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NO. 91154-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON COUNTIES RISK POOL; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP, INC; 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.

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SUPREME COURT

AMICI CURIAE BRIEF OF ASSOCIATION OF GOVERNMENTAL RISK POOLS, NATIONAL LEAGUE OF CITIES, AND CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Association of Governmental Risk Pools ("AGRiP") is an independent trade association of more than 215 public entity risk pools across the United States, in Canada, and in Australia. National League of Cities ("NLC") is the country's largest and oldest national organization, serving over 19,000 cities and towns throughout the country and 49 state municipal leagues, many of which have joined together to fund their risks through public entity risk sharing pools. California Association of Joint Powers Authorities ("CAJPA") consists of 99 joint powers authorities ("JPAs") – public entities formed by a joint powers agreement between two or more public entities – providing group self-insurance and risk management services to a vast majority of the public entities in California.[1]

AGRiP, NLC, and CAJPA have an interest in the proper interpretation of laws governing public entity risk pools, and in seeking to avoid interpretations that would unnecessarily burden the public entity members of risk pools, impede the ability of public entities to pool their risks in the most cost-effective manner possible, or defeat the purposes underlying the creation of public entity risk pools by legislative bodies across the United States. The vast majority of public entity risk pools, like those in

[1] For purposes of this brief, all public entity risk pools, intergovernmental agencies for pooling risk, JPAs, or similar organizations shall be referred to as "pools," "risk pools," or "public entity pools."

Washington, are specifically exempted from certain insurance laws and regulation by state departments of insurance in recognition of the public purpose for which they were created. A holding eroding the autonomy of Washington's public entities to contract among themselves to share losses of the type and in the manner they desire could lead to erosion of such rights elsewhere. AGRiP, NLC, and CAJPA want to preserve the abilities of their constituent public entities, associated pools, and ultimately local government taxpayers and citizens, to realize the benefits derived from such pools operating under the guidance of the local public entities they serve and based upon regulations established by state legislatures that are intentionally different from those governing commercial insurers.

II. ISSUES OF CONCERN TO THESE AMICI CURIAE

(1) Whether state laws governing commercial insurers, including common law "insurance bad faith," "coverage by estoppel" and "extracontractual remedies" doctrines, apply to public entity risk pools, notwithstanding state statutes specifying that such pools are not insurers.

(2) Whether a public entity risk pool member may legally bind its pool (and by extension, its fellow pool members) to liability for consent judgment amounts that are not enforceable against that member.

(3) Whether a public entity risk pool member (or an employee it is statutorily required to defend or indemnify) may legally assign claims

against the pool (and effectively against the other pool members) to third parties, despite contractual provisions prohibiting such assignments.

III. ARGUMENT

A. Nationwide History of Development of Public Entity Risk Pools.

Public entities began forming risk pools when the commercial insurance market abandoned them in the 1970s and 1980s. With expanded public entity liability following the abrogation of governmental immunity in most states in the 1970s, and with the insurance market's struggles and increasing numbers of lawsuits in the 1980s, local governmental entities faced "insurance crises" in which liability insurance was highly unaffordable, if available at all. And, the very limited coverage and services the insurance industry had developed for the private sector were inadequate for unique public entity risks.[2]

Under these circumstances, local governmental entities were faced with unpalatable choices – either reduce services, raise taxes, or go without coverage. Smaller public entities – the vast majority of the United States' 89,000 governmental units[3] – were at particular risk, unable to

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[2] *See, e.g.*, Marcos A. Mendoza, *Reinsurance as Governance: Governmental Risk Management Pools as a Case Study in the Governance of Role Played by Reinsurance Institutions*, 21.1 CONN. INS. L.J. 53, 57-59 (2014); Karen Nixon, *Public Entity Pooling – Built to Last* (2011) at p.1, http://www.cajpa.org/documents/Public-Entity-Pooling-Built-to-Last.pdf; Jason E. Doucette, *Wading in the Pool: Interlocal Cooperation in Municipal Insurance and the State Regulation of Public Entity Risk Sharing Pools – A Survey*, 8 CONN. INS. L.J. 533, 534, 540-42 (2002).

[3] https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html (last visited March 24, 2016).

afford excessive premiums, lacking a sufficient tax base to responsibly self-insure, and unable to pay large judgments if uninsured.[4]

In response to these concerns, many state legislatures enacted legislation allowing local governmental entities to form risk-sharing pools.[5] At least 48 states have passed such legislation (with Texas first in 1974, California in 1975, and Washington in 1979).[6] Like Washington, the vast majority (an estimated 75 percent) of those states have done so under Interlocal Cooperation Acts or equivalent acts, rendering the pools extensions of the public entities they serve, if not public entities themselves.[7] Although state procedures for overseeing and regulating pools vary, the enabling legislation in the vast majority of the states that allow public entity risk pooling, including Washington, expressly exempt the pools from state insurance code requirements.[8] Moreover, a number of states, including Washington, denominate public entity pools as self-insurance,[9] which technically is not insurance at all.[10]

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[4] Mendoza, *supra* note 2, at 58; Louis P. Vitullo & Scott J. Peters, *Intergovernmetnal* [sic] *Cooperation and the Municipal Insurance Crisis*, 30 DEPAUL L. REV. 325, 336 (1981).
[5] Doucette, *supra* note 2, at 541-43; Mendoza, *supra* note 2, at 57-59.
[6] *See* Appendix A; Doucette, *supra* note 2, at 547 & n.88, 562; Mendoza, *supra* note 2, at 57 & n.18; Laws of 1979, 1st Ex. Sess., ch. 256, §1.
[7] *See, e.g.*, RCW 48.62.021(2); RCW 48.62.031(2); Doucette, *supra* note 2, at 542-43.
[8] *See* Appendix A; Doucette, *supra* note 2, at 547-48; RCW 48.01.050; Mendoza, *supra* note 2, at 61 ("Most states are similar to Texas in that they have little or no regulation of pools since they are not considered insurance carriers by statute or case law").
[9] *See, e.g.*, Doucette, *supra* note 2, at 535; RCW 48.62.031(1) and (2); Appendix A.
[10] *See, e.g.*, Doucette, *supra* note 2, at 535; *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 674, 852 P.2d 1078 (1993) (where "insurance" was statutorily defined as "a

The pooling movement grew in the 1980s and 1990s as the commercial insurance market continued to fail to meet local government needs and as pooling proved successful in helping public entities control costs, escape the volatility of insurance market pricing, and keep public dollars working for public purposes rather than for insurance company shareholder's profit.[11] There are now over 500 risk-sharing pools serving counties, cities and towns, schools, and special districts nationwide.[12] Of the 89,000 local public entities nationwide, it is estimated that 80 percent or more participate in one or more risk pools to address some or all of their risk management and risk financing needs.[13]

B. Risk Pools Fundamentally Differ from Commercial Insurers.

While each public entity risk pool is unique, most share certain key characteristics that are fundamentally different from those of commercial insurers: (1) they are formed under state-specific legislation allowing for joint "pooling" of public resources to address risks such as liability, property, workers' compensation, employee benefits, unemployment, and

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contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies," "[b]y its very nature, self-insurance does not involve this type of third party arrangement"); *Fort Bragg Unified Sch. Dist. v. Colonial Am. Cas. & Sur. Co.*, 194 Cal. App. 4th 891, 124 Cal. Rptr. 3d 144, 153 (2011) ("[S]elf-insurance is generally not considered to be "insurance." ... Drawing on one's own funds or reserves to pay for a loss is not indemnity. Thus, the case law has consistently held that an entity that self-insures is not an insurer ... because a self-insurer enters into no contract to indemnify another.").

[11] *See* Mendoza, *supra* note 2, at 59; Doucette, *supra* note 2, at 543-47; Nixon, *supra* note 2, at pp.14-15;

[12] Nixon, *supra* note 2, at p. 3 & App.2; Mendoza, *supra* note 2, at 60.

[13] *See* note 3 *supra*; Nixon, *supra* note 2 at p.3; Mendoza, *supra* note 2 at 60.

others;[14] (2) they are largely created under interlocal cooperation acts or similar legislation, functioning as extensions of the local governmental entities they serve, with some defined as public entities themselves;[15] (3) they are governed by member public entities, who generally remain responsible and are often assessable for any financial losses in excess of contributions;[16] (4) they are not managed for profit or accountable to return profit to shareholders, so they accumulate only necessary funds to assure that they can meet the potential obligations of their public entity members;[17] (5) they exist to provide long-term budgetary stability and predictability for their public entity members, so as not to burden local government budgets and taxpayers with difficult pricing volatility common in the commercial insurance market;[18] (6) they therefore provide tailored loss control and risk management services to their member public entities, designed to reduce the number and reduce and stabilize the costs of public entity risks over time.[19] Such fundamental differences between public entity risk pools and commercial insurers provide sound public

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[14] *See* Appendix A; Doucette, *supra* note 2, at 537-38; "*What is Public Sector Risk Pooling?*", http://www.agrip.org/publicsectorpooling (last visited March 24, 2016).
[15] *See* note 7 *supra*.
[16] Doucette, *supra* note 2, at 538; "*What is Public Sector Risk Pooling?*", *supra* note 14.
[17] *See* "*What is Public Sector Risk Pooling?*", *supra* note 14; see also "*Fact Sheet: Public Entity Risk Pools*," Fact Sheet.docx, http://www.cajpa.org/resources/pr-toolkit (last visited March 24, 2016), at p.1.
[18] *See* "*What is Public Sector Risk Pooling?*", *supra* note 14; "*Fact Sheet: Public Entity Risk Pools*," *supra* note17, at pp. 1, 2.
[19] *See* "*Fact Sheet: Public Entity Risk Pools*," *supra* note17, at p. 2.

policy reasons for respecting legislative determinations that risk pools not be treated as, or be subject to laws governing, commercial insurers.

Public entity risk pools do not exist to sell insurance coverage as a commodity, but rather act as extensions of the local governments they serve. Public entities, working through the pools they have formed, are able to effectively and efficiently meet their long-term financial and risk management needs.[20]

Risk pools are governed by boards comprised of a representative body of their members' public officials, so the same considerations that guide and inform local government decisions guide and inform pooling decisions. Every member has skin in the game, a voice at the table, and the incentive to do unto other members as they would have other members do unto them.[21] There is no body of disinterested players deciding what is right or wrong for the local government participants, as is the case in commercial insurance relationships. There is no "us-versus-them" in pooling – just a consistent public-minded decision making process.

Pools are not driven by profit. Unlike commercial insurers, which

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[20] *See* note 7 *supra*; "*Fact Sheet: Public Entity Risk Pools*," *supra* note17, at p. 2.

[21] *See* note 16 *supra*. A pool's board, made up of its members' representatives, provides its own checks and balances and self-regulation. *See* "*Fact Sheet: Public Entity Risk Pools*," *supra* note17, at p. 3. Because each board member also represents a member public entity, when he or she makes a determination that a given claim is not covered under the pools' member-drafted agreements and coverage documents, is not only preserving the vitality of the pool, but also determining that the public entity he or she represents is not entitled to coverage should similar claims be made against it.

use profits to measure success, public entity risk pools provide services, coverage, and risk management with the singular mission of serving their members.[22] There is no "profit" in the pooling equation. If contributions to the pool turn out to be greater than needed to pay claims and related expenses, the surplus still belongs to the pool members and its use is directed by the representatives of the public entity members who comprise the pool's board. If contributions to the pool are insufficient to cover claims and related expenses, the public entity pool members generally remain liable and may be assessed their share of any liabilities that exceed pool resources.[23] Thus, public entities never truly transfer risk (or reward) to a pool in the same way insureds transfer risk to insurance companies.

Unlike insureds of commercial insurers, public entity members of risk pools do not suffer from a disparity of bargaining power. Unlike standard form "take-it-or-leave-it" adhesion contracts of commercial insurers, the interlocal agreements, coverage documents, and policies and procedures that govern the rights and responsibilities of a pool and its members are negotiated and created by the public entity members themselves. The

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[22] *See* "*What is Public Sector Risk Pooling?*", *supra* note 14; "*Fact Sheet: Public Entity Risk Pools*," *supra* note17, at pp. 1, 2. Because they are not profit-driven, pools do not have to include in their prices a profit margin that is typically 10-15 percent or more for commercial insurers. Pools also have lower overhead costs and do not pay taxes that commercial insurers pay. "*Fact Sheet: Public Entity Risk Pools*," *supra* note17, at pp. 1, 2.

[23] *See, e.g.*, WAC 200-100-02005(1); CP 24-25 (Articles 12(a) and (b), 14(b), and 17(c) of WCRP's Interlocal Agreement).

public entities participating in a risk pool collectively decide what risks they will cover, how the pool will help the public entity members with risk management, the ultimate degree of shared risk among the members, and what procedures will guide claims handling and adjudication and appeals of disputes regarding coverage, and other issues, to ensure that they and their taxpayers are well-served.[24]

Risk pools in most states, including Washington, are not regulated as insurers because traditional insurance law principles do not appropriately reflect the structure and nature of public entity pooling relationships. Given their governance structure, funding methods, and the fact that member public entities remain liable for claims in excess of contributions and retain oversight of funds in excess of claims, public entity risk pools present a fundamentally different construct from that of commercial insurance relationships. Thus, most state legislatures do not treat pools as insurers and exempt them from insurance codes and regulations.[25] Washington's regulations governing public entity risk pools are "among the lengthiest of any state not requiring pools to register as mutual insurance companies,"[26] but still reflect appropriate treatment of public entity risk pools as different from commercial insurers and exempt from

[24] *See, e.g.*, RCW 48.62.031(2); WAC 200-100-02005, -02021, -034, -050; CP 20-28 (WCRP's Interlocal Agreement); CP 483-95 (WCRP's Bylaws); CP 5844-59 (WCRP's Claims Handling Policies and Procedures).
[25] *See* Appendix A; *see also* note 8, *supra*.
[26] Doucette, *supra* note 2, at 557.

the strictures of the insurance code. RCW 48.01.030.

C. Because Sound Public Policy Reasons Justify the Legislative Determinations Made in Most States that Public Entity Risk Pools Should Not Be Subject to Insurance Laws, Courts Have Refused to Burden Them with Restrictions Placed on Commercial Insurers.

Courts in some of the states in which the legislature has determined that public entity risk pools should be exempt from the laws governing insurers have articulated sound policy reasons supporting such legislative determinations and have rejected attempts to subject risk pools to various kinds of restrictions placed upon commercial insurers.

For example, the court in *City of South El Monte v. Southern Cal. Joint Powers Ins. Auth.*, 38 Cal. App. 4th 1629, 45 Cal. Rptr. 2d 729, 731 (1995), recognized the importance of legislation in California allowing local public entities to pool their self-insured claims or losses, but specifying that such pooling shall not be "considered insurance" or "subject to regulation under the Insurance Code," stating:

> [S]ubjecting the pools to the statutory requirements of the Insurance Code would place member entities in the position of having the same duties and obligations as commercial insurers. Such an arrangement would adversely affect the pool's ability to provide members cost-effective liability coverage and subsequently defeat the purpose and intent of these self-insuring groups.

Confronted with the question whether principles of insurance law should be used to resolve questions of coverage, the court in *City of South El Monte*, 45 Cal. Rptr. 2d at 735, answered "no", concluding that:

> Considering the purpose of the pooling arrangements, we determine questions of coverage are properly answered by relying on rules of contract law that emphasize the intent of the parties.[27] Given a local entity's broad power to insure against all potential liabilities and to do that through joint power pooling arrangements, principles governing insurance carriers and insurance laws have no applicability absent consent of the parties to the pooling agreement.[28]

The court reasoned, 45 Cal. Rptr. At 735:

> Joint authority pools are member directed. Municipalities best understand the nature of their risks and losses and a "sense of ownership in the pool endeavor [is] an important motivation in practicing risk management." [Citation omitted.] The pools are the creation of the membership and reflect the local perspective on matters the members have elected to pool and share. Members agree to abide by the terms of their joint powers agreements and programs and agree to pool prescribed losses. They have the authority to self-insure as they deem appropriate and to provide additional coverage as necessary. This authority is based on the members' perceptions of which risks they elect to pool and which risks they do not.
>
> Members jointly determine the scope and extent of their own coverage. They do so by creating member-written agreements and programs tailored to suit the needs of the participating entities. The governing bodies of these pooling arrangements interpret the agreements and programs to implement the intent of the members. The joint powers

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[27] Accord, *Public Entity Pool v. Score*, 658 N.W.2d 64, 70 (S.D. 2003) ("Usually, the ultimate determiner in issues over coverage is the liability contract itself. Questions of coverage are properly answered by adverting to the rules of contract law that rely on the intent of the parties").

[28] The court in *Southgate Recreation and Park Dist. v. California Ass'n for Park and Recreation Ins.*, 106 Cal. App. 4th 293, 130 Cal. Rptr. 2d 728, 730-31 (2003), held that, with respect to joint powers authority risk pools, rules of contract law that emphasize the parties' intent apply to questions of both ***defense and coverage***, stating: "Because joint powers authority risk pools are ultimately member created and directed, they are not considered insurance in a conventional sense; they are an alternative to commercial insurance. ... In recognition of this, questions of defense and coverage are answered by relying on rules of contract law that emphasize the parties' intent." (Citations omitted).

> agreement, bylaws, and the self-insurance program, with related coverage memoranda, provide the framework within which to determine the rights, liabilities, and the intentions of the pools and their respective members.

Moreover, the court went on to hold that, while members of a pooling arrangement might agree to incorporate some common insurance terms into their agreements, that does not mean they thereby incorporate all principles governing insurance carriers and insurance law. *Id.*

Following *City of South El Monte*, and recognizing the express purpose of the enabling legislation to "recognize these self-insuring pools as an alternative to insurance and remove them from regulation under the Insurance Code," the court in *Orange County Water Dist. v. Ass'n of Cal Water Etc. Auth.*, 54 Cal. App. 4th 772, 863 Cal. Rptr. 2d 182, 183, 185-86 (1997), held that a public entity self-insurance pool was not "insurance" subject to "all of the general principles of insurance law, including rules of priority of coverage" under a commercial insurer's policy provision that its coverage will not apply until all "other insurance is exhausted."

California courts are not alone in distinguishing rules and regulations governing public entity risk pools from those governing commercial insurance. *E.g.*, *City of Arvada v. Colorado Intergovernmental Risk Sharing Agency*, 19 P.3d 10, 15 (Colo. 2001) ("a review of the statutory language, the legislative history, and the relevant caselaw from other jurisdictions demonstrates that self-insurance pools do not qualify as 'insur-

ers'" and "are not subject to the notice requirements" applicable to insurers under the insurance code); *Bd. of County Comm'rs v. Ass'n of County Comm'rs of Okla. Self-Ins. Group* ("ACCO-SIG"), 339 P.3d 866, 869 (Okla. 2014) (although a governmental entity cooperative insurance plan insures, it "is not subject to the general rules of liability imposed on all insurers"); *Stratford Sch. Dist, S.A.U. #58 v. Employers Reinsurance Corp.*, 162 F.3d 718, 721-23 (1st Cir. 1998) (benefits paid by a pooled risk management program is not "insurance" for purposes of an insurer's "other insurance" clause); *Young v. Progressive S.E. Ins. Co.*, 753 So.2d 80, 85-86 (Fla. 2000) (a self-insurance pool "does not constitute insurance in any real sense" because it retains the risk of loss); *Public Entity Pool v. Score*, 658 N.W.2d 64, 69 (S.D. 2003) (a public entity liability self-insurance pool does not constitute insurance or an insurance company and thus was not liable under insurance code for attorney's fees in a declaratory judgment action); *Harris v. Haynes*, 445 S.W.3d 143, 148-50 (Tenn. 2014) (governmental risk pools are not insurance companies, not subject to statutes regulating insurance companies and policies, and not required to offer uninsured motorist coverage to their member entities).

As the Colorado Supreme Court in *City of Arvada*, 19 P.3d at 13, explained after looking to statutory definitions of "insurance," "insurance company," and "insurer":

> It is clear from these definitions that a self-insurance pool does not qualify as either an insurance company or an insurer. Self-insurance pools are not in the business of making contracts of insurance, as they are not for-profit associations. ... [Citations omitted.] Furthermore, insurance pools do not undertake the indemnification of a third party. Rather, an insurance pool is, in essence, an extension of each member, as the funds that provide the coverage come directly from the members, and the type and extent of coverage is determined collectively by the members themselves. Thus, self-insurance pools are more properly likened to simple self-insurance than to insurance companies. Indeed, by enacting ... the statute authorizing the creation of self-insurance pools, the legislature intended to distinguish between such pools and traditional insurance by exempting self-insurance pools from laws regulating traditional insurance companies. [Emphasis in original.]

And, as the Oklahoma Supreme Court explained in *Bd. of County Comm'rs*, 339 P.3d at 868-69, in concluding that ACCO-SIG "is not subject to the general rules of liability imposed on all insurers":

> A governmental entity's cooperative insurance plan, which pools self-insured reserves, claims and losses of its member municipalities or counties, shares little in common with commercial enterprises that sell insurance for a profit to their shareholders. The relationship between these governmental entities is contractual in nature. The contracting parties have substantially more freedom to contract than an individual consumer dealing with a commercial for-profit insurance enterprise. All the contracting parties in a governmental cooperative insurance plan have equal interests in enforcing the contracts protecting the pooling of their resources.
>
> * * *
>
> ... ACCO-SIG is not transacting insurance, nor is it otherwise subject to the provisions of the laws of this state regulating insurance or insurance companies. The legislature has clearly spoken on this issue, and a reasonable

> rationale for such a rule is that with such voluntary governmental entities, the protections afforded members of the public with regards to private insurance is not necessary in the protection of municipalities and counties in this type of insurance plan.

D. Local Governmental Risk Pools Are Not Commercial Insurers and the Public Policy Reasons Advanced for Imposition of Insurance Bad Faith Extracontractual Liabilities on Commercial Insurers Do Not Warrant Imposing Similar Liabilities on Such Risk Pools.

Washington's insurance bad faith law "does not constitute a single body of law" – it "derives from statutory and regulatory provisions, and the common law." *Schmidt v. Coogan*, 181 Wn.2d 661, 676, 335 P.3d 424 (2014) (quoting *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 128, 196 P.3d 664 (2008)). As more fully explained by Washington Counties Risk Pool ("WRCP"), *Br. of Resp. WCRP at 41-48*, the extracontractual remedies available to insureds against commercial insurers that Petitioners Clark County, Davis, and Northrop ultimately seek to impose on WRCP, such as tort liability for insurance bad faith, coverage by estoppel, presumption of harm, and recovery of attorney fees, are unique to, and should not be unmoored from, the relationship between "insurer" and "insured." They are imposed on commercial insurers for reasons that do not pertain to the relationship between public entities and their risk pool.

The reasons those extracontractual remedies are imposed on commercial insurers are: (1) "the enhanced fiduciary obligation springing from the insurer-insured relationship [that] requires that 'an insurance company

... refrain from engaging in any action that would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk,'" *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 36-37, 904 P.2d 731 (1995) (quoting *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986)), and "deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests," *Tank*, 105 Wn.2d at 386; and (2) the "disparity of bargaining power between an insurance company and its policyholder," which is "at its greatest when an insurance company presents a current or prospective insured with a standardized, or 'form' document, in essentially a non-negotiable 'take-it-or-leave-it' environment," *McGreevy*, 128 Wn.2d at 35 (quoting *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1992)).

But, as discussed above, the relationship between public entity risk pools and their participating public entities is fundamentally different than the relationship between commercial insurers and their insureds. In Washington, as in most other states, such risk pools are not subject to their state insurance codes and regulations. Public entity risk pools are not in the business of selling insurance as a commodity. They are not driven by profit or accountable to shareholders for expected returns on investments. They are an extension of their public entity members. There is no disparity of bargaining power. The public entity members govern their

risk pools and collectively negotiate and create their own interlocal agreements, coverage documents, and policies and procedures, including claims handling and coverage dispute resolution procedures. Participating public entities generally remain responsible and often are assessable for any financial obligations of the pool in excess of contributions.

Bad faith claims handling and prompt payment regulations of insurance are not needed for a pool of member public entities who are authorized, in a manner acceptable to them as members and indemnitees of the pool, to collectively define their rights and responsibilities and to establish their own policies and procedures, including claims handling procedures.[29] The Washington legislature has recognized as much by exempting local government risk pools from the definition of insurance under the Insurance Code and denominating them joint self-insurance programs. That legislative recognition should be respected.

As the court in *City of South El Monte*, 45 Cal. Rptr. 2d at 731, recognized, subjecting a public entity risk pool to the same duties and

[29] One commentator, recognizing that a pool's "only duties are those outlined in the coverage agreements with their members" and that "they are not generally subject to prompt payment acts, bad faith claims, or penalties," explained that, in his experience, this was "mitigated because pools have limited markets ['quite a finite number compared to markets for insurers'] and therefore inherently attempt to service members promptly to maintain their member base," because "high levels of service are inherently necessary to keep members" as members "potentially may go in and out of the pool in various lines of coverage," and because of the fact that "most pools are organized so the governing boards are comprised of members' representatives" which "gives pool members direct input as to policy." Mendoza, *supra* note 1, at 57 n.17.

obligations as commercial insurers, "would adversely affect the pool's ability to provide members cost-effective liability coverage and subsequently defeat the purpose and intent of these self-insuring groups." That purpose, as expressed by the legislature in Laws of 1979, 1st Ex. Sess., ch. 256, § 1, was "to grant local governmental entities the maximum flexibility to enter into agreements with each other to provide ... programs for the joint purchasing of insurance, joint self-insuring, and joint contracting for or hiring personnel to provide risk management services." *See also* RCW 48.62.011 ("This chapter shall be liberally construed to grant local government entities maximum flexibility in self-insuring to the extent the self-insurance programs are operated in a safe and sound manner").

E. Sound Public Policy Reasons Support the Enforceability of Anti-Assignment Provisions in Public Entity Risk Pools' Member-Drafted Interlocal Agreements and Coverage Documents.

WCRP's Interlocal Agreement, CP 26 (Art. 21) provides:

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

WCRP's Joint Self-Insurance Liability Policy ("JSILP"), CP 40 (§ 7.N.), contains identical prohibitions with respect to any insured or "creditor, assignee, or third-party beneficiary of any insured" under the JSILP.

Both the regulations governing the establishment of local governmental joint self-insurance programs in Washington and sound public policy considerations support the enforceability of such anti-assignment provisions in a public entity risk pool's interlocal agreements and coverage documents. First, pursuant to WAC 200-100-02005 which governs membership in a local governmental joint self-insurance program, "[o]nly members may participate in risk-sharing. Only members may participate in the self-insured retention layer, and only members may participate in the joint purchase of insurance or reinsurance." *See also* WAC 200-100-02007 (while nonmembers may purchase services, "[n]onmembers shall not participate in any coverages of the joint self-insurance program including the self-insured retention layer and the excess insurance or reinsurance layer." To allow a member to assign its rights under the Interlocal Agreement or JSILP to third parties would contravene these regulations.

Second, to allow assignment of one member's purported right to indemnity by a risk pool would defeat the very purpose of the statutory joint self-insurance program as the assets of the pool are the assets of the members, each of whom is ultimately responsible for the obligations of the pool. Finally, to allow one member to unilaterally assign its rights under the Interlocal Agreement or the JSILP to a third party to try to bind a pool and its other members to extracontractual liability for consent judgment

amounts that are not enforceable against the assigning member would impede a risk pool's ability to provide cost-effective liability coverage to its members and defeat the purposes for the pool's creation.

IV. CONCLUSION

The trial court's rulings that risk pools are not insurers, that contract principles, not insurance law principles, apply to risk pools, and that risk pool anti-assignment clauses are enforceable should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of March, 2016.

FAIN ANDERSON VANDERHOEF, ROSENDAHL
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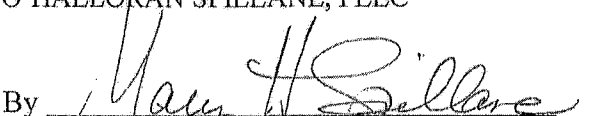
By 
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STATES AUTHORIZING PUBLIC ENTITY RISK POOLS

State	Enabling Statute	Exemption from Insurance regs	Self-insurance
Alabama	AL Code § 11-30-1 et seq.	AL Code § 11-30-4	AL Code § 11-30-4(1) ("liability self-insurance fund")
Alaska	AS 21.76.010 et seq.	AS 21.76.020(a)	AS 21.76.120 (joint insurance arrangement may authorize bonds, etc., to "self-insure")
Arizona	ARS 11-952; 11-952.01	A.R.S. § 15-3829(C)	
Arkansas	Arkansas Code § 21-9-303		Arkansas Code § 21-9-303
California	Cal. Gov. Code § 6500 et seq.	Cal. Gov. Code § 990.8(c)	Cal. Gov. Code § 990.4(a) (authorizing self-insurance)
Colorado	C.R.S. § 24-10-115.5	C.R.S. § 24-10-115.5(2)	C.R.S. § 24-10-115.5
Connecticut	Conn. Gen. Stat. § 7-479a	Conn. Gen. Stat. § 7-479e	
Florida	Fla.Stat. § 163.01(3)(h) (authorizing pools as reciprocal insurer or self-insurer); Fla. Stat. §624.4622	Fla. Stat. §624.461; §624.462(6)	Fla.Stat. § 768.28(16) (authorizing "self-insurance pools")
Georgia	OCGA § 36-85-1 et seq.	OCGA § 36-85-4	OCGA § 36-85-1 (defining "group self-insurance fund")
Idaho	I.C. § 41-2902; § 67-2328	I.C. § 41-2903(1)	
Illinois	5 ILCS 220/6	5 ILCS 220/6	5 ILCS 220/6 (authorizing "joint self-insurance")
Indiana	I.C. § 36-1-7-1 et seq.		
Iowa	Iowa Code 87.4(2) (authorizing public entities to form self-insurance associations for workers' comp)	Iowa Code 87.4(4)	Iowa Code 87.4 ("self-insurance groups")
Kansas	K.S.A. § 12-2617	K.S.A. § 12-2617	
Kentucky	KRS 65.150(3); KRS 65.210 to 65.300		(KRS 65.150(3) authorizes public entities to associate for "purpose of insuring themselves")
Louisiana	La.R.S. 33:1343	La. R.S. 33:1345	La.R.S. 33:1343 (referring to "group self insurance fund[s]")
Maine	30 MRS § 2253	30 MRS § 2254	

APPENDIX A

STATES AUTHORIZING PUBLIC ENTITY RISK POOLS

State	Enabling Statute	Exemption from Insurance regs	Self-insurance
Maryland	Maryland Insurance Code Section 19-602	§ 1-101(t); § 1-101(v)	§ 19-602
Massachusetts	Mass. Gen. Laws ch. 40M, § 1 et seq.	Mass. Gen. Laws ch. 40M, § 1	Mass. Gen. Laws ch. 40M, § 2
Michigan	MCL 124.1 et seq.	MCL 124.6	MCL 124.5; 124.9
Minnesota	Minn. Stat. § 471.981	Minn. Stat. § 60A.02, subdivision 3	Minn. Stat. § 471.981
Mississippi	Miss. Code § 11-46-17 (political subdivisions may pool to purchase insurance or self-insure)	Miss. Code § 11-46-20 (Tort Claims Board regulates public entity group self-insurance programs)	Miss. Code § 11-46-17(5) (authorizing pool self-insurance)
Missouri	RSM § 537.700 et seq.		RSM §537.705
Montana	Mon Code Ann. Section 2-9-211(1)	Mon Code Ann. Section 33-1-102(9)	Mon Code Ann. Section 2-9-211(1)
Nebraska	R.R.S. Neb. § 44-4304(1)	R.R.S. Neb. § 44-4315	R.R.S. Neb. § 44-4303(5)
Nevada	Nev. Rev. Stat. Ann. § 277.055 (public agencies) Nev. Rev. Stat. Ann. § 277.067 (political subdivisions)	Nev. Rev. Stat. Ann. § 692C.070 (political subdivision is not an insurer)	Nev. Rev. Stat. Ann. § 277.055 (public agencies) Nev. Rev. Stat. Ann. § 277.067 (political subdivisions)
New Hampshire	RSA 5-B:3(I)	RSA 5-B:1	RSA 5-B:3(I)
New Jersey	N.J. Stat. § 40A:10-36	N.J. Stat. § 40A:10-48	
New Mexico	N.M. Stat. Ann. § 3-62-1	N.M. Stat. Ann. § 3-62-2(A)	N.M. Stat. Ann. § 3-62-1(A)
New York	NY CLS Ins § 6102 (a)	NY CLS Ins § 6114(a)	
North Carolina	N.C. Gen. Stat. § 58-23-5(a)	§ 58-23-45N.C. Gen. Stat. § 58-23-45	
North Dakota	N.D. Cent. Code, § 32-12.1-07	N.D. Cent. Code, § 26.1-23.1-02	N.D. Cent. Code, § 32-12.1-07(1)(a)
Ohio	ORC Ann. 2744.081	ORC Ann. 2744.081(E)(2	ORC Ann. 2744.081
Oklahoma	51 Okl. St. § 167	51 Okl. St. § 169	51 Okl. St. § 167
Oregon	ORS § 30.282(2)-(3)	ORS § 30.282(6)	ORS § 30.282(2)-(3)
Pennsylvania	42 Pa.C.S. § 8564 (a) 77 P.S. § 1036.1-1036.2 (Workers' Compensation)	42 Pa.C.S. § 8564(d)	
Rhode Island	R.I. Gen. Laws § 45-5-20.1	R.I. Gen. Laws § 45-5-20.1(d)	R.I. Gen. Laws § 45-5-20.1
South Carolina	S.C. Code Ann. § 15-78-140	S.C. Code Ann. § 15-78-140(4)	S.C. Code Ann. § 15-78-140(3)

STATES AUTHORIZING PUBLIC ENTITY RISK POOLS

State	Enabling Statute	Exemption from Insurance regs	Self-insurance
South Dakota	S.D. Codified Laws Ann. §1-24-1 et seq.	S.D. Codified Laws § 3-22-18	
Tennessee	Tenn. Code Ann. § 29-20-401-§ 29-20-408	Tenn. Code Ann. §29-20-401(d)(1)	Tenn. Code Ann. § 29-20-401(b)(1)
Texas	Tex. Gov't Code § 791.011(a); Tex. Gov't Code § 2259.031	Tex. Local Gov't Code § 172.014; Tex. Local Gov't Code § 119.008	Tex. Gov't Code § 2259.031
Utah	Utah Code Ann. § 63G-7-703		
Vermont	24 V.S.A. § 4942	24 V.S.A. § 4944(b)	24 V.S.A. § 4942
Virginia	Va. Code Ann. § 15.2-2703	Va. Code Ann. § 15.2-2709	Va. Code Ann. § 15.2-2704
Washington	RCW 48.62.011-.034	RCW 48.01.050	RCW 48.62.031(1)
West Virginia	W. Va. Code § 29-12A-16(b)(B)	W. Va. Code § 29-12A-16(2) (stating that only workers' compensation pools are subject to the Insurance Commissioner)	
Wisconsin	Wis. Stat. § 611.11		
Wyoming	Wyo. Stat. § 1-41-101 - § 1-41-111	Wyo. Stat. § 1-41-108	Wyo. Stat. § 16-1-101

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 25th day of March, 2016, I caused a true and correct copy of the foregoing document, "Amici Curiae Brief of Association of Governmental Risk Pools, National League of Cities, and California Association of Joint Powers Authorities," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 25th day of March, 2016, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

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Dear Clerk of Court,

Attached for filing in .pdf format please find the Motion for Leave to File Amicus Curiae Brief of AGRiP, NLC, and CAJPA and the Amicus Curiae Brief of AGRiP, NLC, and CAJP in *Washington Counties Risk Pool, et al. v. Clark Cty, et al.*, Supreme Court Cause No. 91154-1. The attorney filing this motion and this brief is Mary Spillane, WSBA No. 11981, (206) 749-0094, e-mail: mary@favros.com.

Respectfully submitted,

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**Please note that we have recently moved to a new suite within our building. Our new address is: 701 Fifth Ave., Suite 4750, Seattle, WA 98104.*

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