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SUPREME COURT  
OF THE STATE OF WASHINGTON

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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,

Respondents,

v.

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

Petitioners.

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PETITIONERS

~~APPELLANTS~~ CLARK COUNTY AND DONALD SLAGLE'S  
OPENING BRIEF

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## I. INTRODUCTION

This case involves an attempt to deprive insured local governments of Washington State and their employees of the basic protections afforded to them as insurance policy holders by Washington's established common law. Respondents Washington Counties Risk Pool ("WCRP"), American International Group, and the AIG-owned Lexington Insurance Company (collectively, "AIG") urged the trial court, and will urge this Court, to abandon the well-developed and longstanding common law rights and protections that it has crafted. In its place, WCRP and AIG would substitute a nebulous alternative body of law that they have retroactively cobbled together from the insurance common law of other jurisdictions.

The Respondents collectively formulated their "choice of law" argument to avoid their specific obligations to insured Appellants Clark County ("County") and Donald Slagle ("Slagle") under the liability claims that were being asserted against them by Appellants Larry Davis and Alan Northrop ("Davis & Northrop"), and did so only after they had received notice of those claims in 2010. Until that time, WCRP and AIG had always applied Washington insurance common law to the adjustment of claims under their policies, including Washington's law of a "continuous trigger" for liability (which they have crafted their current arguments to avoid).

This Court should reject the Respondents' *post hoc* scheme to avoid liability. This Court has repeatedly and unequivocally articulated the rules governing the obligation to defend an insured from a lawsuit, and has repeatedly applied these rules to policies of insurance issued by risk pools and their commercial reinsurers and excess insurers, including to the very WCRP policies at issue in this case. While WCRP may claim exemption from the insurance code because of its purported status as "self insurance", here, the primary policies issued by WCRP are 100% reinsured above the County's deductible by AIG, Ace American Insurance Company ("ACE") and other commercial insurers, and the excess policies issued by AIG are standard, privately bound excess policies—none of the insured risk for these claims is borne by WCRP or its members. Regardless, the core remedies at issue in this appeal derive from the common law of the State of Washington, and not the insurance code.

Under the common law, Respondents were required to defend the County & Slagle from the claims asserted by Davis & Northrop. When Respondents unlawfully refused to do so, the County & Slagle were allowed to enter into a reasonable settlement of the claims against them that included a covenant judgment settlement and assignment of claims for damages.

The trial court erred in failing to apply Washington's common law insurance principles to these policies of insurance, as well as in ruling that: (1) WCRP had no duty to defend the County & Slagle; and (2) the County & Slagle were not permitted, as part of their settlement of the claims against them, to assign their respective claims for damages against WCRP, AIG and others as a part of a covenant judgment settlement.

This Court should reaffirm that insured government entities in the State of Washington, and their tens of thousands of employees, remain entitled to the basic protections afforded under Washington's insurance common law. In particular, this Court should apply Washington's common law to the policies of insurance issued by WCRP and AIG, by reversing the trial court's decisions denying Appellants' motions on the duty to defend and the validity of the assignments, entering summary judgment in Appellants' favor on these same motions, and remanding the case for further proceedings consistent with these principles.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in ruling that the policies of insurance issued by WCRP and AIG (and the claims made under these policies) are subject to the undefined insurance law of other jurisdictions rather than Washington's established insurance common law.

2. The trial court erred in granting WCRP's motion, and denying the County & Slagle's motion, for partial summary judgment on WCRP's duty to defend the County & Slagle in the suit filed by Davis & Northrop ("the Underlying Case").
3. The trial court erred in granting WCRP/AIG's motions, and denying the County & Slagle's motion, for summary judgment on the validity of the assignments of claims by the County & Slagle to Davis & Northrop.
4. The court erred in entering its November 13, 2014 ruling and entering its December 12, 2014 order granting WCRP the right to recover reasonable attorney fees and costs "as a result of" an alleged breach of the Interlocal Agreement.

**B. Issues Pertaining to Assignments of Error**

1. Whether the primary liability insurance policies issued by WCRP are to be governed and construed according to Washington's common law of insurance, when all Washington appellate courts, as well as both WCRP and AIG, have at all prior times treated these policies as subject to Washington's insurance common law, the policies contain a Washington choice of law clause, and the policies are 100% reinsured by private insurance companies? (Assignment of Error Number 1).

2. Whether the excess policies issued by AIG are to be governed and construed according to Washington's common law of insurance, when they purport to follow the terms and provisions of the primary liability insurance policies issued by WCRP? (Assignment of Error Number 1).
3. Whether there was an "occurrence" alleged in the Underlying Case during the period of any of the primary policies issued between 2002 and at least 2010, such that WCRP owed a duty to defend the County & Slagle when Davis & Northrop brought claims based upon express allegations of wrongful acts and injuries taking place each year between 2002 and at least 2010? (Assignment of Error Number 2).
4. Whether the County & Slagle were permitted to validly assign their claims for damages against WCRP and AIG to Davis & Northrop, when WCRP and AIG refused to perform their defense and other legal and contractual obligations to the County & Slagle? (Assignment of Error Number 3).
5. Where Article 22 of the WCRP Interlocal Agreement provides only for the recovery of reasonable attorney fees and costs in an "action instituted to enforce any term" of the Interlocal Agreement, is WCRP entitled to recover its attorney fees incurred "as a result

of the breach of a breach Interlocal Agreement”)? (Assignment of Error Number 4)

6. Whether the County & Slagle are entitled to reasonable attorney’s fees on appeal?

### **III. STATEMENT OF THE CASE**

#### **A. The WCRP Third-Party Liability Insurance Program & Policies**

The County joined WCRP in mid-2002 in order to jointly purchase primary and excess insurance coverage for itself and its employees through the WCRP third-party liability insurance program. CP 8255-8258. To become a member, the County adopted the WCRP Interlocal Agreement, the organization’s governing and membership document. CP 8255, 4733. The Interlocal Agreement sets forth the rights of the WCRP membership to participate in the joint purchase of insurance, as well as the composition and voting rights of members, and the procedures for dissolution and terminating membership. CP 4730-4738.

Notably, the Interlocal Agreement does not grant any insurance coverage to any member county or its employees. *Id.* Rather, the Interlocal Agreement permits member counties the right to jointly purchase insurance with the other members. CP 4730-4738. The actual insurance purchased through WCRP is provided through separate annual

occurrence-based primary and excess liability insurance policies.<sup>1</sup> CP 1028-1117; 4230-4495. Nor do the WCRP Interlocal Agreement and the primary and excess insurance policies incorporate one another; to the contrary, each contain integration clauses confirming that the Interlocal Agreement and the policies are entirely separate documents containing separate and complete agreements.<sup>2</sup>

At all relevant times between July 10, 2002 and at least October 2010, the County and its employees (including Slagle) were insured under a series of annual primary and excess insurance policies procured through the WCRP third-party liability insurance program (“the WCRP primary policies” and “the AIG excess policies”, respectively). CP 1028-1117; 4230-4495. Each year, these policies provided the County and its employees with \$25,000,000 in annual per occurrence limits, which are comprised of the following layers: (1) a \$500,000 deductible to be paid by the County; (2) \$9,500,000 in coverage ostensibly under the WCRP primary insurance policy, but 100% reinsured by private insurance

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<sup>1</sup> The Interlocal Agreement defines the WCRP primary policies as “insurance,” and further emphasizes that WCRP is empowered not just to self-insure, but also to “jointly purchase insurance and re-insurance. . . .” CP 4716-18.

<sup>2</sup> CP 4724 (Article 30 of the WCRP Interlocal Agreement: “The foregoing constitutes the full and complete agreement of the parties. All oral understandings and agreements are set forth in writing herein.”); WCRP Primary Policies Section 7(D): “By acceptance of this policy, the named insured agrees that the statements in the Declarations are its agreements and representations [...] and that this policy embodies all agreements existing between itself and the Pool or any of its agents relating to this insurance. CP 1038, 1048, 1060, 1072, 1082-1083, 1093, 1105, 1116.

companies like AIG; and (3) \$15,000,000 in excess/umbrella coverage under the AIG excess policies. *Id.*

The WCRP primary policies all contained identical insuring agreements stating as follows:

**INSURING AGREEMENT:** The Washington Counties Risk Pool (“Pool”) shall pay on behalf of the **named insured** and other **insureds** identified in Section 2 below . . . **all sums** of monetary damages which an **insured** shall become obligated to pay by reason of liability imposed by law for **bodily injury, personal injury, property damage, errors and omissions, and advertising injury** caused by an **occurrence** during the policy period . . . .

CP 1052, 1029, 1041, 1063, 1075, 1086, 1098, 1109 (emphasis in original).

All of the WCRP primary policies also defined the word “occurrence”:

**“[O]ccurrence”** means an **accident** including continuous or repeated exposure to substantially the same conditions, which results in **bodily injury, property damage, or errors and omissions**. With respect to **personal injury and advertising injury**, “**occurrence**” means an event, including continuous or repeated exposure to substantially the same conditions.

CP 1036, 1047, 1058, 1070, 1081, 1092, 1104, 1115 (emphasis in original).<sup>3</sup>

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<sup>3</sup> “Personal injury” under the policies includes false arrest, false imprisonment, wrongful detention, malicious prosecution, humiliation, invasion of privacy, and state or federal civil rights claims. *See, e.g.*, CP 1036.

The WCRP primary policies also expressly imposed a duty to defend: “The Pool . . . 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.” CP 1052, 1029, 1041, 1063, 1075, 1086, 1098, 1109 (emphasis in original).

The 2002 to 2004 WCRP primary policies contained no language limiting the broad obligation to pay “all sums” arising from injury caused by an “occurrence”, or otherwise requiring an occurrence to be reduced to a singular point in time. CP 1028-1117; 4230-4495. The later 2005-2010 WCRP primary policies contained a so-called “deemer” clause purporting to reduce any “occurrence” to a single point in time—but that point in time is the *last* policy period in which any part of the “occurrence” took place:

An **occurrence** that takes place during more than one policy period will be deemed for all purposes to have taken place during the last policy period in which any part of the **occurrence** took place, and shall be treated as a single **occurrence** during such policy period. No occurrence will be deemed to have taken place after the **insured** has knowledge of the alleged **bodily injury, property damage, personal injury, errors and omissions or advertising injury** that gave rise to the occurrence.

CP 1064, 1076, 1086, 1098, 1109 (emphasis in original).

Notably, each and every one of the WCRP primary policies state that they shall be governed by and construed in accordance with

Washington law: “**Applicable Law:** This Policy shall be governed by and construed in accordance with the laws of the State of Washington.” CP 1040, 1050, 1061, 1073, 1084, 1094, 1106, 1117 (emphasis in original). As previously noted, this is mirrored by WCRP’s bylaws, which also mandate that WCRP must make all *coverage determinations* for claims made under these policies in a manner that is “not inconsistent with the laws of the State of Washington.” CP 1158.

The AIG excess policies are labeled “follow form” policies incorporating by reference the same provisions that are set forth in the WCRP primary policies unless otherwise stated. CP 4231, 4253, 4273, 4292, 4311, 4331, 4351, 4373, 4395, 4419, 4442, 4477. The AIG reinsurance agreements provide reimbursement on the same terms and conditions. CP 3865-81.

Although labeled joint “self insurance,” the primary policies at issue in this case are actually 100% reinsured by AIG, ACE and other commercial insurance companies. CP 1221, 1225, 1229, 1239, 5422 (WCRP Annual Reports); CP 8333-35 (Excerpt of Susan Looker Deposition); CP 4230-4495 (Reinsurance policies). Specifically, WCRP has purchased layers of re-insurance from AIG and other private insurance companies that transfer 100% of the risk of loss for all covered losses over

and above the County's \$500,000 deductible. See Appendix A (Coverage Chart); CP 8333-35.

As a result of this coverage structure, none of the risk of loss in this case has been retained by WCRP or any member county (except the County itself, which is responsible for the payment of its \$500,000 deductible), resulting in no exposure to WCRP and its members. *Id.*

**B. WCRP and AIG Have Always Previously Treated the WCRP Policies As Insurance Subject to Washington's Common Law.**

Until it received notice of the Davis & Northrop's claims in 2010, WCRP had always described the primary policies that it issued as insurance. Each year, WCRP sent its members an Annual Report summarizing that year's "LIABILITY INSURANCE PROGRAM," and touting one of WCRP's "Core Values" as "understanding and responding to its members' insurance needs." CP 5420-49.

As described in WCRP's Plan of Operation, the insurance coverage offered by the WCRP primary policies is a "broad liability insurance 'occurrence' form" with exclusions "standard in commercial insurance." CP 8282-8285. Each year when WCRP provided its members with the primary policy that it issues, it enclosed a cover letter from the Executive Director stating:

Enclosed for each WCRP member county's records is a signed original of the Washington Counties Risk Pool's Joint Self-Insurance Liability Policy ("JSILP") for the

2009-10 policy year. Coverage remains “occurrence” based with the Pool’s *limits of insurance* being \$10 million.

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*Since the JSILP Coverage Form will provide each member county with valuable contract rights now and for many years in the future, the original document should be filed in a safe place with the rest of each county’s insurance policies, especially those from the Risk Pool. Pre-punched copies of the document are enclosed as well to replace the 2008-09 document located under the “Insurance Policies” tab in the WCRP Reference Manual (2008).*

CP 8294 (emphasis added); *see also* CP 8287-8293. The WCRP primary policies are also available on the Members Only section of the WCRP website under the “Insurance Liability Policies” tab. CP 8296-8298. WCRP also issues Certificates of Liability Insurance to provide third parties with proof of insurance coverage. *See* CP 8300-01.

Consistent with the above, WCRP has *always* previously applied Washington’s insurance common law principles to interpret its insurance policies to make coverage decisions and to determine whether it is obligated to provide a defense. CP 8824-8825. Susan Looker, the WCRP Claims Manager who has been employed with WCRP since its inception in 1988, testified that she has always applied Washington’s common law

of insurance to these policies in determining whether WCRP is obligated to defend a claim.<sup>4</sup> CP 8367-8374.

Moreover, although WCRP has aggressively resisted discovery in this case, the few pages of coverage materials from other claims it has produced<sup>5</sup> further confirm that WCRP and AIG have also always applied Washington insurance common law, including Washington's continuous trigger of coverage to determine the timing of an "occurrence." See CP 10489 – 10506 (Appendix B).

For example, in the separate *Broyles* claim, WCRP applied Washington insurance common law in a dispute with AIG (its reinsurer on the claim), to defend its determination that the underlying allegations constituted one continuing occurrence under the terms of the WCRP primary policy:

This [coverage] decision was based upon the [WCRP] Executive Committee's recognition that the second lawsuit alleged liability on the part of Thurston County for the "continuous or repeated exposure to substantially the same conditions" and *Washington law establishing that the*

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<sup>4</sup> To this end, in February of 2009, WCRP published and circulated among its members a detailed case law update entitled "Duty to Defend Triggered Unless Insured's Actions Clearly Not Covered by Policy" advising WCRP policy holders of the Washington Court of Appeals' holding in *Australia Unlimited, Inc. v. Hartford Casualty Ins. Co.*, 147 Wn. App. 758, 198 P.3d 514 (2008). CP 8526-8533; see also 8529; 8367-8374.

<sup>5</sup> WCRP and AIG were ordered to produce all coverage correspondence and documents for certain years showing what law they applied in making coverage determinations under these policies. WCRP waited until after the summary judgment briefing was complete to begin its production, however, and AIG has still not produced this material, despite an order to do so from the trial court. See CP 9792-9824.

*number of occurrences for insurance purposes* is determined by the number [of] distinct causes of alleged damages. *See Greengo v. Public Employees Mutual Ins. Co.*, 135 Wn.2d 799 (1990). The Broyles plaintiffs had alleged a single underlying cause of their damages that happened to extend over multiple policy periods. Therefore, the [WCRP] Executive Committee determined that the allegations constituted a single occurrence for purposes of calculating the deductible owed for the defense of the matter.

CP 10490 (emphasis added) (Appendix B) (Claims Materials).

Likewise in the separate *Case* claim, WCRP wrote another letter to AIG again applying Washington insurance common law to its policies. The *Case* letter contains the bold all caps heading, “**LAW GOVERNING DETERMINATION OF THE OCCURRENCES**,” and is followed by a compendium of Washington insurance common law cases addressing the timing of an occurrence. CP 10497 (Appendix B) (Claims Materials).

**C. The Underlying Case Against the County & Slagle, and Tender to WCRP and AIG**

The Underlying Case arose from the incarceration of Davis & Northrop for the rape of Kari Morrison in 1993 in La Center, Clark County, Washington, as well as subsequent events ultimately resulting in Davis & Northrop’s release. *See* CP 160. Davis & Northrop served 17 years in custody before being released. *See* CP 157. Slagle was the investigating sheriff’s deputy on the Morrison case and was employed by the County through 2006. CP 4199.

In November 2010, the County notified WCRP that counsel for Davis & Northrop had made a public records request to the County that would likely result in a lawsuit. *See* CP 8381-8382. Upon receipt of this request, WCRP also anticipated that a claim was imminent, and authorized a “pre-defense review.” CP 8381. Subsequently, Davis & Northrop submitted a tort claim notice to the County explicitly describing a continuous occurrence between 1993 and 2010. *See* CP 4189; 8382. The County provided these notices to WCRP. *Id.*

On August 25, 2012, Davis & Northrop formally filed the Underlying Case against the County & Slagle in United States District Court, Western District of Washington. CP 4186-4204. The complaint asserted claims for federal civil rights violations under 42 U.S.C. § 1983, negligence, negligent supervision, training and retention by the County with respect to Slagle, and infliction of emotional distress. *Id.* Davis & Northrop’s lawsuit included allegations of acts and events committed and caused by the County & Slagle spanning the entire period of their incarceration, from 1993 until 2010, and even thereafter. *Id.* Upon service of the Complaint, the County again gave WCRP notice and reiterated its requests for defense and indemnity. *See* CP 5251, 4124.

**D. WCRP and AIG's Denial of Defense and Indemnity Coverage to County & Slagle For the Underlying Case**

Even though Davis & Northrop's Complaint contained allegations of ongoing misconduct spanning the entirety of the periods of the policies now at issue (those between at least 2002 and 2010), WCRP summarily denied both defense and indemnity coverage to the County & Slagle. CP 1118-1121. The County & Slagle appealed this denial according to WCRP's bylaws, but WCRP's Executive Director, Vyrle Hill, and WCRP's Executive Committee, upheld the denial. CP 1122-1131.

In the coverage denial letters, WCRP asserted that its policies of insurance operated outside Washington's insurance common law and Washington rules governing insurance policy interpretation. CP 1125. Specifically, on January 3, 2013, in affirming the initial coverage denial, WCRP Executive Director Vyrle Hill contended "[T]he Risk Pool is not an insurance company and is therefore *not necessarily* subject to the rules governing insurance policy interpretation, *which are deliberately slanted in favor of finding coverage.*" *Id.* (emphasis added).

Having purported to exempt WCRP from Washington's insurance common law and the protections it affords to policyholders, Mr. Hill nevertheless went on to apply *the insurance common law of other states* to allegedly resolve the question of whether Davis & Northrop's allegations constituted a continuing occurrence within the scope of WCRP's policies.

CP 1126-1127. Ultimately, Mr. Hill concluded that what he considered<sup>6</sup> the “majority rule” in the United States would not recognize Davis & Northrop’s allegations as a continuous occurrence and affirmed the denial of the County & Slagle’s defense and indemnity claims on that basis. *Id.* Subsequently, WCRP’s Executive Committee summarily affirmed the denial. CP 1131.

In the meantime, after discovery in the Underlying Case had concluded, Davis & Northrop filed an Amended Complaint including additional details regarding the allegations being made by them against the County & Slagle. CP 4205-4228. Davis & Northrop alleged both pre- and post-conviction acts, events and injuries occurring continuously throughout each and every year of their incarceration, including in “[...] 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010.” CP 4207-08. Davis & Northrop also alleged a number of discrete events during the policy periods now at issue, including but not limited to allegations relating to the destruction of DNA evidence in 2006. CP 4219-21.

Following the filing of the Amended Complaint, the County & Slagle again requested that WCRP re-evaluate coverage for the Underlying Case. *See* CP 1132. WCRP again denied defense and

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<sup>6</sup> See section IV(A) *infra*, for discussion as to Washington’s law of continuous trigger, which is contrary to the law WCRP seeks to follow.

indemnity coverage on the purported basis that its policies of insurance were not subject to Washington common law insurance principles. CP 1132-1136. In doing so, WCRP reiterated its theory that, under a “manifestation” trigger of coverage, Davis & Northrop’s claims constituted a single occurrence that both began and ended upon their arrest and conviction in 1993. *Id.* On September 12, 2013, Director Hill affirmed the denial of defense and indemnity coverage relating to the post-conviction allegations in Davis & Northrop’s complaint by summarily concluding that: “It is my determination that despite the new allegations of continuing conduct occurring up until the plaintiffs’ release in 2010, the **occurrence** for purposes of this civil rights claim took place in 1993 [...]” CP 1137-1148 (emphasis in original). Mr. Hill again relied on insurance cases from jurisdictions other than Washington, and specifically those jurisdictions that had adopted a “manifestation” trigger of coverage rejected by Washington. CP 1143-1144. The WCRP Executive Committee again affirmed the denial. CP 1149.

On August 30, 2013, WCRP tendered the underlying claims to reinsurance and excess carrier AIG on behalf of the County & Slagle.<sup>7</sup> CP 4123, 8346. Upon receiving this tender, AIG dispatched a representative

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<sup>7</sup> The claims handling services provided to the County by WCRP included tendering and providing notice of claims to reinsurers and excess insurance providers. CP 8346.

to attend and monitor the trial in the Underlying Case, but took no action to protect its insureds. *See* CP 6251-54. AIG concurred with and joined in WCRP's strategy of denial under the theory that Washington common law insurance principles did not apply to its policies of insurance. *Id.*

**E. Trial and Settlement of the Underlying Case**

After being repeatedly abandoned by WCRP, the County & Slagle were left to defend the Underlying Case on their own for nearly two years, including through extensive discovery, dispositive motions and ten days of trial. *See* CP 1026-1027. The County & Slagle moved for summary judgment, which the U.S. District Court granted in part but denied in part. *Davis v. Clark County*, 966 F. Supp.2d 1106 (W.D. Wash. 2013). Among those claims allowed to proceed to trial *were those based entirely upon events taking place after 2009*. *Id.* at 1145.

Trial began on September 17, 2013. CP 5251. On September 27, 2013, ten days into trial and the day after Slagle testified in his own defense, the County & Slagle, in consultation with their defense counsel, concluded that a settlement was necessary to protect the public interest and avoid a potentially catastrophic judgment. *See* CP 8503, 8512. The County & Slagle gave notice to Respondents of their intent to settle the case. *See* CP 360, 2080.

Davis & Northrop on one hand, and the County & Slagle on the other, subsequently entered into a settlement agreement whereby the County & Slagle agreed to, among other things, enter into a stipulated judgment; pay \$10,500,000 in partial satisfaction of that judgment<sup>8</sup>; and assign to Davis & Northrop any and all claims for damages that the County & Slagle may have against their insurers (including WCRP and AIG). CP 1164-1216.<sup>9</sup> This assignment also encompassed the right to recover at least \$685,952 in unreimbursed defense expenses incurred by the County & Slagle while defending the Underlying Case. *See* CP 1026-1027, 1180-84. By its own terms, the assignment agreement involved claims arising under insurance policies, as opposed to the WCRP Interlocal Agreement, which provides no insurance coverage. CP 5253; CP 1164-1216; 4730-4738. Internally, WCRP concluded the agreement was “troublesome”. CP 4498.

The assignment contained a specific provision that it would not take effect until five days after WCRP’s executive committee again considered the question of coverage. CP 1183. The WCRP Executive Committee then re-affirmed the denial of coverage. CP 1149. Between

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<sup>8</sup> The County has since paid the \$10,500,000. CP 8511.

<sup>9</sup> Although referred to throughout as an “Assignment”, both “Defendants” the County, and Slagle, separately assigned their claims for damages to Davis & Northrop. *See* CP 1180.

Davis & Northrop's two Complaints, WCRP denied the County & Slagle's requests for defense and indemnity on at least six different occasions.

**F. The Present Action.**

Following the settlement, WCRP and AIG filed the present action against the County & Slagle, and Davis & Northrop, for declaratory relief in the Cowlitz County Superior Court, seeking to "void" the assignment. CP \_\_\_\_ (Original Complaint)<sup>10</sup>, 1-239 (First Amended Complaint). Subsequently, Davis & Northrop, and the County & Slagle filed counter-claims against WCRP, AIG and others, including breach of contract claims arising from WCRP's refusal to defend the County & Slagle in the Underlying Case. *See* CP 301-29, 1695-1728.

On April 8, 2014, Davis & Northrop moved for partial summary judgment on WCRP's breach of the duty to defend the County & Slagle under the primary policies issued between July 2002 and October 2010. CP 330-623. The County & Slagle later joined in that motion. CP 6101-6102.

WCRP moved to continue the pending motion for summary judgment on the duty to defend, arguing that it required extrinsic evidence

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<sup>10</sup> The original complaint was excluded from the initial designation of clerk's papers but is the subject of a pending supplemental designation.

in order to address the “choice of law” issue and demonstrate that Washington’s common law insurance principles did not apply to its policies. CP 1336-52. The trial court granted the request for a continuance, and WCRP then launched an extensive round of written, document and deposition discovery. CP 1294-97; *see also, e.g.*, CP 2772-74, 2935, 2943; RP (11/7/14) 158-239.

Five months later, while still refusing to produce the discovery that the trial court had ordered it to turn over, WCRP filed a motion for declaratory judgment seeking a determination that the assignment to Davis & Northrop was invalid. CP 4503-35. Davis & Northrop and the County & Slagle filed a motion seeking partial summary judgment that the assignment was valid. CP 4107-4118.

On November 13, 2014, with Appellants’ motion for summary judgment on the duty to defend still pending, the trial court ruled on the summary judgment motions relating to the assignment. CP 8041-54. The trial court first ruled that WCRP’s insurance policies were not subject to Washington common law on insurance. CP 8047-48. Accordingly, the trial court ruled that it would not look to or rely upon Washington authority involving insurance law or applying insurance principles in interpreting the WCRP primary policies. *See* CP 8048; RP (11/21/2014) at 298-299. The trial court extended its ruling to the AIG excess policies,

apparently because these policies incorporate the substantive terms and provisions of the WCRP primary policies. *See* CP 8053-54. The trial court further ruled that the assignment by the County & Slagle to Davis & Northrop was invalid due to an anti-assignment provision in the WCRP *Interlocal Agreement* (not the WCRP/AIG insurance policies). CP 8050. The trial court also ruled that all of Slagle's rights under the policies were purely derivative of the County's rights, and therefore this anti-assignment provision also voided his assignment even though he was not a party to the Interlocal Agreement. CP 8047.

The trial court further applied its prior ruling that Washington common law on insurance did not apply, and ruled as a matter of law that WCRP did not owe the County & Slagle a duty to defend. CP 9836-58; RP (11/21/2014) at 298-299. The trial court then certified the decisions referenced above for appellate review pursuant to RAP 2.3(b)(4). CP 9859-61. Both Davis & Northrop and the County & Slagle sought immediate review in this Court. CP 9862-9943. Commissioner Pierce subsequently granted direct discretionary review.

#### IV. ARGUMENT

The present appeal arises from the trial court's grant of summary judgment, requiring de novo review. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). A court may only grant

summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); *see also* CR 56(c). Here, Respondents were not entitled to judgment as a matter of law, and the trial court's grant of summary judgment to WCRP/AIG should be reversed. Appellants, on the other hand, are entitled to summary judgment on the duty to defend and the validity of the assignment of County & Slagle's claims for damages to Davis & Northrop, and this Court should so hold.

**A. The Trial Court Erred in Failing to Apply Washington Common Law to WCRP and AIG's Insurance Policies.**

Throughout the Underlying Case and the present case, WCRP and AIG have sought to avoid their obligations to the County & Slagle through their contrivance that their policies of insurance are exempt from Washington's insurance common law. But this Court and others have always applied Washington's insurance common law to policies issued by and through risk pools. The County & Slagle are not aware of a single Washington appellate decision exempting such policies from Washington common law insurance principles, nor have Respondents cited any such authority. Moreover, WCRP's own policies and bylaws expressly require the application of Washington law to its policies and coverage determinations, and WCRP and AIG have in fact always applied this law.

This Court should reject Respondents' attempt to evade Washington law in favor of an undefined alternative body of insurance law assembled retroactively from other jurisdictions for the stated purpose of avoiding coverage. WCRP and AIG's proposed alternative is to afford commercial insurance companies providing insurance through risk pools a complete exemption from the law that would otherwise apply to their policies. This would have devastating impacts on risk pool-insured public entities and their employees who would suddenly find themselves with limited and uncertain rights and something dramatically less valuable than the insurance they purchased.

1. *Washington Appellate Courts have Universally Applied Washington Common Law to Risk Pool Insurance Policies.*

Washington courts, including this Court, have long applied Washington's common law insurance principles to policies issued by and through risk pools (including by WCRP itself). *Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 800-01, 881 P.2d 1020 (1994); *Washington Pub. Util. Districts' Utilities System v. Public Utility Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989); *Transcontinental Ins. Co. v. Washington Pub. Utilities Districts' Util. Sys.*, 111 Wn.2d 452, 760 P.2d 337 (1988); *Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006); *City of Okanogan v. Cities Ins. Ass'n of Wash.*, 72 Wn. App. 697, 865 P.2d 576 (1994). These courts have

thus repeatedly afforded insured local governments and their employees the basic rights and protections afforded to other policyholders in the State of Washington.

In *Wash. Public Utility Districts' Utilities System* (“WPUDUS”), this Court considered whether an insured PUD Treasurer was entitled to coverage under a risk pool insurance policy. Specifically, this Court engaged in a coverage analysis under Washington’s common law insurance principles by applying Washington insurance cases and referring to Washington insurance treatises; this Court concluded the risk pool insurance policies afforded coverage.

**Insurance policies** are to be construed as contracts, and interpretation is a matter of law. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). The entire contract must be construed together in order to give force and effect to each clause. *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 434, 545 P.2d 1193 (1976). The court must enforce the contract as written if the language is clear and unambiguous. *Morgan*, at 435, 545 P.2d 1193. However, if the language *on its face* is fairly susceptible to two different but reasonable interpretations, the contract is ambiguous, and the court must attempt to discern and enforce the contract as the parties intended. *Greer v. Northwestern Nat’l Ins. Co.*, 109 Wn.2d 191, 198–200, 743 P.2d 1244 (1987); *Morgan*, 86 Wn.2d at 435, 545 P.2d 1193. In the event of an ambiguity, the contract will be construed in favor of the insured. *Greer*, 109 Wn.2d at 201, 743 P.2d 1244; *Morgan*, 86 Wn.2d at 435, 545 P.2d 1193.

*Id.* at 10-11, 16-17 (emphasis added).

After applying these principles to the *WPUDUS* risk pool policies, this Court explicitly concluded that the risk pool policy was indeed an ***“insurance contract”*** that gave rise to insurance coverage under Washington law:

The most reasonable interpretation of this **insurance contract** is that it was intended to provide coverage for any liability of a PUD’s officers and directors acting in good faith and within the scope of their duties, and that the exclusions were incorporated as the parties understood them, in other words, as they were defined in the F & C policy.

*Id.* (emphasis added).

Likewise, in *Transcontinental* this Court applied Washington insurance common law to the *WPUDUS* risk pool excess insurance policies to determine the timing of an “occurrence,” one of the central issues in the present case. The *Transcontinental* Court described the structure of the risk pool in a manner analogous to *WCRP*’s structure (the difference here being *WCRP* has transferred all risk to private carriers):

**WPUDUS is an unincorporated association of public utility districts (PUDs) that formed a joint powers agreement in December 1976 to self insure.** The *WPUDUS* member PUDs, their officers, directors and employees are defendants in a myriad of lawsuits brought by *WPPSS* bondholders. The bondholders allege various state and federal securities claims, fraud, negligent misrepresentation and breach of contract. The record contains 13 separate complaints filed by numerous parties for damages arising out of the *WPPSS* bond default.

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The policies at issue here are both “special excess liability policies” meant to provide coverage for losses in excess of the \$500,000 covered by the WPUDUS self-insurance agreement. **The self-insurance agreement provides the first layer of coverage, and the excess policies provide a second layer of coverage up to the particular policy limit.**

*Transcontinental*, 111 Wn.2d at 454-55 (emphasis added).

Ultimately, the *Transcontinental* Court reaffirmed and applied Washington’s continuous trigger of coverage and concluded that the allegations of a “continuous and repeated exposure” could give rise to coverage under the subject risk pool insurance policy. *Id* at 469.

The Court of Appeals has also applied Washington’s common law on insurance to the same WCRP primary policies at issue in this case. *Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006). In *Colby*, a county judge insured under the WCRP policies requested a defense against disciplinary proceedings. In determining whether the judge was owed a duty to defend under the WCRP policy, the *Colby* Court applied Washington’s insurance common law and treated the WCRP policy as a standard insurance policy:

Mr. Colby next contends he was entitled to legal representation under the **Washington Counties Risk Pool Joint Self-Insurance Liability Policy (WCRP)**, which provides for the payment of defense costs for claims brought against elected and appointed officials in any disciplinary proceeding. **Our review of the interpretation given to the language of an insurance policy is also de**

**novo. *Butzberger v. Foster*, 151 Wn.2d 396, 401, 89 P.3d 689 (2004). An insurance policy's language is given the same reasonable and sensible construction as would be given by the average person buying insurance. *Id.* at 401, 89 P.3d 689. We may not modify an insurance contract if the policy language is clear and unambiguous. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).**

*Id.* at 391-92 (emphasis added).

Although the *Colby* Court ultimately concluded on the merits that there was no duty to defend, it applied Washington's common law on insurance to reach this determination. *Id.* (citing *Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004); *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998)). The *Colby* decision, particularly its application of Washington's common law insurance principles to WCRP's own policies (the same policies at issue in this case), was consistent with this Court's rulings in *WPUDUS* and *Transcontinental*.

Similarly, in *City of Okanogan*, the Court of Appeals considered whether the Washington Cities Risk Pool had a duty to indemnify the City of Okanogan. In interpreting the policy and determining whether the requirement of an "occurrence" had been satisfied, the court specifically analyzed a number of Washington common law insurance cases, including *Gruol Construction Co.*, 11 Wn. App. 632, 524 P.2d 427, *review denied*,

84 Wn.2d 1014 (1974), Washington's seminal case adopting the "continuous" trigger of coverage:

An insurance policy is a contract whereby the insurer undertakes to indemnify the insured against loss, damage, or liability arising from a contingent or unknown event." *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1412 (W.D. Wash 1990). This "event" is called an "occurrence" in most liability policies when damages result or are discovered during the policy's coverage. *Gruol Constr. Co. v. Insurance Co.*, 11 Wn. App. 632, 633, 524 P.2d 427, review denied, 84 Wn.2d 1014 (1974).

*City of Okanogan*, 72 Wn. App. at 701-702.

In the face of this authority, WCRP falsely contends that its policies of insurance are somehow exempt from Washington's insurance common law. WCRP bases this proposition on RCW 48.01.050, which reads in pertinent part: "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.**" (Emphasis added). Contrary to WCRP's position in this case, the plain language of this statute, at most, provides risk pools like WCRP with a limited exemption from certain provisions of the Washington Insurance Code, but not the common law.<sup>11</sup>

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<sup>11</sup> The Washington Insurance Code and Washington's insurance common law are separate and distinct bodies of law and impose entirely separate and independent duties. *E.g., Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986) ("Not only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as

The plain language of the cited portion of the Insurance Code only applies to the extent a risk pool “self insures” or “self funds” its claims.<sup>12</sup> It is undisputed in this case that WCRP neither “self insures” nor “self funds” the claims at issue, because the entire risk of loss rests with AIG. *See, e.g.,* CP 8333-34, 8373-74.

Most importantly, the core claims against the insurers in this case are not dependent on the insurance code. For example, whether the WCRP breached its duty to defend in bad faith is not an issue under the Insurance Code. The common law fiduciary relationship between the insurer and the insured is the source of that duty of good faith. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986) (“The duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions.”) (emphasis added).

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well”); *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 143, 29 P.3d 777 (2001) *modified*, 36 P.3d 552 (Wash. App. 2001) (recognizing separate common law and statutory duties); *Newmont USA Ltd. v. Am. Home Assur. Co.*, 795 F. Supp. 2d 1150, 1174 (E.D. Wash. 2011) (same).

<sup>12</sup> Insurance” and “self-insurance” are defined terms, both under the common law and the insurance code. *E.g., Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 696-97, 186 P.3d 1188 (2008) (“insurance involves risk shifting, while *self-insurance involves risk retention*”) (emphasis added); RCW 48.01.040 (“insurance” means “a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies”); RCW 48.62.021(6) (“self-insurance” means “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*”) (emphasis added).

The trial court, therefore, erred in ruling that RCW 48.01.050 creates a wholesale exemption for WCRP and AIG's insurance policies from Washington's insurance law including its established common law insurance principles. The trial court departed from Washington appellate courts' application of Washington common law to the interpretation of risk pool insurance policies, including the *Colby* Court's application of Washington common law insurance principles to the very WCRP insurance policies that are at issue in this case.

2. *WCRP's Own Insurance Policies and Bylaws Require the Application of Washington Common Law to Coverage Determinations.*

Even if Washington appellate courts, including this Court, had not previously applied Washington insurance common law to insurance policies issued by risk pools, which they have, WCRP's own policies and bylaws also explicitly *require* the application of Washington common law insurance coverage principles.

Insurance policies are enforced as contracts, and if the language is clear and unambiguous the terms must be enforced as written. *Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 136-37, 26 P.3d 910 (2001) ("We recognize we must be guarded in our interpretation of an insurance contract as it is elementary law, universally accepted, that the courts do not have the power, under the

guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.”); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665-66, 15 P.3d 115 (2000).

Each of the WCRP policies issued to the County & Slagle between 2002-2010 contains a choice of law clause: “This Policy shall be governed by and construed in accordance with the laws of the State of Washington.” CP 1040, 1050, 1061, 1073, 1084, 1094, 1106, 1117. Similarly, WCRP’s bylaws require that any and all coverage determinations under WCRP’s policies be made in a manner “not inconsistent with Washington law.” CP 1158.

Consistent with these requirements, WCRP has, for the past 25 years, applied Washington’s insurance common law, including with respect to the duty to defend. Specifically, WCRP Claims Manager Susan Looker testified she has never treated the WCRP policies different than other Washington insurance policies for purposes of the duty to defend:

Q. [...] So have you ever represented to anyone, any insured under one of the Washington Counties Risk Pool's policies, that the duty to defend rules are different for risk pools than more traditional insurance companies?

A. I have not.

CP 8373 (at 239:15-20)

Instead, she has squarely applied this Court's precedent in determining whether a defense is owed under WCRP's insurance policy:

Q: [W]hat do you look to, if you're the claims manager and you're looking to whether or not you're going to defend a claim under reservation of rights, what resource do you go to?

A: Four corners of the complaint and the four corners of the JSILP.

Q: So the eight corners of the two documents?

A: Correct.

Q: And why do you go to the eight corners of those two documents?

A: Because I'm contractual [sic] obligated to do so.

CP 8324 (at 208:16-211:19). Ms. Looker further testified that in her 25 years at WCRP (since its inception), she was not aware of a single occasion where WCRP represented to anyone, including her, that something other than Washington law on the duty to defend applied to the duty stated in WCRP's policies of insurance. CP 8365-8366.

In addition to always previously applying Washington common law insurance principles to its duty to defend determinations, WCRP also consistently applied Washington common law insurance principles to the very same policies at issue in this case in order to protect its own interests

and support its coverage determinations when seeking payment from its reinsurers. As discussed above, letters belatedly produced by WCRP in discovery document that as recently as 2011 and 2012 (after receiving notice of the pending claims and just a month before Davis & Northrop filed suit), WCRP relied *exclusively* upon Washington common law insurance principles to justify its own coverage determinations to its reinsures in the *Broyles* and *Case* matters. See CP 10489 – 10506 (compiled in Appendix B).

Letters from WCRP to its reinsurer in the *Broyles* claim show that WCRP applied Washington's insurance common law to reach the conclusion that the plaintiffs' allegations constituted a continuing occurrence under the terms of the WCRP insurance policy. CP 10490. Counsel for WCRP further cited and applied Washington insurance common law to explain why WCRP assigned a 2002 date of loss to an occurrence continuing across multiple policy periods (just as it should have done in the present case):

Since choosing to assign a 2002 date of loss to the second *Broyles* lawsuit, at least two events have occurred justifying that decision. First, in affirming the trial court's judgment based on the jury verdict, the Washington Court of Appeals recognized that conduct occurring during the 2002 policy year gave rise to Thurston County's liability. Second, the court issued its opinion in *In Re Feature Realty Litigation*, 2006 WL 3692649 (2006). In this case, the Court was asked to determine whether an insurer had a duty

to indemnify its insured for liability arising from wrongful acts committed during the policy period. The insurer argued that the liability for which the insured entered into a settlement agreement was based on wrongful acts committed before the insurer's policy period. **Like the Court of Appeals in *Broyles v. Thurston County*, the court in *Feature Realty* held that the liability resolved by the settlement was based on a single continuous wrongful act occurring over several policy periods and because some of the conduct giving rise to liability occurred during the insurer's policy period, the duty to indemnify was triggered.**

CP 10491 (emphasis added) (Appendix B at 3).<sup>13</sup> In the *Case* matter, WCRP similarly applied Washington's insurance common law to establish the timing of an occurrence. CP 10497 (Appendix B at 9).

Nonetheless, after WCRP received notice of the Davis & Northrop claims, it suddenly began telling the County & Slagle that Washington common law did not "necessarily" apply to its coverage determinations. CP 1125. WCRP also stated expressly that the *purpose* of this deviation was to avoid Washington's "rules governing insurance policy interpretation," because they are, in WCRP's view, "deliberately slanted in favor of finding coverage." *Id.*

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<sup>13</sup> The court specifically ruled: "Where, as here, there are repeated and related acts of delay occurring over a period of time, during which the damage incurred from the delay is indivisible and continuous, it is reasonable to deem the act to have been committed continuously for the purpose of determining what insurance policy has been triggered." *In re Feature Realty Litig.*, 468 F. Supp. 2d 1287, 1302 (E.D. Wash. 2006).

Having summarily rejected the application of Washington's insurance common law *due to* its coverage implications, and also ostensibly because it is a risk pool, WCRP then paradoxically applied the insurance common law of *states other than Washington* in order to support a denial of coverage in this case. WCRP argued that this other insurance common law "provide[d] guidance." CP 1126. WCRP then proceeded to cite the insurance common laws of Pennsylvania, Colorado, and California in order to circumvent this Court's express adoption of a "continuous" trigger of coverage and deny its duty to defend. CP 1127-29.<sup>14</sup> Thus, WCRP posits that as a "risk pool" it is exempt from Washington insurance common law because it is "not an insurance company", and that it will adjudicate claims under the insurance laws (or other laws) of whatever jurisdictions most support its efforts to deny coverage.

To prop up these arguments, WCRP has even attempted during the pendency of this case to sanitize its documents of insurance terms they have contained for more than a decade. This effort has included, for example, rejecting previously utilized and defined insurance terms such as "premium" and "insured" which appear hundreds of times in the WCRP policies, in favor of new less insurance-like terms such as "assessment"

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<sup>14</sup> WCRP continued to rely on these authorities before the trial court. *See* CP 7489-91.

and “member”. CP 8726-8727. In 2013, WCRP also provided its members with a new self-description for publication in each county’s annual financial report. CP 8534-8545. For the first time, this self-description referenced WCRP’s purported exemption from Washington’s insurance common law. *Id.*

In sum, Washington courts’ prior application of Washington insurance common law to risk pool insurance policies, the ‘applicable law’ language of WCRP’s policies and bylaws, and WCRP’s own past practices, all require the application of Washington common law to the insurance policies at issue in this case. The trial court erred in failing to apply Washington’s common law insurance principles to the question of whether WCRP breached its duty to the County & Slagle in the Underlying Case and whether the County & Slagle were permitted to protect themselves by assigning their claims for damages arising from this breach to Davis & Northrop. When Washington law is applied, it is readily apparent that WCRP breached its duty to defend and that the County & Slagle were permitted to assign their claims for damages against WCRP and AIG.

**B. The Trial Court Erred in Concluding that WCRP Had No Duty to Defend County & Slagle in the Underlying Case.**

In Washington, “[t]he duty to defend arises where the 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, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404-05, 229 P.3d 693 (2010) (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.* (“*Truck Ins.*”), 147 Wn.2d 751, 760, 58 P.3d 276 (2002)) (internal quotations omitted). “The duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint.” *Id.* at 404 (citing *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007) (emphasis in original). “[I]f there is **any reasonable interpretation** of the facts or law that could result in coverage, the insurer **must** defend.” *Am. Best Food* at 405 (emphasis added). The insurer may not put its own interests ahead of the insured's. *Id.* Accordingly, the insurer must defend until it is clear that the claim is not covered. *Id.* If an insurer disputes facts or law affecting coverage, then its recourse is to defend under a reservation of rights until coverage is settled in a declaratory action. *Id.* at 405, 413.

In *Am. Best*, the insured, American Best, was sued in connection with an assault that occurred at a night club. *Id.* at 403. The insured tendered the claim to its insurer and requested a defense. *Id.* The insurer, Alea, asserted the assault and battery exclusion in its policy and denied a defense, arguing “Washington courts would *likely* find the allegations of negligence not sufficient to trigger coverage.” *Id.* The *Am Best* Court held

that Alea “breached its duty to defend as a matter of law when it gave itself the benefit of the doubt as to the unresolved legal questions rather than giving the benefit of the doubt to the insured.” *Id.* at 402:

**The lack of any Washington case directly on point and a recognized distinction between preassault and postassault negligence in other states presented a legal uncertainty with regard to Alea’s duty. Because any uncertainty works in favor of providing a defense to an insured, Alea’s duty to defend arose when Dorsey brought suit against Café Arizona.**

[...]

**Further, a balanced analysis of the case law should have revealed at least a legal ambiguity as to the application of an “assault and battery” clause with regard to the post assault negligence at the time Café Arizona sought the protection of its insurer, and ambiguities in insurance policies are resolved in favor of the insured.**

*Id.* at 410-411 (emphasis added)

Here WCRP has conceded there is at least legal ambiguity regarding what law should be applied to the interpretation of its policies, repeatedly claiming that extrinsic evidence was necessary to resolve the question at summary judgment. *See* CP 686, 694-96 (stating that the duty to defend as applied to the WCRP policies requires “careful investigation” and requesting an extended series of depositions). WCRP ignored that Washington appellate courts have universally applied Washington insurance common law to risk pool policies and instead gave itself the

benefit of the doubt that risk pools are “not necessarily” subject to Washington’s insurance common law. CP 1125. WCRP further ignored that the Court of Appeals had applied Washington common law to its very own policies in *Colby v. Yakima County*. It has never identified any Washington precedential authority stating that WCRP or any other Washington risk pool is exempt from Washington’s insurance common law. To the contrary, it argued to the trial court that no Washington published authority had ever addressed its argument. CP 7476. Under these circumstances, WCRP was obligated at the very least to defend under a reservation of rights, but it did not do so.

WCRP’s conduct is even more untenable because it has expressly acknowledged that Davis & Northrop had both generally and specifically alleged instances of continuous misconduct on the part of the County & Slagle between 2002 and 2010 when they were insured by WCRP. CP 1137. WCRP conceded in its denial letters that the allegations in the complaint “arguably” fell within the policy period and triggered coverage based on alleged personal injuries. CP 454, 1126. The plain language of the allegations in Davis & Northrop’s Amended Complaint in the Underlying Case contain both general and specific allegations occurring in each and every WCRP policy year, specifically detailing the years “2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010.” CP 4207-08. These

allegations included failing to disclose or otherwise come forward with certain exculpatory evidence and information in every year of Davis & Northrop's incarceration. *Id.*; CP 4219-21.

Although general (and even ambiguous) allegations of misconduct are sufficient to trigger an insurer's duty to defend, *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014), Davis & Northrop also alleged specific instances of misconduct that triggered WCRP's duty to defend the County & Slagle. These allegations included:

- “Specifically, Clark County and Det. Slagle refused to disclose or otherwise come forward with evidence and information that would have exonerated Davis and Northrop during each and every long year of their incarceration....” (CP 4207 at ¶ 1.4) (emphasis added);
- “Defendants Clark County and Slagle’s continued withholding of or failure to come forward with exculpatory evidence.” (CP 4210 at ¶ 4.3(7)) (emphasis added);
- “Clark County and Det. Slagle continued to withhold exculpatory evidence, including evidence regarding alternative suspects....” (CP 4220 at ¶ 4.41) (emphasis added);
- “In each and every long year of Davis’s and Northrop’s wrongful imprisonment, from 1993 through 2010 . . . Clark County and Det. Slagle breached their legal and constitutional duties to disclose exculpatory facts that Davis and Northrop could have used in their defense at trial, and after their conviction in post-conviction motions or in furtherance of meaningful access to executive clemency mechanisms such as parole or pardon.” (*Id.* at ¶ 4.42) (emphasis added);

While these specific allegations of misconduct occurring continuously from 1993-2010 were enough to trigger WCRP's duty to defend, Davis & Northrop also alleged discrete instances of misconduct occurring in 2004, 2005, 2006, 2007 and 2008:

- The destruction of exculpatory DNA evidence in 2006 or 2007 by the County, which the Court had ordered tested only months before, and which would have purportedly proved Davis and Northrop's innocence (CP 4219-20 at ¶ 4.39);
- The 2004 request by Davis and Northrop for previously unavailable DNA testing, which the County opposed and refused to agree to, thus "ratifying the unconstitutional conduct of Detective Slagle [and his] continued failure to provide exculpatory evidence" (*Id.* at ¶ 4.39); and
- The numerous complaints, investigations and reprimands against Slagle in the years following Davis and Northrop's imprisonment, including those on "September 4, 2004; March 26, 2005; May 10, 2005; and March 8, 2006" as well as a "November 19, 2004 [ ] psychological evaluation", all of which are alleged to have put the County on notice of the high probability that undisclosed exculpatory evidence existed and that constitutional and other violations of Davis and Northrop's rights was occurring. (CP 4211 at ¶ 4.7).

Notwithstanding these express allegations of misconduct between 2002-2010, WCRP repeatedly denied the County & Slagle a defense, summarily concluding that the allegations "arguably" arose from a single occurrence in 1993, when Davis & Northrop were convicted, and thus were not covered under WCRP's policies. CP 1126.

As noted above, this conclusion was based on the insurance law of other jurisdictions, including specific positions contrary to Washington's insurance law adopted by this Court. Most significantly, WCRP relied exclusively on the law of other jurisdictions to reject a "continuous trigger" of coverage, even though under Washington law the WCRP policies provide coverage for "all sums" arising from injury derived from a continuous occurrence. *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co.*, 134 Wn.2d 413, 429, 951 P.2d 250 (1998) ("Once coverage is triggered in one or more policy periods, those policies provide full coverage for all continuing damage, without any allocation between insurer and insured."); *see also id.* at 424 (noting that "all insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages.") (citing and approving of *Gruol Constr. Co. v. Insurance Co. of N. Am.*, 11 Wn. App. 632, 524 P.2d 427 (1974)).

WCRP's contrary conclusion and resulting denial of a defense to the County & Slagle not only departed from Washington law, it dispensed with WCRP's established practice of applying the Washington common law "eight corners" standard to its duty to defend determinations, as well as the other established parameters of the duty to defend in Washington. CP 8324; *Expedia, Inc.*, 180 Wn.2d at 803; *Woo*, 161 Wn.2d at 52-53.

Had WCRP engaged in a simple “eight corners” comparison of the allegations in the complaint and the coverage provided by the policy, while giving the insured the benefit of the doubt, it would have easily found a duty to defend. In failing to do so, it wrongfully deprived the County & Slagle of “a valuable benefit of [their] insurance policy.” *Am. Best Food, Inc.*, 168 Wn.2d at 411-412 (quoting *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 390, 823 P.2d 499 (1992)). This Court has repeatedly held that insurers cannot “desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.” *Expedia, Inc.*, 180 Wn.2d at 803 (quoting *Truck Ins.*, 147 Wn.2d at 761 (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563, 951 P.2d 1124 (1998))). But that is exactly what WCRP did here, thereby breaching its duty to defend.

**C. The Trial Court Erred in Voiding the County & Slagle’s Assignment to Davis & Northrop.**

In the face of WCRP’s repeated refusal to provide a defense, and having likewise been denied indemnity coverage, the County & Slagle aggressively litigated the case through ten days of trial before agreeing to settle the case by way of a covenant judgment and assignment of claims for damages to Davis & Northrop. *See* CP 8511-12. This Court has long held that such a settlement is an appropriate remedy for an insured. *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764, 287 P.3d 551 (2012);

*Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 628, 245 P.2d 470 (1952). Furthermore, Washington appellate courts, including this Court, have repeatedly held that assignments of claims for damages are permitted, *even when expressly prohibited by a contract*. This rule applies both to assignments of insurance claims and general contractual assignments.

Nonetheless, WCRP and AIG claim the settlement and assignment violate WCRP's formation and governing Interlocal Agreement. In particular, WCRP and AIG contend that Article 21 of the WCRP Interlocal Agreement barred the assignment of claims for damages under WCRP's *entirely separate insurance policies*. In reality, the plain and much more limited language of Article 21 provided as follows:

No *county* may assign any right, claim, or interest it may have *under this Agreement*. No creditor, assignee, or third-party beneficiary *of any county* shall have any right, claim or title *to any part, share, interest, fund, premium or asset of the Pool*.

CP 4736.

WCRP and AIG disregard the plain language of Article 21, which does not even purport to limit the assignment of claims for damages arising under the *separate WCRP insurance policies*. In addition, *neither Slagle nor AIG are signatories to the WCRP Interlocal Agreement*. Slagle is a separate named insured under all of the policies at issue, and the policies expressly give him separate and independent rights from those of

the County. *E.g.*, CP 1037. Accordingly, even if the Interlocal Agreement did apply to claims for damages under an insurance policy, which by its own terms it does not, Slagle is not bound by terms to which he never agreed. Similarly, because AIG is not a signatory to the Interlocal Agreement, it cannot seek to enforce its inapplicable anti-assignment provision.

Finally, because WCRP breached its duty to defend, it is estopped to deny the validity of the assignment.

For all of these reasons, this Court should affirm the validity of the assignment.

*1. Washington Appellate Courts Have Repeatedly Authorized the Assignment of Claims for Damages that Have Already Accrued, Even When Specifically Prohibited by Contract.*

An insured that has been denied coverage by their insurer may settle the underlying case and assign a claim for damages to the Plaintiff, “even though a policy specifically prohibits assignments.” *Public Utility Dist. No. 1 of Klickitat County v. Int’l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994) (“After a loss has occurred and rights under the policy have accrued, an assignment may be made without the consent of the insurer, even though the policy prohibits assignments”). In *Public Utility Dist. No. 1*, this Court considered whether an assignment of a claim for damages by an entity insured by a risk pool was valid despite contractual language that

purported to limit such assignments. Relying upon decades of precedent, this Court concluded that such assignments are permitted:

The plaintiffs argue, however, that *even though a policy specifically prohibits assignments*, an assignment of a claim, a cause of action, or proceeds may nonetheless be valid if made after the events giving rise to liability have already occurred when the assignment is made. *We agree* and affirm the trial court's summary judgment on the validity of the assignments.

The purpose of a no assignment clause in an insurance contract is to protect the insurer from increased liability. After the events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity. The assignments in this case occurred long after the activities giving rise to liability.

*Id.* (emphasis added) (citing *Kiecker v. Pacific Indem. Co.*, 5 Wn. App. 871, 877, 491 P.2d 244 (1971) (“After a loss has occurred and rights under the policy have accrued, an assignment may be made without the consent of the insurer, even though the policy prohibits assignments.”); *Kagele v. Aetna Life & Cas. Co.*, 40 Wn. App. 194, 197, 698 P.2d 90 (1985) (“[I]t is well established that a claim by an insured against his insurer may be assigned to the injured party.”).<sup>15</sup>

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<sup>15</sup> Although this Court need not look outside Washington, it bears noting that Washington is in accord with the vast majority of courts permitting post-loss assignment without consent of the insurer. *See ABAB, Inc. v. Starnet Ins. Co.*, No. CIV-12-461-D, 2014 WL 5448887, at \*2-3 (W.D. Okla. Oct. 22, 2014) (summarizing majority and minority approach). This rule is based on the notion that after an insured loss occurs and gives rise to the insurer's liability, the insurer's risk is not increased by a change in the identity of the party to whom payment is to be made. *See Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 683 (Ky. 2012).

Significantly, the *PUD No. 1* case involved settlements and assignments by a *risk pool*, its members and their individual employees of their respective insurance claims, just as the County & Slagle have done in the present case:

The plaintiffs in these cases consist of 10 Washington Public Utility Districts (the PUDs), several employees and commissioners of the PUDs . . . (the individuals), and the Washington Public Utilities Districts' Utility System (WPUDUS). *WPUDUS, of which the PUDs are members, is an unincorporated association of public utility districts that formed a joint agreement to self-insure and to purchase additional insurance.*

\*\*\*\*

Settlement in the MDL 551 litigation was achieved in stages and involved several intermediate rulings by the court. As settlement progressed, *the individuals were released from the MDL 551 litigation after negotiating a settlement under which they assigned a percentage of the face value of their insurance policies to the MDL 551 claimants and a smaller percentage to the PUDs, the individuals' employers. The PUDs subsequently negotiated a separate settlement with the MDL 551 claimants* under which the PUDs (who are plaintiffs in the present case) paid the claimants more than \$90 million (substantially less than originally demanded by the claimants), *and in exchange, the claimants assigned their percentage of the insurance proceeds they had received from the individuals.*

*Id.* at 793-95 (emphasis added).

This *PUD No. 1* Court unequivocally held that assignments of claims for damages by risk pool insureds are valid *as a matter of law* if made after the events giving rise to those claims have already occurred.

This rule serves to protect insureds that have been denied insurance coverage from potentially catastrophic liability without increasing the liability exposure of the insurer because the claim for damages accrued prior to the assignment. *Id.* In the present case, as expressly authorized in *PUD No. 1*, the County & Slagle assigned claims for damages against their insurers to Davis & Northrop, CP 1164-1216. Here, just as in *PUD No. 1*, the events giving rise to these claims for damages accrued before the assignment of claims. *See, e.g.*, CP 4207-08.

Even if this Court were to apply general principles of contract (as opposed to insurance law), a general claim for damages is assignable even though the contract contained a prohibition of assignment. As a general matter, “[a]nti-assignment provisions are to be narrowly construed.” 224 *Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 717, 281 P.3d 693, 703 (2012) (citing *Burleson v. Blankenship*, 193 Wash. 547, 549, 76 P.2d 614 (1938)). Thus, in *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 829-30, 881 P.2d 986 (1994), this Court held that “a general assignment clause, one directed at performance of the contract, does not, after performance is completed, prohibit the assignment of a cause of action for breach of contract.” Citing *Portland Elec. & Plumbing Co. v. City of Vancouver*, 29 Wn. App. 292, 294, 627 P.2d 1350 (1981) (quoting 3 Samuel Williston, *Contracts* § 412, at 46-47

(3d ed. 1960)). The rule applied here, in either the insurance or general contract context, would again validate the post-performance assignment to Davis & Northrop.

Thus, whether applying Washington insurance law, or even general contract law, the trial court erred in failing to recognize and apply this Court's holding in *PUD No. 1* and *Berschauer* to validate the County & Slagle's assignment of already accrued claims for damages.

2. *The WCRP Interlocal Agreement Does Not Limit the Assignment of Claims for Damages Under the Separate WCRP and AIG Insurance Policies.*

Even if Washington law did not expressly permit the assignment of claims for damages after they have accrued, which it does, the WCRP Interlocal Agreement does not limit the assignment of claims for damages under the *separate WCRP insurance policies*. Rather, Article 21 is specifically limited to the assignment of any "right, claim, or interest it may have *under this [Interlocal] Agreement.*" CP 4736; *see also* CP 8485-86. The provision does not extend to claims for damages arising under the entirely separate annual insurance policies that were issued to the County & Slagle. Indeed, both the WCRP Interlocal Agreement and WCRP insurance policies contain integration clauses confirming that they are distinct documents giving rise to different rights, claims, and interests. CP 1038, 1048, 1060, 1072, 1082-1083, 1093, 1105, 1116, 4724.

The Interlocal Agreement governs matters such as the formation and purpose of WCRP (Article 2), the composition of WCRP membership (Article 5), the powers of WCRP (Article 7), and governance of WCRP (Article 8). *See* CP 8485-86. But Davis & Northrop are not claiming the right to become members of WCRP, to designate a representative to the WCRP Board of Directors, or to participate as insureds in the WCRP insurance programs. *See id.*

The County & Slagle did not assign any of these rights, claims or interests provided under the Interlocal Agreement to Davis & Northrop. CP 1164-1216, 8486. Instead, the County & Slagle assigned claims for damages arising from the wrongful denial of defense and indemnity coverage under the separate and distinct annual occurrence-based insurance policies issued by WCRP and AIG.

Setting aside the fact that Washington law expressly permits assignment of claims for damages even where prohibited by contract, on the face of the documents alone, the trial court erroneously concluded that Article 21 of the WCRP Interlocal Agreement operated to bar the assignment of claims for damages under the separate insurance policies issued by WCRP and AIG. As a result, the trial court erred in granting WCRP's motion for declaratory judgment invalidating the assignment and

denying the County & Slagle's motion for partial summary judgment against AIG regarding the assignment.

3. *WCRP is Estopped to Contest the Assignment.*

Where, as here, an insurer “wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion.” *Truck Ins.*, 147 Wn. 2d at 765-66. In other words, an insurer that refuses to defend in bad faith is estopped from denying coverage. *Id.* at 759.

As a result, “an insured defendant may independently negotiate a pretrial settlement if the defendant's liability insurer refuses in bad faith to settle the plaintiff's claims.” *Bird*, 175 Wn. 2d at 764 (citing *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002)):

As happened in this case, the typical settlement agreement involves three features: (1) a stipulated or consent judgment between the plaintiff and insured, (2) a plaintiff's covenant not to execute on that judgment against the insured, and (3) an assignment to the plaintiff of the insured's coverage and bad faith claims against the insurer.

*Bird*, 175 Wn.2d at 764-65 (citing *Besel*, 146 Wn.2d at 736-38; Thomas V. Harris, *Washington Insurance Law* § 10.02, at 10-3 (3d ed. 2010)).

The agreement entered in the present case contains each of these components approved by this Court – a stipulated judgment between Davis & Northrop (plaintiff) and the County & Slagle (insureds), CP 1166; a covenant not to execute, CP 1167-68; and an assignment of

coverage and bad faith claims by the County & Slagle, CP 1167. The agreement was the product of arms-length “tooth and nail” negotiations. CP 8503, 8506. WCRP was offered numerous opportunities to defend the Underlying Case, and each time it declined to defend, even under a reservation of rights.<sup>16</sup> Furthermore, it did not seek declaratory relief until after being informed the Underlying Case had settled. *See* CP 1164-1216, 8511. WCRP cannot now second guess the decision the County & Slagle made “to avoid a catastrophic jury verdict that would have buried this county financially.” CP 8512.

**D. The Trial Court Erred in Awarding Attorney’s Fees against the County & Slagle.**

Following its rulings on summary judgment, the trial court also ruled that WCRP was entitled to an award of attorney’s fees against the County & Slagle based on Article 22 of the Interlocal Agreement. CP 9854. The fees ruling should be reversed because for the reasons stated above the trial court’s grants of summary judgment to WCRP and AIG were erroneous. Nonetheless, even if this Court affirms those summary judgment rulings in whole or in part, there is no basis for a fee award against the County & Slagle.

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<sup>16</sup> WCRP acknowledges it can defend a matter under a reservation of rights and has done so before. CP 8325, 8370.

Article 22 of the WCRP Interlocal Agreement provides only for the recovery of reasonable attorney fees and costs in an “action instituted to enforce any term” of the Interlocal Agreement. CP 4736. It does not provide attorney’s fees for defending or prosecuting an insurance coverage dispute, from which the vast majority of WCRP’s claimed \$1 Million in attorney fees and expenses arose. CP 9945. While WCRP may contend it sought to enforce the assignment clause of the Interlocal Agreement, it cannot show how the fact of the assignment necessitated incurring any attorney’s fees, since WCRP also disputed the fact of coverage regardless of who owned the claims against it. This Court should, therefore, deny WCRP’s attempt to use the Interlocal Agreement to recover attorney’s fees for coverage disputes with policyholders.<sup>17</sup>

**E. The County & Slagle are Entitled to Attorney’s Fees and Expenses on Appeal.**

The County & Slagle are entitled to their reasonable attorney’s fees and expenses associated with their efforts to obtain coverage. *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991). Here, WCRP and AIG refused to defend or indemnify the County & Slagle. When the County & Slagle entered into a settlement, WCRP

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<sup>17</sup> The reasonableness and amount of fees were not addressed prior to this Court’s acceptance of review. The County & Slagle reserve the right to address those issues on remand if necessary.

and AIG refused to contribute and instead immediately went to court to challenge the settlement. In particular, WCRP and AIG contested the validity of the County & Slagle's assignment to Davis & Northrop, bringing the County & Slagle into this case and ultimately obtaining a trial court ruling invalidating the assignment. This ruling left the County & Slagle as necessary parties to the prosecution of this appeal, and entitles them to fees and expenses should they prevail. *See, e.g., Wolf v. League Gen. Ins. Co.*, 85 Wn. App. 113, 122, 931 P.2d 184 (1997) (awarding *Olympic Steamship* fees and expenses on appeal). The County & Slagle are also entitled to fees and expenses because WCRP sued the County & Slagle and sought fees against them based on the Interlocal Agreement. *See* CP 9048-9504, 9944-10475. Although the County & Slagle dispute that WCRP is entitled to any relief under the Interlocal Agreement, in the event the County & Slagle obtain reversal of the trial court's rulings, they would be entitled to fees and expenses pursuant to RCW 4.84.330.

On both of these grounds, and pursuant to RAP 18.1, the County & Slagle respectfully request their fees and expenses incurred on appeal as well as those incurred below.

## V. CONCLUSION

Like hundreds of Washington public entities and their tens of thousands of employees, the County & Slagle relied upon insurance purchased through a risk pool based upon the representation that it was subject to the protections of Washington law. Instead of honoring that

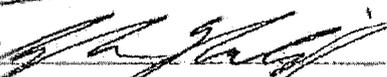
insurance, WCRP and AIG after receiving notice of the claims in this case concocted a "choice of law" scheme in an effort to strip away these protections and provide themselves with the ability to retroactively select and apply whatever law they deemed appropriate. As set forth above, this *post hoc* scheme is directly contrary to Washington appellate authority, WCRP and AIG's own documents, and WCRP's 25 year practice of applying Washington's insurance common law to its own policies. The trial court erred in ruling that WCRP and AIG are not bound by Washington law, and that WCRP did not breach its duty to defend. Moreover, the trial court erred in ruling that the County & Slagle's covenant judgment settlement and assignment of claims was invalid. This Court should reverse the trial court's grants of summary judgment to WCRP and AIG. This Court should also hold that WCRP and AIG are bound by Washington law, that WCRP breached its duty to defend, and that the County & Slagle's assignment to Davis & Northrop is valid.

RESPECTUFLY SUBMITTED this 15<sup>th</sup> day of October, 2015.

CLARK COUNTY PROSECUTING  
ATTORNEY

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By

  
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By

  
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Clark County & Donald Slagle*

# APPENDIX A



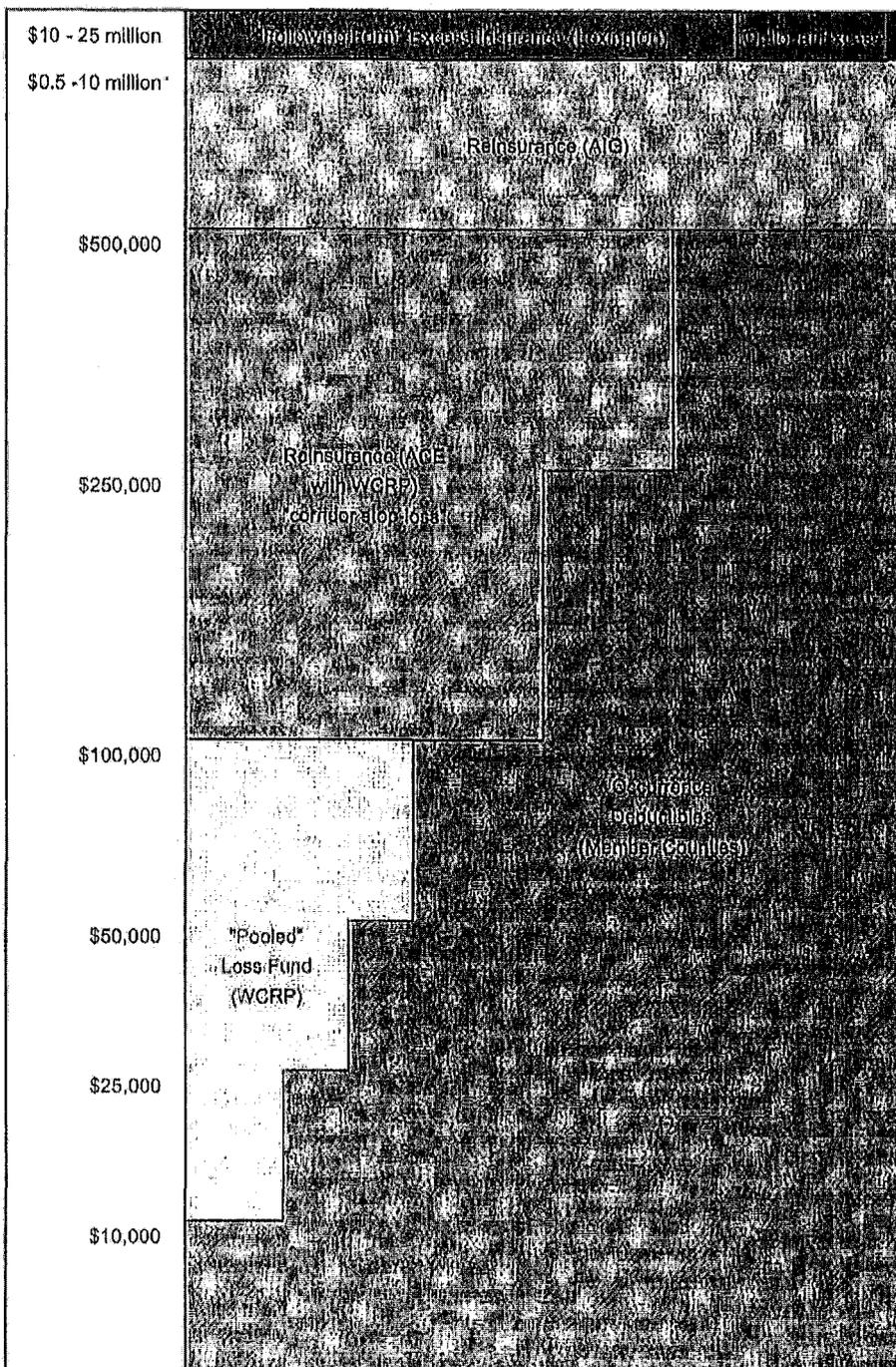
# Washington Counties Risk Pool

## SUMMARY OF 2007-08 LIABILITY INSURANCE PROGRAM

The Washington Counties Risk Pool provides its member counties with liability insurance limits of \$20 million (optional \$25 million limit) per occurrence. Subject to the county-selected deductible, included is \$10 million in joint self-insured coverage plus \$10 (or \$15) million in "following form" excess coverage.

Member counties select an occurrence deductible each policy year of either \$10,000, \$25,000, \$50,000, \$100,000, \$250,000 or \$500,000. There are no annual aggregate limits to the payments the Pool might make for any one member county or all member counties combined.

The insuring document for the Pool's joint self-insurance liability policy covers bodily injury, personal injury, property damage, errors and omissions, and advertising injury.



# APPENDIX B

# STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

601 Union Street, Suite 3100 Seattle, WA 98101-1374 TEL (206) 623-9900 FAX (206) 624-6885

January 22, 2009

Mr. Brian Kelly, CPCU, ARe  
Swiss Reinsurance America Corporation  
175 King Street  
Armonk, NY 10504

Re: Broyles v. Thurston County  
SRA No. 2120352  
WCRP No. TH2002000234  
DOL 10/1/02  
Our File No. 5964-026609

Dear Mr. Kelly:

Susan Looker asked us to respond to your January 7, 2009 email while she was out of the office this past week. Before we respond to the specific questions raised in your email, and at the risk of repeating previous WCRP reports to Swiss Re, the following provides a factual background to the Broyles lawsuit and the Pool's handling thereof.

The initial lawsuit in *Broyles v. Thurston County* was filed in 2002. Several deputy prosecuting attorneys alleged that over several years, Thurston County and its employees created a hostile working environment which led to the wrongful discharge of the plaintiffs. Based on the allegations in that lawsuit, the Pool assigned a date of loss for this lawsuit for defense costs to the 2000 policy year. After several months of litigation, this original lawsuit was dismissed. At the time of dismissal, only the initial \$250,000 deductible and the second \$250,000 reinsurance layer underwritten by Swiss Re had been implicated.

The current *Broyles v. Thurston County* lawsuit was filed in May 2004. In September 2004, the Pool agreed to provide a defense under a reservation of rights, but because the second lawsuit involved alleged misconduct spanning three policy periods, the Pool informed Thurston County that three separate occurrences were involved and that therefore, three separate \$250,000 deductibles would need to be paid. Thurston County appealed this coverage decision to the Executive Committee of the Pool.

After a hearing on December 15, 2004, the Executive Committee reversed the Pool's initial decision. This decision was based upon the Executive Committee's recognition that the second lawsuit alleged liability on the part of Thurston County for the "continuous or repeated exposure to substantially the same conditions" and Washington law establishing that the number of occurrences for insurance purposes is determined by the number distinct causes of alleged damages. See *Greengo v. Public Employees Mutual Ins. Co.*, 135 Wn.2d 799 (1990). The Broyles plaintiffs had alleged a single underlying cause of their damages that happened to extend over multiple policy periods. Therefore, the Executive Committee determined that the allegations constituted a single occurrence for purposes of calculating the deductible owed for the defense of the matter.

Having determined that there was only a single occurrence alleged in the 2004 lawsuit for purposes of applying a single \$250,000 deductible, the Executive Committee then assigned a date of loss for this second lawsuit to October 1, 2002. The Pool based this decision on the allegations in the second complaint, which asserted a single course of misconduct over the course of multiple policy periods. This was explained in the Pool's December 29, 2004 letter, long before there was any reason to expect that Swiss Re's second layer would be implicated.

The Pool then proceeded with the defense of the second *Broyles* lawsuit. Since Swiss Re had already funded the second \$250,000 reinsurance layer in connection with the first lawsuit which was assigned a 2000 date of loss and since Swiss Re had also underwritten the second \$250,000 reinsurance layer for 2002 policy year, the Pool determined that Swiss Re had fulfilled its second layer reinsurance obligations for the 2002 policy year and notified AIG of possible penetration for the second *Broyles* lawsuit in its third layer (\$4.5 Million excess of \$500,000) reinsurance certificate. AIG accepted the Pool's decision to assign a 2002 date of loss to the second *Broyles* lawsuit and agreed to fund its third layer of reinsurance (\$4.5 Million excess of \$500,000).

The *Broyles* lawsuit proceeded to trial. The jury awarded a significant verdict against Thurston County that not only implicates the third layer of reinsurance but also a portion of the fourth layer (\$10 Million excess of \$5 Million). Thurston County appealed the trial court's judgment based on the jury verdict, but the Washington Court of Appeals recently affirmed. One of the key issues on appeal was whether evidence of specific misconduct occurring outside the statute of limitations was admissible to prove a single ongoing claim of hostile work environment, including conduct into 2002 policy year. The Court of Appeals agreed that such earlier misconduct was admissible as part of one unlawful employment practice even if there is a two year gap in events.

As you know, the Pool and Thurston County recently decided to settle the *Broyles* lawsuit. The settlement amount penetrates the Swiss Re 2002 reinsurance

layer by \$986,000. Your January 7, 2009 email followed the Pool's invoice for this amount.

Your email asks whether the Pool's decision to assign an October 1, 2002 date of loss to the second Broyles lawsuit was made to retroactively enforce policy language added in the 2004 policy year. As discussed above, the answer to this question is "No." Though the assignment of this date was consistent with a language change made to the 2004 policy, the Pool did not simply apply this language change retroactively. Rather, having decided because of Thurston County's appeal that only one occurrence would apply for purposes of the duty to defend, the Pool then looked at the appropriate policy period for purposes of its ultimate duty to indemnify. Though mindful that under Washington law, the duty to indemnify is determined by the facts as resolved either by settlement or trial, the Pool understood that if conduct giving rise to liability occurred in any particular policy period, that policy period could be triggered for indemnification purposes. Because the second Broyles lawsuit (as opposed to the first lawsuit) asserted liability against Thurston County based in part on conduct in the 2002 policy period, and because at that time, Thurston County believed that the statute of limitations would bar liability arising from conduct occurring in the 2000 policy year, the Pool chose to assign a date of loss to the 2002 policy year.

Since choosing to assign a 2002 date of loss to the second Broyles lawsuit, at least two events have occurred justifying that decision. First, in affirming the trial court's judgment based on the jury verdict, the Washington Court of Appeals recognized that conduct occurring during the 2002 policy year gave rise to Thurston County's liability.<sup>1</sup> Second, the court issued its opinion in *In Re Feature Realty Litigation*, 2006 WL 3692649 (2006). In this case, the Court was asked to determine whether an insurer had a duty to indemnify its insured for liability arising from wrongful acts committed during the policy period. The insurer argued that the liability for which the insured entered into a settlement agreement was based on wrongful acts committed before the insurer's policy period. Like the Court of Appeals in *Broyles v. Thurston County*, the court in *Feature Realty* held that the liability resolved by the settlement was based on a single continuous wrongful act occurring over several policy periods and because some of the conduct giving rise to liability occurred during the insurer's policy period, the duty to indemnify was triggered.

We hope this clears up any misunderstanding Swiss Re has over the Pool's decision to assign a 2002 year to the second Broyles lawsuit. Please feel free to contact me or Susan Looker if you have any additional questions.

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<sup>1</sup> It should be noted that it wasn't until the jury verdict that the Pool had any concern about the "Ultimate Net Loss" reaching the second Swiss Re layer of reinsurance.

Mr. Brian Kelly  
January 22, 2009  
Page 4

Sincerely,



J. William Ashbaugh

JWA/jwa

cc: Ms. Susan Looker  
Mr. A. Richard Dykstra

## EXHIBIT 2

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January 26, 2012

Mr. Stephen Skinner  
Andrews Skinner, P.S.  
645 Elliott Ave. W., Suite 350  
Seattle, WA 98119

Re: *Case, et al v. Clallam County*  
Jefferson County (WA) Superior Court Case No. 09-2-00072-6  
Reinsurance Certificate No. 8766791  
Policy No. 0607 Risk Pool-XCO

Dear Mr. Skinner:

Since it appears that Chartis/Insurance Company of the State of Pennsylvania ("ISOP") continues to assert that the above-referenced lawsuit triggers more than one occurrence and that such occurrences took place during more than one Washington Counties Risk Pool ("WCRP") Joint Self-Insurance Liability Policy ("JSILP") period, the Pool provides the following last explanation of its position (before any arbitration) and urges Chartis/ISOP to reconsider its position.

### **FACTUAL BACKGROUND**

#### **Facts Known to WCRP at time of Clallam County's Tender of Tort Claim Notice**

Robin Porter was terminated by Clallam County in February 2007. Plaintiff Kathy Nielsen resigned her position in June 2007. In October 2006, plaintiff Elaine Sundt complained to her superiors about disparate treatment. On September 21, 2007, plaintiff Carol Case's attorney wrote a letter to the Clallam County Prosecuting Attorney that stated:

Ms. Case has provided me with background information regarding her recent experiences in the workplace. These raise significant and serious issues of gender and age discrimination, as well as retaliation. A number of current and former employees have spoken to Ms. Case about their own experiences of inappropriate and unprofessional treatment. My understanding is that you have delegated considerable responsibility for personnel management to your Chief Deputy, Mr. Mark Nichols. Ms. Case has not been treated appropriately by Mr. Nichols. There is reason to believe that she is not alone in this regard.

WCRP 045906

Attached as Exhibit 1 hereto is a true copy of this letter. As will be explained below, under Section 1.D of the applicable JSILP, this letter requires that the date of the single occurrence raised by this lawsuit be placed in the 2006-2007 time period.

### **The Allegations in Plaintiffs' Tort Claim Notice**

The four plaintiffs filed a single Notice of Claim with Clallam County on September 30, 2008. The Notice of Claim contains the following allegations:

Claimants were and are employees of the Clallam County Prosecutor's Office and have been subjected to continuous, ongoing, and repetitive discrimination on the basis of age and/or disability and also have been subjected to an extremely hostile and unprofessional work environment because of age and/or disability. Attempts to improve the situation have been met with hostility, retaliation and adverse employment actions.

\* \* \*

The constant and ongoing harassment, discrimination and disparate treatment based upon age and/or disability resulted in a hostile work environment.

\* \* \*

This conduct has made working within the hostile work environment of the Clallam County Prosecuting Attorney's Office extremely difficult, and in some instances, intolerable. Claimants have suffered from ongoing discrimination, emotional distress, mental anguish, fatigue, anxiety, psychological and emotional stress, physical and mental harm and other general damages.

### **The Allegations in Plaintiffs' Complaint**

The four plaintiffs filed a single Complaint that alleges a single cause of action for discrimination and retaliation under the Washington Law Against Discrimination ("WLAD"). Specifically, all plaintiffs claim discrimination in the form of disparate treatment, including wrongful discharge (except for Ms. Nielsen who claims constructive discharge because she actually resigned), and hostile work environment harassment based on age and retaliation for their complaints regarding the alleged discrimination. Only Case adds a further basis for discrimination – disability. The plaintiffs' claims are based on the WLAD, RCW 49.60.180, which provides in pertinent part:

It is an unfair practice for any employer. . . [t]o discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental or physical disability or the use of a trained dog guide or service animal by a person with a disability.

Plaintiffs claim age and disability discrimination under this statute in the form of disparate treatment and/or hostile work environment harassment.

Specific allegations in the plaintiffs' complaint include the following:

**Paragraph 10**

[Defendant] treated Plaintiffs and other women in a hostile, demeaning and condescending manner. Plaintiffs were subjected to intimidation, offensive comments, and/or conduct, a hostile work environment and disparate treatment because of their age.

**Paragraph 12**

Plaintiffs voiced their concerns about what they believed to be illegal discrimination to the County, including complaints about the disparate treatment and the hostile work environment they and others had experienced within the Prosecutor's Office.

**Paragraph 21**

Plaintiffs have been subjected to a continuing pattern and practice of age and/or perceived disability discrimination, including disparate treatment and a hostile work environment, in violation of RCW 49.60.180.

**APPLICABLE JSILP PROVISIONS**

The applicable Joint Self-Insurance Liability Policy ("JSILP") obligates the Risk Pool to pay on behalf of the named insured, subject to the terms and conditions of the JSILP,

"all sums of monetary damages which an insured shall become obligated to pay by reason of liability imposed by law or by reason of liability assumed under an insured contract for **bodily injury, personal injury, property damage, errors and omissions, and advertising injury**, caused by an **occurrence** during the policy period and occurring anywhere in the world, but only if a suit arising out such occurrence is brought in the United States or Canada."

"Monetary damages" are defined in Section 1(A) of the JSILP to include:

"All judgments, settlements, defense costs, and expenses incurred by the Pool, all costs taxed against the insured in any suit defended by the Pool, and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the Pool has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the Pool's liability thereon.

**Bodily injury** means physical trauma, sickness, disease or shock sustained by any person which occurs during the policy period, including death at any time resulting therefrom and, if arising out of the foregoing, mental anguish and emotional injury.

**Errors and omissions** means "any error, misstatement, misleading statement or act or omission, neglect or breach of duty committed attempted by an insured."

**Occurrence** means an **accident**, including continuous or repeated exposure to substantially the same conditions, which results in **bodily injury or errors and omissions**.

An occurrence that takes place during more than one policy period will be deemed for all purposes to have taken place during the last policy period in which any part of the occurrence took place, and shall be treated as a single occurrence during such policy period. *No occurrence will be deemed to have taken place after the insured has knowledge of the alleged bodily injury, property damage, personal injury, errors and omissions, or advertising injury that gave rise to the occurrence.*<sup>1</sup>

- A. The total limit of liability of the pool for Monetary damages resulting from any one occurrence shall not exceed Ten Million Dollars (\$10,000,000). This shall be true regardless of:
1. The number of persons or organizations who are insureds under this policy;
  2. The number of coverages provided under this policy;
  3. The number of claims made and suits brought against any or all insureds;  
and
  4. The number of persons or organizations making claims or bringing suits.
- B. In determining the limit of liability of the Pool, all injuries, damages and losses arising out of continuous or repeated exposure to substantially the same general conditions will be considered as arising out of one occurrence.

#### LAW GOVERNING DETERMINATION OF THE OCCURRENCES

Under Washington law, the number of occurrences is based upon the number of "causes" of an event or damage. In *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799 (1998), the court explained Washington's approach:

Under our approach if each accident, collision, or injury has its own proximate cause then each will be deemed a separate "accident" for insurance policy purposes even if the two accidents occurred coincident, or nearly coincident, in time. For example, in *Liberty Mut. Ins. Co. v. Rawls*, 404 F.2d 880 (5th Cir.1968), the Fifth Circuit found

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<sup>1</sup> Emphasis added. This is Section 1.D of the applicable JSILP.

two separate accidents where one car was involved in two collisions two to five seconds apart and 30 to 300 feet apart. If, however, the collisions or injuries were all caused by a single, uninterrupted proximate cause, then the multiple collisions or injuries will be deemed a single accident. Two Washington cases outline our approach and control our analysis.

In *Truck Ins. Exch. v. Rohde*, 49 Wash.2d 465, 303 P.2d 659, 55 A.L.R.2d 1288 (1956), the insured was driving his car and veered across the median into the oncoming lane where he struck, in quick succession, three motorcycles riding in echelon formation. The trial court found there were three separate "accidents" for insurance purposes. This court reversed, concluding there was but one accident. This court based its holding on a finding that there was but one proximate cause for all three collisions, the driver's negligence in losing control and veering across the median. *Id.* at 471, 303 P.2d 659 ("There was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.").

In *Transcontinental Ins. Co. v. Public Utils. Dists.*, 111 Wash.2d 452, 760 P.2d 337 (1988), the issue was whether a set of losses following a bond default by a public utility district (PUD) constituted a single occurrence or accident for insurance policy purposes. The PUD alleged there was more than one proximate cause to the losses and, therefore, more than one accident or occurrence for insurance purposes. *Id.* at 466, 760 P.2d 337. This court agreed and held that if the PUD's allegations were correct then there would be more than one accident or occurrence for insurance purposes. *Id.* *Transcontinental* explained the collisions in *Rohde* "resulted from one proximate, uninterrupted cause, the driver's loss of control, [and thus] only one occurrence took place." *Transcontinental*, 111 Wash.2d at 466, 760 P.2d 337 (citing *Rohde*, 49 Wash.2d at 471, 303 P.2d 659). *Transcontinental* thus articulated the rule: "[T]he number of triggering events [for insurance policy purposes] depends on the number of causes underlying the alleged damage and resulting liability." 111 Wash.2d at 467, 760 P.2d 337. We reaffirm and follow this approach today.

More recently, the Washington Court of Appeals addressed this issue in the context of a dispute between liability insurers over responsibility for payment of a \$5 Million settlement of a construction defect claim. *Certain Underwriters at Lloyd's v. Valiant Ins. Co.*, 155 Wn.App. 469, 229 P.3d 930 (2010) involved an underlying construction defect claim brought by the developer of a condominium project against the general contractor. The allegations in the underlying litigation involved water intrusion damage over a number of years made possible by numerous deficiencies by various trades in multiple different locations. After funding the settlement, Underwriters – a primary insurer who also took an assignment from an excess liability insurer – brought suit against Valiant, arguing that Valiant's "anti-stacking" clause limiting its liability to one policy limit per "occurrence" did not apply because there were multiple "occurrences." Underwriters argued that there had been multiple causes of the water damage – and thus multiple "occurrences" under Washington law – because the damage took place over a number of years and resulted from numerous deficiencies by various trades in multiple different locations. Both the trial court and the

Court of Appeals disagreed. Relying on Valiant's definition of "occurrence" (virtually identical to WCRP's definition) which included "continuous and repeated exposure to substantially the same general harmful conditions." the court reasoned:

The continuous and repeated exposure of [the condominium] to harmful moisture that gradually intruded through the building envelope over a five-year period from different sources fits this definition

229 P.3d at 932.<sup>2</sup>

*Mead Reinsurance v. Granite State Ins. Company*, 873 F.2d 1185 (9<sup>th</sup> Cir. 1989) is also particularly instructive. In this case, the City of Richmond, California incurred liability, or was potentially liable, under 42 USC § 1983 in twelve lawsuits alleging numerous civil rights violations. The lawsuits involved different claimants, different police officers and actions occurring at different times. The alleged civil rights violations occurred during the policy periods of the plaintiff and defendant insurers. Both the plaintiff insurer and the defendant insurer issued general liability policies to the City from 1979 through 1983. The plaintiff's policy provided for a limit of nine hundred thousand (\$900,000) dollars per occurrence for "net claims," which exceeded the City's one hundred thousand (\$100,000) dollar self-insured retention limit. The defendant policy provided coverage of five million. The issue in the case was how many "occurrences" gave rise to the twelve separate lawsuits. The defendant insurer argued that there were multiple "occurrences" because the separate complaints arose from different police actions, resulting in different injuries and involved different plaintiffs. The court first looked to the definition of "occurrence" which included "damage arising from repeated exposure to substantially the same general conditions," and held that under this definition an ongoing harmful condition may constitute a single occurrence. *Id.* at 1187. The court then ruled that the eleven lawsuits arising out of allegations of excessive force on the part of police all arose out of one occurrence, regardless of the different injuries and different plaintiffs, because they arose out of a single municipal policy of condoning excessive force.

Similarly, in *Transport Insurance Co. v. Lee Way Motor Freight, Inc.*, 487 F.Supp. 1325 (USDC N.D. Tex. 1980), the issue was whether a racial discrimination lawsuit on behalf of numerous plaintiffs constituted single "occurrence". The lawsuit alleged a pattern and practice of racial discrimination at each of the insured's four locations of business. The court was asked to determine whether there was a single "occurrence", four "occurrences" based on the number of business locations or multiple "occurrences" based on the number of people who claimed discrimination. The court, interpreting an "occurrence" definition substantially similar to the WCRP definition, held that there was only a single "occurrence." The court reasoned that the

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<sup>2</sup> In *Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008), an employment discrimination case against a WCRP member, one of the key issues on appeal was whether evidence of specific misconduct occurring outside the statute of limitations was admissible to prove a single ongoing claim of hostile work environment, including conduct into 2002 policy year. The Court of Appeals agreed that such earlier misconduct was admissible as part of one unlawful employment practice even if there is a two year gap in events.

"discriminatees" were exposed to the same general condition of firm-wide discrimination, albeit at different times and places. *Id.* at 1329.

Finally, in *Appalachian Insurance Company v. Liberty Mutual Insurance Company*, 676 F.2d 56 (3<sup>rd</sup> Cir. 1982), the court held that the underlying employment discrimination case brought by multiple plaintiffs for involved only a single "occurrence" under the insured defendant's liability policy. Applying the general rule (also followed in Washington) that an occurrence is determined by the number of cause or causes of the resulting injury, the court held that because the alleged injuries all stemmed from a common source – the insured's discriminatory employment policies – only a single "occurrence" was involved. *Id.* at 61.

### Application of Law to Facts

Washington follows the majority rule in the United States: the determination of the number of occurrences depends on the number of causes of the injuries. In this case, like the courts held in the similar discrimination cases, *Mead Reinsurance v. Granite State Ins. Company*, *Transport Insurance Co. v. Lee Way Motor Freight, Inc.*, and *Appalachian Insurance Company v. Liberty Mutual Insurance Company*, the application of the majority rule requires the conclusion that the plaintiffs' lawsuit herein asserts only a single occurrence under the Pool's JSILP. The plaintiffs' Notice of Claim alleges "continuing, ongoing and repetitive discrimination", nearly tracking both the definition of "occurrence" in the applicable JSILP and the provision in the JSILP that governs the determination of the limit of liability. Their complaint asserts a single claim for relief under a single statute, RCW 49.60.180, and alleges that plaintiffs have been subjected to a "continuing pattern and practice" of age and/or perceived disability discrimination.

### TIMING OF SINGLE OCCURRENCE

The language of the applicable JSILP requires that the single occurrence triggered by the plaintiffs' claim in this case be placed within the October 1, 2006 through September 31, 2007 time period. Under Section 1.D of the JSILP:

**No occurrence will be deemed to have taken place after the insured has knowledge of the alleged bodily injury, property damage, personal injury, errors and omissions, or advertising injury that gave rise to the occurrence.**

Elaine Sundt complained about disparate treatment in October 2006. Robin Porter (whose estate is represented by Hollie Hutton) was discharged in June 2007. Kathy Nielsen resigned (allegedly because of discrimination) in June 2007. Elaine Case retained an attorney who wrote of alleged discrimination as to Case and other women on September 21, 2007. This letter is attached hereto as Exhibit A. Applying Section 1.D to these facts mandates the placement of the single occurrence triggered by this litigation in the 2006-2007 time period. By no later than September 21, 2007 (within the October 1, 2006 – October 1, 2007 JSILP period), Clallam County knew that Carol Case and other women in its office were complaining of discrimination. Under Section 1.D of the JSILP, the Pool was required to place this single occurrence within the 2006-7 period.

### CHARTIS/ISOP'S PREVIOUS PAYMENT OF DEFENSE COST INVOICES

As stated above, the plaintiffs filed their Notice of Claim with Clallam County on September 30, 2008. The Pool appointed defense counsel on October 31, 2008. Since that time, over \$1.7 Million in defense costs have been incurred. Clallam County's \$100,000 deductible was satisfied on March 11, 2009. The first layer reinsurer, ACE, satisfied its \$400,000 layer on November 20, 2009. On November 30, 2009, defense cost invoices were first sent to Chartis. Chartis willingly paid defense costs on numerous occasions without reserving its rights. Between December 2009 and February 2011, Chartis never communicated any concern with the Pool's designation of a single occurrence and the Pool's placement of this occurrence in the 2006-07 time period. Even after it first raised a concern about the number of occurrences in February 2011, Chartis still paid defense cost invoices submitted by the Pool.<sup>3</sup> Chartis' checks issued in payment of defense cost invoices listed a single policy, a single claim number and a single date of loss. Even its September 2, 2011 letter listed only a single overall claim number.

Under New York law,<sup>4</sup> a waiver is the voluntary relinquishment of a known right, which is not created by negligence, oversight or negligence. *Plato General Const. Corp/EMCO Tech Constr. Corp. v. Dormitory Authority of State*, 89 A.3d 819, 825 (N.Y. App. 2011). A waiver may arise by either an express agreement or by such conduct or a failure to act as to evince an intent not to claim the purported right. *Golfo v. Kycta Associates, Inc.*, 45 A.D.3d 531, 533 (N.Y. App. 2007). In *Sumitomo Marine & Fire Ins. Co. v. Cologne Reinsurance Company of America*, 552 N.E.2d 139 (N.Y. 1990) the reinsurers sought to rescind its reinsurance certificate on the basis of an alleged material misrepresentation made by the reinsured at the time the reinsured offered to purchase reinsurance, which offer was accepted by the reinsurers. After the reinsurers' acceptance of the reinsured's offer to purchase reinsurance, a loss occurred which was covered by the reinsured's policy. The reinsured notified the reinsurers of the loss and after receiving this notice, the reinsurers issued their formal certificates of reinsurance to the reinsured. When the reinsured settled the underlying loss and submitted its billing to the reinsurers, they refused, initially claiming that the loss was excluded and much later claiming that at the time the reinsured submitted its offer to purchase reinsurance, it materially omitted the fact that its policy provided coverage for this type of loss.

The court held that in issuing its reinsurance certificate after it knew of the loss and in failing to timely raise its defense of material misrepresentation, the reinsurers had waived any right to assert the defense. 552 N.E.2d at 143-44. Under this applicable law and based on the indisputable facts, Chartis has waived any right to now challenge the Pool's coverage determinations in this regard.

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<sup>3</sup> Attached as Exhibit 2 hereto is true copy of the Pool's ledger showing the dates of submittal and the dates of payment of defense cost invoices to Chartis. As the ledger clearly shows, Chartis continued making payments even after it first raised the coverage issues it now claims require the reimbursement of these same payments.

<sup>4</sup> New York law governs the Charts/Pool reinsurance agreement.

Moreover, Chartis' continued payment of defense cost invoices constitutes a ratification of the Pool's coverage determinations pursuant to its JSILP in that Chartis has both expressly and impliedly adopted the coverage determinations made by the Pool. *See Holm v. C.M.P. Sheet Metal, Inc.*, 455 N.Y.S.2d 429, 432 (N.Y. App. 1982). In addition, the equitable doctrine of estoppel also prevents Chartis from changing its coverage position at this late date. The Pool has relied on Chartis' previous position, and is now substantially prejudiced by Chartis' decision to seek reimbursement of its payment of defense costs. *See Generally, Nassau Trust Co. v. Montrose Concrete Products Corp.*, 451 N.Y.S.2d 663, 667 (N.Y. 1982). Finally, Chartis' attempt to seek reimbursement of its defense costs without having previously reserved its right to do so is contrary to the prevailing law. *See Buss v. Superior Court*, 16 Cal.4<sup>th</sup> 35, 939 P.2d 766 (1997) and its progeny.

#### THE FOLLOW THE FORTUNES CLAUSE IN ISOP'S REINSURANCE TREATY

ISOP's Reinsurance Certificate No. 876-6791 applies to the risks the Pool covers under its 2006-2007 JSLIP document. Section 5 of this certificate contains the pertinent clauses:

##### 5. CLAIMS & SETTLEMENTS . \* \* \*

\* \* \*

All good faith settlements, compromises, and adjustments of claims under the Policy reinsured made by the Company [the Pool], including those involving coverage issues and/or the resolution of whether such claims are required by law, regulation or regulatory authority to be covered (or not to be excluded) thereunder, shall be binding on the Reinsurer. Upon receipt of a proof of loss, the Reinsurer shall immediately pay its share of Loss and/or Expense paid by the Company.

Unless otherwise provided in the Additional Reinsurance Conditions Section of the Declarations, the treatment of Expense shall follow form with the Policy Reinsured.

\* \* \*

The Pool's decision to treat the underlying lawsuit as triggering a single occurrence and placing that occurrence during the 2006-2007 JSLIP year was required by both Washington law and the terms and conditions of the applicable JSILP given the allegations in the Notice of Claim and Complaint and the underlying facts and circumstances. Chartis may have a different interpretation of Washington law, or of the terms and conditions of the applicable JSILP, or of the underlying facts and circumstances of the plaintiffs' claim, but it cannot be disputed that the Pool's determination of these coverage issues on the basis of its review of the law, facts and applicable JSILP language was both reasonable and made in good faith. The ISOP Reinsurance Treaty binds ISOP to all good faith coverage decisions made by the Pool.

The law on this "follow the fortunes" doctrine is well settled. For example, in *Trenwick America Reinsurance Corporation v. IRC, Inc.*, 764 F.Supp.2d 274 (D. Mass. 2011), the court applied the "follow the fortunes" doctrine even in the absence of an express reinsurance contract,

holding that the reinsurer cannot raise coverage defenses that the reinsured has already decided to waive. *Id.* at 282. Similarly, in *American Home Assur. Co. v. Everest Reinsurance Co.*, 90 A.3d 580, 2011 N.Y. Slip. Op. 09537 (N.Y. App. 2011), the court held that a reinsurer will be bound by a settlement agreed to by the ceding company [the reinsured] if it reasonably within the terms of the original policy, even if not technically covered by it. In *Christiana Gen. Ins. Corp. of New York v. Great American Ins. Co.*, 979 F.2d 268 (2<sup>nd</sup> Cir. 1992), the court held that under New York law and the “follow the fortunes” doctrine, a reinsurer cannot second guess the good faith liability determinations made by its reinsured, nor could it question the reinsured’s good faith decisions regarding coverage defenses. *Id.* at 280. See also *Travelers Cas. And Sur. Co. v. Certain Underwriters at Lloyd’s of London*, 734 N.Y.S.2d 531, 760 N.E.2d 319 (2001); *Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33 (1<sup>st</sup> Cir. 2000).

In *North River Ins. co. v. ACE American Reinsurance Company*, 361 F.3d 134 (2<sup>nd</sup> Cir. 2004) the court applied the “follow the fortunes” doctrine in rejecting a reinsurer’s challenge to its reinsured’s allocation of settlement loss within that reinsurer’s layer. In so holding, the court, applying New York law, engaged in a lengthy discussion of the doctrine:

The follow-the-fortunes doctrine “binds a reinsurer to accept the cedent’s good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured: coverage, tactics, lawsuits, compromise, resistance or capitulation.” *British Int’l Ins. Co. v. Seguros La Republica, S.A.*, 342 F.3d 78, 85 (2d Cir.2003). This doctrine insulates a reinsured’s liability determinations from challenge by a reinsurer unless they are fraudulent, in bad faith, or the payments are “clearly beyond the scope of the original policy” or “in excess of [the reinsurer’s] agreed-to exposure.” *Christiana*, 979 F.2d at 280. “Basically, the doctrine burdens the reinsurer with those risks which the direct insurer bears under the direct insurer’s policy covering the original insured.” *Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co.*, 903 F.2d 910, 912 (2d Cir.1990). It is well established that a follow-the-fortunes doctrine applies to all outcomes, including settlements and judgments. See *N. River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1205 (3d Cir.1995) (“Thus, we find the clause applies both to settlements and to judgments.”).

Finally, and just recently a New York appellate court thoroughly examined the “follow the fortunes” doctrine in rejecting the defendant reinsurers’ arguments supporting their refusal to pay a claim previously settled by the reinsured. In *United States Fid. & Guar. Co. v. American Re-Ins. Co.*, 2012 NY Slip Op 00421 (January 24, 2012),<sup>5</sup> the plaintiff reinsured settled a hotly disputed coverage case involving hundreds of asbestos claims against an insured of the reinsured. In settling the underlying coverage and asbestos claims, the reinsured allocated the settled claims to a particular policy year in which the per person limits were higher, allowing a higher payout to the injured asbestos claimants. After it submitted its reinsurance billing for the settlement as allocated, the reinsurers for that policy year refused to pay, contending that the reinsured’s decision to allocate the losses to the particular policy year with the higher per person per person limit was in fact a bad faith allocation made for the real purpose of paying for underlying insurance bad faith claims held

<sup>5</sup> A true copy of this opinion is attached hereto as Exhibit 3.

by the insured. In applying the "follow the fortunes" clause in rejecting this argument, the court stated:

The requirement that a reinsurer "follow the fortunes" of the reinsured is as old as the business of reinsurance itself. The doctrine is broad in its application, and is said to derive from the Latin phrase: *iste secundus assecurator tenetur ad solvendum omne totum quod primus assecurator solverit*, which although "indeterminate and general in its expression" (*New York State Marine Ins. Co. v Protection Ins. Co.*, 18 F Cas 160, 161 (D Mass 1841)) has been translated to mean that "the reinsurer is held in full to the result that the primary insurer (reinsured) obtained" (*North Riv. Ins. Co. v Cligna Rein. Co.*, 52 F 3d 1194, 1205, n 16 [3rd Cir 1995]). Put simply, the reinsurer agrees to follow the insurer's financial obligations (fortunes), wherever they lead either company.

In modern parlance, follow the fortunes "burdens the reinsurer with those risks which the direct insurer bears under the direct insurer's policy covering the original insured" (*Bellefonte Rein. Co. v Aetna Cas. & Sur. Co.*, 903 F2d 910, 912 [2d Cir 1990]), in effect protecting the "risk transfer mechanism by providing that covered losses pass uninterrupted along the risk transfer chain" (*North River Ins. Co.*, 52 F 3d at 1205). It "simply requires payment where the [insurer's] good faith payment is at least arguably within the scope of the insurance coverage that was reinsured" (*Mentor Ins. Co [UK] v Brannkasse*, 996 F2d 506, 517 [2d Cir 1993]), preventing the reinsurer from second guessing the good faith liability determinations made by its reinsured (see e.g. *Insurance Co. v Associated Manufacturers' Corp.*, 70 App Div 69 [1902], *affd* 174 NY 541 [1903]) as well as precluding "wasteful relitigation" by a reinsurer in cases where the insured has paid in good faith (*National Union Fire Ins. Co. of Pittsburgh, Pa. v American Re-Insurance Co.*, 441 F Supp 2d 646, 650 [SD NY 2006]).

We find that the motion Court correctly determined that the follow-the-fortunes doctrine required defendants to accept the reinsurance presentation made by USF & G herein. Accordingly, all of defendants' efforts to second guess USF & G's decisions concerning allocation of the loss, whether it be the alleged bad faith claims; the decision to allocate the losses to the 1959 USF & G/MacArthur policy year and corresponding failure to spread the losses over the 13 policy years; the valuation of the lung cancer and mesothelioma claims; the alleged alteration of the loss presentation from an accident to occurrence basis; and the failure of USF & G to otherwise spread the loss out over the life of the policies as purportedly required by California law, which governed the USF & G/MacArthur policies, are precluded from this court's review (see e.g. *id* at 650-651).

These cases stand for the general rule that under the "follow the fortunes" doctrine, a reinsured's reasonable settlement and coverage decisions about claims under its policy are binding upon the reinsurer. Conversely, the reinsurer should not be able to effectively challenge the reinsured's reasonable settlement and coverage determinations including, for example, the Pool's

coverage determinations in this matter on the number of occurrences, the date of the occurrence, and any other issues that arise under its policy. These citations not only provide support for the general "follow the fortunes" principle, but also for the specific instances in which the reinsured settles a case, reaches a coverage determination on the number and dates of occurrences, and allocates or spreads out the losses to different policy periods and reinsurance contracts. Even under those circumstances, the courts customarily uphold and enforce against the reinsurers the reinsured's reasonable actions and decisions regarding coverage, allocations, occurrences, and dates of loss.

### CONCLUSION

The underlying facts and factual allegations, the applicable law, and the applicable JSILP language not only justify, but require the Pool's conclusion that the underlying lawsuit in this matter triggers only a single occurrence and that such occurrence be placed within the 2006-2007 time period. In accepting the Pool's coverage determinations in this regard and making payments based on those determinations without reserving its rights, Chartis has waived any right to challenge those determinations now. Finally, the "follow the fortunes" clause in Chartis' reinsurance treaty and the case law applying the "follow the fortunes" doctrine, binds Chartis to the Pool's good faith coverage determination of a single occurrence and the placement of that occurrence within the 2006-07 time period.

For all of the above reasons, the Pool urges ISOP/Chartis to drop its contention that the underlying lawsuit triggers four occurrences taking place during different JSILP periods and resume payment of defense cost invoices.

Very truly yours,

HACKETT, BEECHER & HART



J. William Ashbaugh

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May 21, 2012

*Via Email and US Mail*

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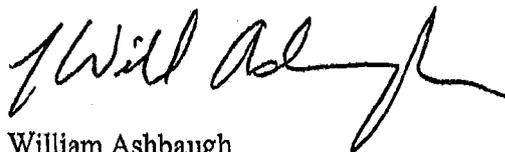
Re: *Case, et al v. Clallam County*  
Jefferson County (WA) Superior Court Case No. 09-2-00072-6  
Reinsurance Certificate No. 8766791  
Policy No. 0607 Risk Pool-XCO

Dear Mr. Skinner:

This is in follow-up to my voicemail message left last Friday afternoon. This matter settled Friday evening for \$1.6 Million, well within ISOP/Chartis' layer of reinsurance. Chartis' adjuster, Mary Andrews, actively participated in the negotiations. The Washington Counties Risk Pool intends to fund the settlement within the next 30 days, at which time it will invoice Chartis for reimbursement pursuant to the terms of the applicable reinsurance treaty. In light of Chartis' statement last Friday afternoon that Chartis continues to assert its coverage position, the Pool again reiterates that ISOP/Chartis is fully liable to reimburse the Pool for the amount of the settlement and remaining defense costs, not only under the terms of the Pool's Joint Self-Insurance Liability Policy and applicable Washington law, but just as importantly, under the "follow the fortunes" provision in Chartis' reinsurance treaty and under the doctrines of waiver, estoppel and ratification.

Very truly yours,

HACKETT, BEECHER & HART



J. William Ashbaugh

WCRP 045890

**SUPREME COURT OF THE STATE OF WASHINGTON**

WASHINGTON COUNTIES RISK  
POOL; LEXINGTON INSURANCE  
COMPANY; AMERICAN  
INTERNATIONAL GROUP, INC.;  
VYRLE HILL, Executive Director of  
the Washington Counties risk Pool, in  
both his individual capacity and  
official capacity; J. WILLIAM  
ASHBAUGH, individually; and ACE  
AMERICAN INSURANCE  
COMPANY,

Respondents,

v.

CLARK COUNTY, WASHINGTON,  
a municipal corporation; DONALD  
SLAGLE, an individual; LARRY  
DAVIS, individually, and as assignee  
of Clark County and of Donald Slagle;  
and ALAN NORTHROP,  
individually, and as assignee of Clark  
County and of Donald Slagle,

Appellants.

**PROOF OF SERVICE**

I am and at all times hereinafter mentioned was a citizen of the  
United States, a resident of the State of Washington, over the age of 21  
years, competent to be a witness in the above action, and not a party

thereto. On the 15<sup>th</sup> day of October, 2015 I caused to be served a true copy of the following documents upon the parties listed below:

1. Appellants Clark County and Donald Slagle's Opening Brief;
- and
2. Proof of Service.

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**RESPONDENT WASHINGTON COUNTIES  
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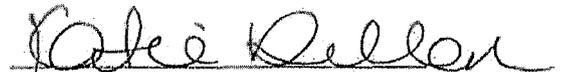
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DATED this 15th day of October.



Katie Dillon

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**Subject:** RE: Washington Counties Risk Pool v. Clark County - Supreme Cause No: 91154-1 - Clark County and Donald Slagle's Opening Brief, Appendix A-B, and Proof of Service

Received on 10-15-2015

Supreme Court Clerk's Office

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**Subject:** Washington Counties Risk Pool v. Clark County - Supreme Cause No: 91154-1 - Clark County and Donald Slagle's Opening Brief, Appendix A-B, and Proof of Service

Attached please find Appellants Clark County and Donald Slagle's Opening Brief, Appendix A-B, and Proof of Service for filing

Attorney Name and WSBA #: Matthew J. Segal, 29797

Please let me know if you have any problems receiving the attachments.

*Please note that our reception, address suite number and zip code have changed.*

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