Testimony for Public Hearing
Oregon Senate Committee on Business and Transportation
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S.B. No. 1590

Chairman Beyer and members of the Committee:

I am a partner at the Betts Patterson law firm in Portland, and my specialty is insurance coverage analysis, advice and litigation. I have nearly two decades of experience in this field in Oregon, Washington, Idaho, Montana and many other states, and am a frequent writer and speaker on insurance law topics nationwide. Besides my work as an advocate, I am the author of a number of scholarly analyses on insurance law that have been cited and adopted by courts across the country, and am a contributing author to respected and influential insurance treatises. I represent and am testifying on behalf of the Property Casualty Insurers Association of America and the American Insurance Association in opposition to S.B. 1590.

If enacted, S.B. 1590 will drastically change Oregon insurance law and its marketplace; making Oregon an outlier in insurance law in many respects. Among the troubling features of the bill are these:

Estoppel without an ability to cure.

- The breach of the duty to defend, even a minor breach, an honest mistake or an honest oversight, results in the insurer's loss of ability to participate in the defense of the lawsuit, but the insurer must still pay whatever fees and costs counsel charges. More importantly, with this legislation the insurer loses its defenses against paying the claim, even if the claim is far outside the coverage of that type of insurance policy.

- That breach of the duty to defend would also result in the insurer's liability for any judgment or settlement agreed to by the insured and the claimant. This is troubling because it encourages unmeritorious lawsuits, and may well lay the ground for instances of collusive and fraudulent agreements between insureds and claimants.

- Even in Washington, a breach of the duty to defend must be in bad faith and must cause damages before it is actionable, and an insurer who breaches the duty to defend can usually correct its decision and repair any damage caused. In SB 1590, there is no provision for an insurer to receive notice of a supposed violation or an opportunity to cure.

Dangerous fiduciary duty standard.

- The fiduciary duty standard imposed in the bill would introduce something new and troubling. Today, in Oregon, and other states like Washington, insurers must give equal weight to the insured's interests, but are not required to ignore their own interests by doing things like settling unreasonable demands, paying unmeritorious or unproven liability claims or settling above policy limits. Unlike the current accepted and reasonable standard, a strict fiduciary duty may force these extreme actions. This provision in the bill also could very well bar insurers from seeking a declaratory judgment from a court to clarify the insurer's duty to defend or other duties because to do so might breach the fiduciary relationship.

- The fiduciary duty standard appears to create a tort claim and allow for tort damages for alleged insurer breaches while the insurer is defending an insured. Tort damages include non-economic, consequential and punitive damages, and though not stated specifically in the bill, are a logical and very troubling consequences of the bill's language.

Promotes crippling increases in insurance costs for small business.

- With all of these unnecessary and unsupportable changes to Oregon law, Oregon would stand in the position of interfering with the insurance contracts entered into by insurers and policyholders. More importantly, the bill would drive up costs and incent unnecessary litigation with little benefit to small businesses or the rest of the insurance consumers. Studies have shown the very negative effect of proposals such as this one on the insurance marketplace.

An anti-competitive "barrier to entrance".

- Liability insurance is a requirement for most businesses. By raising startup and operating costs, small businesses will have less capital to bring business to Oregon and to maintain or expand existing business, putting them at a competitive disadvantage.

Hurts taxpayers.

- SB 1590 creates financial incentives for pursuing dubious claims, which will no doubt burden taxpaying businesses and individuals who fund the court and regulatory system.

Creates a climate of uncertainty.

- In order to function and thrive, businesses need certainty. The bill creates vague and unrealistic standards for insurance that will take an enormous number of cases and legal decisions to sort out. This climate of uncertainty will be costly and leave business owners, large and small, without a clear understanding of what their insurance policies cover, and what their duties and responsibilities are.

- There are currently no clear guidelines for what policyholders or insurers should do if SB 1590 is violated.

Regulatory estoppel.

- Regulatory estoppel is rarely recognized by courts across the nation in insurance questions, and in the small number of states in which courts have cited regulatory estoppel, it has been confined strictly to environmental contamination issues, not used for interpretation of general insurance contracts. Further, regulatory estoppel has obvious separation of powers implications. It would require the courts to determine the actual reasons for decisions of an administrative body established by the Legislature. This is not only constitutionally dubious, it would create extreme difficulties by forcing courts to hold evidentiary hearings to obtain evidence about regulatory decisions made years, often decades before. In many if not most instances, it might be next to impossible to determine what was said and by whom 5, 10, 20 or even 30 years in the past. Regulatory estoppel, in short, would create a discovery nightmare for courts, parties and regulators in insurance litigation, and dramatically raising the cost of many lawsuits.

- In addition, the concept of regulatory estoppel unnecessarily offends regulators, even if not intended – as we see it, it supposes that regulators' approval of insurance provisions is because they are regularly hoodwinked by the insurance industry. These are among the reasons why the courts of the overwhelming majority of states do not recognize regulatory estoppel in any form in insurance litigation, and in the few that do, it is used rarely and in limited circumstances. It appears that no other state has created regulatory estoppel concerning insurance by statute, as would S.B. 1590. The reason for this is that arguments for regulatory estoppel, when they are advanced by parties in litigation, are made because courts have consistently rejected the arguments of those parties and found that language in insurance contracts is clear and unambiguous. In other words, regulatory estoppel is the answer to a question no one is asking – the touchstone of insurance law is the language of the insurance contract itself, how the parties understand that language and how courts interpret it. This way of deciding insurance disputes works in Oregon and other states, and there is no good reason to overturn it and inaugurate a problematic and extreme new system.