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IN THE 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,

Petitioners.

**APPELLANTS CLARK COUNTY AND DONALD SLAGLE'S
REPLY BRIEF**

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ORIGINAL

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I. INTRODUCTION

For many years, WCRP has provided “occurrence”-based coverage for third-party liability claims against member counties, like Clark County, and their employees, like Donald Slagle.¹ It did so through a written “policy” that provides a “duty to defend” and an obligation “to pay” such claims, using language drawn straight from traditional commercial liability insurance contracts that have been extensively interpreted by Washington Courts. WCRP’s insurance contract expressly provides that Washington law applies to the interpretation of the agreement. Although WCRP objects to the characterization of its contract as an “insurance” policy, the key issue here is the substance of the contract rather than its label. Under traditional rules on contract interpretation in Washington, the WCRP contract provides defense and indemnity coverage to the County & Slagle on the same basis as an insurance policy using the same insurance terms of art. AIG, a traditional commercial insurance company, used a traditional excess insurance policy form to provide excess insurance to the County & Slagle, providing insurance coverage on

¹ This brief continues to use defined terms in the same manner as they were used in the County & Slagle’s Opening Brief. Thus, for example, “WCRP” refers to the Respondent Washington Counties Risk Pool, the “County & Slagle” refers to Appellants Clark County and Donald Slagle, “AIG” refers to Respondent Lexington Insurance Company, and “Davis & Northrop” refers to Appellants Larry Davis and Alan Northrop. Although Lexington apparently objects to being referred to as AIG, it is in fact a member of AIG, holds itself out as a member of AIG, and has its policies certified by another member of AIG. *See, e.g.*, CP 4229; <http://www.lexingtoninsurance.com/>.

the same basis as WRCR. There is no real dispute that under Washington law the insurance terms at issue in this case establish that WRCR and AIG owe defense and indemnification obligations to the County & Slagle.

Nonetheless, WCRP and AIG have gone to extraordinary lengths to avoid contractual responsibility for the claim tendered to them by the County & Slagle.² WCRP and AIG contend that neither is subject to Washington law interpreting the very terms at issue here. Rather, they assert they may retroactively select and apply the insurance law of other jurisdictions if it allows them to deny coverage. They allege that employees of Washington counties are not actually insured under WCRP and AIG's policies despite the fact that they are expressly named as additional insureds. They purport to deny their insureds the right to assign a post-loss claim for damages even though Washington and virtually every other state allows such assignments. And they claim WCRP may deny a duty to defend even when it concedes it relied on unsettled law from other states to do so. These positions are contrary to the express contract terms at issue, the established law of this state, and the past practices of WCRP.

The Court should reject WCRP and AIG's attempts to avoid their obligations and confirm that risk pool insured public entities and

² The record establishes that it was WCRP's obligation and practice to tender claims to reinsurance and excess insurance carriers on behalf of insureds such as the County & Slagle, *see* CP 5468, 8377, despite AIG's suggestion to the contrary, *see* AIG Br. at 15.

employees, like the County & Slagle, are entitled to at least the same level of protection as any other insured in the State of Washington. Applying Washington law interpreting the coverage terms at issue conclusively establishes a breach of the duty to defend. Moreover, the contractual remedy for such a breach includes payment of a reasonable settlement, which should be the remedy here. Reasonableness may appropriately be confirmed on remand.

The trial court erred in ruling that Washington insurance common law did not apply to the interpretation of the WCRP and AIG policies, that WCRP owed no duty to defend the County & Slagle, and that the County & Slagle's assignment was void. This Court should reverse the trial court, and hold that under Washington law: (i) common law insurance principles apply to WCRP and AIG's policies; (ii) WCRP breached its duty to defend the County & Slagle; (iii) WCRP owes damages resulting from that breach including payment of a reasonable settlement; and (iv) the post-loss assignments by the County & Slagle are valid. The matter should be remanded for further proceedings based on these holdings.

II. ARGUMENT IN REPLY

A. WCRP Breached Its Duty to Defend.

The key issue in this appeal remains WCRP's breach of its duty to defend the County & Slagle. The WCRP primary policies, on their face,

establish such a duty. Washington common law elaborates on the rights and remedies associated with such a duty. And when Washington law is applied here, it confirms that WCRP has essentially conceded a breach of its duty. The remedy for such a breach includes reimbursement of defense fees and a reasonable settlement. This is the remedy that should be imposed on remand.

1. The WCRP primary policies establish a contractual duty to defend.

As already identified in the County & Slagle’s opening brief, the WCRP primary policies provided that WCRP had a “duty to defend” the County and its employees in “any suit . . . seeking monetary damages on account of any of the [] coverages identified” in the policies. County & Slagle (“C&S”) Op. Br. at 9 (quoting record). As a result, WCRP’s counter-argument in its response brief—that it should not be subject to the same “extra-contractual” duties as a private insurer—is beside the point. WCRP Br. at 28-48. WCRP’s duty to defend was contractual, not extra-contractual, and WCRP breached its contractual duty.

As also previously noted, the WCRP primary policies are to be “construed in accordance with the laws of the State of Washington.” C&S Op. Br. at 10 (quoting record). Under Washington law, the meaning and scope of any given contractual term depends upon the language used,

viewed in the context of “the contract as a whole, its subject matter and objective, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their interpretations.” *Berg v.*

Hudesman, 115 Wn.2d 657, 666-68, 801 P.2d 222 (1990). Each of these factors here confirms that WCRP’s contractual duty to defend under the policies was coextensive with that of an insurer’s.

First, the WCRP primary policies use a phrase of art, “duty to defend,” that has a well-established meaning under Washington insurance law (and insurance law across the country). This Court has identified the “duty to defend” as “one of the main benefits of [an] insurance contract.”

Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 761, 58

P.3d 276 (2002). The duty “is triggered if the insurance policy

conceivably covers allegations in the complaint.” *Expedia, Inc. v.*

Steadfast Ins. Co., 180 Wn.2d 793, 802-03, 329 P.3d 59 (2014). In that

case, the insurer must defend. If the insurer “is unsure of its obligation,”

then “it may defend under a reservation of rights while seeking a

declaratory judgment,” but it cannot simply deny the promised defense.

Truck Ins., 147 Wn.2d at 761. WCRP implicated these principles when it

incorporated into its policies a “duty to defend” the County and its employees against certain lawsuits.³

Second, the policies as a whole confirm the overall context of the relationship is one of insurance and that the parties intended to invoke the duties of an insurer. *See Berg*, 115 Wn.2d at 669 (holding that language that is “technical” or a “term[] of art” is “to be given its technical meaning when used in a transaction within its technical field”). Each of the policies was labeled a form of “insurance,” designated the County and its employees as “insureds,” used technical insurance terms throughout,⁴ and specifically provided that WCRP had a duty to defend the insureds in “any suit” seeking damages “on account of” any of the “coverages” identified in the policies. *E.g.*, CP 1028-30. This precise language, establishing WCRP’s duty to defend, is distinct and commonplace for a liability insurance policy. *See, e.g., Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 42, 811 P.2d 673 (1991); *Aluminum Co. of Am. v. Aetna*

³ It is disingenuous to suggest that the County had a role in drafting the policy language, as WCRP attempts to argue. As the County’s former risk manager Ed Pavone testified, the County had no role in drafting the initial policies (for the first five years after it joined WCRP), and the vote of the Board of County Commissioners was an up-or-down vote on whether to approve/purchase the insurance, not an underwriting exercise. CP 5457-58.

⁴ Such terms include “Insuring Agreement”, “Policy”, “Exclusions”, “Declarations”, “Deductible”, “Limits of Insurance”, “Coverages”, “Coverage Form”, “Defense Costs” and “Named Insured”. *E.g.*, CP 1028-1040.

Cas. & Sur. Co., 140 Wn.2d 517, 566, 998 P.2d 856 (2000). In context, the referenced duty to defend is undoubtedly that of an insurer.⁵

Third, the objective of the policies further demonstrates Washington common law insurance principles were intended to govern WCRP's duty to defend. In particular, the purpose of the County's policies was to provide the County with liability coverage akin to standard, private liability insurance. CP 8255-58. These were form policies that not only guaranteed indemnification for certain potential liability, subject to identified exclusions, but also expressly included a promise to defend lawsuits threatening such liability. *E.g.*, CP 1028-30. The goal was thus to protect the County and its employees to the same extent as other insured parties with coverage from WCRP or a private insurer. *See* CP 8255-58, 8263-64, 8593, 8612. WCRP never suggested to the County or Slagle that the policies it was purchasing would not accomplish that purpose. *Id.*

Fourth, the subsequent conduct of the parties, and especially of WCRP, further confirms that under the policies, WCRP accepted an insurer's duty to defend. *See, e.g., Spradlin Rock Products, Inc. v. Pub.*

⁵ WCRP is correct that some of the later policies only (i.e., after 2006) indicate they do not provide "traditional insurance," *see* WCRP Br. at 35 (emphasis added); CP 359-450, but in both form and substance, all the policies (earlier and later) still use the same terminology and provide a form of insurance coverage, specifically liability coverage, for the County as named insured and Slagle as an "additional insured".

Util. Dist. No. 1 of Grays Harbor Cty., 164 Wn. App. 641, 661, 266 P.3d 229 (2011) (course of performance and course of dealing may be used to interpret the meaning of a contract). As it had done before, WCRP universally applied Washington common law insurance principles to decide whether a defense was owed under such policies. *See* CP 8824-25, 8367-74. WCRP makes absolutely no mention in its brief of the testimony of Susan Looker, its claims manager, who testified that WCRP had applied an insurer's duty to defend under the policies for decades. CP 8324-25, 8365-74. Nor does it mention the letters it belatedly produced in discovery showing its application of Washington insurance common law (including the law of trigger) to other claims. CP 10489-506. Nor does WCRP explain why it published and circulated Washington case law updates to its members, including an update specifically regarding the scope of an insurer's duty to defend under Washington common law, in the event it believed these duties did not apply. CP 8526-33. Nor does WCRP explain why it regularly described its program to members as a "liability insurance program" that responded to "insurance needs," CP 5420-49, directed members to file WCRP policies "with the rest of each county's insurance policies," CP 8294, and made policies available to members in a section of its website labeled "Insurance Liability Policies," CP 8296-98.

Both AIG and WCRP rely upon language describing WCRP that appeared in Clark County's Annual Financial Report for 2013. *See* WCRP Br. at 14; AIG Br. at 3. Respondents omit the fact that this language was authored by WCRP during this litigation and provided surreptitiously to the Clark County auditor for publication. CP 8533-8545. Specifically, on March 3, 2014, WCRP Executive Director Vyrle Hill emailed Clark County Risk Manager Mark Wilsdon a copy of what appeared to be a routine annual note relating to WCRP's finances for publication in the County's annual financial report. *See id.* Without disclosing that this annual note contained new self-serving language mirroring WCRP's legal arguments in this lawsuit, Mr. Hill instructed Mr. Wilsdon to "forward this information promptly to the person(s) responsible for preparing and publishing the county's Annual Financial Report." CP 8534 (emphasis in original). It is noteworthy that the previous annual notes provided by WCRP do not reflect WCRP and AIG's newfound legal position in this case (that WCRP/AIG are "not necessarily" subject to Washington insurance common law).⁶

⁶ WCRP previously provided a note every year describing its structure, finances and solvency and this note was published nearly verbatim to advise Clark County residents of WCRP's self-description of its structure and financial health (subjects which Clark County was not independently in a position to know or independently represent). *See, e.g.,* Clark County, *Comprehensive Annual Fin. Report FY ended Dec. 31, 2011* at 89-92 (2012), available at https://www.clark.wa.gov/sites/all/files/auditor/financial-reports/0_2011cafr_AIG_WCover.pdf; Clark County, *Comprehensive Annual Fin. Report FY ended Dec. 31, 2012* at 94-97 (2013), available at

WCRP and AIG fail to identify to this Court Mr. Wilsdon's conflicted dual roles with WCRP and Clark County. Instead, they attempt to rely on the cherry-picked statements and unfounded legal opinions from Mr. Wilsdon (a lay witness) to argue that their insurance policies should be exempt from Washington's insurance common law.⁷ See WCRP Br. at 20, 23; AIG Br. at 17-18, 51, 53. Mr. Wilsdon himself confirmed, however, that as WCRP President and Executive Committee Member he "wore a different hat" and was obliged to represent the interests of WCRP, not necessarily those of Clark County as an entity. CP 8580-81. Mr. Wilsdon also was not involved in the underlying litigation and was not authorized to speak on behalf of Clark County. CP 8642, 8627-28, CP 8513. Specifically, Mr. Wilsdon and Superior Court Judge Hon. Bernard Veljacic⁸ testified that Mr. Wilsdon had no active role in the litigation and that he was not authorized to speak on behalf of the County with regard to

https://www.clark.wa.gov/sites/all/files/auditor/financial-reports/0_2012cafr_ClarkCityWA_000.pdf.

⁷ Even if Mr. Wilsdon were authorized to speak on behalf of Clark County, which he was not, his conflicted and inaccurate views of the law as a lay witness are not "admissions" and are not binding on this Court's determination of the purely legal issues in this case. See, e.g., *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009) ("It is well established that a party concession or admission concerning a question of law . . . is not binding on the court." (internal quotations omitted)); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 859, 292 P.3d 779, 792 (2013) ("An admission is not binding on the party—he is permitted at trial to explain or deny the admission, or introduce evidence to the contrary.").

⁸ At the time, Judge Veljacic was the Deputy Prosecuting Attorney responsible for defending the Underlying Case, and he testified as Clark County's CR 30(b)(6) witness in this action. See CP 8471, 8497.

the Underlying Case. *Id.* This Court should, therefore, take Mr. Wilsdon's conflicted statements and lay legal opinions with more than a grain of salt.⁹

The record in this case overall establishes that the parties rightly understood that Washington common law insurance principles applied. WCRP's subsequent change of heart, and efforts to improve upon the record by taking advantage of Mr. Wilsdon's conflict of interest, does not change the meaning of the contracts WCRP entered into years earlier. *See City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 591, 269 P.3d 1017 (2012) (holding that prior "course of dealings" showed meaning of contract regardless of one party's more recent change in practice).

Finally, application of an insurer's duty to defend under Washington common law is the only reasonable interpretation of the WCRP primary policies on this point. This Court has observed that a duty to defend is "a valuable provision" that "would have little value" and "would be rendered almost meaningless" if the promisor could dispute coverage at the outset by questioning the allegations in the underlying lawsuit. *Holland Am. Ins. Co. v. Nat'l Indemnity Co.*, 75 Wn.2d 909, 912, 454 P.2d 383 (1969) (internal quotations omitted). This is also why an

⁹ The trial court correctly discounted the value of Mr. Wilsdon's statements, concluding that "Wilsdon was either still serving as an officer of the Pool or writing in his capacity as the former Pool President". CP 8051.

insurer must defend unless “the alleged claim is clearly not covered by the policy,” again, subject to a potential reservation of rights. *Truck Ins.*, 147 Wn.2d at 760-61 (emphasis added). Together, these principles ensure the duty to defend is not eviscerated and “can be given effect,” as WCRP and the County necessarily intended at the time of agreement. *Holland*, 75 Wn.2d at 913; *see Snohomish County Pub. Transp. Ben. Area Corp. v. First Group Am., Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012) (noting “an interpretation that renders a [contractual] provision ineffective” is disfavored).

In sum, the WCRP primary policies are contracts, and the plain language of the contracts demonstrates that WCRP assumed an insurer’s duty to defend the County & Slagle.

2. Nothing in the policies or Washington law suggests an alternative interpretation of WCRP’s duty.

WCRP nonetheless attempts to avoid the specific contractual obligations in the policies by suggesting that the policies are technically not policies and that WCRP is technically not an insurer. Even if the court were to accept these propositions, which it should not do, they would not change the proper result in this case.

WCRP first suggests in passing that a party undertaking the duty to defend in a mere indemnification agreement, rather than an insurance

contract, is not subject to the same “strict” rules. WCRP Br. at 39 (quoting *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 472, 836 P.2d 851 (1992)). This position has no import in this case, for multiple reasons.

For one thing, the County’s policies are not “indemnity agreements” in the sense described by the *George Sollitt* case. Such an agreement is part of a contract for services, such as a contract between a general contractor and subcontractor, assigning risk of liability from performance of the contract to one of the contracting parties. *See, e.g., George Sollitt*, 67 Wn. App. at 470-71 & nn.1-2 (“Chapman assumed the entire risk and responsibility for any injuries . . . [from] the performance of the subcontract.”). In contrast, the WCRP primary policies are standalone contracts for liability coverage. Moreover, the policies use and incorporate specialized insurance terms throughout, including specifically with regard to WCRP’s duty to defend. *See supra*, at 5-7 & n.4.

WCRP is also wrong to suggest that the duty to defend varies as between indemnity agreements and insurance contracts under Washington law. No Washington authority stands for this proposition. To the contrary, Washington courts have indicated that they “favor application of the [same] test to both insurers and indemnitors” that are under a contractual duty to defend. *Parks v. W. Wash. Fair Ass’n*, 15 Wn. App.

852, 856, 553 P.2d 459 (1976). As this Court explained in *Holland*, the common law principles governing the duty to defend ensure that the agreed-upon duty “can be given effect,” as the parties necessarily intended at the time of contracting. 75 Wn.2d at 913. That is no less true in the context of an indemnity agreement, so long as one party undertakes a duty to defend the other against specified claims. *See, e.g., Crawford v. Weather Shield Mfg. Inc.*, 44 Cal.4th 541, 553-54, 187 P.3d 424, 79 Cal. Rptr. 3d 721 (2008) (noting that “[a] contractual promise to ‘defend’ another against specified claims” has special meaning in “legal parlance” and “connotes an obligation of active responsibility”).

The authority WCRP relies on is inapposite. *See* WCRP Br. at 39. That authority discusses the test for determining whether the duty to defend has been triggered in a given case. In particular, the Court of Appeals in *George Sollitt* observed that the normal “strict” test hinging the duty on the four corners of the complaint should be expanded in some cases to incorporate the “facts known” at the time of tender. 67 Wn. App. at 472 (citing *Parks*). WCRP does not identify how this would have led to a different result in the present case. Regardless, the purpose of the “expanded rule” is to broaden the duty to defend, in light of “the advent of notice pleadings,” under which vague factual allegations may nonetheless implicate coverage. *Parks*, 15 Wn. App. at 855. At the time of *George*

Sollitt and Parks, this Court had not yet resolved the issue. *See Nat'l Steel Constr. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 14 Wn. App. 573, 575, 543 P.2d 642 (1975). Since that time, however, this Court has clarified repeatedly that the facts known at the time of tender may be relied upon—but only to expand the duty to defend, not to narrow it. *See, e.g., Expedia*, 180 Wn.2d at 803. And the same rule applies here.

WCRP next points to RCW 48.01.050 to argue that it is not an insurer and therefore, in its view, not subject to Washington insurance common law. *See* WCRP Br. at 28. But that statute says only that a joint government insurance program like WCRP is “not an ‘insurer’ under this code.” RCW 48.01.050 (emphasis added). The referenced “code” is Title 48 RCW, which “constitutes the insurance code.” RCW 48.01.010.

WCRP’s interpretation renders the phrase “under this code” superfluous, contrary to an essential principle of statutory construction. *See, e.g., Ralph v. State Dep’t of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (“We must interpret a statute as a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant.” (internal marks omitted)). The fact that WCRP is not an “insurer” under the code does not answer whether WCRP’s contracts of insurance should be interpreted under Washington’s common law insurance principles, or whether WCRP agreed to undertake duties equivalent to those of an

insurer based on the contractual terms. Washington's appellate decisions addressing risk pool contracts have certainly proceeded in that fashion. *See* C&S Op. Br. at 25-30; *see also infra*, at 16-18.

Ultimately, WCRP argues that RCW 48.01.050 somehow provides an implied statutory exemption from the common law that is supported on public policy grounds. Even if such an implied exemption and the resulting detrimental impact on risk pool insured public entities and their employees did serve a public policy, which it does not, this Court has repeatedly and recently held that it will not "read a new exception into [a] statute on policy grounds." *Saucedo v. John Hancock Life & Health Ins. Co.*, ___ P. 3d ___, No. 91945-3, 2016 WL 852459, at *3 (Wash. Mar. 3, 2016). Likewise, this Court will not "recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent" to do so, which is absent here. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008).

WCRP unconvincingly attempts to discredit the Washington decisions applying common law insurance principles to joint government insurance pools such as WCRP, most notably the case of *Wash. Pub. Util. Dists. ' Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 771 P.2d 701 (1989) ("*WPUDUS*"). In particular, WCRP notes that the pool at issue in that case had been "formed in 1953," before such pools

were statutorily authorized “under RCW ch. 48.62 in 1979.” WCRP Br. at 46. But the source of underlying authority to form a joint insurance pool does not alter the legal principles that will apply once such a pool has been formed, absent express language to that effect. *See* RCW 4.04.010 (common law applies unless “inconsistent with” applicable statutes). Accordingly, absent some other basis for distinguishing this Court’s prior application of common law insurance principles to joint government insurance programs as in *WPUDUS*, *see* 112 Wn.2d at 10-11, that precedent still applies. And as WCRP points out, the policy at issue in *WPUDUS* incorporated “commercial” insurance policy terms and provided a “first layer” of liability coverage. WCRP Br. at 46. The same is true here. *See, e.g.*, CP 1028-30.

WCRP also ignores that following *WPUDUS*, Washington courts have consistently applied common law insurance principles to the policies of joint government insurance programs such as WCRP. *See Colby v. Yakima County*, 133 Wn. App. 386, 391-92, 136 P.3d 131 (2006) (applying common law insurance principles to WCRP policy); *see also City of Okanogan v. Cities Ins. Ass’n of Wash.*, 72 Wn. App. 697, 699 & n.2, 701, 865 P.2d 576 (1994) (applying common law insurance principles to policy of municipal association acting under “an interlocal agreement for . . . jointly purchased insurance”). As these cases show, parties in

Washington (including WCRP) have long understood that joint government risk programs are subject to common law insurance rules. And this Court recognizes the “value in maintaining a well-settled rule” to promote the “consistent development of legal principles,” to foster “reliance on judicial decisions,” and to contribute to the “integrity of the judicial process.” *Key Design Inc. v. Moser*, 138 Wn.2d 875, 882, 983 P.2d 653 (1999) (internal quotations omitted). WCRP has not made the “clear showing” required to overturn well-settled Washington law on this issue. *Id.*

Although Washington law is dispositive of this issue, courts in other states also have applied common law insurance principles to claims against government risk pools like WCRP. *See, e.g., Gilley v. Mo. Pub. Entity Risk Mgmt. Fund*, 437 S.W.3d 315, 320 n.6 (Mo. Ct. App. 2014) (“A public entity’s participation in [the risk pool] has the same effect as a public entity’s purchase of insurance”); *S.D. Pub. Assur. Alliance v. Aurora County*, 803 N.W.2d 612, 614 & n.1 (S.D. 2011) (“Technically, risk pool coverage is not insurance, but . . . coverage concepts are similar to insurance so we apply the same general principles.” (internal marks omitted)). Likewise, courts have applied common law insurance principles to self-insurance programs, especially when the underlying coverage of numerous individuals is at stake, as it is here. *See, e.g.,*

ELRAC, Inc. v. Ward, 96 N.Y.2d 58, 77, 748 N.E.2d 1 (2001) (noting that self-insuring rental car company “undertook all the duties and responsibilities of an insurer”); *McClain v. Begley*, 465 N.W.2d 680, 682 (Minn. 1991) (noting in workers compensation context that “[s]elf-insurance is the functional equivalent of a commercial insurance policy”).

WCRP cites to other foreign decisions in support of its argument that common law insurance principles do not apply to it, *see* WCRP Br. at 45-48 & nn. 9, 11, but none of these cases supports WCRP’s asserted exemption from Washington’s common law. For example, in *Milner v. City of Leander*, 64 S.W.3d 33 (Tex. Ct. App. 2000), the court merely held that a risk pool had not waived its immunity as to workers compensation claims, while also noting that the pool was an insurance carrier. 64 S.W.3d at 39. The remaining cases resolve discrete statutory issues not relevant here, and often based on statutes expressly exempting government risk pools from all insurance law, unlike here. *See, e.g., Bd. of County Comm’rs v. Ass’n of County Comm’rs*, 339 P.3d 866, 867-69 (Okl. 2014) (deciding pool was not “an insurer pursuant to 36 O.S.2011, §§ 607.1” because related statute broadly exempted such pools from “the laws of [the] state regulating insurance”).¹⁰

¹⁰ *See also City of South El Monte v. S. Cal. Joint Pwrs. Ins. Auth.*, 38 Cal. App. 4th 1629, 1635, 45 Cal. Rptr. 2d 729 (1995) (noting that statute previously stated government insurance “shall not be considered insurance . . . under the Insurance Code”—but was

Finally, the Court should take note that WCRP does not identify any alternative understanding of the scope or nature of its duty to defend, much less the basis for such an alternative formulation, or how such an alternative would be implemented and adjudicated in any given case. This Court has long recognized the concern inherent in inconsistent treatment of the duty to defend. *See Holland*, 75 Wn.2d at 913-14 (rejecting proposed alternative rule on duty to defend that lacked any explanation of “how the rule . . . could be applied at the time the complaint is filed,” “whose responsibility” it would be “to prove” relevant facts, or “in what kind of proceeding” the duty would be adjudicated). In the end, WCRP was under a contractual and common law duty to defend the County and its employees, a duty equivalent to that of an insurer. WCRP simply failed to fulfill that duty in this case, and should be found in breach.

3. Applying Washington law, WCRP has effectively conceded a breach of the duty to defend.

WCRP should be found in breach of its duty to defend because it admittedly attempted to apply non-Washington authority to resolve an

specifically amended to “declare[] that self-insurance programs ‘shall not be considered insurance,’” without limitation); *Pub. Entity Pool for Liab. v. Score*, 658 N.W.2d 64, 65 (S.D. 2003) (deciding pool was not insurance “under [the] insurance code” while also observing that “because the concepts are similar to insurance, we have adopted insurance law principles” to decide certain questions); *City of Arvada v. Colo. Intergov’t Risk Sharing Agency*, 19 P.3d 10, 11 (Colo. 2001) (holding statutory requirements did not apply to pool because it was expressly exempted from “the laws of [the] state regulating insurance”); *Antiporek v. Vill. of Hillside*, 114 Ill.2d 246, 248-51, 499 N.E.2d 1307 (1986) (applying specific statutory language regarding immunity to government risk pool); *Morgan v. City of Ruleville*, 627 So.2d 275, 280 & n.4 (Miss. 1993) (same).

issue in its favor that was, at best, ambiguous. This is not permitted in the context of a duty to defend.

Specifically, WCRP contends that it had no duty to defend the County & Slagle because, in WCRP's view, the occurrence giving rise to coverage pre-dated the County's membership in the pool. WCRP Br. at 57.¹¹ To reach this conclusion, however, WCRP necessarily applies a "trigger" rule that is contrary to Washington's law of "continuous trigger". See, e.g., *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 465-69, 760 P.2d 337 (1988) (discussing cases, noting "an occurrence" is based on "when damages or injuries took place," and holding that coverage may be triggered by "multiple," "continuing," or "long-standing causes resulting in injury during the policy periods").

In WCRP's own words, "this Court has not addressed what triggers coverage" specifically "in a civil rights claim" WCRP Br. at 65; see also AIG Br. at 28 (same). But when WCRP was called upon to defend, it nonetheless speculated that the Court would depart from its

¹¹ Having no basis in this appeal to contest WCRP's duty to defend, AIG attempts to make the same argument with respect to its duty to indemnify, AIG Br. at 27, although it concedes the trial court never addressed this issue, AIG Br. at 34. Nor would the trial court have had occasion to address the duty to indemnify, as no party filed motions on that issue prior to the rulings that are now on appeal. As a result, the question of any duty to indemnify is not before the Court in this appeal, and would need to be addressed on remand following this Court's holdings. Cf. AIG Br. at 34 n. 5 ("If this Court finds that WCRP owed a duty to defend, whether and to what extent Lexington owes a duty to indemnify must be determined on remand.").

earlier continuous trigger rulings and apply a different rule to the facts of the present case; WCRP then relied on that speculation to deny a defense. This is the exact same approach this Court deemed a breach of the duty to defend in both *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 402, 410-11, 229 P.3d 693 (2010), and *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 60, 164 P.3d 454 (2007). WCRP also fails to explain how its assertion that it is not subject to Washington's common law of insurance allows it to apply the insurance common law of other jurisdictions to avoid its duty to defend.

In any case, even the law of other jurisdictions establishes that WCRP had a duty to defend. Throughout the country, courts addressing coverage for wrongful conviction lawsuits have found the duty to defend triggered under policies similar to the ones at issue here, whether such policies were in place during incarceration, at the time of any alleged malfeasance or nonfeasance, or at the time of ultimate exoneration. *See, e.g., Nat'l Cas. Ins. Co. v. City of Mt. Vernon*, 128 A.D.2d 332, 335-37, 515 N.Y.S.2d 267 (N.Y. App. Div. 1987) (holding ongoing injury of imprisonment was continuing occurrence under policy and duty to defend was triggered); *Waters v. W. World Ins. Co.*, No. 11-P-2123, 2013 WL 499215, at *1-2 (Mass. Ct. App. Feb. 12, 2013) (unpublished) (holding allegations of inadequate training and supervision, failure to reinvestigate,

and ongoing failure to provide exculpatory evidence “plainly implicate[d] acts, errors and omissions during the period of . . . coverage”); *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 776 F. Supp. 2d 670, 698 (N.D. Ill. 2011) (insurer’s duty to defend was triggered because conviction was invalidated during policy period) (citing *Nat’l Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010)). Elsewhere, the insurer’s duty to defend under such policies has been simply assumed by all parties and the courts. See *Sharonville v. Am. Employers Ins. Co.*, 846 N.E.2d 833, 835-37, 839-40 (Ohio 2006) (allegations of city’s ongoing withholding of evidence over span of 20 years had triggered policies of multiple insurers “that had provided coverage to the city from 1979 to 2002”).

WCRP admits that there is at least a split of authority regarding the application of continuous trigger in wrongful conviction cases, which it characterizes as a “minority” rule. WCRP Br. at 66 n. 16; *see also* CP 1126-27 (letter from WCRP’s executive director applying the “majority rule” to deny a duty to defend). “Minority” rule is a misnomer, however, because it does not account for the question of whether (like Washington) the jurisdictions in question have adopted a continuous trigger in other contexts.¹² Nor does it address the variations between the facts and causes

¹² For example, WCRP cites and relies on *N. River Ins. Co. v. Broward County Sherriff’s Office*, 428 F. Supp. 2d 1284 (S.D. Fla. 2006), *see* WCRP Br. at 66, but the court in that case specifically applied a manifestation trigger under Florida law, which is inconsistent

of action pleaded in each of the cited cases, including underlying policy language. Regardless, WCRP's assertion of a lack of controlling authority from this Court and a purported "minority" position in other states establishes at least the possibility of coverage and, therefore, a duty to defend.¹³

The federal civil rights claim in the Underlying Case, standing alone, was sufficient to trigger WCRP's duty to defend. The original and amended complaints included allegations of ongoing wrongful incarceration and various acts of both malfeasance and nonfeasance throughout the relevant policy periods. *See* C&S Op. Br. at 41-43 (detailing allegations). Both complaints also contained elements challenging the propriety of Davis & Northrop's convictions, claims that did not accrue until those convictions were formally vacated. *Cf. McFatridge*, 604 F.3d at 344 (holding claims for "unconstitutional conviction, imprisonment, and denial of due process" would not accrue or

with Washington law, *see N. River*, 428 F. Supp. 2d at 1289-90 ("Florida courts follow the general rule that the time of occurrence . . . is the time at which the plaintiff's injur[ies] first manifest. . . . In this case, it is clear that the damage . . . manifested itself well before the Policy period." (internal quotations omitted; emphasis added)).

¹³ This Court looks at cases on the merits rather than rejecting a position labeled as a "minority", even if AIG might consider such an approach "impolitic". AIG Br. at 23; *see, e.g., Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 888, 224 P.3d 761 (2010) ("We conclude that the minority rule . . . employs the better reasoning."); *Abbey Rd. Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009) ("Washington's rule is the minority rule, and it offers more protection . . . than the rule generally applied in other jurisdictions."); *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 906, 792 P.2d 1254 (1990) ("Washington is aligned with the 'minority' rule.").

occur under policy until underlying conviction had been “reversed on direct appeal . . . or called into question by a federal court’s issuance of a writ of habeas corpus” (internal quotes omitted)); *see also Roess v. St. Paul Fire and Marine Ins. Co.*, 383 F. Supp. 1231, 1235 (M.D. Fla. 1974) (“[The] claim . . . for malicious prosecution did not mature until the [] action was finally terminated . . . within the operative term of the policy . . .”). WCRP at least acknowledges that such allegations were included in the underlying complaints. WCRP Br. at 1 (referring to Davis & Northrop’s claims as encompassing allegations of “wrongful conviction and incarceration”), 18 (citing CP 4764).

WCRP further ignores that Davis & Northrup separately asserted basic state claims sounding in tort that independently triggered the duty to defend. The complaints asserted claims for negligence; negligent supervision, training and retention; and infliction of emotional distress. *See, e.g.*, CP 4186-4204. These are not “civil rights” claims, and as to these types of claims, this Court has applied the continuous trigger rule. *See Transcon. Ins.*, 111 Wn.2d at 468-69 (applying rule to negligence-based state tort claims); *see also In re Feature Realty Litigation*, 468 F. Supp. 2d 1287, 1299-1303 (E.D. Wash. 2006). Accordingly, the state claims in the Underlying Case triggered WCRP’s duty to defend, because

“some of the acts” alleged “conceivably caus[ed] damage during one [of] the policy periods.” *Transcon. Ins.*, 111 Wn.2d at 469.

In the end, WCRP’s duty to defend was triggered because there was no way to eliminate the prospect of coverage based on the operative pleadings in the Underlying Case. Throughout the Underlying Case there were disputes regarding the factual predicates for each of Davis & Northrop’s causes of action. *See Davis v. Clark Cty.*, 966 F. Supp. 2d 1106, 1145 (W.D. Wash. 2013), *on reconsideration in part* (Sept. 9, 2013) (“There has been substantial confusion regarding Plaintiffs’ claims and the factual support for those claims.”). The state law claims ultimately proceeded to trial based *solely* on events occurring after 2009. *Id.* As to the claims under 42 U.S.C. § 1983, neither the original complaint nor the first amended complaint specified all of the underlying grounds for that cause of action.¹⁴

Nor do WCRP and AIG’s confused and contradictory positions regarding the “deemer” clause found in the later WCRP policies absolve WCRP of its duty to defend. The origin of the “deemer” concept is the 1995 California Supreme Court decision that adopted the “continuous

¹⁴ WCRP appears to chastise the County & Slagle for stipulating to the amended complaint. Had WCRP defended the case as it should have, it could of course have opposed the amendment, although the Ninth Circuit standard for amendment of pleadings is one of “extreme liberality”. *E.g., C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir. 2011).

trigger” rule, *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995). *Montrose* held that an insurer must provide coverage for the entire loss caused by ongoing property damage, even if it was a known event insured by a prior policy. Specifically, the *Montrose* court held that known bodily injury or property damage predating a general liability policy may trigger a policy years later so long as the injury or damage continues. The question on appeal was whether an insurer had a duty to defend a chemical company despite the fact that damage was allegedly discovered (i.e., known) before the start of the insurer’s policy term. *Id.* at 881, 884-85. The court held that the policy covered damage that began prior to the policy period and progressed throughout the period. *Id.* at 890, 892-93, 904.¹⁵ This Court has adopted the California rule of continuous trigger.¹⁶

Insurance companies soon began revising their policies through use of “deemer” clauses in an attempt to “circumvent the continuous

¹⁵ Subsequent case law extended *Montrose* to the duty to indemnify. See *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 54 Cal. Rptr. 2d 176, 188 (Cal. Ct. App. 1996), as modified (July 19, 1996).

¹⁶ “We hold that once a policy is triggered, the policy language requires insurer to pay all sums for which the insured becomes legally obligated, up to the policy limits. 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.” *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 134 Wn.2d 413, 429, 951 P.2d 250 (1998) (footnote omitted) (citing *Aerojet-Gen. Corp. v. Transport Indem. Co.*, 17 Cal.4th 38, 948 P.2d 909, 70 Cal.Rptr.2d 118, 128 (1997) (holding that “if specified harm is caused by an included occurrence and results, at least in part, within the policy period, it perdures to all points of time at which some such harm results thereafter”) (emphasis added)).

injury trigger of the coverage rule laid down in [*Montrose*].” *USF Insurance Co. v. Clarendon Am. Ins. Co.*, 452 F. Supp. 2d 972, 989 (C.D. Cal. 2006). Importantly, however, the so-called “deemer” clause in the WCRP primary policies is substantially different than the standard “deemer” clause. The standard “deemer” clause attempts to reduce multiple or continuing occurrences to a single, earlier point in time. *See, e.g., USF*, 452 F. Supp. 2d at 990. In contrast, the “deemer” clause in the WCRP primary policies from 2004 onward attempts to reduce multiple or continuing occurrences to a single, later point in time. *See, e.g., CP 1109*. WCRP and AIG both mention the “deemer” clause, but attempt to treat it like a standard “deemer” clause limiting an occurrence to an earlier date, rather than as the clause is written.

WCRP also attempts to rely on the second sentence of the clause to contend the County had actual knowledge of the alleged injuries prior to the inception of coverage. WCRP bases these allegations on information outside the underlying complaints, however, which cannot negate a duty to defend. *Truck Ins.*, 147 Wn.2d at 761. Furthermore, as Judge Veljacic testified, the fact that Davis & Northrop appealed and collaterally attacked their convictions in the normal course does not equate to actual knowledge of the alleged injury. CP 8493, 8507-8510. Such knowledge did not accrue until the invalidation of Davis & Northrop’s convictions, and it was

only after that occurred that the County received first notice of a claim for damage in 2012. *See id.* WCRP and AIG also both ignore the effect of the “deemer” clause’s absence from the 2001-03 WCRP primary policies, since the language was not added until 2004.¹⁷ None of those policies contained the cited “knowledge” language, or any attempted qualification of the continuous trigger rule.

In sum, WCRP had no basis in the law or the policies to eliminate any possibility of coverage. Washington has adopted the continuous trigger rule, and even if this Court were to apply a different rule to civil rights claims, such a rule would encompass only one claim in the Underlying Case. There is also a split of authority among other jurisdictions about how to determine the triggering event or events as to such claims. All of these reasons established at least the possibility of coverage based on the broad allegations in Davis & Northrop’s pleadings. WCRP thus breached its duty to defend the County & Slagle.

¹⁷ AIG remarkably suggests that the “deemer” clause was present in the earlier policies, but WCRP’s brief admits it did not arise until several years after the County joined the risk pool: “In 2004, the Pool’s Board approved a provision, known as a ‘deemer clause,’ clarifying that an ‘occurrence’ that takes place over multiple policy periods will be deemed one occurrence taking place in the last policy period during which any portion of the occurrence took place, but that in no event could an occurrence be deemed to take place once an insured has knowledge of the claim.” WCRP Br. at 16; *cf.* AIG Br. at 7.

4. The Remedy for breach includes payment of a reasonable settlement.

As a result of WCRP's breach of its duty to defend, the County and Slagle were entitled to damages, including the cost of settlement. As a longstanding rule of Washington contract law, if a party has breached its duty to defend, it must "reimburse" the abandoned party for "costs reasonably incurred in defense of the action" and any reasonable "judgment or settlement". *Waite v. Aetna Cas. & Sur. Co.*, 77 Wn.2d 850, 856, 467 P.2d 847 (1970). As elaborated in the County & Slagle's Opening Brief, wrongful refusal to defend similarly waives the right to object to a reasonable settlement entered by the insured. *See C&S Op. Br.* at 53-54. WCRP is thus liable to the County & Slagle for attorney fees the County incurred in defense, and for the settlement that resolved the Underlying Case in WCRP's absence. At the very least, the Appellants must be afforded the opportunity to establish a wrongful denial of the duty to defend on remand, including a breach of the contractual duty of good faith and fair dealing.

WCRP suggests that regardless of the nature of the breach, these established rules should not apply to it because the imbalance of power in the insurance context is not applicable to a joint insurance pool such as WCRP. *See WCRP Br.* at 43-44. But WCRP overlooks the real risks of

coercion and abuse in insurance pools, as demonstrated in this very case. Here, once the County & Slagle submitted claims for coverage to WCRP, coverage was denied, and the County was subsequently removed from the pool for failing to agree to indemnify WCRP. *See* CP 1118-1121, 8278. In March 2014, counsel for WCRP went so far as to engage in direct *ex parte* contact regarding this litigation with Clark County representatives (whose attorneys were not present) in an effort to elicit statements that they would then rely upon in court. CP 8439-41, 8277-81, 8448-50. Simultaneously, and acting in concert with their attorneys, the WCRP board interrogated Clark County representatives under the threat of cancelation of the County's insurance. *Id.*

The WCRP board, with their litigation attorneys present, demanded that the unrepresented Clark County witnesses agree to the following conditions pertaining to *this lawsuit* in exchange for remaining insured: (1) admit in a resolution that the County breached the Interlocal Agreement; (2) remove Bernard Veljacic as the attorney on the case; (3) agree not to oppose any motions brought by WCRP in the present case; (4) refrain from providing any assistance or cooperation to the County's co-defendants Davis and Northrop in this case; and (5) fully indemnify both WCRP and its commercial insurance excess and reinsurance carriers from any exposure in this case. *Id.* Mr. Wilsdon aptly characterized these

demands as an ultimatum from WCRP to the County to either “throw the fight” in this litigation or have its insurance canceled. CP 8280-81. The trial court referred to this conduct as “very concerning” and ultimately refused to consider “evidence” that WCRP gathered in this fashion. CP 8050-52.

This conduct shows, however, that when a large claim is submitted to a risk pool, the impetus may well be for the other counties (and the pool’s commercial insurance partners) to band together to deny the claim, even if it is covered under the policy terms. In such a case, it is not only the county’s interests at stake, but also those of its numerous employees. These dynamics support application of common law insurance principles to a joint government insurance program such as WCRP, especially when coverage is fully reinsured with a private insurer, as it is here.¹⁸

WCRP nonetheless argues that the County & Slagle should be limited to “breach of contract damages”, which WCRP defines as solely reimbursement of defense fees. WCRP Br. at 74. But even if this Court applied only a strict “contractual” remedy, the cost of a judgment or settlement is awarded for breach of the duty to defend in Washington as matter of contract law. *See, e.g., Waite*, 77 Wn.2d at 856. Such

¹⁸ WCRP has purchased reinsurance to transfer 100% of the risk of loss. *See* CP 1221, 1225, 1229, 1239, 5422 (WCRP Annual Reports); CP 8333-35 (excerpt from Susan Looker deposition); CP 4230-4495 (reinsurance policies); CP 8256.

reimbursement for settlement is both contractual and compensatory, deemed necessary to put the abandoned party “in as good a position as he or she would have been had the contract not been breached.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998); *see also Greer v. Nw. Nat’l Ins. Co.*, 109 Wn.2d 191, 202, 743 P.2d 1244 (1987).

The policy behind both the contract and estoppel remedies dictates that WCRP should be liable for a reasonable settlement here. A party abandoned to defend itself cannot be expected simply to replace the defense that an absent insurer would have provided. In such cases, a negotiated settlement may be the only reasonable way to resolve the dispute. Further, limiting damages in such cases to reimbursement for attorney fees would practically eviscerate the duty to defend. As this Court has explained in discussing the presumptions associated with damages from breach of the duty to defend:

The rebuttable presumption of harm applies to the question before us because a bad faith breach of the duty to defend wrongfully deprives the insured of a valuable benefit of the insurance contract, and leaves the insured faced with the difficult problem of proving harm. Without the rebuttable presumption of harm, the insurer could defend its position under the following contract theory—even if there were a duty to defend, our bad faith breach did not cause injury to the insured because ultimate liability was found to be outside the scope of coverage. . . . The rebuttable presumption of harm must be applied because an insured should not be required to prove what might have happened had the insurer not breached its duty to defend in bad faith;

that obligation rightfully belongs to the insurer who caused the breach.

Am. Best Food, Inc., 168 Wn.2d at 411-12.

In sum, the County and Slagle should be entitled to full relief for WCRP's breach of the duty to defend, including the cost of settlement.

B. Clark County & Slagle's Assignment Is Valid.

WCRP attempts to avoid the ramifications of its breach by challenging the County & Slagle's assignment. Thus, WCRP's (and AIG's) argument on the County & Slagle's assignment of a post-loss claim for damages is not only that the assignment is void (despite established authority allowing such assignments), but also that it absolves WCRP and AIG of any preceding breach of their duty to defend or indemnify. This position is both extreme and unsupported by Washington law.

1. Under "insurance" or "contract" law, the assignment is valid.

WCRP does not cite a single case precluding a "post-loss" assignment of a claim for breach of contract under Washington common law (be it the law of insurance, or contract). With respect to insurance common law, virtually every court and jurisdiction in the country is consistent with Washington law in allowing assignment of a claim under an insurance policy after a loss has already taken place:

For many decades . . . courts, parties to transactions, and litigants generally *assumed* the legal propriety of assigning to a successor, in connection with a transfer of assets and liabilities, the right to invoke insurance coverage for losses that had previously occurred—even if those losses were not determined with precision or indeed known, let alone reduced to a judgment. . . . We are aware of only one out-of-state exception to this line of authority, and that decision has not been followed by any other jurisdiction.

Fluor Corp. v. Superior Court, 61 Cal.4th 1175, 1213-15, 354 P.3d 302, 191 Cal. Rptr. 3d 498 (2015); *see also* C&S Op. Br. at 47-50 & n.15.

WCRP's assertion that it is not an insurer does not help it here because Washington applies this same rule to both insurance policies and other contracts. *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 830, 881 P.2d 986, 994 (1994) (“We follow the reasoning adopted in *Portland Elec.* and hold a general anti-assignment clause, one aimed at prohibiting the assignment of a contractual performance, does not, absent specific language to the contrary, prohibit the assignment of a breach of contract cause of action.”). Given the clear state of the law on this issue, the County and WCRP would have reasonably understood that the assignment provision of the Interlocal Agreement did not preclude assignment of a claim for breach of contract damages. *See, e.g., H & J Contracting, Inc. v. Jacobs Eng'g Grp., Inc.*, No. 15-61462-CIV, 2015 WL 6504543, at *2 (S.D. Fla. Oct. 28, 2015) (“Reasoning that an anti-assignment clause is designed to protect the parties from having to deal

with performance by parties with whom they did not contract, the [Berschauer] court held that once performance under the contract is complete, the anti-assignment clause does not prohibit the assignment of a cause of action for breach of contract.”¹⁹

WCRP does not even cite *Berschauer* much less attempt to distinguish it. The sole authority it does cite is *Portland Elec. & Plumbing Co. v. City of Vancouver*, 29 Wn. App. 292, 627 P.2d 1350 (1981), but that case confirms that “[i]f transfer will not change the nature of performance, contract rights, generally, are assignable absent prohibition by contract or statute.” *Id.* at 295 (citing *Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 391 P.2d 713 (1964) and 1 Restatement of Contracts § 151, at 181 (1932)). The Court of Appeals in *Portland Electric* specifically distinguished the assignment at issue in that case from the assignment of a breach of contract claim, which is at issue here. *See id.* at 294-95 (“PEPCo’s argument ignores basic contract pleadings and must

¹⁹ WCRP’s response also conspicuously ignores that the assigned claims for damages in this case arise from WCRP insurance policies, not the distinct interlocal governance agreement. As set for in the County & Slagle’s Opening Brief, these policies are entirely separate (each with its own non-incorporation clause) and an assignment of rights under one cannot constitute a breach under the other. *See* C&S Op. Br. at 7 & n.2 (citing record).

fail. There is a distinction between a claim for monies due, or an action for the price, and a claim for damages for breach of contract.”²⁰

AIG claims that *Berschauer* does not apply because the clause at issue there referred to “any interest,” whereas the Interlocal Agreement’s assignment provision applied to “any right, claim or interest.” Even assuming there is a meaningful distinction between the language, the holding of and policy behind *Berschauer* still apply here—namely, that once performance under the contract is complete, there is no longer a basis to prohibit assignment of a cause of action for breach of contract.

Berschauer, 124 Wn.2d at 830 (“Given complete performance, the rule in *Portland Elec.* makes good sense.”); see also *Kim v. Moffett*, 156 Wn. App. 689, 705, 234 P.3d 279 (2010) (noting that in *Berschauer* “our Supreme Court addressed the efficacy of a contract’s anti-assignment clause in light of a clear assignment of a claim alleging breach of contract following completed performance”).

2. Slagle is an “insured” by the express policy terms.

WCRP also attempts to negate Slagle’s rights under the WCRP primary policies by now claiming he is not an insured at all. This assertion cannot be squared with the plain language of the WCRP primary

²⁰ The result in *Portland Electric* is an outlier and also appears to be strained even under that Court’s reasoning.

policies. Specifically, the WCRP primary policies state: “The Washington Counties Risk Pool (‘Pool’) shall pay on behalf of the **named insured** and other **insureds** identified in Section 2 below” CP 1052, 1029, 1041, 1063, 1075, 1086, 1098, 1109 (emphasis in original). “Section 2” is entitled “Persons and Organizations Insured”, which states in relevant part the following:

This policy shall insure:

Subject to and conditioned upon authorization by the member county, as provided in RCW 4.96.041 and the member county’s implementing ordinance or resolution, all past and present employees . . . while acting or in good faith purporting to act within the scope of their official duties for the member county or on its behalf

E.g., CP 1030, 1042.

Thus, while the WCRP primary policies do require that the member county authorize defense and indemnity for every employee as a condition precedent to coverage, once that authorization takes place (as it did here), the employee becomes an “other insured” of WCRP and AIG, independent of the County itself. This conclusion is further buttressed by the fact that WCRP considered Slagle a separate insured, independent from the County, in the adjustment of his claims. *See* CP 1130-31, 1148-49 (denying claim and stating “Clark County and/or Donald Slagle may appeal” (emphasis added)). WCRP could have simply structured its

policies to reimburse the County for any defense and indemnity payments it made, without identifying employees as insureds. This is not what the contract provides, however. In fact, AIG contradicts itself in its brief when it refers to Slagle as an “additional insured”. AIG Br. at 55-56.

As AIG presumably knows, an “additional insured’s interest in the policy is regarded as coextensive with that of the named insured unless the policy includes a severability of interests clause. Accordingly, the additional insured enjoys the full benefits of the policy despite any restrictions contained in a separate contractual agreement with the insured” 9 Couch on Ins. § 126:7. The Court should reject WCRP and AIG’s argument that Slagle is anything other than an insured pursuant to the express terms of the WCRP primary policies.

Neither WCRP nor AIG argues that if Slagle is an “other insured”, he could nonetheless be precluded from assigning a claim against WCRP or AIG based on a provision in the WCRP Interlocal Agreement. Nor could such an argument be made, as the assignment provision in the Interlocal Agreement, by its terms, applies only to “counties”, and was never signed by Slagle. If anything, these facts further highlight that the assignment provision in the Interlocal Agreement cannot preclude post-loss assignment of claims by an insured (which may include employees,

spouses of employees, and beneficiaries of an insured contract). *E.g.*, CP 1030, 1042.²¹

Finally, even if this Court were somehow to conclude that the assignment is invalid, WCRP and AIG are not entitled to a resulting windfall that forgives their prior breach of the duties to defend and indemnify the County & Slagle. An assignment of a claim under the circumstances presented in this case changes nothing other than the identity of the real party in interest:

In some circumstances where contractual prohibitions of assignment are regularly limited by construction, explicit contractual provision would not change the result. Where a right to the payment of money is fully earned by performance, for example, a provision that an attempt to assign forfeits the right may be invalid as a contractual penalty. See § 356. If there is no forfeiture, and the obligee joins in demanding payment to the assignee, a contractual prohibition which serves no legitimate interest of the obligor is disregarded.

Restatement (Second) of Contracts § 322 (1981); *Spedden v. Sykes*, 51 Wash. 267, 272, 98 P. 752 (1908) (“This court has held the general

²¹ AIG also acknowledges that it “did not rely on the interlocal agreement below, as it is not a party to that contract.” AIG Br. at 45. It further contends that the parties did not address the separate issue of whether the anti-assignment clause in the WCRP primary policies barred assignment. WCRP did not raise this issue and the ruling regarding WCRP was based solely on the Interlocal Agreement. CP 8049-50. The Lexington policy does not contain an anti-assignment clause and, as Davis & Northrop pointed out in their opening brief, the anti-assignment clause in the WCRP primary policies would be unenforceable under the same authorities governing such clauses in other policies. D&N Op. Br. at 61 & n. 57; C&S Op. Br. at 47-50 & n.15.

doctrine that forfeitures are not favored in the law, and that courts should promptly seize upon any circumstance arising out of the contract or relations of the parties that would indicate an election or an agreement to waive the harsh, and at times unjust, remedy of forfeiture . . .”).

AIG further asserts that the County & Slagle’s assignment was a material breach of the Interlocal Agreement, which somehow relieved AIG of any further obligations. AIG Br. at 43-44. It is true that “if it is determined that a breach is material, or goes to the root or essence of the contract, it follows that substantial performance has not been rendered, and further performance by the other party is excused.” *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 220, 317 P.3d 543 (2014). The assignment, however, did not amount to a material breach for the reasons summarized above.

Even if it did, however, when there are competing claims of breach of the same contract, the first material breach excuses any further performance by the other party. *See City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 646-47, 211 P.3d 406 (2009) (City’s material breach of contract with Church in refusing to accept and process permit excused Church’s promise not to erect tent city despite Church’s prior breach in failing timely to submit permit application); *see also* 17A Am. Jur. 2d Contracts § 606, Effect of First Breach (“As a rule, a

party first guilty of a substantial or material breach of contract cannot complain if the other party subsequently refuses to perform. That party can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform.”); 14 Williston on Contracts § 43:6 (4th ed.) (“[T]he general rule [is] that one party’s uncured, material failure of performance under a contract calling for an exchange of performances will suspend or discharge the other party’s duty to perform”).

WCRP breached its duty to defend the County & Slagle before the assignment took place—in fact, the earlier breach by WCRP necessitated the assignment. The breach of the duty to defend was also material—this Court has identified the duty to defend as one of the most important benefits of an insurance contract. *E.g., Am. Best Food*, 168 Wn.2d at 412 (noting the duty to defend is a “valuable benefit of the insurance contract”). Thus, to the extent the excuse-of-performance doctrine applies in this case, it applies to validate the County & Slagle’s assignment to Davis & Northrup.

In sum, the assignment by the County & Slagle was appropriate and justified. But even if the assignment was invalid, then the result should not be a forfeiture, but instead that the County & Slagle remain the

real parties in interest and may pursue their claims to their conclusion on the merits.

C. Reasonableness Is An Issue That May Be Addressed On Remand.

Both WCRP and AIG also imply to this Court that the settlement between the County & Slagle and Davis & Northrop was collusive or unreasonable. *See* WCRP Br. at 47, n. 10; AIG Br. at 19, 44. There is no evidence supporting this claim, although there is ample evidence explaining how the amount of the settlement was reasonably reached at arms-length after WCRP and AIG had abandoned the County & Slagle in the underlying litigation. CP 8502-05; 8511-8513. WCRP and AIG were in fact invited to participate in mediation and settlement discussions but refused. *See* CP 7153-58. Regardless, issues pertaining to the reasonableness of the settlement may be addressed on remand in a reasonableness hearing, and have no bearing on the outcome of this appeal.

“RCW 4.22.060 provides for a reasonableness hearing after a settlement has been reached.” *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 377, 89 P.3d 265 (2004). This Court, “in *Besel* . . . specifically approved the use of a reasonableness hearing where all parties to the original suit settled.” *Id.* at 378 (citing *Besel v. Viking Ins.*

Co. of Wis., 146 Wn.2d 730, 49 P.3d 887 (2002)). In other words, it is appropriate for a reasonableness hearing to occur in a subsequent coverage or indemnity action when one has not taken place in the original, settled case.

In deciding whether a settlement is reasonable, trial courts are to consider the following factors:

[T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative fault; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (quoting *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983)),²²

“Using these factors to determine whether a settlement is reasonable protects insurers from liability for excessive judgments.”

Howard, 121 Wn. App. at 380 (citing *Besel*, 146 Wn.2d at 738).

Importantly, a “court’s determination that the amount is unreasonable does not affect the validity of the settlement agreement and the court cannot adjust the amount paid under the agreement.” *Meadow Valley Owners*

²² Based on these two decisions the factors are commonly referred to as the “*Glover/Chaussee*” factors.

Ass'n v. St. Paul Fire & Marine Ins. Co., 137 Wn. App. 810, 817, 156 P.3d 240 (2007) (citing RCW 4.22.060(3)).

Following the completion of the settlement in the Underlying Case, the Appellants requested a reasonableness hearing before Judge Bryan. *Davis v. Clark Cty*, No. 12-5765 RJB, Dkt. No. 150 (W.D. Wash). Respondents opposed having the hearing, and the District Court elected not to hold it. *Id.*, Dkt. Nos. 154, 156, 169, 183. Both WCRP and AIG take issue with the fact that no reasonableness hearing has yet occurred, WCRP Br. at 47, n. 10; AIG Br. at 44, but fail to mention that their own objections resulted in the hearing not taking place. At any rate, to the extent WCRP's or AIG's concerns prove justified (and they are not), the remedy would be adjustment of a settlement amount and not ratification of WCRP's breach of contract.

D. The County & Slagle, Not WCRP, Are Entitled to Fees.

In addition to fees the County and Slagle incurred defending the Underlying Case in WCRP's absence, they are also entitled to the fees they have incurred in this lawsuit to obtain coverage from WCRP. Washington law recognizes that a fee award is warranted against an insurer in such circumstances as a matter of equity, including fees on appeal. *See C&S Op. Br.* at 55-56 (citing *Olympic Steamship*, 117 Wn.2d

at 52). WCRP ignores the underlying nature of its duties as an insurer and thus dismisses this basis for fees. *See* WCRP Br. at 73.

The *Olympic Steamship* rule applies here. In particular, the policies of joint government risk programs such as WCRP qualify as insurance policies at common law and are thus subject to common law insurance principles, including for fee awards. *See supra*, at 4-20. The Legislature specifically exempted such policies only from codified insurance requirements, not from the common law. And the *Olympic Steamship* rule is a common law equitable rule that applies to any policies “regarded in the nature of insurance contracts” and “controlled by the rules of interpretation of such contracts,” as here. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 598, 167 P.3d 1125 (2007) (internal quotations omitted) (Chambers, J., lead opinion); *see also id.* at 610 (Sanders, J., concurring as to fees issue).

Once again, WCRP insists that it is not an insurer. But even if the WCRP policies did not qualify strictly as a form of insurance, this Court would still be warranted in applying the *Olympic Steamship* rule. In *Colorado Structures*, this Court applied the rule to performance bonds, because the rule’s primary purposes all applied to such agreements. *See* 161 Wn.2d at 597-607. The same is true here. For one thing, there is a “disparity of power” when “an event occurs that arguably triggers”

coverage, and if WCRP were not required to pay attorney fees resulting from a breach, it would have “nothing to lose” disputing coverage in any given case. *Id.* at 601-02 & n.13. More importantly, the “sole purpose” of each underlying policy “is prompt payment if the triggering event occurs,” to prevent “bad situations from getting worse.” *Id.* at 603-04. It is precisely in this state of “emergency” that the policy is intended to avoid “vexatious, time-consuming, expensive litigation” *Id.* at 603 (internal quotations omitted). In such delicate circumstances, WCRP should not be able to deny coverage without also paying the litigation expenses of any insureds who successfully demonstrate coverage after the fact. *See Olympic Steamship*, 117 Wn.2d at 52-53; *Colorado Structures*, 161 Wn.2d at 601-04.

Beyond disclaiming its obligation to pay fees, WCRP also argues that it is entitled to a fee award based on the Interlocal Agreement. *See* WCRP Br. at 73-75. But any fee award under that agreement must be relatively limited in scope and should be awarded only to the County rather than WCRP. Initially, the Interlocal Agreement authorizes a fee award only for an action “to enforce [a] term of [the] Agreement,” not for a policy coverage dispute. CP 4722. The only term of the Interlocal Agreement ever at issue in this case is the assignment provision. And as the County already has explained, the issue of assignability is distinct from

the question of policy coverage, which has taken up the majority of this lawsuit. *See* C&S Op. Br. at 55. Even if there “may be an interrelationship as to the basic facts, the legal theories . . . are different.” *Travis v. Wash. Horse Breeders Ass’n, Inc.*, 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988). Thus, any award of fees under the Interlocal Agreement must be “only for those services related to” the narrow issue of assignability. *Id.* at 410 (internal quotations omitted).

Notwithstanding the narrow scope of fees awardable in this case under the Interlocal Agreement, any such fees must be awarded to the County, not WCRP. As explained above, it is the County that is entitled to prevail on the issue of assignability. *See supra*, at 34-37. Thus, WCRP is not entitled to a fee award under the Interlocal Agreement.

WCRP has identified no other legitimate basis for its alleged entitlement to a fee award. WCRP asserts, without argument or explanation, that the County is liable for WCRP’s “attorney fees and costs” as a form of “damages”. WCRP Br. at 73. But as this Court has clarified, fees cannot be awarded as “*costs or damages*” absent a valid and applicable exception grounded in contract, statute, or equity. *City of Seattle v. McCready*, 131 Wn.2d 266, 273-75, 931 P.2d 156 (1997) (emphasis in original). Again, WCRP has identified no such valid exception that applies here. *Cf., e.g., Haner v. Quincy Farm Chems., Inc.*,

97 Wn.2d 753, 758, 649 P.2d 828 (1982) (discussing equitable ground for fees requiring wrongful act not involving the party seeking fees that embroiled that party in litigation with a third party).

III. CONCLUSION

The County & Slagle respectfully request that this Court reverse the trial court; hold that Washington common law insurance principles apply to WCRP and AIG's policies, that under Washington common law WCRP has breached its duty to defend, that WCRP owes damages resulting from that breach including payment of a reasonable settlement, and that under Washington common law the assignments to Davis & Northrop are valid; and remand for further proceedings.

RESPECTFULLY SUBMITTED this 17th day of March, 2016.

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