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Via Email Only

Senator Chip Shields
c/o Channa Newell
900 Court St NE, S-421
Salem, OR, 97301
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Re: HB 4051

Dear Senator Shields:

Thank you for giving me the opportunity to address the committee in opposition to HB 4051.

I am an attorney in private practice, and have been practicing in Oregon since 2002. I am a partner with Parsons Farnell & Grein LLP, and a member of its policyholder insurance recovery group. While our firm represents commercial-lines policyholders of all sizes, most of our clients are small businesses or non-profit agencies with deep roots in Oregon. The observations below are my own, and are not being made on behalf of any one of our clients.

This bill appears to be part of a nationwide effort by the insurance industry to cut its costs associated with providing paper copies of insurance policies to policyholders. Enclosed are several examples of recent legislation in other states: Idaho HB 232, passed in 2013; South Dakota HB 1156, passed this year; Arizona SB 1222, passed this year; and Wyoming SF 0017, passed this year. HB 4051 differs in some very significant, and troubling, ways from the other legislation. Moreover, because Oregon lacks some important protections for policyholders, legislation that may make sense in another state may not in Oregon.

An insurance policy is a contract. However, particularly in the commercial lines setting, it is a contract of a somewhat unique sort. Most business contracts are immediately executed upon and put into effect; the benefit of the contract is realized immediately. Insurance contracts, by contrast, are documents that most businesses hope never to use. Casualty and particularly "occurrence-based" liability policies are often not called into action for years, and sometimes decades, after they are issued. But when disaster strikes, insurance policies are often the only

things standing between a small business and ruin. Therefore, adjustments to the way that these contracts are handled in the insurance code must be considered very carefully.

I believe that there are several problems with HB 4051's provisions permitting insurers to provide policy documents via website. Here are but two of these problems.

1. *Lack of choice.* HB 4051 by default forces the policyholder to accept a method of delivery that benefits the insurer – delivery via website – without regard for the policyholder's preferences. It appears that in every other state in which similar legislation has been proposed a provision has been made to give the policyholder a say in how to receive the policy. Indeed, the insurance industry has consistently touted policyholder choice as a basis for such legislation.[1] HB 4051's failure to ensure that policyholders affirmatively consent to electronic delivery of the policy is inconsistent with what the industry has said are its goals, and is bad for commercial-lines policyholders.[2]

2. *Retention period.* HB 4051 fails to take into account that liability insurance policies – occurrence-based policies – are very often not called into service until many years, and sometimes decades, after they are issued. The 10-year retention period in the current version of the bill is insufficient. While some causes of action will technically sunset after 10 years (through a "statute of ultimate repose"), that does not mean that the insured cannot be sued for occurrences more than ten years old, no matter the claim.[3] Moreover, in some of the most high-risk types of cases (environmental contamination, sex abuse, toxic tort) a statute of ultimate repose does not exist or is considerably longer – these are the so-called "long tail" cases.

Long-tail coverage disputes often arise out of claims against the policyholder that did not exist when the policy was issued, meaning that at the time that the policy was purchased the insured did not perceive the importance of the liability policy, and may not have taken steps to ensure that the policy was preserved. These disputes also often arise in situations in where the named insured entity no longer exists, but successor entities are entitled to policy benefits. In these situations recordkeeping has usually not been consistent. Therefore, many coverage disputes in these long-tail cases involve what are called "lost policy" disputes, in which the insurance company denies that a policy was issued or disputes the terms of the policy. In general the insured is at a significant disadvantage in these cases because the burden is put on the

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[1] *See, e.g.,* PCIAA News Release, February 17, 2014, available at http://www.pciaa.net/LegTrack/web/NAIIPublications.nsf/lookupwebcontent/FF408B3E8F39010F86257C820064340?opendocument (last visited February 19, 2014).

[2] ORS 84.070 currently contains a "choice" provision relating to electronic communications to individual, personal-lines policyholders. HB 4052 is designed to make further alterations to that statute. This letter does not address HB 4052.

[3] Standard-form general liability policies provide that the insurer will provide a defense even against claims that are false or frivolous. Therefore, policyholders are entitled to call upon their carrier to defend them even against a claim that is time-barred.

policyholder to prove the specific terms of the coverage. And because Oregon lacks the robust bad faith law found in most other states, insurance companies have little incentive to come to the table to resolve these disputes. As a result, hundreds of thousands if not millions of dollars in attorney fees have been spent over the past fifteen years by Oregon companies, non-profits and government agencies in these "lost policy" disputes. HB 4051, by permitting insurance companies to do the electronic version of discarding policies after only ten years, would further advantage insurance companies in these disputes.

These are only a few of my concerns about this legislation. My recommendation is that this legislation be sent "back to the drawing board" if not rejected altogether, for further discussion between the relevant stakeholders. Because of the many complexities involved in the coverage disputes that would be impacted by this legislation, involvement of the appropriate regulatory officials may be beneficial as well.

Thank you again for the opportunity to provide my perspective on HB 4051.

Very truly yours,

Seth H. Row

SHR/dtg
Enclosures