to commence investigation of an environmental claim within 15 working days after receipt of a notice of an environmental claim or failure to diligently respond to tenders of environmental claims, provided that an excess insurer may rely on the investigation of a primary insurer.

(b) Failure to make timely payments for costs reasonably incurred in the defense of environmental claims or for reasonable costs for which indemnity is owed.

(c) Denial of a claim for any improper purpose, such as to harass or to cause unnecessary delay or to needlessly increase the cost of litigation.

(d) Require that the insured provide answers to repetitive questions and requests for information concerning matters or issues unnecessary for resolution of the environmental claim of the insured, provided that an insurer may reserve its rights as to information that is not available at the time of the correspondence.

(e) Failure to pay interest as specified in ORS 82.010:

(A) On payments that an insured has made and that the insurer is legally obligated to pay as costs of defense or indemnity, provided that interest begins to accrue only on the 31st day after the claim for payment or reimbursement is presented or payment is made by the insured, whichever is later; or

(B) On overdue payments that an insurer agreed to make pursuant to an agreed settlement with an insured, provided that interest begins to accrue on the 31st day after the date of the settlement or on the date by which the insurer agreed to make the payment, whichever is later.

(f) Violation by insurers as described in ORS 465.479 (9)(a).

(2)(a) In addition to the unfair environmental claims settlement practices specified in subsection (1) of this section, it is an unfair environmental claims settlement practice for an insurer to fail to participate in good faith in a nonbinding environmental claim mediation described under this subsection that is requested by an insured concerning the existence, terms or conditions of a lost policy or regarding coverage for an environmental claim.

(b) The insured may request in writing that the insurer participate in a nonbinding environmental claim mediation.

(c) Upon request from an insured to participate in a nonbinding environmental claim mediation, an insurer shall provide an insured with information concerning a nonbinding environmental claim mediation program. The information must include, but need not be limited to, a description of how an insured can efficiently commence the mediation with the insurer.

(d) The purposes of the nonbinding environmental claim mediation include, but are not be limited to, the following:

(A) To assist the parties in resolving disputes concerning whether or not a general liability insurance policy applicable to the environmental claim was issued to the insured by the insurer and concerning the relevant terms, conditions and exclusions;

(B) To determine whether the entire claim, or a portion thereof, can be settled by agreement of the parties;

(C) To determine, if the claim cannot be settled, whether one or more issues can be resolved to the satisfaction of the parties; and

(D) To discuss any other methods of streamlining or reducing the cost of litigation.

(e) The Attorney General shall:

(A) Appoint a mediation service provider to operate a mediation program related to environmental claims;

(B) Prescribe by rule requirements related to qualification, training and experience for mediators who participate in the mediation program; and

(C) Establish by rule a schedule of fees related to the mediation program.

(f) Unless otherwise agreed, information provided and statements made by either party in a mediation shall be kept confidential by the parties and used only for purposes of the mediation in accordance with ORS 36.220.

(g) The insured and the insurer shall have representatives present, or available by telephone, with authority to settle the matter at all mediation sessions.

(3) The unfair environmental claims settlement practices specified in this section are in addition to any provisions relating to unfair claim settlement practices under ORS 746.230.

(4)(a) Any insured aggrieved by one or more unfair environmental claims settlement practices specified in this section may apply to the circuit court for the county in which the insured resides, or any other court of competent jurisdiction, to recover the actual damages sustained, together with the costs of the action, including reasonable attorney fees and litigation costs.

(b) Twenty days prior to filing an action based on this section, the insured must provide written notice of the basis for the cause of action to the insurer and office of the Director of the Department of Consumer and Business Services. Notice and proof of notice must be provided by regular mail, registered mail or certified mail with return receipt requested. The insurer and director are deemed to have received notice three business days after the notice is mailed.

(c) If the insurer fails to resolve the basis for the action within the 20-day period after the written notice by the insured, the insured may bring the action without any further notice.

(d) If a written notice of claim is served under paragraph (b) of this subsection within the time prescribed for the filing of an action under this subsection, the statute of limitations for the action is tolled during the period of time required to comply with paragraph (b) of this subsection.

(e) In any action brought pursuant to this subsection, the court may, after finding that an insurer has acted unreasonably, increase the total award of damages to an amount not to exceed three times the actual damages.

(f) An action under this subsection must be brought within two years from the date the alleged violation is, or should have been, discovered.

(5) The provisions of this section do not limit the ability of a court to provide for any other remedy that is available at law.

SECTION 7. (1) If the provisions of a general liability insurance policy impose a duty to defend upon an insurer, and the insurer has undertaken the defense of an environmental claim on behalf of an insured under a reservation of rights, or if the insured has potential liability for the environmental claim in excess of the limits of the general liability insurance policy, the insurer shall provide independent counsel to defend the insured who shall represent only the insured and not the insurer.

(2)(a)(A) Independent counsel retained by the insurer to defend the insured under the provisions of this section must be experienced in handling the type and complexity of the environmental claim at issue.

(B) If independent counsel who meet the requirements specified in this paragraph are not available within the insured's community, then independent counsel from outside the insured's community who meet the requirements of this paragraph must be considered.

(b)(A) An insurer may retain environmental consultants to assist an independent counsel described in subsection (1) of this section. Any environmental consultants retained by the insurer must be experienced in responding to the type and complexity of the environmental claim at issue.

(B) If environmental consultants who meet the requirements specified in this paragraph are not available within the insured's community, then environmental consultants from outside the insured's community who meet the requirements of this paragraph must be considered.

(c) As used in this subsection, "experienced" means an established environmental practice that includes substantial defense experience in the type and complexity of environmental claim at issue.

(3)(a) The obligation of the insurer to pay fees to independent counsel and environmental consultants is based on the regular and customary rates for the type and complexity of environmental claim at issue in the community where the underlying claim arose or is being defended.

(b) In the event of a dispute concerning the selection of independent counsel or environmental consultants, or the fees of the independent counsel or an environmental consultant, either party may request that the other party participate in nonbinding environmental claim mediation described in section 6 (2) of this 2013 Act.

(4) The provisions of this section do not relieve the insured of its duty to cooperate with the insurer under the terms of the insurance contract.

SECTION 8. (1) Except as provided in subsections (2) and (3) of this section, sections 2, 6 and 7 of this 2013 Act and the amendments to ORS 465.479 and 465.480 by sections 3 and 4 of this 2013 Act apply to all environmental claims, whether arising before, on or after the effective date of this 2013 Act.

(2) Sections 2, 6 and 7 of this 2013 Act and the amendments to ORS 465.479 and 465.480 by sections 3 and 4 of this 2013 Act do not apply to any environmental claim for which a final judgment, after exhaustion of all appeals, was entered before the effective date of this 2013 Act.

(3) Nothing in sections 2, 6 and 7 of this 2013 Act or the amendments to ORS 465.479 and 465.480 by sections 3 and 4 of this 2013 Act 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 2013 Act.

SECTION 9. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

Passed by Senate April 10, 2013

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Robert Taylor, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House May 30, 2013

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Tina Kotek, Speaker of House

Received by Governor:

.....M.,....., 2013

Approved:

.....M.,....., 2013

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John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M.,....., 2013

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Kate Brown, Secretary of State