COA # 46590-6
No. 89609-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TILLMAN CARR, individually; CAL FARRER and JENELL FARRER, a marital community; KUO-YING FRENZEL, individually; JULIE GANAS, individually; WILLIAM B. MINAGLIA, individually; DARRYL and ROSE HUDSON, a marital community KEITH PETERSON, individually; KATHRYN DEBERNARDI, individually; KATHERINE MEADE, individually; ROB AND SHARA COFFMAN, a marital community, and PAMELA SMITH, individually,

Appellants,

v.

THE STATE OF WASHINGTON by and through the WASHINGTON STATE LIQUOR CONTROL BOARD, a board of the State of Washington and the WASHINGTON STATE DEPARTMENT OF REVENUE, a department of the State of Washington

Respondents.

APPEALED FROM THURSTON COUNTY SUPERIOR COURT
CAUSE NO. 12-2-02279-5
THE HONORABLE CHRIS WICKHAM

APPELLANTS' OPENING BRIEF

KEVIN W. ROBERTS
WSBA #29473
ROBERT A. DUNN
WSBA #12089
Dunn Black & Roberts, P.S.
111 North Post Street, Ste. 300
Spokane, Washington 99201
(509) 455-8711

STANLEY E. PERDUE
WSBA #10922
41 Camino De Los Angelitos
Galisteo, New Mexico 87540
(509) 624-6009

Attorneys for Appellants

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> *"The transition **must** include, **without limitation**, a provision for applying operating and asset sales revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirit, taking into account present value of issuance of a spirits license to the holder of such interest."*[1]

I. INTRODUCTION

In passing Initiative 1183 to privatize the sale of liquor in the State of Washington, the People of Washington State recognized that existing nonemployee contract liquor store operators ("Store Owners") would be harmed by the proposed privatization change. At the time of I-1183, Plaintiff Store Owners were "under then existing contracts for supply by the board of distilled spirit." These contracts did not expire until 2016. Thus, the Store Owners had four years left on their term when I-1183 was enacted. Nonetheless, the new legislation specifically provided protections to insure Store Owners in the business of selling state liquor held on consignment were not economically harmed by I-1183's passage. In other words, while People of Washington wanted government out of the liquor

[1] RCW 66.24.620(6)(b)(emphasis added).

business, the private, small businesses who were selling state owned distilled spirits held on consignment were not to be harmed by the transition to privatization. Consequently, I-1183 was crafted to protect these small businesses by specifically requiring the State to "avert harm". This was to be accomplished by applying specifically identified revenues to compensate the Store Owners for any harm caused by having their State contracts terminated as a result of I-1183. Despite this explicit legislative direction, the State brazenly ignored the plain language of I-1183 and refused to comply with its express statutory requirements. Without any substantive legal analysis of either the statutory language or its intent, the Trial Court erred in issuing its 11/4/13 **Letter Opinion** (CP 00850-856)(**Appendix A** hereto) ruling that the Statute created no substantive obligations for the State to "avert harm". The Trial Court's erroneous rulings left the Contract Liquor Store Owners with no remedy to enforce the State's failure/refusal to "avert harm". As explained below, the Trial Court committed further error by dismissing Plaintiffs' statutory claim, as well as all remaining claims on Summary Judgment. (CP 00850-856).

II. ASSIGNMENTS OF ERROR

1. The Court Erred In Granting the State's Motion for Summary Judgment Dismissing Plaintiffs' Claims Erroneously Ruling That:

    A. The Store Owners' "particular contracts were not substantially impaired". (CP 00851).

    B. I-1183 "does not direct compensation to the affected parties but rather that the funds be used to avert harm." (CP 00853).

    C. "There does not appear to be a fund set aside for compensation to plaintiffs." (CP 00853).

    D. "There is no clear intent to provide compensation to plaintiffs and therefore no statutory claim of action." (CP 00854).

    E. "The People did not intend" for Store Owners to have a cause of action for the State's failure/refusal to engage in reasonable harm aversion. (CP 00854).

    F. The State did not improperly fail to develop rules and procedures to address Store Owners' claims that I-1183 unconstitutionally impaired State contracts. (CP 00855).

    G. It would have been futile "and a disservice to taxpayers who would have to fund the meaningless effort" of developing rules and procedures to address constitutional claims of Store Owners. (CP 00855).

H. The Store Owner contracts were terminated by "mutual agreement" and "there was no breach." (CP 00855).

I. The Store Owners had no "present and enforceable right" of continuing contract benefits. (CP 00855-6).

2. The Court Erred By Denying Plaintiffs' Motion for Partial Summary Judgment.

III. ISSUES PRESENTED

1. Whether the State was required to avert harm suffered by Contract Liquor Store Owners as a result of having their Contracts terminated?

2. Whether RCW 66.24.620(6)(b) required the State to apply operating and asset sales revenue to avert harm to the Plaintiffs Store Owners?

3. Whether Initiative 1183 and RCW 66.24.620 created a private cause of action to ensure compliance by the State?

4. Whether the State violated RCW 66.24 et seq. and I-1183 by failing to avert Plaintiffs' harm and/or to provide compensation for the impairment of Plaintiffs' contracts?

5. Whether the State breached Initiative 1183 by failing to provide a claims process for Contract Liquor Store Owners harmed by Initiative 1183?

6. Whether a finding that Initiative 1183 did not create a private cause of action rendered Initiative 1183 unconstitutional?

7. Whether the State's failure to avert harm to the Plaintiffs, unconstitutionally impaired their Contracts?

8. Whether Initiative 1183 constituted an unconstitutional taking without just compensation?

9. Whether the State's early termination of the Store Owners' Contracts upon passage of I-1183 constituted an actionable breach of contract?

10. Whether the State's early termination of the Store Owners' Contracts upon passage of I-1183 constituted a taking or damage to their contract rights?

IV. STATEMENT OF THE CASE

A. The Contract Liquor Store Owners.

Plaintiffs are all contract liquor store operators ("Store Owners") with stores located in a number of locations throughout Washington State.[2] Immediately preceding passage of Initiative 1183, each Plaintiff had existing Contracts with the Liquor Control Board ("State") for five year terms – 6/30/11 through 6/30/16. (CP 126 – 489). Plaintiffs all had operated under prior Contracts with the State as well. For example, Mr. Carr and Ms. Coffman had become contract liquor owners in 2002, Ms. Ganas in 2006, and the Farrers in 2007. (CP 564-569; 624-629; 610-617)

[2] Including, Cheney (Carr); Liberty Lake (Farrer); Richland (Frenzel); Leavenworth (Ganas); Port Hadlock (Norris, f/k/a DeBernardi); Greenacres (Petersen); Wilbur (Coffman); Republic (Meade); Coupeville (Smith); Duvall (Minaglia); and Ephrata (Hudson).

The Plaintiff Store Owners in making their business decisions relied upon representations by the State that their Contracts were to be for a term of 5 years in duration. For instance, at the urging of the State, the Farrers made the decision to sell their home and to invest their retirement in order to open a State Liquor Store in Liberty Lake. (CP 610-617). This included investing in substantial tenant improvements in direct reliance upon their Contract having a term length that allowed them to recoup that investment. Id. All the Store Owners incurred expenses in direct reliance upon the Contract term that provided time to recoup their investment. Id. (See also CP 624-629 - invested the expense of a new location and incurred expenses for tenant improvements based upon the length of the Contract; CP 630-637 – purchased a building and invested in new point of sale software and remodeling). As explained below, the loss of the Store Owners' investments, including expectancy of a reasonable return, is just a sampling of the unaddressed harm suffered by the Store Owners as a result of the State's refusal/failure to abide by the statutory mandates of I-1183.

B. History Behind Initiative 1183.

During prohibition, neither private citizens nor the State of Washington had authority to sell intoxicating liquors. In 1933, the 21st Amendment to the United States Constitution provided each state with the authority to regulate the sale of liquor within its boundaries. Since that time, authority to the States has not been withdrawn, reduced or limited, including Washington State.

Initiative 1183 was legislation brought by the People of Washington to privatize the sale of liquor in Washington. The Initiative was intended to get "*state government out of the business of distributing, selling, and promoting the sale of liquor...*". Thus, I-1183 provided that all state liquor stores were to close by 6/1/12. At that time, there were approximately 160 Contract Liquor Stores and 167 *"state"* owned liquor stores. When I-1183 was passed on 11/8/11, it took effect by operation of law on 12/8/11. As a result, effective that date, performance of State Contracts with the Store Owners was unilaterally terminated.

Uniquely, I-1183 included specific provisions to account for damage and harm that was anticipated to be suffered by Store

Owners upon passage. To that end, I-1183 created an anticipated pool of revenues from the sale of (1) liquor store assets; (2) the State's Distribution Center; and (3) revenue's obtained by auctioning off licenses from former liquor store locations. Next, I-1183 specifically identified that these accumulated *"operating and asset sales revenues"* were to be applied to *"avert harm"* to the interests of the *"nonemployee liquor store operators under then existing contracts"*. I-1183 directed that this occur *"without limitation"*. Finally, I-1183 directed that *"[t]he department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act."*

Without question, passage of I-1183 and the State's subsequent actions resulted in harm that was not averted to the Store Owners in numerous ways: by impairing their Contracts in preventing performance through their Contract term of 2016; by denying Store Owners a return on investment made in reliance upon

the Contract; by impacting the inventory supply to Store Owners prior to the privatization transition; by preventing Store Owners from selling their interests as previously promised following the privatization transition; by preventing Store Owners from making damage averting business decisions based upon the I-1183 transition; by misrepresentations made to Store Owners that following transition a 17% H-class fee (restaurants and bars) would not apply to such sales; as well as a myriad of other harms suffered by the Plaintiff Store Owners. (CP 610-617; 564-569; 630-637; 624-629; 558-563; 638-643; 618-623).

This harm to the Store Owners occurred while the State in turn realized approximately $31,000,000 in revenue from auctioning off 167 state-run liquor stores. (CP 595-597). Additionally, it was estimated the State was to realize an additional $36,400,000 from the sale of the State's liquor Distribution Center. (CP 00598). Yet, despite realizing more than $66,000,000 from its "operating and asset sales revenues", the State refused to abide by I-1183 in failing to apply any of those revenues to "avert harm" suffered by the Store Owners. Further, the State failed to develop any requisite rules and

procedures to address claims that I-1183 had caused harm to the Store Owners. In doing so, the State failed to provide a means for compensating Store Owners for harm not averted. Instead, the State simply ignored the Store Owners' claims and refused to follow the mandates of I-1183.

By refusing to apply the more than $66,000,000 in available "operating and asset sales revenues" to avert harm suffered by the Store Owners, the State violated the requirements of I-1183. (CP 595-598). In doing so, the State took the position the enacted statute was just "*essentially a policy statement*". (CP 742-743). This position clearly ignored that I-1183 included specific provisions to account for the harm anticipated to and suffered by Store Owners.

Subsequent to the State's termination of Plaintiffs' contracts and its violations surrounding I-1183, the State presented Plaintiffs with a form contract *"amendment"* forcing Store Owners to now 'buy' the liquor that had been previously provided to them on 'consignment'. This *"amendment"* failed to address the fact that Plaintiffs had already begun experiencing harm that the State had been obligated under I-1183 to avert. (CP 564; 610-617; 558-563;

618-623; 638-643; 763-766; 630-637; 771-775; 739-750; 751-762; 776-782; 767-770). As harm to the Store Owners mounted with no redress by the State, Plaintiffs were left with no meaningful economic choice but to sign the State's post-breach *"amendment"* just in order to remain in business; despite the fact that it was one-sided and an agreement of adhesion. (CP 676-770; 751-762; 776-782; 771-775). There was no economic benefit to Plaintiffs in signing any *"amendment"* after I-1183 was passed except as a hedge against total loss of their business investments. (CP 751-762). This is especially so since the State announced it was going to allow competing distributors to access bars and restaurants in March 2012, to solicit and deliver product, and to engage in flexible pricing. All the while, the Store Owners' fixed prices were made known to the distributors and remained *"fixed"* by the State until 6/1/12. Id. The Store Owners, if they were to continue operating, were compelled to sign the contract *"amendment"* in order to be allowed to purchase the inventory that had previously been consigned. (CP 751-762). In fact, the State did commence selling liquor to distributors in direct competition with the Store Owners. (CP 751-762). In turn, the State

threatened to postpone inventory audits of the Store Owners and the re-opening of their stores unless they complied with the new *"amendment"* requirements. Id. As part of its plan to coerce Store Owners during the time prior to 6/1/12, the State refused to provide full orders submitted by the Store Owners, thus leaving the stores less than stocked until 6/1/12. (CP 751-762). For instance, the Farrers' last order was provided at a 45% fill rate. Id. All of this of course seriously harmed the retail sales of the Store Owners.

At the time I-1183 passed, the Store Owners had not yet completed the 5-year term of their contracts. (CP 126 – 489; CP 751-762). The Store Owners had reasonably relied upon the State's representations concerning the length of the contract term. (CP 751-762). Furthermore, when I-1100 and I-1105 – the predecessor privatization efforts were defeated in 2010, the State as an inducement to compel the Store Owners' contracts dismissed those failed efforts telling the Store Owners that *"they* (the People) *try this every few years, but they never succeed"*. (CP 751-762).

The Store Owners had also been repeatedly told by the State that a 17% licensing fee would not apply to Class H (restaurant and

bar) sales, emphasizing that Class H business could be a huge benefit to the Contract Liquor Stores after privatization. (CP 776-782). However, Store Owners were told that in order to gain the right to solicit Class H business and to make deliveries (actions the State now claims were simply part of complying with RCW 66.24.620) they were required to sign the contract *"amendment"*. (CP 776-782). Further, the State indicated the terms of the *"amendment"* were not negotiable. Faced with the reality that their Contracts had already been ended by I-1183 and the State had done nothing to avert the harm they were experiencing, Store Owners were essentially optionless if they were to continue with any business after privatization. (CP 776-782). Notably, at the time the State compelled the contract *"amendment"*, the Store Owners were not told that in reality the 17% tax would apply to the Store Owner's Class H sales. (CP 776-782).

It was only after I-1183 passed and the Store Owners' contract rights were taken and destroyed, that the State presented the *"amendment"* to their Contract. (CP 767-770). The State told the contract Store Owners that they would not be able to purchase their

inventory from the State if they did not sign the *"amendment"* as an agreement to remain in business. (CP 767-770).

V. ARGUMENT

A. Standard of Review.

Summary Judgment dismissals are reviewed de novo. Huff v. Budbill, 141 Wn.2d 1, 7 (2000). A party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. CR 56(c). *"The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard."* Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 502-03 (1992). The facts along with all reasonable inferences from those facts are considered in the light most favorable to Plaintiffs. Nationwide Mutual Fire Ins. Co. v. Watson, 120 Wn.2d 178, 186 (1992). Any doubts about the existence of a genuine issue of material fact are resolved against the moving party. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506 (1990). It is not the purpose of CR 56 to cut litigants off from their right to a trial by jury. Burback v.

Bucher, 56 Wn.2d 875, 877 (1960). Here, the Trial Court incorrectly interpreted facts and law, ignoring that at the very least, genuine issues of material fact existed with regard to certain of Plaintiffs' claims.

B. The State Violated Initiative 1183.

1. Undisputedly The State Did Not Comply With The Statute.

"*In approving an initiative measure, the people of Washington wield direct legislative power.*" Pierce County v. State, 150 Wn.2d 422, 430 (2003). Interpretation of an initiative measure requires the Court to ascertain the voters' intent in approving the measure. Id. Voter initiatives are interpreted according to the general rules of statutory construction. City of Spokane v. Taxpayers of City of Spokane, 111 Wn.2d 91, 97 (1988). Statutory language must be given its usual and ordinary meaning. Dep't of Revenue v. Hoppe, 82 Wn.2d 549, 552 (1973). When interpreting an initiative, a court focuses on " '*the voters' intent and the language of the initiative as the average informed lay voter would read it.*' " City of Spokane, 111 Wn.2d 91, 97 (1988). If the statute's language is plain on its face, the court must give effect to that plain meaning.

D.O.E. v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 19 (2002). If the question is answered by the plain language of the initiative, the court may not look beyond the express language. Pierce County, Supra., at 430; Brown v. State, 155 Wn.2d 254, 268 (2005).

Under the "*plain meaning*" rule, examination of the title in which the statute is found, as well as related statutes or chapters of the same act in which the statute is found, is appropriate as part of the determination whether a plain meaning can be ascertained. D.O.E., supra., at 10. "*[A]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous.*" State v. Bunker, 169 Wn.2d 571, 578 (2010).

In this case, the Trial Court engaged in no such review and failed to interpret the language and intent at issue other than in a vacuum. A review of I-1183 (and the statutes codifying it) as a whole confirms the People's intent to ensure that "operating and asset sales revenues" were to be used to avert harm to Store Owners. This included providing payment for any damages incurred. Here, it is not disputed that the Plaintiff Store Owners suffered severe

economic harm as a result of I-1183. Not only by having their investments destroyed and by having their contracts terminated four years early, but also by the manner in which I-1183 was implemented by the State and the effects allowed to occur to the Store Owners. (CP 00630-637; 00618-623; 00564-569; 00648-654; 00638-643; 00558-563; 00610-617). (See also CP 00599 - "*This is too important of a matter for our business future to not have notified each of us via email as you have today with this information.*") Despite requests and demands by the Store Owners, the State refused to use the "operating and asset sales revenues" to avert harm, did not take into account the *"present value of issuance of a spirits license"*, did not provide payment to the Store Owners for the harm suffered, and did not provide for the compensation expressly contemplated by the Initiative. (CP 00600-608 – *"Former Contract Liquor Store Owners: Demand for compensatory payment from lost sales."*). Indeed, the State was even unwilling to provide interpretations to help guide the Store Owners. (See CP 00609 – *"I would prefer NOT to provide interpretation."*).

The Trial Court erred in not addressing or analyzing the plain language of RCW 66.24.620(b)(6) which created a pool of revenues for the benefit of the Store Owners requiring the State to apply them to avert harm resulting from I-1183. The duty of the State to avert harm was mandatory and *"without limitation"*. The plain language of I-1183 is clear and unambiguous. The Statute specifically created a source of funds in order to avert harm to the Store Owners. The State was supposed to take into account the existing contracts and present value of the retail licenses held by contract. Id. Payments were supposed to be made to the Store Owners to avert any harm, a mandate which the Trial Court simply ignored in its analysis of the State's Summary Judgment Motion.

In addition, I-1183 underscored the clear intent that Store Owners were to be compensated from operating and asset sale revenues in that:

> *[t]he Department of Revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.*

See I-1183 § 303. It is equally undisputed the State also ignored this mandate insofar as it failed to develop any rules and/or procedures to address unconstitutional impairment of contract claims contemplated under I-1183. Nor did the State provide *"a means for reasonable compensation of claims it finds valid..."* Id. The fact is, the State refused to provide any compensation to Store Owners of any kind, and outright failed to create any type of process to address claims for damages. The language of the Statute could not have been clearer - the State was required to *"avert harm"*. Yet, it refused to do so. As a result, the State violated the directives of I-1183 and RCW 66.24 et. seq. resulting in damages to the Store Owners and claims which the Trial Court erroneously rejected. (CP 00851-56).

2. The State Failed To Use Available Funds to "Avert Harm".

It is undisputed that I-1183 provided a substantial on-going financial benefit to the State. In addition to netting more than $66,000,000 from auctioning off State Liquor Stores, and selling its Distribution Center, the State estimated it would receive increased revenues of $59,300,000 in 2014; and from 2015 forward at least $40,800,000 in additional revenue. (CP 00605 – LCB 100). In

contrast, the Store Owners who had made decisions and investments based upon their five year term contracts with the State, had those contracts unceremoniously terminated. The Trial Court erred in concluding that Store Owners, all of whom were small Washington business owners, essentially were required to absorb the consequences of I-1183 as expenses and losses on their own, simply as the cost of doing business with the State,. Yet, I-1183 anticipated and recognized that by taking government out of the liquor business, it could/would cause harm to those in existing business relationships with the State. As a result, I-1183 built in specific safeguards to insure that "nonemployee liquor store operators under then existing contracts for supply", as well as others who had contracts with the State, would not be harmed by I-1183.

I-1183 recognized that in addition to the State receiving on-going increased revenues following privatization, it would also receive *"operating and asset sales revenues"* during the transition. Those were specifically identified as funds to be used to *"avert harm"* as a result of the transition to privatization. RCW 66.24.620(6)(b). "All sale proceeds...*net of direct sales expenses*

and other transition costs authorized by this section...." RCW 66.24.620(5)(emphasis added). The *"transition costs"* authorized by RCW 66.24.620 could only be construed in reference to the payments required to avert harm! Thus, a logical reading of RCW 66.24.620(5) envisioned that sales proceeds would be used to avert harm and that any funds remaining ("net") would be deposited in the Liquor Board's revolving fund. *"[A]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous."* State v. Bunker, 169 Wn.2d 571, 578 (2010).

Statutory language must be given its usual and ordinary meaning. Dep't of Revenue v. Hoppe, 82 Wn.2d 549, 552 (1973). Yet, the Trial Court here ignored the plain language of the statute claiming the State had to merely treat the mandate to avert harm as a "discretionary and fluid standard." (CP 00854). The Trial Court ignored the statutory language, suggesting instead that it apparently was enough that the State simply consider the interests of the Store Owners or to assist them in making the switch transition. A review of RCW 66.24.620 confirms that the statute's language simply does

not support such a strained interpretation. The statute did not direct the State to "reduce" the harm or to "ease" the harm. It required the State to "avert" the harm. The common meaning definition of "avert" is "to ward off; prevent". Webster's Encyclopedic Dictionary, p. 143. In other words, the Statute required, and the intent of the voters was to make sure that Plaintiffs did not suffer any harm. In this case, the State failed to avert that harm using required "just and reasonable measures." The State's mandate was not merely to 'assist' Store Owners with the privatization transition, or to merely 'consider' their interests. It was to actually avert harm to them. The Trial Court's conclusion to the contrary constitutes reversible error.

Second, RCW 66.24.620(6)(a) required the State to complete an orderly transition. Therefore, the State was required to do certain non-monetary actions in order to make the transition happen. However, the legislation did not stop there. It also went on to require that identified funds were to be used to "avert harm". The "interests" of the Store Owners included the investments they had made in reliance upon contracts entered into with the State,

including expected returns from the performance of those contracts. The "harm" contemplated by the statute necessarily related to Plaintiffs' economic harm suffered as viable businesses. In order to "avert harm" the State was required to provide compensation for claims contemplated by I-1183.

That money was contemplated to be actually paid, is further supported by the fact that the Statute requires the State to take *"into account present value of issuance of a spirits license to the holder of such interest."* RCW 66.24.620(6)(b). The "spirits license" refers to the license necessary to continue business following the transition. Since the State was mandated to consider the value of the license post-transaction, this further indicates legislative intent was to provide payment of money in order to avert harm. To insure Plaintiffs did not receive a post-transition windfall, the State was to consider the present value of a spirit license to ensure Plaintiffs were paid only for the true harm suffered, while allowing credit to the State for the value of any post I-1183 spirit license.

The record supports that Plaintiffs' suffered harm. The State presented no evidence disputing that fact. (CP 00610-617; 00624-

629; 00648-654, 00763-766; 00638-643; 00618-623; 00558-563; 00771-775; 00630-637; 00564-569; 00751-762; 00776-782; 00767-770; 00739-750). All of the Plaintiffs had their Contracts destroyed 4 years early, lost investments made in reliance upon the Contracts, and suffered economic harm. Id. Thus, the Statute required payment of funds to them in order to "avert harm." It is equally undisputed that the State refused to make any payments to Plaintiffs. As a result, Plaintiffs' summary judgment on that issue was appropriate and constituted reversible error by the Trial Court when it was denied.

3. The Trial Court Erred In Rendering RCW 66.24.620 Meaningless as to Store Owners.

The Trial Court erred in concluding the State was not required to follow the explicit requirements of the legislation passed by the People of Washington. RCW 66.24.620(6)(b) and I-1183 § 303. The Trial Court erroneously concluded that the statutes and directives at issue created no State obligations, provided no remedy, and no State accountability for refusing to comply. (CP 00850-56). The Trial Court's erroneous conclusions are not supported by the intent inherently expressed in I-1183 or by the facts of the case.

There is no language or evidence indicating any intent that compliance with I-1183 was optional or that the Statute could be ignored and/or thus violated with impunity based upon some "discretionary and fluid standard." (CP 000854). It was err by the Trial Court to rule otherwise.

Reviewing the legislation as a whole confirms the Store Owners' damages were contemplated within the Statute and that the provisions at issue were set forth to eliminate such harm. The plain language of I-1183 was not only mandatory but was adamant in directing that the Plaintiffs were not to suffer harm. There is nothing in the legislation indicating it was intended to be optional. (CP 00742-743). The Trial Court's conclusion that the State was not accountable for violating the Statute constitutes reversible error.

A private cause of action for damages is implied if 1) the Plaintiff is within the class for whose special benefit the statute was enacted; 2) the legislative intent, either explicitly or implicitly, supports creating a remedy, and 3) if implying a remedy is consistent with the underlying purpose of the legislation. Braam v. State, 150 Wn.2d 689, 711 (2003) and Roe v. TeleTech Customer Care

Management (Colorado), LLC, 152 Wn. App. 388 (2009). See also Bennett v. Hardy, 113 Wn.2d 912, 920-21 (1990); Wingert v. Yellow Freight, 146 Wn.2d 841, 849-50 (2002) (Court held a private cause of action was implied in RCW 49.12 since the Legislature would not create a right if it did not intend for an employee to be able to enforce that right); Doe v. Corporation of President of Church of Jesus Christ of LDS, 141 Wn. App. 407, 421-22 (2007)(concluding that a private right of action is implied under the mandating reporting statute); and Tyner v. DSHS, CPS, 141 Wn.2d 68, 81 (2000).

a. RCW 66.24.620 Implies A Private Cause of Action.

The State does not dispute that RCW 66.24.620(6)(a) and (b) were enacted for the special benefit of the class to which plaintiffs belong. Thus, the only question was whether the legislative intent here supports the creation of a remedy and whether implying a remedy is consistent with that legislation. Braam, Supra., at 711. "*[I]n determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted*

the measure." Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205-06 (2000); Roe v. TeleTech., Supra., at 396. Here, the Trial Court committed reversible error by ignoring the intent of the People in failing to analyze the legislation's language as a whole.

A review of the cases establishing implied private causes of action confirms that if the legislative intent is to create a remedy and the implication of a remedy is consistent with the intent of the legislature, a private cause of action should be implied. For example, in Bennett, supra., the Washington Supreme Court determined a private cause of action could be implied from RCW 49.44.090. Bennett, supra. The Bennett court relied "*on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights*" and that implying a private right of action was consistent with the statute's underlying purpose. Id. Likewise, here it should be assumed that the People of Washington did not intend to enact legislation creating rights benefiting Store Owners without also enabling them to enforce those rights.

Here there is a stated strong legislative intent to create a remedy which is consistent with the underlying purpose of the legislation. The legislation included mandatory, unequivocal language obligating the State to create a fund from which payments were to be made to nonemployee liquor store owners. "*The transition must include, without limitation, a provision for applying operating and asset sales revenues of the board to just and reasonable measures to avert harm....*" RCW 66.24.620(6)(b) (emphasis added). As such, the only reasonable conclusion is that by directing the creation of a mandatory fund, the People intended to create a remedy. The Trial Court erred in failing to recognize and to implement that statutory remedy.

The State was mandated to create a money fund to eliminate harm to the Store Owners out of the sale of assets and from operating revenues. Yet, the State failed to create an *"Alleviate Harm Fund"* as specifically required by RCW 66.24.620. The statute contemplates the payment of money as the remedy for harm done to the nonemployee liquor store operators, and not simply non-monetary administrative tasks designed to facilitate transition to

privatized liquor sales. For example, establishing an auditing schedule in the transition period does not address the payment of money damages as required by RCW 66.24.620(6)(a) and (b), and did nothing to alleviate or avert the substantial economic harm caused by the Initiative.

The Statute's intent to create a remedy is further bolstered by the fact that I-1183 directed that the measures to avert harm were to be *"just and reasonable"* - terms typically associated with the concept of compensation. Here, there was nothing "just or reasonable" about the Trial Court refusing to provide the very remedy contemplated by the statute enacted to protect the interests of the Store Owners at issue.

The initiative language was required to be read and interpreted as an average informed lay voter would have read it. A simple, informed lay voter reading of the statute compels the reasonable conclusion that Washington voters intended to create a money fund to provide remedy to any Store Owner that suffered harm.

Implementing a compensatory remedy is consistent with the underlying purpose of I-1183. The admitted purpose I-1183 was to eliminate state government from the liquor business while simultaneously averting harm to contract liquor stores who had contracted with the State. As a result, RCW 66.24.620(6)(a) and (b) were included to insure that these small business operations would not carry the burden of the legislation intended to affect only the State. This was done by ensuring a fund was created and available to avert the financial impacts and harm such Store Owners were going to suffer by having their store contracts terminated. To that end, the People included a section in I-1183 providing that contract liquor store operators need not meet the Initiative's new 10,000 square foot retail space requirement. This too was a specific mandate to alleviate the financial impact of the initiative on existing Store Owners. RCW 66.24.630(2)(c). By providing this relief the initiative recognized that giving space concessions or other such administrative assistance to the contract liquor store owners was necessary. However, it did not stop there. RCW 66.24.620(6)(a) and (b) were enacted to create an *"Alleviate Harm Fund"*. The

legislation as a whole confirms that a private cause of action was contemplated and intended by the People as part of the entire statute, to allow Store Owners to sue the State if they believed that harm aversion was ignored or unreasonable. The Trial Court's conclusion *"that the People did not intend such an action"* constitutes reversible error. (CP 00854).

b. The State Violated Legislation Requiring Payment of Reasonable Compensation.

Section 303 of I-1183 requires the State to provide *"reasonable compensation"* for claims relating to contracts impaired as a result of I-1183. With regard to Plaintiffs, there is simply no question that but for I-1183, the contracts at issue would have been performed by the State. The Trial Court's erroneous assertion that I-1183 does not create a private cause of action is undermined by the fact that the State issued a *"special notice"* instructing claimants to "*file its claim directly with a court of competent jurisdiction*". (CP 00111-112).

The constitutionality of I-1183 has already been determined. See Washington Ass'n for Substance Abuse and Violence Prevention v. State, 174 Wn.2d 642 (2012). Thus, the only issue here is

whether the State violated I-1183 for refusing to address the Store Owners' claims by failing to *"provide a means for reasonable compensation"*. There is no disputed fact about that. Statutes are to be construed to give effect to all language so as to render no portion meaningless or superfluous. Rivard v. State, 168 Wn.2d 775, 783 (2010). Any interpretation to the contrary would result in superfluous statutory language rendering the requirement of providing a means for *"reasonable compensation"* meaningless. Furthermore, statutory construction requires the presumption that the People did not intend absurd results. Thus, any ambiguous language must be interpreted to avoid such absurdity. State v. Vela, 100 Wn.2d 636, 641 (1983).

As provided by I-1183, there was a requirement imposed on the State's Department of Revenue to establish rules and procedures to address any impairment of contract claims that arose out of I-1183. The procedure would have followed the test that courts use in determining impairment of contracts. The courts use a 3–part test to determine if there has been an impairment of a public contract: (1) does a contractual relationship exist, (2) does the legislation

substantially impair the contractual relationship, and (3) if there is a substantial impairment, is it reasonable and necessary to serve a legitimate public purpose. Johanson v. Department of Social and Health Services, State of Wash., 91 Wn.App. 737, 744 (1998).

As required by the statute here, a procedure and process was to have been created to determine whether a contractual relationship existed between the nonemployee liquor store owners and the State; followed by determination as to whether I-1183 substantially impaired the nonemployee liquor store owners' contracts with the State. This is the only interpretation of I-1183 that gives effect to the statute. When the Department of Revenue refused and failed to provide a financial procedure to allow claims to be made for damages to contracts caused by I-1183, it triggered Plaintiffs' private cause of action.

Since there is no ambiguity to I-1183, there can be no deference given to the State concerning a contrary interpretation. Dot Foods, Inc. v. Washington Dep't of Revenue, 166 Wn.2d 912, 921 (2009). Furthermore, deference to an agency interpretation is never warranted when the agency's interpretation conflicts with the

statutory mandate. Bostain v. Food Exp., Inc., 159 Wn.2d 700, 716 (2007). Where the express language of a statute is unambiguous, a state agency may not interpret that language in a manner inconsistent with the statute's express language. Dot Foods, Supra. at 926. In Dot Foods, the Department of Revenue changed its interpretation of a statute by amending a regulation. Id. at 915. Under the Department's new interpretation it rendered plaintiff no longer tax exempt. Id. at 915-16. Plaintiff filed suit challenging the Department's revised interpretation. Id. at 916. The statutory language remained the same and only the Department's interpretation changed. Id. at 921. The Dot Foods court reasoned that the Department's revised interpretation was inconsistent with the plain language of the statute and refused to allow the Department to utilize its new interpretation. Id. at 921-22.

Here, the Trial Court erroneously considered the applicability of RCW 34.05.330 to adopt a position inconsistent with the statutory mandate concerning reasonable compensation. This is not a situation where Plaintiffs petitioned the Department of Revenue to adopt, amend, or repeal a rule. Instead, this is a situation where

legislation was passed directing the State, through the Department of Revenue, to develop rules and procedures to address Store Owner claims and to provide reasonable compensation. The State had no authority to simply ignore the law passed by the People. Pursuant to I-1183, the State was directed to provide reasonable compensation for harm that occurred, a position that the Trial Court erroneously rejected in ruling *"The Statute, however, does not direct compensation to the affected parties but rather that the funds be used to avert harm."* (CP 00854). Further, the Trial Court's conclusions that *"Thus, there does not appear to be a fund set aside for compensation to Plaintiffs"* and *"As a result there is no clear intent to provide compensation to Plaintiffs and therefore no statutory claim of action"*, both constitute reversible error. Id.

C. I-1183 Resulted In An Unconstitutional Taking And/Or Impairment Of Contract Rights.

The purpose of the Fifth Amendment is to *"...bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."* Armstrong v. U.S., 364 U.S. 40, 49 (1960). *"Valid contracts are property, whether the obligor be a private individual,*

a municipality, a state, or the United States." Lynch v. U.S., 292 U.S. 571, 579 (1934)(holding plaintiff was eligible for just compensation under the takings clause of the Fifth Amendment when plaintiff's contractually created right to war risk insurance was abrogated by statute). The government is liable for a taking if it uses its power to appropriate a contract for public use. Franconia Assoc. v. U.S., 61 Fed. Cl. 718, 739 (2004)(quoting Home Savings of Am., F.S.B. v. U.S., 51 Fed. Cl. 487, 494-95) (2002)).

A taking lies when the government engages in any legislative or administrative action that abrogates or repudiates contract obligations or otherwise impairs plaintiff's ability to enforce their rights secured under the terms of the contract. Janicki Logging Co. v. United States, 36 Fed. Cl. 338, 346 (1996), aff'd 124 F.3d 226 (Fed.Cir.1997). "*The elements of inverse condemnation are: "(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.*" Fitzpatrick v. Okanogan County, 143 Wn. App. 288, 301 (2008) aff'd, 169 Wn.2d 598 (2010). Any governmental activity that invades or interferes with the right to

use and enjoy property is a taking. Showalter v. City of Cheney, 118 Wn. App. 543, 549 (2003). The right to compensation is determined by asking whether the governmental action deprived the property owner of a valuable right. Id. In this case, Plaintiffs had contract rights that were taken, and undisputedly, for which they were not provided just compensation. If I-1183 is deemed not to be an unconstitutional impairment of contract in that it was for a public purpose as a matter of law, it then is an unlawful taking.

On the other hand, if I-1183 is not for a public purpose, then it was an unconstitutional impairment of the contracts. The Washington State Constitution states, "*[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.*" Wash. Const. Art. I, § 23. This prohibition applies to "*any form of legislative action, including ... direct action by the people.*" Washington Federation of State Employees v. State of Washington, 127 Wn.2d 544, 560 (1995) (quoting Ruano v. Spellman, 81 Wn.2d 820, 825 (1973)). Moreover, Article 1 § 10 of the United States Constitution states that "*[n]o state shall ... pass any ... law impairing the obligation of contracts ...*" U.S. Const. Art. I, § 10.

When a state interferes with its own contracts, those impairments "*face more stringent examination under the Contracts Clause than would laws regulating contractual relationships between private parties.*" Washington Federation, supra. at 561, (quoting Allied Structural Steel Co. v. Spannaus, 234, 244 n. 15 (1978)). Thus, by attempting to unilaterally terminate the contracts through the initiative process the State faces an even more stringent examination.

The Supreme Court of Washington uses a three-part test to determine if there has been an impairment of a public contract: "*(1) does a contractual relationship exist, (2) does the legislation substantially impair the contractual relationship, and (3) if there is a substantial impairment, is it reasonable and necessary to serve a legitimate public purpose.*" Washington Federation, supra. (citing Caritas Servs., Inc. v. Department of Social & Health Servs., 123 Wn.2d 391, 403 (1994)).

"*A contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value.*" Washington Federation, supra. Such impairment may be substantial if the

complaining party relied on the supplanted portions of the contract. Id. If a legitimate public purpose is identified, the next inquiry is whether the legislation's impairment of rights and obligations is based upon reasonable conditions and is appropriate in light of the public purpose justifying the legislation's adoption. Interstate Marina Dev. Co. v. County of Los Angeles, 202 Cal. Rptr. 377, 384 (1984)(citing Energy Reserves, 459 U.S. 400, 409 (1983)). The government must use the least intrusive means to achieve its goals. Id.

Here, the only way that Initiative 1183 does not unconstitutionally impair contractual obligations is if the State concedes the Initiative's mandate of requiring payment to the Store Owners. Based upon the impairment of contract analysis, if the State continues to claim there was no requirement for compensation, then Initiative 1183 is an unconstitutional impairment of contract and an unlawful taking of Plaintiffs' contract rights. In other words, no legitimate state purpose can be served by the impairment of the contracts UNLESS, there is a provision in the Initiative that compensates Plaintiffs for the impairment. Without the

compensation remedy built into the Initiative, no legitimate public purpose exists. It has to be one or the other. It's either an impairment of a contract OR it is not an impairment of contract because the Initiative provided for payment to the Store Owners. Yet, the Trial Court here erroneously misconstrued or misunderstood the facts and established law, ruling that *"These particular contracts were not substantially impaired and, therefore, the State is entitled to summary judgment on the issues."* (CP 00852).

D. I-1183 Resulted In A Breach Of Contract.

An express contract is one where the intentions of the parties and the terms of the agreement are expressed by the parties in writing or orally at the time it is entered into. Eaton v. Engelcke Mfg., Inc., 37 Wn. App. 677, 680 (1984). The essence of a contract is that it binds parties to its terms, obligates them to perform the terms, and a failure to perform constitutes a breach of contract. Carboneau v. Peterson, 1 Wn.2d 347, 374 (1939); Jones Associates v. Eastside Properties, 41 Wn. App. 462 (1985). Generally, a party to a contract cannot breach it, thereby securing some advantage to

the detriment of another party. Lea v. Young, 168 Wash. 496, 505 (1932).

In this case, the State does not dispute that the Store Owners entered into and reasonably relied upon contracts that had a 5 year set term from 6/30/11 through 6/30/16. In direct reliance on this term, the Store Owners incurred substantial investment debt, including making long term economic business decisions, such as incurring the expense of substantial tenant improvements. (CPs 00564-569; 00630-637; 00618-623; 00610-617; 00638-643; 00558-563; 00648-654). When Initiative 1183 took effect on 12/11/11, the State terminated the Store Owner Contracts by announcing their Liquor Stores would be closed on 6/1/12 - four years prior to the agreed upon term!

There is also no dispute that the State failed to perform the Contracts for the entirety of the Contract term, which the Store Owners in turn claimed as a breach that caused harm. Any claim by the State that it took actions after the breach to justify its breach of the Contract, such as providing a unilateral contract *"amendment"* is irrelevant.

First, there was no consideration for any post-breach *"amendment"* to the Contract. Consideration is an essential element of any contract. Peoples Mortgage Co. v. Vista View Builders, 6 Wn. App. 744, 747 (1972). Performance of a pre-existing duty does not constitute valid consideration. Queen City Const. v. City of Seattle, 3 Wn.2d 6, 17-18 (1940). On 12/8/11, the State, through I-1183, eliminated the remaining term of the Store Owner Contracts. In an attempt to avoid liability, the State forced Plaintiffs to sign a Contract *"amendment"*. Indeed, the *"amendment"* provided Plaintiffs with nothing the State was not already obligated to do. Furthermore, the State already had a preexisting duty to provide the transition items described in the post-initiative *"amendment"*, and the *"amendment"* was nothing more than the State's attempt to avoid its obligation to mitigate its failure to "avert harm". RCW 66.24.620.

Second, the post-breach *"amendment"* constituted an adhesion contract that was unconscionable. An adhesion contract exists if 1) the contract is a standard form, 2) it was *"prepared by one party and submitted to the other on a 'take it or leave it' basis"*,

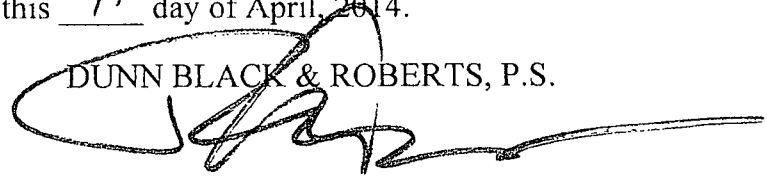
and 3) there was *"no true equality of bargaining power"* between the parties. Yakima Valley Fire Protection Dist. 12 v. City of Yakima, 122 Wn.2d 371, 394 (1993). An adhesion contract is unconscionable when the party lacks a meaningful choice. Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 306 (2004)(*"the key inquiry for finding procedural unconscionability is whether Zuver lacked meaningful choice."*). Here, the State's *"amendment"* was a standard form provided to all Plaintiffs, on a 'take it or leave it' basis, with no equality in bargaining power between the parties. Since I-1183 had already passed and destroyed the existing Contracts, and the State forced Plaintiffs to sign an *"amendment"* in order to stay in business, the *"amendment"* was unconscionable and unenforceable. Any assertion to the contrary raises material questions of fact that were simply improper for summary judgment determination. Thus, the Trial Court's ruling that the parties mutually agreed to terminate the Contract and that *"The contracts were terminated by their terms and there was no breach"* constitutes reversible error. (CP 00855).

VI. CONCLUSION

For the foregoing reasons, the Trial Court committed reversible error in granting the State's Motion for Summary Judgment and by denying Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs respectfully request that the Court reverse the Trial Court's rulings and enforce the intent of the People pursuant to I-1183 by remanding this matter for certain factual determinations and a trial on damages.

DATED this 9th day of April, 2014.

DUNN BLACK & ROBERTS, P.S.



KEVIN W. ROBERTS, WSBA #29473
ROBERT A. DUNN, WSBA #12089
Attorneys for Appellants

and

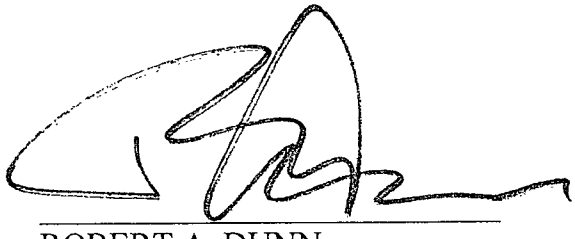
STANLEY E. PERDUE, WSBA #10922
Co-Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of April, 2014, I caused to be served a true and correct copy of the foregoing document to the following:

☐	HAND DELIVERY	Charles Zalesky
☒	U.S. MAIL	Kelly Owings
☐	OVERNIGHT MAIL	Assistant Attorney Generals
☐	FAX TRANSMISSION	State of Washington
☒	EMAIL	P.O. Box 40123
		Olympia, WA 98504

☐	HAND DELIVERY	Fronda Woods
☒	U.S. MAIL	Assistant Attorney General
☐	OVERNIGHT MAIL	State of Washington
☐	FAX TRANSMISSION	P.O. Box 40110
☒	EMAIL	Olympia, WA 98504-0110



ROBERT A. DUNN

Carr
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Superior Court of the State of Washington
For Thurston County

2000 Lakeridge Drive SW • Building No. Two • Olympia WA 98502
Telephone (360) 786-5560 • Fax (360) 754-4060

November 4, 2013

Kevin Roberts
Attorney at Law
111 N Post St Ste 300
Spokane WA 99201-4911

Charles Zalesky
Assistant Attorney General
PO Box 40123
Olympia WA 98504-0123

Stanley Perdue
Attorney at Law
41 Camino De Los Angelitos
Galisteo NM 87540-9764

Fronda Woods
Assistant Attorney General
PO Box 40110
Olympia WA 98504-0110

Re: Carr v State of Washington et al
Thurston County Cause No. 12-2-02279-5

LETTER OPINION

Dear Counsel:

The Court heard argument on cross motions for summary judgment on September 16, 2013. The decision follows.

The plaintiffs in this case are 15 former owners of "contract liquor stores." The owners sold liquor under contracts with the Liquor Control Board. The Board owned the liquor and the owners sold it on consignment.

Each of the plaintiffs entered into an identical contract with the Board for a term of June 30, 2011 through June 30, 2016. There were efforts before 2011 to privatize liquor sales and, shortly before these contracts were signed, I-1183 was submitted. It had not yet been approved by voters when the contracts were signed.

The contracts each had two relevant clauses. Paragraph 6.5 allowed the parties to terminate the contracts by mutual agreement. And paragraph 6.9 provided:

> 6.9 *TERMINATION FOR WITHDRAWAL OF AUTHORITY*
> In the event that the WSLCB's authority to perform any of its duties relating to this Contract is withdrawn, reduced, or limited in any way after the commencement of this Contract and prior to normal completion, the WSLCB may terminate this Contract, in whole or in part, by seven (7) calendar day's written notice to Contractor. Contractor shall have no right of appeal when this clause is exercised by the WSLCB.

Affidavit of Farley, Ex. 1. The People withdrew the Board's authority to sell liquor through contract liquor stores when they enacted I-1183. The Board invoked this clause and terminated these contracts with the plaintiffs upon seven days' notice.

The Board offered amended contracts that expired May 31, 2012, the last day on which the Board could operate liquor stores. Every plaintiff except Carr and Farrer entered into amended contracts.

The Board also offered new contracts that allowed the plaintiffs to buy liquor in order to sell it; previously, the liquor was held on consignment. The new contracts also gave the plaintiffs daily commissions for each day the Board closed down their stores in order to inventory the stock, a necessity to the transition to private sales. Paragraph G of those contracts contain agreements that the plaintiffs could continue liquor sales after May 31 only if a court enjoined I-1183 from going into effect. No injunction was issued. Every plaintiff entered into this new contract.

By second amended complaint, the plaintiffs bring five causes of action against the state: (1) unconstitutional impairment of contracts; (2) violation of RCW 66.24.620(6)(b); (3) violation of Section 303 of I-1183; (4) breach of contract; and (5) inverse condemnation. The parties bring cross motions for summary judgment. The plaintiffs seek partial summary judgment on the issue of liability, leaving damages for a later time. The State seeks full summary judgment. The issues overlap significantly.

Unconstitutional Impairment of Contracts

Both parties move for summary judgment on the issue of unconstitutional impairment of contracts.

The test for analyzing impairment of public contracts has three parts. First, the court must determine whether a contractual relationship exists; second, the court must determine whether the legislation *substantially* impairs the contractual relationship; third, when a state impairs its own contracts, the court must determine if the impairment was reasonable and necessary to serve a legitimate public purpose. *Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.*, 123 Wash. 2d 391, 403 (1994). Here, there were contracts and I-1183 caused those contracts to terminate. The first question is not at issue.

The second question is whether the contractual relationship was impaired in a *substantial* manner. A line of cases views "substantial" in a particular way when the contract involved a heavily regulated industry. "[A] party who enters into a contract regarding an activity 'already regulated in the particular [way] to which he now objects' is deemed to have contracted 'subject to further legislation upon the same topic.'". *Margola Associates v Seattle,* 121 Wash. 2d 625, 653, cited approvingly in *Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.*, 123 Wash. 2d 391, 405 (1994). There is an exception to this rule when the State changes legislation in a manner that allows it to back out of its own contracts. *Caritas Services*, 123 Wn.2d 391, 405-406. In *Caritas Services,* the issue was retroactive application of legislation that affected existing contracts. The Court distinguished legislation that was prospective only.

In the current case, however, the initiative forced the Liquor Control Board to terminate its contracts pursuant to a termination clause and did not retroactively modify them. This distinguishes this case from *Caritas Services* and so the regular rule applies – the plaintiffs here were subject to a heavily regulated industry and part of their contractual relationship rested on the reality that the industry could change in a manner that disallowed the contracts to continue. When the plaintiffs in this case entered contracts with

the State for liquor sales, they did so within a political atmosphere in which several attempts had been made to privatize the liquor industry. Another attempt was pending when the plaintiffs signed the contracts. This is a well-regulated industry for which further legislation was not only possible, but was probable and foreseeable. These particular contracts were not substantially impaired and, therefore, the State is entitled to summary judgment on this issue.

Violation of RCW 66.24.620(b)(6)

Next, both parties move for summary judgment on whether the State violated RCW 66.24.620(5) and (6)(b). This statute, Section 102 of the initiative, provides:

> (5) All sales proceeds under this section, net of direct sales expenses and other transition costs authorized by this section, must be deposited into the liquor revolving fund.
>
> (6)(a) The board must complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012.
>
> (b) The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

Washington courts have adopted a three part test to determine whether a statute impliedly creates a cause of action: "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or

denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Braam ex rel. Braam v. State*, 150 Wash. 2d 689, 711 (2003) (quoting *Bennett v. Hardy*, 113 Wash. 2d 912, 920–21, 784 P.2d 1258 (1990)).

Clearly plaintiffs are within the class of entities intended to benefit from this section. The statute, however, does not direct compensation to the affected parties but rather that the funds be used to "avert harm." Section (5) directs sales proceeds to be deposited into the liquor revolving fund. That fund has its own rules for distribution which do not include contract liquor stores. Thus there does not appear to be a fund set aside for compensation to plaintiffs.. As a result there is no clear intent to provide compensation to plaintiffs and therefore no statutory claim of action.

Moreover, the requirement that the State take "just and reasonable measures to avert harm" to interest groups provides a discretionary and fluid standard. The State asserts that it took "just and reasonable measures" when it offered the plaintiffs new contracts that would allow them to buy the State's liquor and sell it for a period of time, and when it gave liquor store owners a daily payment when the State closed the shops to conduct inventories of its assets. This court is not asked directly to determine whether those measures were "just and reasonable." Instead, the court must determine whether the People wanted to allow liquor store owners to sue the State if they believed that the harm-aversion was unreasonable. The plaintiffs have not provided a persuasive argument that the People intended them to pursue such a cause of action, and this Court concludes that the People did not intend such an action. For these reasons, judgment will be granted to the State on this claim.

Violation of Section 303

Both parties also move for summary judgment on whether Section 303 of I-1183 was violated and whether there is an implied cause of action for its violation. That section provides:

> The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any

> contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.

DOR admits that it did not develop rules for this issue. It determined that it did not have authority to fulfill this mandate because administrative agencies cannot adjudicate constitutional issues. Instead of developing rules, it sent out a public notice stating that anyone who had such a claim should file it in superior court.

The Department is correct. Administrative agencies do not have the authority to adjudicate constitutional claims, and development of rules and procedures to do so would be futile and a disservice to taxpayers who would have to fund this meaningless effort. Those constitutional claims are being considered as part of this litigation. The State is granted summary judgment on the claim it improperly failed to develop rules.

Breach of Contract

The parties also both move for summary judgment on whether there was a breach of contract. Section 6.5 of the contracts allowed the parties to terminate the contract by mutual agreement. All of the plaintiffs except Carr and Farrer terminated the contracts under this section when they agreed to amended contracts. Section 6.9 of the contracts allows termination, on seven days' notice, if the Board loses authority. It lost authority. It gave seven days' notice. The contracts were terminated by their terms and there was no breach.

Taking

When a plaintiff claims that a contract termination is a taking, the plaintiff must establish a present and enforceable right more specific than a mere expectation of continuing benefits. *Clear Channel*, 136 Wn. App. 781, 784 (2007).

Here, the plaintiffs had a right to continue their contracts *as long as* they did not mutually agree to terminate the contracts and *as long as* the Board

continued to have authority to continue to operate liquor stores. There were several initiatives on the ballot that would have revoked this authority in the years before these contracts were signed, and I-1183 was submitted before the contracts were signed. There was not an "enforceable right" that the contracts would continue until 2016 no matter what. Summary judgment will be granted to the State.

Conclusion

The passage of initiative 1183 was a significant event in the sales of liquor in the State of Washington. Existing business expectations and business investments were affected. Many small, long-lived businesses were concluded relatively abruptly through no fault of their own. The focus of the initiative, however, was not on fulfilling expectations of existing contract liquor stores. Rather, it was on the summary conclusion of those businesses and the prompt sale of licenses to their successors. Although there is some language that seems to suggest compensation for contract liquor store operators, it is not clear or direct enough to support a private cause of action. Summary judgment is granted to the State on all issues. The Court will sign an order of dismissal of all claims.

Sincerely,

Chris Wickham
Superior Court Judge

CW/tw
c Clerk for filing

RCW 66.24.620

Sale of spirits by a holder of a spirits distributor or spirits retail license — State liquor store closure.

(1) The holder of a spirits distributor license or spirits retail license issued under this title may commence sale of spirits upon issuance thereof, but in no event earlier than March 1, 2012, for distributors, or June 1, 2012, for retailers. The board must complete application processing by those dates of all complete applications for spirits licenses on file with the board on or before sixty days from December 8, 2011.

(2) The board must effect orderly closure of all state liquor stores no later than June 1, 2012, and must thereafter refrain from purchase, sale, or distribution of liquor, except for asset sales authorized by chapter 2, Laws of 2012.

(3) The board must devote sufficient resources to planning and preparation for sale of all assets of state liquor stores and distribution centers, and all other assets of the state over which the board has power of disposition, including without limitation goodwill and location value associated with state liquor stores, with the objective of depleting all inventory of liquor by May 31, 2012, and closing all other asset sales no later than June 1, 2013. The board, in furtherance of this subsection, may sell liquor to spirits licensees.

(4)(a) Disposition of any state liquor store or distribution center assets remaining after June 1, 2013, must be managed by the department of revenue.

(b) The board must obtain the maximum reasonable value for all asset sales made under this section.

(c) The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

(5) All sales proceeds under this section, net of direct sales expenses and other transition costs authorized by this section, must be deposited into the liquor revolving fund.

(6)(a) The board must complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012.

(b) The transition must include, without limitation, a provision for applying operating and

asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

(c) Purchases by the federal government from any licensee of the board of spirits for resale through commissaries at military installations are exempt from sales tax based on selling price levied by RCW 82.08.150.

[2012 c 2 § 102 (Initiative Measure No. 1183, approved November 8, 2011).]

RCW 49.44.090

Unfair practices in employment because of age of employee or applicant — Exceptions.

It shall be an unfair practice:

(1) For an employer or licensing agency, because an individual is forty years of age or older, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment: PROVIDED, That employers or licensing agencies may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature as to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive director of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.

(2) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses any limitation, specification or discrimination respecting individuals forty years of age or older: PROVIDED, That nothing herein shall forbid a requirement of disclosure of birth date upon any form of application for employment or by the production of a birth certificate or other sufficient evidence of the applicant's true age after an employee is hired.

Nothing contained in this section or in RCW 49.60.180 as to age shall be construed to prevent the termination of the employment of any person who is physically unable to perform his or her duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of this section; nor shall anything in this section or in RCW 49.60.180 be deemed to preclude the varying of insurance coverages according to an employee's age; nor shall this section be construed as applying to any state, county, or city law enforcement agencies, or as superseding any law fixing or authorizing the establishment of reasonable minimum or maximum age limits with respect to candidates for certain positions in public employment which are of such a nature as to require extraordinary physical effort, or which for other reasons warrant consideration of age factors.

[1993 c 510 § 24; 1985 c 185 § 30; 1983 c 293 § 2; 1961 c 100 § 5.]

RCW 34.05.330

Petition for adoption, amendment, repeal — Agency action — Appeal.

(1) Any person may petition an agency requesting the adoption, amendment, or repeal of any rule. The office of financial management shall prescribe by rule the format for such petitions and the procedure for their submission, consideration, and disposition and provide a standard form that may be used to petition any agency. Within sixty days after submission of a petition, the agency shall either (a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner, or (b) initiate rule-making proceedings in accordance with RCW 34.05.320.

(2) If an agency denies a petition to repeal or amend a rule submitted under subsection (1) of this section, and the petition alleges that the rule is not within the intent of the legislature or was not adopted in accordance with all applicable provisions of law, the person may petition for review of the rule by the joint administrative rules review committee under RCW 34.05.655.

(3) If an agency denies a petition to repeal or amend a rule submitted under subsection (1) of this section, the petitioner, within thirty days of the denial, may appeal the denial to the governor. The governor shall immediately file notice of the appeal with the code reviser for publication in the Washington state register. Within forty-five days after receiving the appeal, the governor shall either (a) deny the petition in writing, stating (i) his or her reasons for the denial, specifically addressing the concerns raised by the petitioner, and, (ii) where appropriate, the alternative means by which he or she will address the concerns raised by the petitioner; (b) for agencies listed in RCW 43.17.010, direct the agency to initiate rule-making proceedings in accordance with this chapter; or (c) for agencies not listed in RCW 43.17.010, recommend that the agency initiate rule-making proceedings in accordance with this chapter. The governor's response to the appeal shall be published in the Washington state register and copies shall be submitted to the chief clerk of the house of representatives and the secretary of the senate.

(4) In petitioning for repeal or amendment of a rule under this section, a person is encouraged to address, among other concerns:

(a) Whether the rule is authorized;

(b) Whether the rule is needed;

(c) Whether the rule conflicts with or duplicates other federal, state, or local laws;

(d) Whether alternatives to the rule exist that will serve the same purpose at less cost;

(e) Whether the rule applies differently to public and private entities;

(f) Whether the rule serves the purposes for which it was adopted;

(g) Whether the costs imposed by the rule are unreasonable;

(h) Whether the rule is clearly and simply stated;

(i) Whether the rule is different than a federal law applicable to the same activity or subject matter without adequate justification; and

(j) Whether the rule was adopted according to all applicable provisions of law.

(5) The *department of community, trade, and economic development and the office of financial management shall coordinate efforts among agencies to inform the public about the existence of this rules review process.

(6) The office of financial management shall initiate the rule making required by subsection (1) of this section by September 1, 1995.

[1998 c 280 § 5; 1996 c 318 § 1; 1995 c 403 § 703; 1988 c 288 § 305; 1967 c 237 § 5; 1959 c 234 § 6. Formerly RCW 34.04.060.]

RCW 66.24.630

Spirits retail license.

(1) There is a spirits retail license to: Sell spirits in original containers to consumers for consumption off the licensed premises and to permit holders; sell spirits in original containers to retailers licensed to sell spirits for consumption on the premises, for resale at their licensed premises according to the terms of their licenses, although no single sale may exceed twenty-four liters, unless the sale is by a licensee that was a contract liquor store manager of a contract liquor store at the location of its spirits retail licensed premises from which it makes such sales; and export spirits.

(2) For the purposes of this title, a spirits retail license is a retail license, and a sale by a spirits retailer is a retail sale only if not for resale. Nothing in this title authorizes sales by on-sale licensees to other retail licensees. The board must establish by rule an obligation of on-sale spirits retailers to:

(a) Maintain a schedule by stock-keeping unit of all their purchases of spirits from spirits retail licensees, indicating the identity of the seller and the quantities purchased; and

(b) Provide, not more frequently than quarterly, a report for each scheduled item containing the identity of the purchasing on-premise licensee and the quantities of that scheduled item purchased since any preceding report to:

(i) A distributor authorized by the distiller to distribute a scheduled item in the on-sale licensee's geographic area; or

(ii) A distiller acting as distributor of the scheduled item in the area.

(3)(a) Except as otherwise provided in (c) of this subsection, the board may issue spirits retail licenses only for premises comprising at least ten thousand square feet of fully enclosed retail space within a single structure, including storerooms and other interior auxiliary areas but excluding covered or fenced exterior areas, whether or not attached to the structure, and only to applicants that the board determines will maintain systems for inventory management, employee training, employee supervision, and physical security of the product substantially as effective as those of stores currently operated by the board with respect to preventing sales to or pilferage by underage or inebriated persons.

(b) License issuances and renewals are subject to RCW 66.24.010 and the regulations promulgated thereunder, including without limitation rights of cities, towns, county legislative authorities, the public, churches, schools, and public institutions to object to or prevent issuance of local liquor licenses. However, existing grocery premises licensed to sell beer and/or wine are deemed to be premises "now licensed" under RCW 66.24.010(9)(a) for the purpose of processing applications for spirits retail licenses.

(c) The board may not deny a spirits retail license to an otherwise qualified contract liquor store at its contract location or to the holder of former state liquor store operating rights sold at auction under RCW 66.24.620 on the grounds of location, nature, or size of the premises to be

licensed. The board may not deny a spirits retail license to applicants that are not contract liquor stores or operating rights holders on the grounds of the size of the premises to be licensed, if such applicant is otherwise qualified and the board determines that:

(i) There is no retail spirits license holder in the trade area that the applicant proposes to serve;

(ii) The applicant meets, or upon licensure will meet, the operational requirements established by the board by rule; and

(iii) The licensee has not committed more than one public safety violation within the three years preceding application.

(d) A retailer authorized to sell spirits for consumption on or off the licensed premises may accept delivery of spirits at its licensed premises or at one or more warehouse facilities registered with the board, which facilities may also warehouse and distribute nonliquor items, and from which the retailer may deliver to its own licensed premises and, pursuant to sales permitted under subsection (1) of this section:

(i) To other retailer premises licensed to sell spirits for consumption on the licensed premises;

(ii) To other registered facilities; or

(iii) To lawful purchasers outside the state. The facilities may be registered and utilized by associations, cooperatives, or comparable groups of retailers, including at least one retailer licensed to sell spirits.

(4)(a) Except as otherwise provided in (b) of this subsection, each spirits retail licensee must pay to the board, for deposit into the liquor revolving fund, a license issuance fee equivalent to seventeen percent of all spirits sales revenues under the license, exclusive of taxes collected by the licensee and of sales of items on which a license fee payable under this section has otherwise been incurred. The board must establish rules setting forth the timing of such payments and reporting of sales dollar volume by the licensee, with payments required quarterly in arrears. The first payment is due October 1, 2012.

(b) This subsection (4) does not apply to craft distilleries.

(5) In addition to the payment required under subsection (4) of this section, each licensee must pay an annual license renewal fee of one hundred sixty-six dollars. The board must periodically review and adjust the renewal fee as may be required to maintain it as comparable to annual license renewal fees for licenses to sell beer and wine not for consumption on the licensed premises. If required by law at the time, any increase of the annual renewal fee becomes effective only upon ratification by the legislature.

(6) As a condition to receiving and renewing a retail spirits license the licensee must provide training as prescribed by the board by rule for individuals who sell spirits or who manage others who sell spirits regarding compliance with laws and regulations regarding sale of spirits, including without limitation the prohibitions against sale of spirits to individuals who are underage or visibly intoxicated. The training must be provided before the individual first engages in the sale of spirits and must be renewed at least every five years. The licensee must maintain

records documenting the nature and frequency of the training provided. An employee training program is presumptively sufficient if it incorporates a "responsible vendor program" promulgated by the board.

(7) The maximum penalties prescribed by the board in WAC 314-29-020 through 314-29-040 relating to fines and suspensions are doubled for violations relating to the sale of spirits by retail spirits licensees.

(8)(a) The board must promulgate regulations concerning the adoption and administration of a compliance training program for spirits retail licensees, to be known as a "responsible vendor program," to reduce underage drinking, encourage licensees to adopt specific best practices to prevent sales to minors, and provide licensees with an incentive to give their employees ongoing training in responsible alcohol sales and service.

(b) Licensees who join the responsible vendor program under this section and maintain all of the program's requirements are not subject to the doubling of penalties provided in this section for a single violation in any period of twelve calendar months.

(c) The responsible vendor program must be free, voluntary, and self-monitoring.

(d) To participate in the responsible vendor program, licensees must submit an application form to the board. If the application establishes that the licensee meets the qualifications to join the program, the board must send the licensee a membership certificate.

(e) A licensee participating in the responsible vendor program must at a minimum:

(i) Provide ongoing training to employees;

(ii) Accept only certain forms of identification for alcohol sales;

(iii) Adopt policies on alcohol sales and checking identification;

(iv) Post specific signs in the business; and

(v) Keep records verifying compliance with the program's requirements.

[2012 2nd sp.s. c 6 § 401; 2012 c 2 § 103 (Initiative Measure No. 1183, approved November 8, 2011).]

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Sent: Wednesday, April 09, 2014 4:18 PM
To: 'Maureen Obrien'
Cc: frondaw@atg.wa.gov; chuckz@atg.wa.gov; Stanley Perdue (perduelaw@mac.com); kellyO2@atg.wa.gov; Kevin Roberts; Bob Dunn
Subject: RE: Supreme Court Case No. 89609-7, Tillman Carr, et al. v. State of Washington

Rec'd 4-9-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maureen Obrien [mailto:mobrien@dunnandblack.com]
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Cc: frondaw@atg.wa.gov; chuckz@atg.wa.gov; Stanley Perdue (perduelaw@mac.com); kellyO2@atg.wa.gov; Kevin Roberts; Bob Dunn
Subject: Supreme Court Case No. 89609-7, Tillman Carr, et al. v. State of Washington

Good afternoon,

Attached for filing in the matter of Carr, et al. v. State of Washington, Supreme Court Case No. 89609-7, please find Appellants' Opening Brief.

This pleading are being filed by Robert A. Dunn, 509-455-8711, WSBA No. 12089, email address: bdunn@dunnandblack.com.

Thank you.

Maureen E. Cox-O'Brien
Paralegal to Robert A. Dunn

Maureen Cox-O'Brien | Dunn Black & Roberts, P.S.
111 N Post, Suite 300 | Spokane, WA 99201
Tel: (509) 455-8711 | Fax: (509) 455-8734
Email: mobrien@dunnandblack.com
Website: www.DunnandBlack.com