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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

FILED
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WASHINGTON STATE
SUPREME COURT

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AMICUS BRIEF SUBMITTED BY WASHINGTON SCHOOLS RISK
MANAGEMENT POOL, WASHINGTON CITIES INSURANCE
AUTHORITY, WASHINGTON STATE TRANSIT INSURANCE POOL,
THE SOUTHWEST WASHINGTON RISK MANAGEMENT
INSURANCE COOPERATIVE, ASSOCIATION OF WASHINGTON
CITIES RISK MANAGEMENT SERVICES AGENCY, THE WATER
AND SEWER RISK MANAGEMENT POOL, AND ENDURIS

Jessie Harris, WSBA # 29399
Jerry B. Edmonds, WSBA #05601
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph: (206) 628-6600
Fx: (206) 628-6611
Attorneys for *amici*

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I. IDENTITY AND INTERESTS OF AMICUS CURIAE

This brief is respectfully submitted by the largest risk pools in the State of Washington, which provide risk management services to nearly 900 public entities. The Washington Schools Risk Management Pool provides self-insurance and risk management services to more than 90 school districts across the state. The Southwest Washington Risk Management Insurance Cooperative is a collective of 32 school districts in southwest Washington that jointly provide claims coverage and risk management services. Washington Cities Insurance Authority is this state's first and oldest risk pool, made up of more than 150 cities, towns, and other special purpose districts. The Association of Washington Cities, through its Risk Management Service Agency, furnishes member-run, member-owned risk pooling services to 85 small and medium sized cities and towns in Washington, as well as 10 special purpose districts. The Washington State Transit Insurance Pool consists of more than 25 public transportation agencies that pool resources to provide claims, litigation, and risk management services. The Water and Sewer Risk Management Pool provides liability coverage for 64 water and sewer districts, as well as specialized risk management services. And Enduris is comprised of more than 500 special utility districts that share risk and reduce public cost.

All of these risk pools have a strong interest in ensuring that this Court does not depart from the historical purpose of risk pool formation and the legislation that codified it. As discussed below, public risk pooling was not created to be a *type* of conventional insurance, but an *alternative* to it.

II. STATEMENT OF THE CASE

Amici adopt the statement of the case provided by the respondents.

III. AUTHORITY AND ARGUMENT

A. Risk Pools Were Created As An Alternative To Conventional Insurance And Operate Accordingly

On March 24, 1986, Time Magazine featured a picture of a small, idyllic town on its cover. Emblazoned across it: “Sorry, America, Your Insurance Has Been Canceled.” *See* Appendix A. Time Magazine had picked up on what was fast-becoming a national crisis. Conventional insurers had either made insurance for public entities cost-prohibitive, or left the market all together.¹

As government was losing many of its immunities, public entities became far less attractive to a profit-driven insurance industry. *See*

¹ *See, e.g.*, Wall St. J., Apr. 16, 1986, at 41, col. 2 (reporting on “indications that ‘quite a few’ New Jersey municipalities can’t get insurance”); Sullivan, U.S., States Seeking Ways to End Liability Insurance Crisis, Christian Sci. Monitor, Mar. 7, 1986, at 4, col. 3 (Blue Lake, Cal., lost its liability insurance policy and flew flag upside down as signal of distress); Wolinsky, Insurance Crisis Forecast for Most California Cities, L.A. Times, Feb. 28, 1986, at 3, col. 3 (estimating that two-thirds of California cities will be forced to go without liability coverage, while 43 cities already lack coverage).

generally Marcos Antonio Mendoza, *Reinsurance As Governance: Governmental Risk Management Pools As A Case Study in the Governance Role Played by Reinsurance Institutions*, 21 Conn. Ins. L.J. 53, 58 (2015) [“Mendoza, *Reinsurance As Governance*”]. Unlike private entities that can tailor their business to avoid liability exposures, many of the services that local government must perform,² or that the public wants them to perform,³ necessarily involve risk. *Id.*; see also James R. Hackney, Jr., *A Proposal for State Funding of Municipal Tort Liability*, 98 Yale L.J. 389, 389-90 (1988).

Excessive premiums demanded by conventional insurers left even the largest governmental agencies in a difficult position. They could, to the extent the public and law permitted, limit services and raise taxes. Or they could forego insurance and attempt to self-insure—risking bankruptcy in the event of a large judgment. Without a broad tax base, smaller jurisdictions did not have even these unpleasant options.

The solution was governmental risk pooling. Risk pools are not-for-profit, member-driven organizations that are owned and governed by the members themselves—typically through elected member boards. The

² See, e.g., RCW 36.28.010 (law enforcement); *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845, 852 (2002) (duty to maintain roads and sidewalks in reasonable condition for ordinary use).

³ This may include, for example, providing parks, swimming pools, or sponsoring recreational events.

County Risk Pool provides a good illustration: during relevant events, Clark County's Risk Manager chaired the County Pool's Board of Directors and its Executive Committee. CP 2620.

Members of a risk pool combine their resources to self-insure, "mutualizing" their risk. So in the event of member liability, the pool pays some or all of the loss. Some pools take the additional step of jointly purchasing reinsurance or excess insurance, smoothing the impact of losses over time and hedging against particularly large ones.

Because risk pools have no profit margin, they've saved taxpayers billions of dollars since their inception. See Karen Nixon, *Public Entity Pooling-Built to Last*, <http://www.agrip.org/publicsectorpooling> (2011) (last visited March 10, 2016).

While pools share core values, each is unique. As *amici* demonstrate, they generally serve a specific type of entity (*e.g.*, municipalities, school districts, public transit, utility districts). This specialization allows proactive risk management, such as police use-of-force standards, anti-bullying education, or prevention of sewer backups. See *infra* Section B-4. Commercial carriers seldom, if ever, offer this proactive assistance, *ibid.*, given their large and diverse pool of insureds.

The mandate of the Washington Legislature was a reflection of the historical context. The “joint self-insurance risk programs” are not conventional insurance, nor were they ever intended to be:

Two or more local governmental entities, under any provision of law, that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding are *not an “insurer” under this code*.

RCW 48.01.050 (emphasis added).⁴ Ch. 48.62 RCW alone, and not the rest of Title 48, is the “exclusive source of local government entity authority to individually or jointly self-insure risks.” RCW 48.62.011.

This important distinction between risk pools and commercial insurance led the legislature to place risk pools under the regulatory authority of the State Office of Risk Management rather than the insurance commissioner. *See* RCW 48.62.071.⁵ The Risk Manager rigorously audits and oversees every aspect of a Washington joint self-insurance program’s management and operations, including claims handling. RCW 48.62.061; *see also* WAC 200-100 *et seq.* (standards relating to, *inter alia*, claim handling, electing a governing body, meetings, financial solvency,

⁴ This statute was revisited by the Legislature just last year, and expanded to exclude nonprofit risk pools from the definition of “insurance.” *See* 2015 Wash. Legis. Serv. Ch. 109 (S.B. 5119).

⁵ Petitioners cite former RCW 48.62.041 for the proposition that risk pools have been subject to “close OIC supervision.” Reply Br. at 13. The fact that this statute was repealed five years ago speaks for itself vis-à-vis legislative intent. Moreover, as the former statute states, the five member board was there to “assist the state risk manager” in carrying out his or her oversight obligations. Former RCW 48.62.041(2).

reporting, conflicts of interest). Its standards are among the most detailed and demanding in the country.⁶

The distinct regulatory structure set up by legislatures for risk pools is working. Across the United States, there are approximately 91,000 distinct governmental entities, including counties, cities, school districts, townships and special districts. Over 80% are members of a risk pool. Mendoza, *Reinsurance As Governance* at 60.

B. Conventional Insurance Remedies Were Developed Within A Very Specific Context, Which Is Wholly Inapplicable To Risk Pools

With this framework in place, *amici* turn to the question before the Court: whether to wrench common law insurance principles from their proper context, and broadly superimpose them on public entity risk pools.

The answer is no—for many reasons.

1. Risk Pool Members Are Sophisticated

For more than 75 years, Washington courts have construed conventional insurance contracts with a very specific principle in mind:

... our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. The words employed in a contract of insurance are to be taken and understood in their plain, ordinary, usual and popular sense, rather than according to the meaning given them by lexicographers, or persons

⁶ In contrast, the Insurance Commissioner—which receives notice of and investigates insurance bad faith (RCW 48.30.010)—has never exerted its own authority over risk pools.

skilled in the niceties of language. The rule is practically universal that, when the language of an accident policy is susceptible of different constructions, that one must be adopted which is most beneficial to the insured.

Kane v. Order of United Commercial Travelers of Am., 3 Wn.2d 355, 362, 100 P.2d 1036 (1940). The people entering into these contracts are “average men,” not “persons skilled in the niceties of language,” so courts interpret them as a “layman” would understand them. *Id.*

These concerns ring hollow when applied to joint self-insurance agreements negotiated by county prosecutors, city attorneys, outside counsel, elected officials, and risk managers. If ever there was a subset of the population “skilled in the niceties of language,” it is this group.

Government entities, including Clark County,⁷ have the background and resources to understand the contracts they enter into. These are, after all, the same entities society entrusts to arrest and jail citizens, administer pensions, run fire departments, provide safe drinking water, and maintain highways. It would be incongruous to suddenly treat them as an unsophisticated “average person” when they are considering membership in a risk pool. There is nothing unique about risk pooling

⁷ Nowhere in the record does Clark County claim that it misunderstood the JSILP or any other terms of its risk pooling agreement. Indeed, accepting the evidence at face value, its risk manager understood the terms precisely. *See* CP 4806 (acknowledging that the proposed claim assignment was “unlawful”).

agreements that would require that they be interpreted based upon anything other than well-developed contract principles.

2. Risk Pool Members Have Leverage And Recourse

As this Court observed, “insurance contracts are substantially different from other commercial contracts.” *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991). This is largely due to 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... ‘form’ document, in essentially a nonnegotiable, ‘take-it-or-leave-it’ environment.” *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35, 904 P.2d 731, 736 (1995). As true as this may be in the conventional insurance arena, it is equally *untrue* in the context of risk pooling.

First, the members are the owners and directly weigh the costs and benefits of their carefully drafted pooling agreements. By vote, they determine the scope of their own coverage, the nature of the pool’s management, and the type of dispute resolution process they want. Absent a regulation coming from the State Risk Manager, virtually every part of joint self-insurance is subject to change by the members.⁸

⁸ WCIA, for example, recently amended its coverage to include drones.

Second, risk pools are small, specialized non-profit groups with much less bargaining power than insurers. Conventional insurers have an almost limitless population of potential insureds, some of whom are required to purchase insurance. *See e.g.* RCW 46.30.020 (mandating auto coverage); 26 U.S.C. § 5000A (mandating healthcare coverage).⁹ Accordingly, a single policyholder has little recourse. The same cannot be said of risk pool participants. The Washington Counties Risk Pool has 26 members (out of 39 counties in the state). As one commentator put it while dismissing the need for bad faith remedies:

... pools have limited markets and therefore inherently attempt to service members promptly to maintain their member base. Most operational charters limit the potential membership, so even though a pool has a potential market of 1000 or more members, it is still quite a finite number compared to markets for insurers... [H]igh levels of service are inherently necessary to keep members. The member potentially may go in and out of the pool in various lines of coverage. However, most pools are organized so the governing boards are comprised of members' representatives. This board representation gives pool members direct input as to policy.

Mendoza, *Reinsurance As Governance*, at 147 n.17.

3. Risk Pool Members Need Clarity and Predictability

Unlike the typical insurance purchaser, risk pool members are using taxpayer dollars to fund their risk-sharing and claims administration.

⁹ Additionally, homeowner's insurance is required by nearly all banks as a condition of securing a mortgage.

They also assume the downside risk of an unpredictably high loss by other individual members.¹⁰ This shared liability means that the actions of a single pool member can have a drastic impact on the others.

In order to responsibly enter into such an arrangement with public funds, governmental entities need to know that the carefully drafted agreements they negotiated and signed will be interpreted as written. When disagreements pertaining to coverage or losses arise, there is a contract—which has been vetted through the membership’s periodic input—that sets forth specific rights, rules, expectations and procedures for resolving disputes.

This contract among participating members does *not* say that the extent of coverage afforded by the agreement must be negotiated or litigated with non-member tort claimants. Anti-assignment (CP 8041-54), in this context, is not about limiting liability. It is about “selecting the persons with whom [one] deals.” *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 830, 881 P.2d 986 (1994). And WAC 200-100-02005 makes it very clear that “[o]nly *members* may participate in risk sharing” (emphasis added). This is what the

¹⁰ Members of the County Risk Pool, for example, were required to pay assessments, *in addition* to the “contingent liability for the liabilities of the Pool in the event the assets of the Pool are not sufficient to cover its liabilities,” with deficits “financed through fair and reasonable retroactive assessments levied against each member county as determined by the Board.” CP 4623. This liability does not end with withdrawal, or even termination, from the pool. *See* CP 4624-25.

membership of the County Risk Pool agreed to, along with a specific dispute resolution process. *See, e.g.*, CP 2656, 7797-804. None of the counties bargained for eight figure consent judgments, nor coverage lawsuits brought by tort claimants standing in the shoes of a pool member.¹¹

Petitioners go even further, suggesting that “hundreds of thousands of [government employees] and their families” should be permitted to assign insurance claims against risk pools. Pet. Davis and Northrup Br. at 45-46. Aside from their lack of privity, this proposes to address a problem that does not exist. Government employees do not face “fiscal uncertainty” (*id.*), because they are entitled to indemnification under RCW 4.96.041 so long as their conduct is not in bad faith.

The unpredictable, ever-changing relationship and impossible-to-predict exposure advocated by Petitioners is the opposite of what pool members bargained for, and is not supported by the enabling framework.

In addition, the law would become wildly unpredictable if Petitioners’ argument were accepted. Superficially, they acknowledge that “RCW 48.62.011 and RCW 48.01.050 appropriately exempt true self-insuring and self-funding risk pools from the Insurance Code regulations

¹¹ No disrespect toward Messrs. Davis and Northrup is intended; they appear to have suffered an injustice. But their quarrel is with Clark County. And any quarrel Clark County has with the County Risk Pool, it may pursue through precisely the remedial process it bargained for, consistent with the shared expectations of the other counties.

applicable to insurers that conflict with the nature of the work the Legislature authorized risk pools to perform.” Reply Br. at 18. This, however, pulls the analytical rug out from under the “decades of painstakingly developed common law principles” (*id.* at 23) Petitioners wish to apply to risk pools.

The insurance “common law” is simply a collection of appellate holdings, the majority of which are based upon the very regulations and statutes Petitioners concede do not apply,¹² or may not apply.¹³ In reality—as an alternative to settled contract law—Petitioners are proposing an entirely new body of law, which begins with an inquiry into whether a risk pool is “truly self-funding” (*see* *infra* Section C), and then applies insurance case law to the extent not reliant on “Insurance Code regulations,” to the extent they are “in conflict with the nature of the work

¹² *See, e.g., Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 331, 2 P.3d 1029 (2000) (“State Farm’s failure to advise Anderson of her coverage violated WAC 284-30-350 and constituted bad faith as a matter of law.”); *Coventry Associates v. Am. States Ins. Co.*, 136 Wn.2d 269, 276, 961 P.2d 933 (1998) (determining bad faith and CPA liability by reference to WAC 284-30); *Tank v. St. Farm & Casualty Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986) (“the Insurance Commissioner, pursuant to legislative authority under RCW 48.30.010, has promulgated regulations defining specific acts and practices which constitute a breach of an insurer’s duty of good faith.”); *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520, 528 (1990) (“single violation of WAC 284-30-330” may inure to liability”); *Truck Ins. Exchange v VanPort Homes, Inc.*, 147 Wn.2d 751, 764, 58 P.3d 276 (2002) (“Violations of WAC 284-30-330 are *per se* violations of Washington’s Consumer Protection Act.”).

¹³ *See, e.g.,* whether *State, Dep’t of Transp. v. James River Ins. Co.*, 176 Wn.2d 390, 395, 292 P.3d 118, 121 (2013) (voiding mandatory arbitration clause under RCW 48.18.200). Setting aside the statutory framework, it would seem to be in the public’s interest for government to resolve coverage disagreements through arbitration, rather than expending taxpayer dollars on superior court litigation.

the Legislature authorized.” *Ibid.* This is novel, and wholly *inconsistent* with anybody’s reasonable expectations.

4. Risk Pool Funds Are Used To Proactively Reduce Risk, Making Both The Members And Their Citizens Safer

Governmental liability “encourages responsible conduct in two ways: through holding governmental entities accountable for tortious acts and through providing compensation to injured citizens.” Debra L. Stephens & Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*, 30 Seattle U.L. Rev. 35, 59 (2006). Risk pooling encourages responsible conduct, while forced application of insurance law undermines it.

Local governmental risk pools are uniquely well-suited to minimize future harm to the public through aggressive risk management programs. Some examples of which include:

- The Washington Schools Risk Management Pool and Southwest Washington Risk Management Insurance Cooperative have together invested millions of dollars in “school hardening,” to mitigate and eliminate school shootings. This includes emergency operation plans, proactive construction elements, and monitoring strategies.
- The Washington State Transit Insurance Pool has put substantial resources into the country’s first “collision avoidance system” pilot program. The objective is for the vehicle to stop, automatically, when a pedestrian is detected in its path.
- Washington Cities Insurance Authority and the Association of Washington Cities Risk Management Service Agency educate their

members on best practices and standards—in the form of newsletters, seminars, and legal consultations—on issues such as police use-of-force, road maintenance, and employment law. One recent focus of WCIA has been ensuring compliance with state public defense standards in the municipal courts.

- The Water and Sewer Risk Management Pool holds semi-annual trainings for all members to improve operations in water and sewer utilities. And should an accident occur, the Pool implemented a “Good Neighbor” policy, which covers the cost of putting the occupants in a hotel during the clean-up.

Risk pools benefit because proactive risk management programs reduce their losses. Members benefit because they are able to serve the public more effectively. And the community benefits when there are fewer school shootings, bus accidents, and sewer backups.

The resources that fund these important programs would be the very resources diverted if risk pools had to fund extra-contractual exposure and litigation. Washington’s regulations governing pools are already “among the lengthiest of any state not requiring pools to register as mutual insurance companies.” 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, 557 (2002). Requiring compliance with conventional insurance claims practices, in addition to state risk pool regulations, would negate cost savings and force risk pools to cut services like conventional insurers.

It is also worth mention that allowing government entities to take a covenant judgment and assign away their liability to other governmental entities is *antithetical* to the principle of government accountability. Assuming Clark County erred, tort law would dictate that it be held accountable. But under Petitioners' proffered scenario it is not. It is, according to its own risk manager, "throwing the other 26 [counties] under the bus in an attempt to save... money" instead. CP 4806.¹⁴ Other counties that had no dealings with Messrs. Davis or Northrup would be required to shoulder Clark County's accountability, as well as the cost of litigating unprecedented claims for extra-contractual exposure.

5. Risk Pool Members—And Ultimately, The Public As A Whole—Are The Ones Who Would Be Punished By Holding Risk Pools Liable As Insurance Companies

Conventional insurers are almost invariably large, for-profit corporations. They have incredible bargaining power and resources, making disputes a hardship for the insured, even when he or she turns out to be right. *See Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991). This truth was further developed in *Safeco Ins. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992), and *Kirk v. Mt. Airy*

¹⁴ One may argue that risk pools should be held accountable for their mistakes, too. *Amici* do not disagree. Indeed, they are creatures of interlocal agreements, which specifically contemplate dispute processes and contractual remedies. To the extent that the membership wants to broaden either, they can vote to do so. But, in the end, those grievances should be raised by the members themselves, pursuant to their contractual agreement—not by adverse claimants. *See, e.g.*, CP 4806 (anti-assignment).

Ins. Co., 134 Wn.2d 558, 951 P.2d 1124 (1998), as the Court began to apply bad faith law to “incentivize” insurers to act in good faith by setting aside “the traditional rules regarding harm and contract damages.” *Id.* at 562. “If the only remedy available were the limits of the contract... [a]n insurer could act in bad faith without risking any additional loss.” *Butler*, 118 Wn.2d at 394. In other words, the remedy must do more than “right the wrong.” It must be punitive enough to deter. *See Nat’l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 880, 297 P.3d 688 (2013) (characterizing bad faith finding as “potentially disastrous”).

Large financial punishments, threats of coverage by estoppel and presumed damages may be effective means of deterring undesirable behavior by a large, for-profit corporation. These remedies, after all, take money out of company coffers, which matters to executives and shareholders. But assessing these remedies against public entities makes no sense, particularly when the cost is shouldered by other public entities whose only connection with the claim is a risk pooling agreement.

And in the end, any punitive remedy against a public agency is “borne by widows, orphans, aged men and women, and strangers...” *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 261 (1981) (citing *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 674 (La. 1846)). As for the risk pools themselves, they are non-profits which

often do not even have a “staff.” Of the ones that do, 37% have five or fewer employees, 26% have more than 20 employees, 21% have 11-20 employees, and 16% have 6-10 employees. Mendoza, *Reinsurance As Governance*, at 60.

Subjecting risk pools to extra-contractual liability would, in the short term, only serve to punish innocent members and divert resources from public services—with costs ultimately passed to taxpayers to offset increased assessments. In the long run it could lead to the demise of risk pooling, as public officials realize the liabilities they have agreed to share are not confined to their written contract.

Common law insurance principles serve an important purpose. But Petitioners’ request to graft them onto a different framework—with different players, incentives, and legislative intent—should be declined.

C. WCRP’s Purchase Of “Reinsurance” And Use Of “Insurance Terminology” Is Not A Principled Basis For A Ruling Against It—And Certainly Not A Principled Basis For A Ruling Against *All* Washington Risk Pools

Despite the legislature’s careful effort to distinguish risk pools from insurance companies, Petitioners argue that Washington County Risk Pool should be treated as an insurance company because it purchased reinsurance. *See* Davis and Northrop Br. at 45. This argument is flawed.

As a threshold matter, when the legislature crafted a framework for local governmental risk pools, it expressly authorized them to “[j]ointly purchase insurance and reinsurance coverage in such form and amount as the program’s participants agree by contract.” RCW 48.62.031(4)(d). Affording them this tool was simply pragmatic.¹⁵ Like any self-insured entity, a risk pool can internalize all, some, or none of its risk.¹⁶ It is unclear why risk pools doing something they are authorized to do would make them less of a risk pool, or expose them to extra-contractual liability.

But more fundamentally, the possible presence of reinsurance¹⁷—or WCRP’s sporadic use of “insurance terminology,” for that matter—

¹⁵ Reinsurance is a risk sharing method among pool participants in that reinsurance premiums are largely driven by past losses. See Thomas W. Rynard, *The Local Government as Insured or Insurer: Some New Risk Management Alternatives*, 20 Urb. L. Rev. 103, 108 (1988) (noting that premiums are based on calculated projection of future losses, and “the projection of future losses is based primarily on past losses”). Thus, reinsurance serves a financing function for the amortization of insurance losses. See Robert W. Strain, REINSURANCE, at 15, 45 (1980). While reinsurance can reduce volatility by spreading losses out over time, it does not meaningfully externalize payment by risk pool members. Petitioners’ argument that “WCRP is not ‘self-insured’ for a single dollar of the loss at issue in this case” (Davis and Northrop Br. at 35), even if supportable by the record, is not true in any practical sense. Assuming hypothetically that some non-party group of reinsurers might pay a \$10.5 to \$33.5 million stipulated loss that has been assigned—and then secure reimbursement from the County Risk Pool over time in increased premiums—pool members collectively still pay.

¹⁶ Many large cities, like Seattle, Tacoma, and Kent, self-insure. If they were to outsource their risk, through reinsurance and excess insurance, the Petitioners’ logic would seemingly dictate (illogically) that these municipalities are subject to common law bad faith as well, because they, too, would be a “front for private insurers.” Davis and Northrop Br. at 45.

¹⁷ *Amici* note that the reinsurance policies in place from 2002-2010 are not before the Court. Petitioners append a chart to their briefs purporting to show the County Risk Pool’s reinsurance structure. But this is not a substitution for the text of the reinsurance agreements. Petitioners County and Slagle’s citation to CP 4230-4495 is likewise incomplete – the cited documents are excess insurance policies, not reinsurance policies.

would be a very tenuous ground for a broad ruling applicable to *all* risk pools. Risk pools were designed to be flexible, RCW 48.62.011, so those in this state are predictably diverse. Some of these *amici* have substantial self-insured, mutualized risk. Others utilize reinsurance to some degree. Most *amici* do not rely on the insurance common law at all in rendering coverage determinations. Some pools might, however, because it is their chosen mechanism for resolving disagreements. These types of internal decisions are entirely consistent with “flexibility in self-insuring.” *See* RCW 48.62.031(4)(d).

The Court should not render a broadly applicable decision based upon a single factual record, pertaining to a single risk pool.

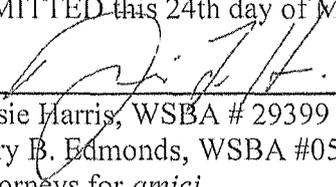
As for the case against WCRP, *amici* would point out that a decision predicated upon the extent of a risk pool’s reinsurance or semantic use of insurance terminology would be inherently arbitrary. These “criteria” find no support in the case law or statutes, other than an acknowledgement that pools are *permitted* to purchase reinsurance. If WCRP is subject to liability as a conventional insurer, the other pools will have to guess at how much reinsurance is too much, or what language they must avoid. This was not the intention of the common law, nor of the legislature.

The purpose of permitting local governmental entities to form risk pools was to allow greater flexibility and more cost effective use of taxpayer dollars. Imposing extra-contractual liability exposure on a risk pool thwarts that intent and introduces dramatic fiscal unpredictability.

IV. CONCLUSION

The trial court's ruling was correct and should be affirmed.

RESPECTFULLY SUBMITTED this 24th day of March, 2016.



Jessie Harris, WSBA # 29399
Jerry B. Edmonds, WSBA #05601
Attorneys for *amici*
WILLIAMS, KASTNER & GIBBS, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph. (206) 628-6600
Fx: (206) 628-6611
Email: jharris@williamskastner.com
jedmonds@williamskastner.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the law of Washington that, on this 24th day of March, 2016, I caused a true and correct copy of the foregoing document, "Motion by State Risk Pools to File Amicus Curiae Brief in Support of Lower Courts Decisions Under Review" to be delivered in the manner indicated below, to the following counsel of record:

Michael E. Farnell
Virgil Ian Hale
PARSONS FARNELL & GREIN LLP
1030 SW Morrison Street
Portland, OR 97205-2626
Email: mfarnell@pfglaw.com
Email: ihale@pfglaw.com

SENT VIA:
 Fax
 ABC Legal Services
 Express Mail
 Regular U.S. Mail
 E-file / E-mail

Timothy Kent Ford
David J. Whedbee
Tiffany Mae Cartwright
MACDONALD HOAGUE & BAYLESS
702 2nd Ave., Suite 1500
Seattle, WA 98104
Email: TimF@mhb.com
Email: davidw@mhb.com
Email: tiffanyc@mhb.com

SENT VIA:
 Fax
 ABC Legal Services
 Express Mail
 Regular U.S. Mail
 E-file / E-mail

Phil Albert Talmadge
TALMADGE/FITZPATRICK/TRIBE
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126-2138
Email: phil@tal-fitzlaw.com

SENT VIA:
 Fax
 ABC Legal Services
 Express Mail
 Regular U.S. Mail
 E-file / E-mail

Bradley S. Keller
Devon Skye Richards
BYRNES KELLER CROMWELL LLP
1000 2nd Ave., Suite 3800
Seattle, WA 98104-1094
Email: bkeller@byrneskeller.com
Email: drichards@byrneskeller.com
William James Leedom
Amy Magnano
David Norman
BENNETT BIGELOW LEEDOM PS
601 Union Street, Suite 1500
Seattle, WA 98101
Email: wleedom@bbllaw.com
Email: amagnano@bbllaw.com
Email: dnorman@bbllaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Howard Mark Goodfriend
Catherine Wright Smith
SMITH GOODFRIEND PS
1619 8th Avenue North
Seattle, WA 98109
Email: howard@washingtonappeals.com
Email: cate@washingtonappeals.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Thomas Martin Jones
Brendan Winslow-Nason
COZEN O'CONNOR
999 3rd Ave., Suite 1900
Seattle, WA 98104
Email: tjones@cozen.com
Email: bwinslow-nason@cozen.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Troy Aaron Biddle
Donald James Verfurth
GORDON & REES LLP
701 5th Ave. Suite 2100
Seattle, WA 98104
Email: tbiddle@gordonrees.com
Email dverfurth@gordonrees.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Patrick Timothy Jordon
JORDON LEGAL LLC
1001 1st Avenue North, Apt. 1
Seattle, WA 98109
Email: pjordon@jordan-legal.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Agelo Reppas
SEDGWICK LLP
One North Wacker Drive, Suite 4200
Chicago, IL 60606
Email: agelo.reppas@sedgwicklaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

John Robert Connelly, Jr.
Micah R. Lebank
CONNELLY LAW OFFICES
2301 N. 30th Street
Tacoma, WA 98403
Email: jconnelly@connelly-law.com
Email: mlebank@connelly-law.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Taylor Ross Hallvik
Christopher Horne
CLARK COUNTY PROSECUTING
ATTORNEY'S OFFICE
P.O. Box 5000
Vancouver, WA 98666
Email: Taylor.hallvik@clark.wa.gov
Email chris.horne@clark.wa.gov

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Matthew Segal
PACIFICA LAW GROUP LLP
1191 2nd Avenue, Suite 2000
Seattle, WA 98101
Email:
matthew.segal@pacificallawgroup.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Dated this 24th day of March, 2016, at Seattle, Washington.


Jessica Barcz, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Barcz, Jessica
Cc: phil@tal-fitzlaw.com; jconnelly@connelly-law.com; mlebank@connelly-law.com; mfarnell@pfglaw.com; ihale@pfglaw.com; TimF@mhb.com; tiffanyc@mhb.com; wleedom@bllaw.com; amagnano@bllaw.com; dnorman@bllaw.com; howard@washingtonappeals.com; chris.horne@clark.wa.gov; tbiddle@gordonrees.com; dverfurth@gordonrees.com; bkeller@byrneskeller.com; drichards@byrneskeller.com; tjones@cozen.com; bwinslow-nason@cozen.com; jconnelly@connelly-law.com; davidw@mhb.com; cat@washingtonappeals.com; pjordon@jordon-legal.com; agelo.reppas@sedgwicklaw.com; taylor.hallvik@clark.wa.gov; matthew.segal@pacificallawgroup.com; Harris, Jessie; Edmonds, Jerry
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Subject: Clark County, Washington et al. v. Washington Counties Risk Pool et al. Case No. 91154-1

Attached please find for Case No. 91154-1, *Clark County, Washington et al. v. Washington Counties Risk Pool et al.* the following pleadings to be filed with the Court.

- Motion for Leave to File Amicus Curiae Brief of Washington Schools Risk Management Pool, Washington Cities Insurance Authority, Washington State Transit Insurance Pool, the Southwest Washington Risk Management Insurance Cooperative, Association of Washington Cities, the Water and Sewer Risk Management Pool, and Enduris
- Amicus Brief Submitted by Washington Schools Risk Management Pool, Washington Cities Insurance Authority, Washington State Transit Insurance Pool, the Southwest Washington Risk Management Insurance Cooperative, Association of Washington Cities, the Water and Sewer Risk Management Pool, and Enduris

Additionally a hard copy has been sent via legal messenger to all counsel of record.

Thank you,

Jessica

Jessica Barcz

Williams Kastner | Legal Assistant
601 Union Street, Suite 4100
Seattle, WA 98101-2380
P: 206.628.2416 | F: 206.628.6611
www.williamskastner.com

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Sent: Thursday, March 24, 2016 3:54 PM
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Cc: phil@tal-fitzlaw.com; jconnelly@connelly-law.com; mlebank@connelly-law.com; mfarnell@pfglaw.com; ihale@pfglaw.com; TimF@mhb.com; tiffanyc@mhb.com; wleedom@bblaw.com; amagnano@bblaw.com; dnorman@bblaw.com; howard@washingtonappeals.com; chris.horne@clark.wa.gov; tbiddle@gordonrees.com; dverfurth@gordonrees.com; bkeller@byrneskeller.com; drichards@byrneskeller.com; tjones@cozen.com; bwinslow-nason@cozen.com; jconnelly@connelly-law.com; davidw@mhb.com; cat@washingtonappeals.com; agelo.reppas@sedgwicklaw.com; taylor.halvik@clark.wa.gov; matthew.segal@pacificallawgroup.com; Harris, Jessie <jharris@williamskastner.com>; Edmonds, Jerry <jedmonds@williamskastner.com>; pjordan@jordan-legal.com; Cate@washingtonappeals.com; lauraf@mhb.com; taraf@washingtonappeals.com
Subject: Clark County, Washington et al. v. Washington Counties Risk Pool et al. Case No. 91154-1

Per telephone conversation with the Court Clerk, attached please find for Case No. 91154-1, *Clark County, Washington et al. v. Washington Counties Risk Pool et al.*, the following Appendix to be filed with the Amicus brief filed via email with the Court at 1:32 pm today.

- Appendix A to the Amicus Brief Submitted by Washington Schools Risk Management Pool, Washington Cities Insurance Authority, Washington State Transit Insurance Pool, the Southwest Washington Risk Management Insurance Cooperative, Association of Washington Cities, the Water and Sewer Risk Management Pool, and Enduris

Thank you,

Jessica

Jessica Barcz
Williams Kastner | Legal Assistant
601 Union Street, Suite 4100
Seattle, WA 98101-2380
P: 206.628.2416 | F: 206.628.6611
www.williamskastner.com

SEATTLE PORTLAND