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**THE SUPREME COURT OF
THE STATE OF WASHINGTON**

PORT OF LONGVIEW, a Washington municipal corporation, Respondent, v. ARROWOOD INDEMNITY, et al., Appellants.	No. 94066-5 RESPONDENT'S ANSWER TO BRIEF OF AMICUS CURIAE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF APPELLANTS' PETITION FOR REVIEW

I. INTRODUCTION

Amicus curiae Complex Insurance Claims Litigation Association will be referred to in this brief as "Amicus."

It is initially necessary to clarify the use of terms–particularly the term "TWP Site." The Port bought a portion of property (the Maintenance Facility Area or "MFA") owned by International Paper ("IP") with IP retaining the remainder of the property (the "Plant Area"). When DOE initially discovered groundwater contamination, it was thought to be limited to the Plant Area. The Plant Area at that time was referred to as the Treated Wood Products ("TWP") area and sometimes as the TWP site. Once the DOE and IP discovered in 1998 that the groundwater contamination extended into the MFA Area, the DOE ruled that the MFA Area and the Plant Area together constituted a single remediation site and the use of the term "TWP Site" was expanded to refer to the entire

remediation site (the MFA and Plant Areas combined). CP 3227. The Port carefully uses that term in its expanded meaning and distinguishes references to each of the two areas comprising the single remediation site. LMI, however, seek to cause confusion by using that expanded site definition as though it continued to refer only to the Plant Area. LMI (and then Amicus) refer to the Port purchasing the "TWP Site" in 1999, which is literally not true–the Port purchased only the Plant Area in 1999.

The court of appeals ("COA") opinion ("Opinion") contains an extensive statement of facts, which LMI has admitted to this Court to be accurate. Pet. for Review 2. These admitted facts remain unchallenged, so the Port will avoid any detailed repetition of those admitted facts.

Amicus' brief mischaracterizes both the ruling of the COA in its unpublished opinion and the record in this case. The Port does not now and never has sought coverage for any alleged additional environmental liabilities LMI assert the Port acquired through the purchase of the "Plant Area" in 1999. Despite LMI's assertions, they failed to prove any such alleged additional environmental liabilities, and *the trial court specifically found that the Port's 1999 purchase did not affect the Port's already existing liability.* CP 5038. Instead, the Port obtained a declaration of coverage solely for the liabilities retroactively imposed upon it by statute as a result of its ownership of the adjacent MFA Area since the 1960s. As discussed below, Amicus also improperly seeks to introduce new alleged issues that were not raised by LMI and are wholly irrelevant to the COA's decision in this case.

II. STATEMENT OF THE CASE

As stated in the Port's prior briefing and the COA's admittedly accurate statements,[1] the TWP Site includes both the groundwater contamination beneath the Plant Area as well as beneath the MFA Area. The Port acquired the MFA property in the 1960s. By virtue of MTCA's subsequent retroactive imposition of joint and several liability, the Port's liability arising from its ownership of the MFA extends to the entire TWP Site which DOE has defined as including the Plant Area.[2] The jury correctly found that the Port proved it did not expect or intend the MFA groundwater contamination when it purchased its insurance from LMI in the 1970s and 1980s. CP 18649-50.

The Port acquired the remaining portion of the TWP Site (the Plant Area) from IP in 1999. The Port acquired this property pursuant to a purchase and sale agreement under which IP (the only other PLP for the TWP Site) agreed to remain responsible for the remediation on the acquired property. Opinion 6.

The trial court agreed that the Port could not knowingly increase its liability (so that LMI would theoretically be entitled to a ruling excluding from coverage any such additional liability that LMI could identify and prove.) CP 5015. Thus, Amicus' assertion that trial court did not

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[1] Br. of Resp't 2-4; Answer to Pet. for Review 12-14; Opinion 4-6.
[2] RCW 70.105D.040(1)(2) ("the following persons are liable with respect to a facility: (a) The owner or operator of the facility; (b) Any person who owned or operated the facility at the time of the disposal or release of the hazardous substances"); RCW 70.105D.020(8) ("'Facility' means . . .(b) any site or area where a hazardous substance . . .has been deposited, stored, disposed of, or placed, or otherwise come to be located.")

"acknowledge that liability knowingly assumed . . . cannot expand the insurer's liability" is simply untrue. Am. Br. of Amicus 5 n.2.

However, LMI failed to identify or provide any evidence that the 1999 acquisition actually increased the liability that the Port already faced as a result of its ownership of the MFA Area. LMI only asserted (incorrectly) that absent the 1999 acquisition, the Port would have been able to assert a defense (the groundwater plume defense) to liability for the entire TWP Site.[3] CP 3832. The trial court, however, found based on undisputed evidence (including the testimony of LMI's own expert) that this defense would have been inapplicable to the Port. CP 5035-38. LMI made no attempt to reargue its unsuccessful alleged plume defense on appeal.

Further, LMI actually argued to the trial court and presented evidence establishing that IP indemnified the Port for remedial costs and liability such that the Port would never face any additional liability for that contamination. LMI also told the trial court that the Port has no obligation to pay for any cleanup costs at the TWP Site, and that **the Plant Area** (which they repeatedly refer to as the "TWP Site" in order to create confusion) **has already been remediated by IP** pursuant to an agreed order and a consent decree between IP and DOE. CP 3831, 11317, 11326. *See also* CP 1345-46, 1350.

The trial court's actual determinations, affirmed by the COA,

[3] LMI's motion referred to its alleged groundwater plume defense as "RCW 70.105D.020(17)(b)(iv)," but that section is currently codified as RCW 70.105D.020(22)(iv).

completely undermine the premise behind all of Amicus' arguments.

III. ARGUMENT

A. The COA Did Not Find LMI Liable for Losses the Port Acquired Subsequent to the Policy Periods

Neither the trial court nor the COA determined that LMI was liable for losses the Port allegedly had knowingly acquired after the expiration of its insurance policies. Both lower courts properly recognized that the Port's liability for which it sought coverage arose from its ownership of the MFA since the 1960s, not from its 1999 acquisition. These courts also properly recognized that there is no legal basis for LMI to abrogate their obligation to provide coverage for the Port's liability arising from its ownership of the MFA.[4]

LMI did not argue at trial or before the COA, as Amicus now asserts, that the Port's proportion of liability for damages was expanded by the ownership of the Plant Area it acquired in 1999. They did not do so because it contradicted their repeated assertions, which they raised in multiple summary judgment motions, that the Port faced no liability *at all* for the TWP Site.[5] The fallacy of LMI's (and Amicus') claim that the Port knowingly acquired its liability in 1999 is further made apparent by LMI's assertions that IP is a "multi-billion dollar company conducting the cleanup under an Agreed Order with [DOE]" and that there is no evidence IP will

[4] If DOE had determined that the MFA Area contamination were a separate site/facility from the contamination on the Plant Area, the declaratory judgment of coverage would have been for that MFA site rather than the Plant Area or TWP Site. But, under RCW 70.105D.020(8), DOE determined that the facility known as the TWP Site includes the hazardous substances located on both the Plant area and the MFA.

[5] *See e.g.,* CP 1342-43, 11325-26, 12779-80.

fail to fulfil its legal obligations at the TWP Site. CP 3831.

LMI repeatedly failed to identify any additional liabilities allegedly acquired by the Port by its 1999 purchase of the Plant Area, and LMI's argument on appeal was limited to unsupported *ex cathedra* assertions that the purchase had resulted in such additional liability. LMI made absolutely no attempt to identify these alleged additional liabilities, much less present any factual support for its assertions. Amicus merely regurgitates LMI's bald *ex cathedra* assertions as the sole foundation for its arguments.

B. There Are No Known Loss/Fortuity Issues In This Case.

Assuming hypothetically (since LMI did not and could not do so), that LMI had been able to identify and prove an additional liability resulting from the 1999 Plant Area purchase, there still would be no known loss/fortuity issues in this case. LMI would have been entitled to a ruling, as recognized by the trial court, holding that additional liability was not related to the Port's ownership of the MFA and, therefore, to that extent, there would be no coverage. LMI, however, never sought such an order. Instead, LMI sought to twist and distort their unsupported assertions of unidentified additional liability into a known loss/fortuity argument in an attempt to retroactively void all coverage for the Port's liabilities arising from its ownership of the MFA.

The COA clearly ruled, based upon established precedent, that known loss/fortuity issues must be resolved as of the time the insurance policy is purchased and that in the context of general liability insurance a "loss" means the insured's known loss to third parties. Opinion 31-32.

The Port proved that it had no knowledge of any groundwater pollution at the MFA when the subject policies were purchased, much less knowledge of any liability to third parties related to that pollution. Indeed, that liability did not exist until years later when strict, joint and several liability was imposed retroactively on the Port by statute.

Both LMI and Amicus wax at length about the value of the known loss/fortuity principals to the insurance industry, but they ignore that the critical elements of those principals must be proven as of the date the policy is issued. They provide no authorities or analysis justifying their magical transportation of events happening decades later back to the time the policy is purchased.

LMI attempt to draw an inept analogy between the circumstances of this case (general liability insurance for liabilities that are subsequently created and retroactively imposed on activities occurring during the policy periods), and a situation where a homeowner seeks to purchase a fire policy after his house has burned down. Amicus in turn seeks to adopt this inept analogy as the basis of its arguments. Ironically, even this analogy emphasizes that known loss/fortuity **must be resolved as of the date the insurance policy is purchased.**

C. There Are No *Weyerhaeuser* Issues In This Case.

Amicus seeks to inject an entirely new issue that was not raised below and that is based upon a manufactured set of facts in order to secure an advisory ruling re-visiting and revising this Court's decision in *Weyerhaeuser v. Commercial Union,* 142 Wn.2d 654, 15 P.3d 115

(2000).[6] LMI never challenged *Weyerhaeuser*. To the contrary, LMI's only reference to this case was a favorable citation in its opening brief. Br. of Appellants 28. In literally hundreds of pages of briefing, through LMI's Petition for Review, there is no other reference to the *Weyerhaeuser* opinion.

The COA's opinion does not even mention, much less rely upon *Weyerhaeuser*. The Opinion relied on other established Washington precedent that fully supported the Opinion's rulings. There would have been no reason to consider *Weyerhaeuser's* unique complex situation.

The *Weyerhaeuser* court held that an insured could obtain coverage for an occurrence during the policy period even if the insured's liability for that occurrence arose from actions taken after the policy periods. 142 Wn.2d at 681. However, in that case, the insured had no knowledge that its actions would cause that liability. The *Weyerhaeuser* case does not stand for the proposition that an insured can obtain coverage for liability it knowingly acquired any more than the COA's Opinion does here.[7]

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[6] *See Wash. Beauty Coll. Inc., v. Huse*, 195 Wash. 160, 164-65, 80 P.2d 403 (1938); *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 122, 231 P.3d 219 (2010) (noting that to answer appellant's hypothetical scenario, the court would have to ignore record and issue an advisory opinion).

[7] Even if it were at all applicable to this case, Amicus' criticism of the *Weyerhaeuser* opinion is misplaced. Amicus characterizes *Weyerhaeuser* as an "outlier" opinion. But Amicus cites only to a Rhode Island case and two trial court opinions from New York and New Hampshire that were decided prior to the *Weyerhaeuser* case. Amicus ignores the fact that this Court determined the Ninth Circuit's decision in *In re K.F. Dairies, Inc. & Affiliates*, 224 F.3d 922, 925 (9th Cir. 2000) to be directly on point and persuasive, and it was also consistent with two Washington district court opinions and a California appellate decision. *Weyerhaeuser*, 142 Wn.2d at 681. *See also President & Fellows of Harvard Coll. v. Westchester Fire Ins. Co.*, 09-5398-BLS2, 2011 WL 679846, at *8 (Mass. Super. Feb. 24, 2011) (rejecting insurers' defense based upon implied after-acquired property exclusion). The cases Amicus relies upon are also inapposite because, unlike the Port, the insureds in those cases had no liability prior to

D. There Are No Constitutional Issues In This Case.

Despite hundreds of pages of briefing in this case, including LMI's Petition for Review, LMI have never raised any constitutional issues. Amicus now seeks to improperly (and vaguely) assert that there are new constitutional issues it wants considered. Amicus' position appears to be based upon an unsupported and unsupportable assertion that the trial court and/or the COA has somehow modified the terms of LMI's insurance policies. However, Amicus' feigned indignation and complaints of due process violations rely upon inaccurate factual premises. None of the constitutional cases cited by Amicus have any relevance to the actual facts at issue in this case. Neither the trial court nor the COA reformed the insurance contracts. The unpublished COA opinion simply recognized that the record did not support LMI's factual assertions, and that LMI had failed to prove either on summary judgment or at trial that the Port expected or intended the MFA contamination or the resulting liability prior to the policy periods. The insurance policies were enforced as written, and the parties each received the benefit of their bargain. The courts below simply enforced the policy provisions in the context of subsequent statutory liabilities imposed retroactively on occurrences during the policy periods. LMI's and Amicus' complaints, if any, concern the statutes involved, not the courts' enforcement of the policy terms. "If there is unfairness it is the statute that creates the liability, not the insured which attempts to insure

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the acquisition of the companies or entities with that liability.

against it." *Weyerhaeuser*, 142 Wn.2d at 679.

IV. CONCLUSION

As noted in the Port's answer to LMI's Petition for Review, this is not an appropriate case for review. The COA Opinion is based almost entirely on LMI's procedural errors and their failure to create a record upon which to properly make their legal arguments. It is difficult to fathom how this unpublished analysis of LMI's multiple failures to preserve issues for appeal could have any import on issues "that are of great consequence to insurers, policyholders, and the public." Am. Br. of Amicus 1. Further, Amicus' repeated assertions that the COA opinion would undermine the underwriting process is specious given that the only policies that even arguably could be affected are occurrence based comprehensive general liability policies (without absolute pollution exclusions) that have not been issued since the mid-1980s and are not likely to be issued in the future. The Amicus brief adds nothing to the Petition for Review and does not change the fact that review of the COA's unpublished opinion is not appropriate.

Respectfully Submitted this 24th day of April, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for the preceding Respondent's Answer to Brief of *Amicus Curiae* Complex Insurance Claims Litigation Association in Support of Appellants' Petition for Review to be filed by email in The Supreme Court of Washington:

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Hilary Loya