SB 814 Talking Points

- The bill will not make environmental clean-up faster or less expensive. To the contrary, it will make the process slower and more costly. The chief obstacle to remediation is the cumbersome process created by regulators and Potentially Responsible Parties (PRPs) that requires years and even decades of studies, testing, reports, meetings and hearings before substantial funds can be spent on remediation. The "emergency" designation of the bill is a misnomer. It does not address the true problems and will make them worse, not better.

- Insureds are being defended and are paying staggering amounts each year for defense counsel and consultants to work, on behalf of insureds, with other PRPs and with the EPA and DEQ. The bill's provisions will greatly increase the cost of defense, which does nothing to address the flaws of the investigation and remediation process. It is not any lack of defense dollars that has made this process inefficient, and therefore greatly increasing that cost will not provide any incentive to those who control the process to hasten its end. Insurers pay for defense, and are not direct participants in the investigatory and remediation process.

- Insurers, for the most part, are unable to pay indemnity toward remediation because the regulatory process will not allow remediation until the final phases of the process: after all testing and investigation is completed and a remedy is approved. EPA and DEQ generally do not allow individual PRPs to pay and be released from liability. Instead, PRPs are required to come up with group solutions and allocations, and then get final approval for a collective remediation.

- The insurance policies affected by this bill are pre-1985 policies, before the introduction of the Absolute Pollution Exclusion, which precludes coverage for all environmental contamination liability. Policies between about the early 1970s and 1985 had what is called the "Limited Pollution Exclusion," which the Oregon Supreme Court held in 1996 did not preclude coverage for environmental liabilities. Insurers never thought these policies would cover environmental contamination and millions in defense costs, year after year. The premiums paid for many of these policies, accordingly, were for different risks and were relatively small. The yearly premiums for some of these policies were just hundreds of dollars or a few thousand dollars. Insureds are not being treated unjustly. To the contrary, they are receiving much more than they bargained for. Oregon coverage law regarding environmental contamination is already among the nation's most generous to insureds.

- Section 2 invalidates anti-transfer clauses, which have been a feature of insurance policies for a hundred years and have been a fundamental basis of the bargain for that long. Anti-transfer clauses go to the first of the five elements of a valid insurance contract: (1) identity of the insured, (2) scope of the risk, (3) premium to be charged, (4) length of policy period and (5) policy limits or amount of insurance. The Oregon Supreme Court in 2006 in *Holloway v. Republic Indemnity Co.* said these clauses must be strictly enforced, even in event of insurer breach of the duty to defend. The bill goes to

the extraordinary length not only of overturning a settled interpretation of these clauses, but negates anti-transfer clauses even where the insurer has accepted the defense.

- Section 4 negates the "owned property" exclusion and Oregon appellate court decisions upholding it, and creates an obligation for insurers to pay indemnity even where a polluter has contaminated its own land and has not even caused damage to state waters or to other third parties. Liability policies have never covered first party losses, i.e., damage one causes to his own property.

- Section 4 creates a rubric of "good faith settlements" for which there is no process or precedent in Oregon law.

- Section 4 would allow some insurers to settle with insureds for immediate indemnity payments, perhaps for less than policy limits, and pass the duty to defend to other insurers. However, because insureds themselves cannot spend the indemnity dollars on remediation until EPA and DEQ allow it, this money has nowhere to go. There are no restrictions on how insureds can use this money and no guarantees it will actually go toward clean-up.

- The bad faith provisions of Section 6 are extremely broad with treble damages and go beyond even Washington bad faith law in some respects. Section 6 creates no good faith obligations on the part of insureds. It also introduces the State of Oregon into a new mediation process, with no funds allocated toward the State's participation, and this new requirement is likely to be expensive and produce more disputes than it solves. Taxpayer funding will be necessary for a process that is currently entirely privately funded.

- Section 7 creates an independent counsel requirement that will lead to immediate rate increases for defense counsel and consultants, and will make remediation more costly and lengthy. This independent counsel provision does not require that a conflict of interest exists between insurer and insured, and goes far beyond independent counsel requirements in California and Washington. Even in those states, insurers have the right to appoint counsel, except in the relatively few cases where a conflict exists. And even when independent counsel must be appointed, they are subject to defense panel rates. Section 7 mandates virtually unlimited rates and payments to defense counsel and consultants, and Section 6 indicates that failure to pay whatever rate is demanded can be bad faith calling for treble damages.

- The bill is an unconstitutional retroactive impairment of contracts. The "savings clause" of Section 4(8) does not solve this problem because it wrongly claims that the bill sets forth "rules of construction" and "the intent of the parties" only. The bill contains no actual rules of construction of insurance contracts, as Oregon courts have used that phrase. Instead, the bill mandates non-enforcement of insurance terms that have been interpreted by Oregon courts and are part of settled law already. The intent of the parties thus has already been determined.