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WASHINGTON COUNTIES RISK POOL, AMERICAN
INTERNATIONAL GROUP, INC.; LEXINGTON INSURANCE
COMPANY; VYRLE HILL; J. WILLIAM ASHBAUGH; and ACE
AMERICAN INSURANCE COMPANY,

Plaintiffs-Respondents,

vs.

CLARK COUNTY, a municipal corporation;
DONALD SLAGLE, an individual, LARRY DAVIS, an individual,
and ALAN NORTHROP, an individual,

Defendants-Petitioners.

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BRIEF OF AMICUS CURIAE
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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights and obligations of municipalities and their employees covered under risk pools created pursuant to Chs. 39.34 and 48.62 RCW.

II. STATEMENT OF THE CASE

This case presents the Court with the opportunity to decide, among other things, whether municipal risk pools are subject to the same enhanced duty of good faith and duty-to-defend analysis as traditional insurers. Larry Davis (Davis) and Alan Northrop (Northrop) originally brought suit against Clark County (County) and one of its former detectives, Donald Slagle (Slagle), for common law and civil rights claims arising from Davis's and Northrop's convictions and incarceration for crimes they did not commit. The parties to the underlying action

eventually reached a settlement, which included an assignment of the County's and Slagle's rights against Washington Counties Risk Pool (WCRP) and Lexington Insurance Company (Lexington). WCRP then filed an action against Davis, Northrop, the County and Slagle, subsequently joined by Lexington, seeking declaratory judgment that there was no coverage under one or more Joint Self-Insured Liability Policies issued by WCRP, or under related excess policies issued by Lexington. The facts are drawn from the briefing of the parties and the relevant superior court orders on the parties' cross-motions for summary judgment.¹ For purposes of this amicus curiae brief, the following facts are relevant:

Underlying Action. In 1993, Davis and Northrop were wrongfully convicted of crimes they did not commit, and, in 2010, they were exonerated and released from confinement. Following their release, they sued the County and Slagle for common law torts and related civil rights

¹ See Davis & Northrop Br. at 5-22; County & Slagle Br. at 6-23; WCRP Br. at 3-27; Lexington Br. at 1-22; CP 8041-54 (Court's Ruling on Oct. 10, 2014 Hearing, dated Nov. 13, 2014); CP 9825-31 (Order Denying Defendants' Motions for Partial Summary Judgment on WCRP's Breach of the Duty to Defend and Finding WCRP Had No Duty to Defend Clark County or Donald Slagle as a Matter of Law, dated Dec. 12, 2014); CP 9832-35 (Court's Ruling on November 21, 2014 Hearing, dated Nov. 25, 2014); CP 9836-44 (Order Granting Plaintiff Washington Counties Risk Pool's Motion for Partial Summary Judgment on the Assignment to Davis and Northrop and Granting Lexington Insurance Company and WCRP's Cross Motion for Partial Summary Judgment Re: Assignment, dated Dec. 12, 2014).

violations arising from their arrests, convictions and imprisonment. The parties dispute whether the allegations of the original or amended complaints are limited to discrete misconduct by the County and Slagle occurring before or during 1993, or whether the allegations include both discrete and continuous misconduct spanning the entire period of Davis's and Northrop's incarceration (i.e., until 2010).

During trial of the common law and civil rights claims, Davis and Northrop settled with the County and Slagle in exchange for a stipulated covenant judgment in the amount of \$35 million. The County and Slagle paid \$10.5 million in partial satisfaction of the judgment, and assigned to Davis and Northrop their rights against WCRP and various insurers, including Lexington, to satisfy the balance of the County's and Slagle's liability.²

Liability Coverage. The County and Slagle tendered defense of the original and amended complaints filed by Davis and Northrop to WCRP, but with respect to both complaints the duties to defend and indemnify were denied on grounds that there was no "occurrence" during the relevant policy periods. (For its part, Lexington denies receiving any tender.)

² To date no reasonableness hearing has been conducted regarding the settlement.

At the time of Davis's and Northrop's arrests and convictions in 1993, the County was self-insured. In 2002, the County first joined WCRP, a risk pool created by an Interlocal Agreement among a number of counties pursuant to Ch. 39.34 RCW, which authorizes such agreements, and Ch. 48.62 RCW, which authorizes formation of risk pools. The County remained a member of the risk pool until 2010, when it was ousted by the other members following settlement of the claims at issue here, which included the County's and Slagle's assignment to Davis and Northrop of their rights against WCRP and its insurers.

For all of the relevant annual policy periods, WCRP provided \$10 million in coverage under a joint self-insured liability policy (JSILP), 100% of which was reinsured. During this time frame, it also procured excess policies from Lexington that followed the form of the JSILPs. Throughout, the County's deductible was \$500,000.

The JSILPs and excess policies include what appears to be standard definitions of "occurrence": "an event, including continuous or repeated exposure to substantially the same conditions." Davis & Northrop Br. at 13 (quoting JSILP); accord id. at 14 (quoting similar but not identical definition from excess policy). The parties agree that the JSILPs and excess policies from 2004 to 2010 also included a "deemer" clause,

which deems an occurrence that takes place during more than one policy period to have taken place during the last policy period in which any part of the occurrence took place, unless the insured had prior knowledge of the occurrence. See id. at 14 (quoting deemer clause). Lexington contends that the deemer clause was also part of the policies covering 2001 through 2003, see Lexington Br. at 7-8, and that the County and Slagle had prior knowledge of the potential claims against them before any of the applicable policy periods.

The JSILPs also contain what appears to be standard contractual duty-to-defend language, obligating WCRP to defend members such as the County and its employees:

The Pool may at its discretion investigate any **occurrence** during the policy period and settle any claim or **suit** that may result and shall have the right and duty to defend any **suit** against the **insured** seeking monetary damages on account of any of the five coverages identified above, or any combination thereof.

Davis & Northrop Br. at 12-13 (citing CP 362) (bold in original). The excess policies issued by Lexington apparently do not impose a duty to defend prior to exhaustion of the JSILP limits. See Lexington Br. at 9-11.

The Interlocal Agreement creating WCRP and the JSILPs issued by the risk pool both contain anti-assignment provisions. The follow-form

excess policies issued by Lexington incorporate the anti-assignment provisions in the JSILPs.

Declaratory Judgment Action. Davis and Northrop settled with the County and Slagle mid-trial in September 2013, approximately one year after the underlying litigation commenced. WCRP subsequently filed a declaratory judgment action contending that there was no duty to defend or indemnify and that the County's and Slagle's attempted assignment of rights is prohibited by the Interlocal Agreement and JSILPs. Lexington intervened and sought a declaratory judgment along similar lines. Davis and Northrop counterclaimed against WCRP, Lexington and others, alleging breach of contract and asserting extra-contractual claims for bad faith and violations of the Insurance Fair Conduct Act, RCW 48.30.015, and the Consumer Protection Act, Ch. 19.86 RCW.

Davis and Northrop moved for summary judgment against WCRP on the duty to defend. The superior court granted WCRP's motion to continue summary judgment to conduct discovery pursuant to CR 56(f). After conducting discovery, WCRP and Lexington moved for summary judgment on grounds that the anti-assignment provisions of the Interlocal Agreement and JSILPs (incorporated into Lexington's excess policies) prohibited Clark and Slagle from assigning their rights. Davis and

Northrop re-noted their motion for summary judgment on the duty to defend and WCRP and Lexington cross-moved for summary judgment.

The superior court granted WCRP's and Lexington's motions for summary judgment, enforcing the anti-assignment provisions of the relevant agreements and holding there was no duty to defend as a matter of law. See CP 8041-54, 9836-44 (regarding anti-assignment provisions); CP 9825-28, 9832-35 (regarding duty to defend). Underlying the superior court's rulings is the apparent belief that WCRP and Lexington are not subject to the duties normally imposed upon traditional insurers because risk pools are excluded from the definition of "insurer" under RCW 48.01.050. See CP 8046-47, 9832.

The superior court certified its rulings for discretionary review under RAP 2.4(b). Davis's and Northrop's extra-contractual claims against WCRP and Lexington remain pending. This Court granted direct discretionary review of the superior court orders.

III. ISSUES PRESENTED FOR REVIEW

1. Do WCRP and Lexington owe an enhanced duty of good faith to participating municipalities and their employees, grounded in the common law and Insurance Code, particularly RCW 48.01.030?
2. Are the duty-to-defend provisions of the JSILPs subject to the same analysis typically applied in the insurance context,

or are they subject to the duty-to-defend analysis that appears to be employed in the non-insurance indemnity context?

See Davis & Northrop Br. at 5; County & Slagle Br. at 4-6; WCRP Br. at 1-2.³

IV. SUMMARY OF ARGUMENT

Municipal risk pools created under Chs. 39.34 and 48.62 RCW have the same enhanced duty of good faith and fair dealing as traditional liability insurers. The enhanced duty arises from the common law, based on the nature of the relationship between the risk pool, participating municipalities, and municipal employees. This duty is independently grounded in the statutory duty of good faith imposed by the Insurance Code, see RCW 48.01.030, which, properly interpreted, is applicable to risk pools created under Ch. 48.62 of the Code.

Because risk pools have the same enhanced duty of good faith as traditional insurers, the Court should reject WCRP's attempt to invoke a duty-to-defend analysis that is traceable to non-insurance indemnity agreements. Instead, the Court should apply the same duty-to-defend analysis to the JSILPs that typically applies to liability insurance policies.

³ Other issues raised by the parties are not addressed in this amicus curiae brief. See Davis & Northrop Br. at 5; County & Slagle Br. at 4-6; WCRP Br. at 1-3.

Under the proper duty-to-defend analysis, if the existence of potential or conceivable coverage is not clear from the face of the complaint(s) and applicable policy(ies), a risk pool must investigate and give the insured the benefit of the doubt on all questions of fact and law bearing on the duty to defend. A risk pool can protect itself by defending under a reservation of rights while seeking a declaratory judgment that it has no duty to defend. If a risk pool breaches its duty to defend, participating municipalities and their employees should have the right to protect themselves by entering into a covenant judgment settlement with the plaintiff, which may include an assignment of their rights against the risk pool to the plaintiff.

V. ARGUMENT

A. **Overview Of The Liability Of Municipalities And Municipal Employees, And The Creation Of Municipal Risk Pools To Cover Such Liability.**

Municipal Tort Liability. Following the waiver of sovereign immunity, local government entities such as the County are liable for damages arising out of their tortious conduct or the tortious conduct of their employees to the same extent as a private person. See RCW 4.96.010; see also RCW 4.92.090 (regarding state waiver of sovereign immunity); Kelso v. City of Tacoma, 63 Wn.2d 913, 390 P.2d 2 (1964)

(holding waiver of sovereign immunity by the state effected waiver of sovereign immunity by political subdivisions).⁴

Whenever a claim for damages is brought against an employee of a local government entity, the employee may ask the local government entity to defend the action. See RCW 4.96.041(1).⁵ The local government entity is required to provide a defense if it “finds that the acts or omissions of the [employee] were, or in good faith purported to be, within the scope of his or her official duties[.]” RCW 4.96.041(2) (brackets added). The governing body of the local government entity may create its own procedure to determine whether the acts or omissions of the employee were within the scope of official duties or in good faith purported to be within the scope of those duties. See id.; see also Colby v. Yakima County, 133 Wn. App. 386, 390, 136 P.3d 131 (2006) (discussing provisions of RCW 4.96.041).

Payment of any money judgment against the employee of a local government entity is subject to the approval of the governing body of the

⁴ The full text of the current version of RCW 4.96.010 is reproduced in the Appendix. The waiver of sovereign immunity extends to entities created by Interlocal Agreement under RCW 39.34.030. See RCW 4.96.010(2). This would include municipal risk pools such as WCRP. See RCW 48.62.031(2). This brief uses “employee” as shorthand for the statutory language referring to “any past or present officer, employee, or volunteer of a local governmental entity.” RCW 4.96.010(1).

⁵ The full text of the current version of RCW 4.96.041 is reproduced in the Appendix.

local government entity. See RCW 4.96.041(2). The statute does not specifically mention settlements. It is unclear from the statutory language whether the local government entity may revisit the scope-of-authority question before providing approval to pay a judgment (or settlement).

If the court hearing an action finds that the employee was acting within the scope of his or her official duties, and a judgment is entered against the employee, then the judgment creditor may only seek satisfaction for non-punitive damages from the local government entity. See RCW 4.96.041(4). In the absence of such a finding, the judgment creditor can presumably execute on the assets of the employee for all damages, whether they are compensatory or punitive. See id.⁶

Liability Coverage. To cover liability for themselves and their employees, local government entities may individually self-insure, as the County apparently did during the period of time from 1993 through 2001, or they may elect to procure liability insurance. See RCW 36.16.136 & . 138 (authorizing counties to obtain liability insurance for officers and employees).

⁶ The local government entity may create a procedure to pay for an award of punitive damages. See RCW 4.96.041(4).

Alternatively, the Legislature has authorized local government entities to form risk pools to “jointly self-insure risks, jointly purchase insurance or reinsurance, and to contract for risk management, claims, and administrative services.” RCW 48.62.011. “The governing body of a local government entity ... may join or form a self-insurance program together with other entities, and may jointly purchase insurance or reinsurance with other entities for property and liability risks,” and “may contract for or hire personnel to provide risk management, claims, and administrative services.” RCW 48.62.031 (ellipses added). The formation of a joint self-insurance program is accomplished by Interlocal Agreement pursuant to Ch. 39.34 RCW, and may result in the creation of a separate legal entity, such as WCRP. See RCW 48.62.031(2).⁷

The statutes authorizing creation of risk pools are set forth in the Insurance Code, Title 48 RCW. Risk pools are excluded from the definition of an “insurer,” thereby avoiding regulation by the insurance commissioner. See RCW 48.01.050.⁸ While risk pools may “[c]onsult with

⁷ The full texts of the current versions of RCW 48.62.011 and .031 are reproduced in the Appendix.

⁸ The full text of the current version of RCW 48.01.050 is reproduced in the Appendix. Exclusion from the definition of “insurer” relieves risk pools from the certification process required of insurers, see Ch. 48.05 RCW, and other regulations, including those bearing on assets and liabilities, Ch. 48.12, investments, Ch. 48.13, fees and taxes, Ch. 48.14, and certain unfair acts and practices, Ch. 48.30.

the state insurance commissioner,” RCW 48.62.031(4)(c), they are regulated by the state risk manager. See RCW 48.62.061; Ch. 200-100 WAC. The statutory enabling language for risk pools is otherwise silent regarding applicability of the Insurance Code. See Ch. 48.62 RCW.⁹

The key inquiry to be addressed is whether, given this statutory construct, risk pools are subject to some of the same duties as traditional insurers.

B. Risk Pools Should Be Subject To The Same Enhanced Duty Of Good Faith And Fair Dealing As Traditional Insurers, Under Both The Common Law And RCW 48.01.030.

While the superior court did not specifically reference the enhanced duty of good faith and fair dealing that applies to traditional insurers, its rulings seem to be premised on the belief that the exclusion of risk pools from the definition of “insurer” under RCW 48.01.050 relieves risk pools from this duty. See CP 8046-49, 9832 (concluding that insurance law does not apply to risk pools).

The nature of the enhanced duty of good faith and fair dealing and its underpinnings are explained by this Court in its landmark opinion in

⁹ As noted above, the Insurance Code allows municipalities to self-insure. However, during the relevant time frame, WCRP did not satisfy the definition of self-insurance. See RCW 48.62.021(6) (defining “self-insurance” as “a formal program of advance funding and management of entity financial exposure to a risk of loss that is not transferred through the purchase of an insurance policy or contract”).

Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 385-86, 715 P.2d

1133 (1986):

The duty to act in good faith or liability for acting in bad faith generally refers to the same obligation. *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 173, 473 P.2d 193 (1970). Indeed, we have used those terms interchangeably. See *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960). However, regardless of whether a good faith duty in the realm of insurance is cast in the affirmative or the negative, the source of the duty is the same. That source is the fiduciary relationship existing between the insurer and insured. Such a relationship exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers. This fiduciary relationship, as the basis of an insurer's duty of good faith, implies more than the "honesty and lawfulness of purpose" which comprises a standard definition of good faith. It implies "a broad obligation of fair dealing", *Tyler*, at 173, and a responsibility to give "equal consideration" to the insured's interests. *Tyler*, at 177. Thus, an insurance company's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests.

The duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions.

Not only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as well. RCW 48.01.030 provides, in relevant part:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.

(Formatting in original; citations omitted). While the duty of good faith is tied to the existence of a contract, it is also independent of the contract. See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 128-29, 196 P.3d 664 (2008) (stating “Washington’s insurance bad faith law derives from statutory and regulatory provisions, and the common law” and “the duty of good faith is not specific to either of the main benefits of an insurance contract [i.e., defense and indemnity] but permeates the insurance arrangement”; brackets added).

As is evident from the foregoing quotation from Tank, an insurer’s enhanced duty of good faith and fair dealing arises in part from the common law, based on the nature of the relationship between an insurer and its insured. The same type of relationship, including “high stakes,” and an “elevated level of trust,” is present when coverage is provided by or through a risk pool. Nothing in the Insurance Code provisions authorizing the creation of risk pools precludes application of this common law analysis. See Ch. 48.62 RCW; see also RCW 4.04.010 (providing the common law is the rule of decision in the courts of this state); In re Parentage of L.B., 155 Wn.2d 679, 689, 122 P.3d 161 (2005) (construing RCW 4.04.010 as “providing that the common law may serve to fill interstices that legislative enactments do not cover”; quotations

omitted).¹⁰ The common-law basis for imposing an enhanced duty of good faith and fair dealing on traditional insurers should apply with equal, if not greater, force to a risk pool.¹¹

Furthermore, the quotation from Tank indicates that the enhanced duty of good faith and fair dealing is independently grounded in the Insurance Code. See RCW 48.01.030. While risk pools are excluded from the definition of “insurer,” the statutory duty of good faith is not limited to insurers and, properly interpreted, applies to risk pools. It encompasses “all persons ... in all insurance matters.” RCW 48.01.030. “Person” is defined to include any “association, organization ... or corporation.” RCW 48.01.070 (ellipses added). Risk pools satisfy the definition of

¹⁰ As pointed out by WCRP, members of risk pools have a right to internal review of coverage determinations. See WCRP Br. at 42-43; see also WAC 200-100-050 (requiring internal appeal procedures). However, the mere existence of a remedy that potentially overlaps a common law remedy does not preclude resort to the common law remedy. See Potter v. Wash. State Patrol, 165 Wn.2d 67, 78-88, 196 P.3d 691 (2008) (holding nonexclusive wrongful impoundment of vehicle statute does not preclude common law conversion claim). “The common law is free standing, and absent clear legislative intent to modify the common law, its remedies are generally not foreclosed merely because other avenues for relief exist.” Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 283, 358 P.3d 1139 (2015) (recognizing the common law is “independent of any underlying contractual agreement or statute”).

¹¹ A risk pool may be more akin to a true fiduciary because it has features of a partnership among the participating local government entities. See In re Consol. Meridian Funds, 485 B.R. 604, 618 (Bankr. W.D. Wash. 2013) (synthesizing Washington law as holding that a fiduciary relationship arises in fact when “one party justifiably relies on another to look after the former’s financial interests”). To the extent it is a true fiduciary, a risk pool would be required to place the interests of its members above its own interests, resulting in greater duties than an insurer, which is merely a quasi-fiduciary required to give equal consideration to the interests of its insureds. See Cedell v. Farmers Ins. Co., 176 Wn.2d 686, 706, 295 P.3d 239 (2013) (distinguishing fiduciary and quasi-fiduciary relationships).

“person.” See RCW 48.62.031(2) (authorizing a risk pool to form a separate legal entity pursuant to interlocal agreement under Ch. 39.34 RCW).

The activities of a risk pool also involve “insurance matters.” RCW 48.01.030. Chapter 48.62 RCW is entitled “Local Government *Insurance* Transactions.” (Emphasis added.) Risk pools are authorized to jointly self-insure risks, and jointly purchase insurance or reinsurance, among other things. See RCW 48.62.011 & .031. These activities fall within the definition of “insurance,” even though risk pools are not themselves considered “insurers” subject to regulation by the Insurance Commissioner. See RCW 48.01.040 (defining “insurance” as “a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies”).¹²

There is nothing in the chapter of the Insurance Code authorizing the creation of risk pools that would exempt them from the express duty of

¹² The reference to the “business of insurance” in the statutory duty of good faith does not limit the duty to for-profit insurers, nor should it otherwise exclude risk pools. RCW 48.01.030. The phrase is undefined and should be given its ordinary meaning as discerned from common dictionaries. See e.g. *Filmore LLLP v. Unit Owners Ass’n of Centre Pointe Condo.*, 184 Wn.2d 170, 174, 355 P.3d 1128 (2015). The common definition of “business” includes “purposeful activity,” “role, function,” “an immediate task or objective,” and “a particular field of endeavor.” Merriam-Webster Online, s.v. “business” (1st & 2nd full definitions; viewed Mar. 21, 2016; available at www.m-w.com). The full text of the current version of RCW 48.01.030 is reproduced in the Appendix.

good faith imposed by RCW 48.01.030.¹³ WSAJ Foundation concurs with Davis and Northrop that the Legislature is presumed to be aware of an “existing legal framework” when it enacts a new statute. See Davis & Northrop Br. at 37-39 (citing Maziar v. Washington State Dep’t of Corrections, 183 Wn.2d 84, 89, 349 P.3d 826 (2015)). Thus, in enacting Ch. 48.62 RCW, the Legislature is deemed to have had the statutory duty of good faith in mind, and expressly chose not to exempt risk pools from its purview.¹⁴

¹³ It appears that, unlike Washington, other jurisdictions have excluded risk pools from all insurance regulation. See County & Slagle Reply Br. at 19. Notwithstanding the fact that risk pools are not deemed to be insurers, the lack of a complete exemption from Title 48 RCW suggests that risk pools implicate the public interest to the same extent as traditional insurers. See RCW 48.01.030; Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 376-77, 535 P.2d 816 (1975) (recognizing “insurance policies, in fact, are simply unlike traditional contracts, i.e., they are not purely private affairs but abound with public policy considerations, one of which is that the risk-spreading theory of such policies should operate to afford to affected members of the public-frequently innocent third persons-the maximum protection possible consonant with fairness to the insurer”).

¹⁴ The Legislature has provided that Ch. 48.62 RCW “shall be liberally construed to grant local government entities maximum flexibility in self-insuring to the extent the self-insurance programs are operated in a safe and sound manner.” RCW 48.62.011. This rule of construction appears to be limited to self-insurance, which is defined in terms that would seem to exclude risk pools such as WCRP. See RCW 48.62.021(6) (defining “self-insurance” to mean “a formal program of advance funding and management of entity financial exposure to a risk of loss that is not transferred through the purchase of an insurance policy or contract”). The rule of construction also appears to relate to flexibility in the organization and structure of self-insurance programs—including risk pools—rather than the rights and obligations of persons covered under such programs. In any event, the language referring to operating self-insurance programs in a “safe and sound manner” would appear to serve as a limitation on a risk pool’s flexibility, requiring courts (as well as the executive branch) to determine what rights and obligations are necessary to ensure safe and sound operation.

Under both the common law and RCW 48.01.030, risk pools should be subject to the same enhanced duty of good faith and fair dealing as traditional insurers.

C. Because Risk Pools Are Subject To The Same Enhanced Duty Of Good Faith As Traditional Insurers, Contractual Duty-To-Defend Provisions Should Be Subject To The Same Analysis As Such Provisions In Traditional Insurance Policies, Including The Availability Of The Covenant Judgment Settlement Mechanism When The Duty To Defend Has Been Breached.

The duty-to-defend analysis applied in the insurance context was recently summarized by the Court in Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 802-04, 329 P.3d 59 (2014):

This court has “long held that the duty to defend is different from and broader than the duty to indemnify.” *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010) (citing *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992)). While the duty to indemnify exists only if the policy covers the insured's liability, the duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint. *Id.* (citing *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007)). “The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.” *Am. Best Food*, 168 Wn.2d at 404–05, 229 P.3d 693 (internal quotation marks omitted) (quoting *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002)). Furthermore, exclusionary clauses in the insurance contract “are to be most strictly construed against the insurer.” *Id.* at 406, 229 P.3d 693 (quoting *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509(1983)).

It is a cornerstone of insurance law that an insurer may never put its own interests ahead of its insured's. *Id.* at 405, 229 P.3d 693 (citing *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 269, 199 P.3d 376 (2008)). “[T]he duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint.” *Id.* at 412, 229 P.3d 693 (quoting *Woo*, 161 Wn.2d at 60, 164 P.3d 454). A court will construe an ambiguous complaint liberally in favor of triggering the duty to defend. *Woo*, 161 Wn.2d at 52, 164 P.3d 454 (quoting *Truck Ins. Exch.*, 147 Wn.2d at 760, 58 P.3d 276). In *Truck Insurance Exchange*, we held that “[o]nce the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.” 147 Wn.2d at 761, 58 P.3d 276 (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563, 951 P.2d 1124 (1998)). An insurer must accordingly defend its insured until it is clear that a claim is not covered under the policy. *Am. Best Food*, 168 Wn.2d at 405, 229 P.3d 693 (citing *Truck Ins. Exch.*, 147 Wn.2d at 765, 58 P.3d 276).

The duty to defend generally is determined from the “eight corners” of the insurance contract and the underlying complaint. There are two exceptions to this rule, and both favor the insured. *Woo*, 161 Wn.2d at 53, 164 P.3d 454 (quoting *Truck Ins. Exch.*, 147 Wn.2d at 761, 58 P.3d 276). First, if coverage is not clear from the face of the complaint but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt on the duty to defend. *Id.* Second, if the allegations in the complaint conflict with facts known to the insurer or if the allegations are ambiguous, facts outside the complaint may be considered. *Id.* at 54, 164 P.3d 454. However, these extrinsic facts may only be used to trigger the duty to defend; the insurer may not rely on such facts to deny its defense duty. *Id.*

(Formatting & citations in original.)

This expansive duty to defend derives from the enhanced duty of good faith and fair dealing. The connection is not explicit in the case law, but there is no other explanation for the fact that breach of the duty to defend gives rise to claims for bad faith. See Tank, 105 Wn.2d at 386 (stating duty of good faith entails an obligation on the insurer to give equal consideration to the insured's interests in all matters, and recognizing that failure to defend in third-party reservation of rights case constituted bad faith even though insured was not actually covered); American Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 413, 229 P.3d 693 (2010) (indicating ambiguity regarding fact or law must be interpreted in favor of the insured, and refusal to defend in the face of ambiguity constitutes bad faith as a matter of law)¹⁵; see also National Surety Corp. v. Immunex Corp., 176 Wn.2d 872, 878-88, 297 P.3d 688 (2013) (holding insurers may not recoup defense costs incurred under a reservation of rights while duty

¹⁵ In Alea, both the majority and concurrence/dissent found a breach of the duty to defend because the insurer did not give its insured the benefit of the doubt on an unsettled issue of law. See 168 Wn.2d at 413 (majority op.); id. at 415 (Owens, J., concurring/dissenting). The majority opinion further indicated, in response to the concurrence/dissent, that "we do not presume that a breach of the duty to defend is per se bad faith[.]" 168 Wn.2d at 413 n.5. Nonetheless, the majority found bad faith as a matter of law based upon breach of the duty to defend under the circumstances. See id. at 413. This holding confirms the link between the duty of good faith and the the duty to defend.

to defend is uncertain, based in part on duty of good faith and equal consideration rule).¹⁶

The superior court analyzed WCRP's duty to defend the County and Slagle as "a matter of contract law" rather than insurance law. CP 9832. For its part, WCRP advocates for a duty-to-defend analysis derived from the non-insurance indemnity context. See WCRP Br. at 37-38 (citing George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc., 67 Wn. App. 468, 472, 836 P.2d 851 (1992)). Under this analysis, indemnitors are not held to the "strict test" applicable to liability insurers. See George Sollitt, 67 Wn. App. at 472. Instead, in the non-insurance indemnity context, it appears that the duty to defend is based on all the facts, rather than the eight corners of the complaint and the policy. See id. It also appears that the duty to defend is based on actual coverage rather than conceivable coverage. See id. (quoting Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wn. App. 689, 693-94, 509 P.2d 86 (1973), for the proposition that the "facts at the time of the tender of defense must demonstrate that liability would eventually fall upon the indemnitor,

¹⁶ Davis and Northrop also appear to argue for an expansive duty to defend based solely on the contract (JSILP). See Davis & Northrop Br. at 28-29 & n.37. Their analysis does not appear to be inconsistent with the expansive duty to defend grounded in the duty of good faith, as set forth in this brief.

thereby placing it under a duty to defend”).¹⁷ This approach to the duty to defend is incompatible with the enhanced duty of good faith and fair dealing because it allows the indemnitor to place its own interests ahead of its indemnitee.

Under the proper duty-to-defend analysis, if the existence of coverage is not clear from the face of the complaint and the applicable policy(ies), a risk pool *must* investigate and give its members the benefit of the doubt on questions of law or fact bearing on the duty to defend, just as with traditional insurers. See Expedia, 180 Wn.2d at 804. A risk pool should not be allowed to desert participating municipalities and their employees, forcing them to incur substantial legal costs while awaiting an indemnity determination. See Truck Ins. Exch., 147 Wn.2d at 761. Risk pools can protect themselves by defending under a reservation of rights while seeking a declaratory judgment that there is no duty to defend. See id.; see also Alea, 168 Wn.2d at 404-05 (discussing Truck Ins. Exch.). When a risk pool breaches its duty to defend, participating municipalities and their employees should have the right to protect themselves by means of a covenant judgment settlement with the plaintiff, including an

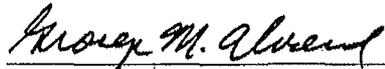
¹⁷ It does not appear that this Court has addressed the duty to defend in the non-insurance indemnity context.

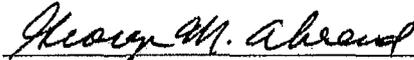
assignment of their rights. See Besel v. Viking Ins. Co., 146 Wn.2d 730, 738-40, 49 P.3d 887 (2002) (approving covenant judgment and assignment procedure, and rejecting argument that settlement violated insured's duty to cooperate); Truck Ins. Exch., 147 Wn.2d at 764-66 (citing Besel as controlling and approving covenant judgment and assignment procedure).¹⁸

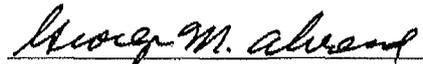
VI. CONCLUSION

The Court should resolve the issues on review in accordance with the analysis set forth in this brief.

Dated this 25th day of March, 2016.


GEORGE M. AHREND


FOR BRYAN P. HARNETIAUX, WITH
AUTHORITY


FOR VALERIE D. McOMIE, WITH
AUTHORITY

On Behalf of WSAJ Foundation

¹⁸ Under Besel and Truck Ins. Exch., the duty of good faith should also preclude enforcement of contractual non-assignment provisions as a matter of public policy because the covered municipality and its employees cannot otherwise protect themselves post loss, when the duty to defend has been breached. See also Public Utility Dist. No. 1 v. International Ins. Co., 124 Wn.2d 789, 800, 881 P.2d 1020 (1994) (approving *post-loss* assignments of insurance proceeds notwithstanding broadly worded contractual non-assignment provisions requiring consent).

APPENDIX

West's Revised Code of Washington Annotated
Title 4 Civil Procedure (Refs & Annos)
Chapter 4.96 Actions Against Political Subdivisions, Municipal and Quasi-Municipal Corporations (Refs
& Annos)

West's RCWA 4.96.010

4.96.010. Tortious conduct of local governmental entities--Liability for damages

Effective: July 22, 2011
Currentness

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

Credits

[2011 c 258 § 10, eff. July 22, 2011; 2001 c 119 § 1; 1993 c 449 § 2; 1967 c 164 § 1.]

Notes of Decisions (174)

West's RCWA 4.96.010, WA ST 4.96.010

Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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West's Revised Code of Washington Annotated
Title 4 Civil Procedure (Refs & Annos)
Chapter 4.96 Actions Against Political Subdivisions, Municipal and Quasi-Municipal Corporations (Refs
& Annos)

West's RCWA 4.96.041

4.96.041. Action or proceeding against officer, employee, or volunteer of
local governmental entity--Payment of damages and expenses of defense

Currentness

(1) Whenever an action or proceeding for damages is brought against any past or present officer, employee, or volunteer of a local governmental entity of this state, arising from acts or omissions while performing or in good faith purporting to perform his or her official duties, such officer, employee, or volunteer may request the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity.

(2) If the legislative authority of the local governmental entity, or the local governmental entity using a procedure created by ordinance or resolution, finds that the acts or omissions of the officer, employee, or volunteer were, or in good faith purported to be, within the scope of his or her official duties, the request shall be granted. If the request is granted, the necessary expenses of defending the action or proceeding shall be paid by the local governmental entity. Any monetary judgment against the officer, employee, or volunteer shall be paid on approval of the legislative authority of the local governmental entity or by a procedure for approval created by ordinance or resolution.

(3) The necessary expenses of defending an elective officer of the local governmental entity in a judicial hearing to determine the sufficiency of a recall charge as provided in *RCW 29.82.023 shall be paid by the local governmental entity if the officer requests such defense and approval is granted by both the legislative authority of the local governmental entity and the attorney representing the local governmental entity. The expenses paid by the local governmental entity may include costs associated with an appeal of the decision rendered by the superior court concerning the sufficiency of the recall charge.

(4) When an officer, employee, or volunteer of the local governmental entity has been represented at the expense of the local governmental entity under subsection (1) of this section and the court hearing the action has found that the officer, employee, or volunteer was acting within the scope of his or her official duties, and a judgment has been entered against the officer, employee, or volunteer under chapter 4.96 RCW or 42 U.S.C. Sec. 1981 et seq., thereafter the judgment creditor shall seek satisfaction for nonpunitive damages only from the local governmental entity, and judgment for nonpunitive damages shall not become a lien upon any property of such officer, employee, or volunteer. The legislative authority of a local governmental entity may, pursuant to a procedure created by ordinance or resolution, agree to pay an award for punitive damages.

Credits

[1993 c 449 § 4; 1989 c 250 § 1; 1979 ex.s. c 72 § 1. Formerly RCW 36.16.134.]

Notes of Decisions (10)

West's RCWA 4.96.041, WA ST 4.96.041

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West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.01. Initial Provisions (Refs & Annos)

West's RCWA 48.01.030

48.01.030. Public interest

Currentness

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Credits

[1995 c 285 § 16; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

Notes of Decisions (187)

West's RCWA 48.01.030, WA ST 48.01.030

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.01. Initial Provisions (Refs & Annos)

West's RCWA 48.01.050

48.01.050. "Insurer" defined

Effective: July 24, 2015

Currentness

"Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal or interinsurance exchange is an "insurer" as used in this code. Two or more hospitals that join and organize as a mutual corporation pursuant to chapter 24.06 RCW for the purpose of insuring or self-insuring against liability claims, including medical liability, through a contributing trust fund are not an "insurer" under this code. Two or more local governmental entities, under any provision of law, that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding are not an "insurer" under this code. Two or more affordable housing entities that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding under chapter 48.64 RCW are not an "insurer" under this code. Two or more persons engaged in the business of commercial fishing who enter into an arrangement with other such persons for the pooling of funds to pay claims or losses arising out of loss or damage to a vessel or machinery used in the business of commercial fishing and owned by a member of the pool are not an "insurer" under this code. Two or more nonprofit corporations that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding for property and liability risks under chapter 48.180 RCW are not an "insurer" under this code.

Credits

[2015 c 109 § 1, eff. July 24, 2015; 2009 c 314 § 19, eff. Jan. 1, 2010; 2003 c 248 § 1, eff. July 27, 2003; 1990 c 130 § 1; 1985 c 277 § 9; 1979 ex.s. c 256 § 13; 1975-'76 2nd ex.s. c 13 § 1; 1947 c 79 § .01.05; Rem. Supp. 1947 § 45.01.05.]

Notes of Decisions (7)

West's RCWA 48.01.050, WA ST 48.01.050

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West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.62. Local Government Insurance Transactions

West's RCWA 48.62.011

48.62.011. Legislative intent--Construction

Currentness

This chapter is intended to provide the exclusive source of local government entity authority to individually or jointly self-insure risks, jointly purchase insurance or reinsurance, and to contract for risk management, claims, and administrative services. This chapter shall be liberally construed to grant local government entities maximum flexibility in self-insuring to the extent the self-insurance programs are operated in a safe and sound manner. This chapter is intended to require prior approval for the establishment of every individual local government self-insured employee health and welfare benefit program and every joint local government self-insurance program. In addition, this chapter is intended to require every local government entity that establishes a self-insurance program not subject to prior approval to notify the state of the existence of the program and to comply with the regulatory and statutory standards governing the management and operation of the programs as provided in this chapter. This chapter is not intended to authorize or regulate self-insurance of unemployment compensation under chapter 50.44 RCW, or industrial insurance under chapter 51.14 RCW.

Credits

[1991 sp.s. c 30 § 1.]

West's RCWA 48.62.011, WA ST 48.62.011

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West's Revised Code of Washington Annotated
Title 48. Insurance (Refs & Annos)
Chapter 48.62. Local Government Insurance Transactions

West's RCWA 48.62.031

48.62.031. Authority to self-insure--Options--Risk manager

Effective: July 24, 2015
Currentness

- (1) The governing body of a local government entity may individually self-insure, may join or form a self-insurance program together with other entities, and may jointly purchase insurance or reinsurance with other entities for property and liability risks, and health and welfare benefits only as permitted under this chapter. In addition, the entity or entities may contract for or hire personnel to provide risk management, claims, and administrative services in accordance with this chapter.
- (2) The agreement to form a joint self-insurance program shall be made under chapter 39.34 RCW and may create a separate legal or administrative entity with powers delegated thereto.
- (3) Every individual and joint self-insurance program is subject to audit by the state auditor.
- (4) If provided for in the agreement or contract established under chapter 39.34 RCW, a joint self-insurance program may, in conformance with this chapter:
 - (a) Contract or otherwise provide for risk management and loss control services;
 - (b) Contract or otherwise provide legal counsel for the defense of claims and other legal services;
 - (c) Consult with the state insurance commissioner and the state risk manager;
 - (d) Jointly purchase insurance and reinsurance coverage in such form and amount as the program's participants agree by contract;
 - (e) Obligate the program's participants to pledge revenues or contribute money to secure the obligations or pay the expenses of the program, including the establishment of a reserve or fund for coverage; and
 - (f) Possess any other powers and perform all other functions reasonably necessary to carry out the purposes of this chapter.

(5) A self-insurance program formed and governed under this chapter that has decided to assume a risk of loss must have available for inspection by the state auditor a written report indicating the class of risk or risks the governing body of the entity has decided to assume.

(6) Every joint self-insurance program governed by this chapter shall appoint the risk manager as its attorney to receive service of, and upon whom shall be served, all legal process issued against it in this state upon causes of action arising in this state.

(a) Service upon the risk manager as attorney shall constitute service upon the program. Service upon joint insurance programs subject to chapter 30, Laws of 1991 1st sp. sess. can be had only by service upon the risk manager. At the time of service, the plaintiff shall pay to the risk manager a fee to be set by the risk manager, taxable as costs in the action.

(b) With the initial filing for approval with the risk manager, each joint self-insurance program shall designate by name and address the person to whom the risk manager shall forward legal process so served upon him or her. The joint self-insurance program may change such person by filing a new designation.

(c) The appointment of the risk manager as attorney shall be irrevocable, shall bind any successor in interest or to the assets or liabilities of the joint self-insurance program, and shall remain in effect as long as there is in force in this state any contract made by the joint self-insurance program or liabilities or duties arising therefrom.

(d) The risk manager shall keep a record of the day and hour of service upon him or her of all legal process. A copy of the process, by registered mail with return receipt requested, shall be sent by the risk manager, to the person designated for the purpose by the joint self-insurance program in its most recent such designation filed with the risk manager. No proceedings shall be had against the joint self-insurance program, and the program shall not be required to appear, plead, or answer, until the expiration of forty days after the date of service upon the risk manager.

Credits

[2015 c 109 § 3, eff. July 24, 2015; 2005 c 147 § 1, eff. July 24, 2005; 1991 sp.s. c 30 § 3.]

Notes of Decisions (1)

West's RCWA 48.62.031, WA ST 48.62.031

Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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Subject: Case # 91154-1 - Washington Counties Risk Pool, et al. v. Clark County, Washington, et al.

Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, a letter request to file an Amicus Curiae Brief, accompanying Amicus Curiae Brief (with annexed Appendix), and Motion to File Overlength Brief are attached to this email. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--

Shari M. Canet, Paralegal
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100 E. Broadway Ave.

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