



AGENDA

Executive Committee
 October 25, 2018
 WSTIP Office ~ Olympia

9:00 am	CALL TO ORDER – President Paul Shiners	Sign-in sheet
	<ol style="list-style-type: none"> Roll Call of Members and Introduction of Guests Changes in Agenda/Motion to Accept Agenda 	
	CONSENT AGENDA	Page # *WP #
	<ol style="list-style-type: none"> Minutes – September 27, 2018 September 2018 Administrative Vouchers/Checks – Total voucher approval of \$310,993.93 including staff payroll and internet/credit card payments. September 2018 Claims Vouchers/Checks – Total voucher approval of \$301,193.21. 	002 007 010
	COVERAGE APPEAL – Burdett et al v. Community Transit	014
	EXECUTIVE SESSION	
	Pursuant to RCW 42.30.110 (1) (i) to discuss with legal counsel representing the agency litigation in which a member acting in an official capacity is a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.	
	The Executive Session is expected to conclude after 60 minutes, unless extended by the Presiding Officer.	
	DISCUSSION ITEMS	
	<ol style="list-style-type: none"> 2018 Executive Committee Work Plan, Strategic Plan – Christianson Executive Committee Retreat – Jordan 2019 Budget Item: New Position – Christianson & Powell 2019 Budget Item: Board Errors and Omissions Coverage – White 2019 Budget Item: Building Reserve Fund -- Powell Losses Above \$100,000 Report – Kerrigan Draft Public Officials Liability Coverage Document Matrix – Christianson & Shiners Notice Letter from the Department of Licensing -- Christianson 	173 185 186 190 191 192 208 235
	ACTION ITEMS	
	<ol style="list-style-type: none"> Request to Engage Certified Public Accountant 	242
	STAFF REPORTS	
	<ol style="list-style-type: none"> Executive Staff Report – Christianson, Adams, Kerrigan & Powell 	255
	SUBCOMMITTEE REPORTS	
	<ol style="list-style-type: none"> Governance Policy Committee – No Report Board Development Committee – No Report Emerging Risks & Opportunities Committee – No Report Data Governance Committee – No Report Coverage Review Committee – Verbal Report Nomination & Elections Committee – Report 	267
1:00 pm	RECAP and ADJOURN – President Paul Shiners	
	*WP = Work Plan Item # Board Development Committee Meeting – 10/25 after EC MTG Governance Policy Committee Meeting – 10/25 after EC MTG Emerging Risks and Opportunities Committee Meeting – 11/07 @ WSTIP Data Governance Committee Meeting - TBD Coverage Review Committee Meeting – TBD @ WSTIP Audit Committee – 10/25 before EC MTG	

NB&F

NICOLL BLACK & FEIG

ATTORNEYS

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October 22, 2018

VIA E-MAIL

Washington State Transit Insurance Pool
Executive Committee
c/o Paul Shinnars, WSTIP President
60 Washington Avenue, Ste. 200
Bremerton, WA 982337
pauls@kitsaptransit.com

Re:

**Matter: Burdett, Johnson & Perkins vs. Snohomish County Public
Transportation Benefit Area d/b/a Community Transit**
Insured: Community Transit
Claim No: 18-014659-1
Date of Loss: 8/17/2018

Dear Executive Committee Members:

I have been retained by the Washington State Transportation Insurance Pool (“WSTIP”) to assist it in connection with claims asserted by putative class representatives against Community Transit in an as yet unfiled lawsuit. Specifically, I have been retained to provide advice concerning Community Transit’s claim for defense and indemnity related to the lawsuit brought against Community Transit by certain transit drivers. I have reviewed the October 12, 2018 letter from Franklin Cordell of Gordon Tilden Thomas and Cordell (“Cordell Letter”) disputing WSTIP’s denial of the claim and rejection of Community Transit’s tender of defense. I am writing to provide a response to the points raised in Mr. Cordell’s letter and to explain WSTIP’s coverage position so that the Executive Committee can make an informed decision regarding Community Transit’s request for a defense and indemnity in light of the policies applicable to the Pool.

I. INTRODUCTION

A. **Insurance Pools are not Traditional Insurance and are not Governed by Policies and Considerations Applicable to Traditional Insurance or Case Law Deciding Coverage Issues in the Courts.**

Any analysis of the rights and obligations of WSTIP and its members must begin with a discussion of the concept and nature of an Insurance Pool.

WSTIP is a public entity authorized by RCW 48.62.031 and RCW 39.34. Pursuant to these statutes, local government entities are permitted to join together to jointly self-insure, jointly purchase insurance or reinsurance for liability and property risks and jointly contract for or hire personnel to provide risk management, claims and administrative services. In 1979, the Legislature added sections to Title 48 RCW, to allow local governmental entities to join together to jointly self-insure risks, jointly purchase insurance or reinsurance, and jointly contract for risk management, claims and administrative services. As stated in the session laws from the 1979 1st Extraordinary Session:

NEW SECTION. Section 1. The legislature finds that local governmental entities in this state are experiencing a trend of vastly increased insurance premiums for the renewal of identical insurance policies, that fewer insurance carriers are willing to provide local governmental entities with insurance coverage, and that some local governments are unable to obtain desired insurance coverage.

It is the intent of this legislation to clearly provide for the authority of local government entities to individually self-insure, purchase individual insurance coverage, and obtain risk management services. It is also the intent of this legislation to grant local governmental entities the maximum flexibility to enter into agreements with each other to provide joint programs, which include programs for the joint purchasing of insurance, joint self-insurance, joint self-insuring, and joint contracting for or hiring personnel to provide risk management services.

In crafting this legislation, in the final new section, the Legislature set forth its intention that, in enabling these entities to form together to jointly self-insure, they did not then become “insurers subject” to regulation by the Insurance Commissioner in Washington:

"Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society....Two or more local governmental entities, as defined in Section 2 of this 1979 act, which

pursuant to section 4 of this 1979 act or any other provision of law join together and organize to form an organization for the purpose of jointly self-insuring shall not be deemed an insurer under this code.

Session law, Chapter 256, Section 12 (emphasis in the original); *see also* RCW 48.01.050 (“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”).

In recognition of the authority providing for the Pool’s formation, the WSTIP Coverage Document states in its Introduction:

The Washington State Transit Insurance Pool (Pool) is not an insurance company. It is an entity created pursuant to RCW 48.62. It is controlled and governed by applicable state statutes and regulations, the Interlocal agreement through which the Pool was formed, and its own bylaws and governance documents.

The state statutes and regulations which apply to insurance companies do not apply to the Pool. The Pool is not regulated by the state insurance commissioner. The judicial cases which apply to the construction and interpretation of insurance policies do not apply to this coverage document.

This coverage document shall be construed, applied, and interpreted in accordance with the Pool’s rules, regulations, and bylaws.

See 2018 Public Officials Liability Coverage Document (“Coverage Document”), p. 1. These statements appear in the Coverage Document and are agreed to by each Member. As contemplated by statute, WSTIP is not an insurer and in deciding any appeal of a coverage position taken by WSTIP, the first question that must be addressed is how to understand WSTIP’s rights and duties to its members.

There is almost no guidance in Washington law on this issue. Nevertheless, courts from other jurisdictions have discussed Insurance Pools and the policy considerations that should inform decisions involving disputes between the Pool and its members. The fundamental difference between an Insurance Pool and a traditional insurer/insured relationship is that an Insurance Pool is member directed. As one California case observed:

[The members of the pool] 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." 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.

City of South El Monte v. Southern Cal. Joint Powers Ins. Authority, 38 Cal. App. 4th 1629, 1639, 45 Cal. Rptr. 2d 729, 735 (1995) (citation omitted).

The ultimate decision regarding an appropriate response to a claim lies with the members and, as their proxy, the Executive Committee. Thus, the cases discussed by Mr. Cordell and the opinions expressed by Mr. Marchel are irrelevant for the purposes of resolving the dispute that has developed between WSTIP and Community Transit. Mr. Cordell's own analysis acknowledges that case law applicable to traditional insurers and insurance policies in this state is "not clearly applicable to Insurance Pools" (*see* Cordell Letter, page 7). Despite this acknowledgment, Mr. Cordell completely ignores the controlling language in the Coverage Document's Introduction and ignores his own conclusion by focusing his arguments and analysis on case law interpreting and construing traditional insurance policies that contain similar language but involve completely different factual scenarios and are based on the traditional relationships between an insurance company and its insured.

Here, the situation involves claims against a member of the Pool and a decision by the Pool that there is no coverage for any liability that might exist for those claims. Instead of the more traditional situation where an insurer dictates the extent and terms of coverage to its insureds, in a Pool,

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.

Id.

It is critical to keep in mind that the appeal process is not the equivalent of civil litigation or a trial and the holdings of courts deciding coverage issues in civil litigation are not in any way binding on this committee. The Executive Committee's goal must be to give full effect to the intent of the members as expressed in their Coverage Document, not to impose on them an interpretation or construction of that coverage document that reflects the policy considerations applicable to a traditional insurer/insured relationship as expressed in case law applying Washington (or other jurisdictions') insurance law. As recognized by the *City of South El Monte* case, the members agreed to adopt the terms and conditions set out in the coverage document but

They did not agree to also incorporate principles governing insurance carriers and insurance law into coverage decisions.

City of South El Monte, 38 Cal. App. 4th at 1641, 45 Cal. Rptr. 2d at 735. It is the agreement by the Pool members that is the crux of any coverage determination.

B The Burdett et al. Complaint

Mr. Cordell's discussion of the potential claims asserted by the putative class members against Community Transport is essentially accurate. The causes of action are all statutory and created by RCW Chapter 49. The first is a cause of action for failure to pay wages due under RCW 49.46 and concerns a claim for payment of overtime wages for work in excess of 40 hours per week. The second involves a "Willful Withholding of Wages in Violation of RCW 49.52" and specifically claims that Community Transit willfully withheld wages that were due to the putative class under RCW 49.52.050. The remedy sought for the violation is twice the amount of wages willfully withheld. Finally, the third claim is for a violation of the requirement that accurate records of wages and hours be maintained under RCW 49.46.070. The remedy sought for this alleged violation is "[a]n order that Community Transit must keep the wage and hour records required by law[.]"

As an initial matter, and in reverse order, Mr. Cordell and Community Transit agree that the Coverage Document affords no coverage for the injunctive relief sought under RCW 49.46.070 and the exemplary damages sought under RCW 49.52.070 (*see* Cordell Letter, p. 9). Those aspects of the claim will not be discussed further. But Mr. Cordell's arguments and analysis related to the remaining claims are not well taken and do not carry the day.

II. ARGUMENT

A. Plaintiffs' Claimed Damages, if Awarded, do not Constitute "Loss" as that Term is Used in the Coverage Document

Mr. Cordell's letter accurately quotes the Coverage Document's definition of "loss" but then departs from an analysis of the intent of the Members in adopting that definition in favor of an interpretation and construction of the term based entirely on a federal court decision ostensibly applying Washington law. This argument should be rejected in favor of an analysis of the intent of the Members in adopting the definition. The Coverage Document's use of the word "loss" indicates an intent to cover only those awards of "damages" or settlements relating to claimed "wrongful acts" that reflect an amount of "financial detriment." *See* <https://www.merriam-webster.com/dictionary/loss>. The Coverage Document uses the word "loss" to convey an actual net detriment to the Member as a result of an award of damages or a settlement necessitated by the assertion of a claimed wrongful act. It was not used to convey the disgorgement of wrongfully-retained wages that, if the claims are proved, actually rightfully belong to an employee.

Community Transit's technical analysis based on claimed Washington insurance law should not be accepted to convert this pooled coverage into a vehicle compensating a member, even if liable, where it has not suffered a direct financial detriment in the payment of damages. Here, Community Transit allegedly withheld payment of compensation allegedly due to its drivers. If a judgment or settlement requires Community Transit to pay money to the class plaintiffs, it will pay that money with funds it already has and to which it was not entitled. Thus Community Transit will not suffer a net detriment and will not sustain a loss as contemplated by the Coverage Document.

B. Even if the Claimed Damages Alleged Against Community Transit Constitute "Loss," Exclusions E and G Apply to Bar Coverage

Mr. Cordell quotes Exclusion E and Exclusion G accurately. Ignoring the actual language of the exclusions, however, Community Transit argues that both apply only if there are judicial findings of fact that Community Transit obtained "profit, advantage or remuneration" from the alleged "wrongful act" or deliberately violated a "federal, state, or local statute." This argument is misplaced and would have the Committee ignore the actual language of these two exclusions.

1. Exclusion E

Exclusion E provides that the coverage afforded by the coverage Document does not apply to a "loss"

Arising out of or attributable to the member . . . obtaining profit, advantage or remuneration to which the member . . . is not entitled; Provided, an adverse fact or finding attributable to a member . . . shall not be imputed to any other member.

In its argument in favor of a defense, Community Transit argues that the exclusion can never apply until there is a judicial finding of "profit, advantage or remuneration to which the member...is not entitled." But the exclusion does not say that. First, the "proviso" that refers to an "adverse fact or finding" is not even applicable to the current situation. Here, the allegations by the putative class are against Community Transit, alone, and there is no situation where the conduct of Community Transit could be imputed to any other member. Thus, the Executive Committee must focus on the language of the exclusion that precedes the proviso. The exclusion simply says that the coverage afforded by the Coverage Document does not apply to any loss (assuming the claim for damages constitutes a "loss" which WSTIP disputes), arising out of or attributable to the member obtaining profit or advantage. According to the allegations of the Complaint, Community Transit retained money that was due as compensation owed to drivers for work performed. It is difficult to imagine any clearer example of profit or advantage. Community Transit allegedly withheld money that it otherwise would have paid, money it was then able to use for its own purposes. Clearly the claims asserted by the putative class constitute

a loss arising out of the obtaining of profit or advantage. There is nothing unclear or ambiguous in the language of the exclusion.

In recognition of this, Community Transit resorts to a creative argument that for the exclusion to apply there must necessarily be a judicial finding that Community Transit obtained a profit or advantage, based on the proviso (which does not even apply in this situation). But even if you accept that the language of the proviso has some impact on the analysis applicable here, Community Transit's argument is flawed. The proviso itself says that no "adverse fact or finding attributable to a member" will be "imputed to another member." From this, Community Transit makes the leap that in order for the exclusion to apply there must be a judicial finding of the excluded result (the obtaining of profit or advantage). The language of the proviso does not support this leap. Here, the proviso says "adverse fact *or* finding." The disjunctive *or* indicates that the proviso might apply if there were adverse facts applicable to one member *or* a finding applicable to a member. Community Transit would have the Committee ignore the disjunctive *or* and simply treat the phrase as "finding of adverse fact." The Committee should not accept this invitation. When read in its entirety, the proviso, if it has any application at all, contemplates "adverse facts" of a profit or advantage to which the member is not entitled *or* a judicial finding of fact. The disjunctive makes it clear (if the proviso has any application at all in determining whether the exclusion applies to the member who is alleged to have committed the "wrongful act) that the allegation of adverse facts can trigger the application of the exclusion, as can a judicial finding. Here, the allegations made against Community Transit are that it failed to pay compensation due, which constituted an advantage to it. The allegation is clearly that Community Transit believed it would enjoy an advantage or profit from retaining the wages allegedly owed to the putative class members. Regardless of whether Community Transit disputes that it wrongfully retained wages, it is clear that the putative plaintiffs allege that it did and enjoyed the resultant advantage from holding onto money it otherwise would have paid.

2. Exclusion G

Exclusion G provides that the coverage afforded by the coverage Document does not apply to a "loss"

Brought about or contributed to by fraud, dishonestly, or bad faith or arising from the deliberate violation of any federal, state, or local statute, ordinance, rule, or regulation; Provided, an adverse fact or finding attributable to a member . . . shall not be imputed to any other member.

The text of the exclusion makes it applicable if Community Transit is liable to the putative plaintiffs for damages arising out of the deliberate violation of a statute. Here, *all* of the putative class members' claims are based upon the violation of a statute. For the putative class members' claims to succeed they would have to demonstrate that a statute was violated. The fact that Community Transit disputes that it violated any statute does not change the fact that any recovery

by the putative class would necessarily be based on or arise out of a willful (deliberate) violation of a state statute. The same analysis discussed above related to the proviso applies here as well. As a result, Community Transit's argument to the contrary should be rejected and, at least with respect to the claims related to a willful violation of RCW 49.52, the Executive Committee should decide that Exclusion G. applies.

C. Community Transit's Discussion of the "Insurance Marketplace" and the Report Provided by Mr. Marchel Are Irrelevant and the Executive Committee Should Restrict its Analysis to the Coverage Document and the Insurance Pool's Collective Intent

Community Transit devotes a considerable portion of its argument to a discussion of the way that insurance policies with similar (though not identical) provisions have been interpreted and construed by courts. As discussed above, this enterprise is completely misplaced and the Executive Committee should reject Community Transit's attempt to persuade it to adopt the analysis and conclusions of the cases discussed because, by agreement of the Members, they have no application to the Executive Committee's responsibility to resolve this appeal. The Executive Committee's responsibility is to carry out the intent of the Pool based upon its understanding of the collective intent and interests of all the Pool members. Under the terms agreed to by all the Pool members, interpretation of the Coverage Document is simply not to be based on case, statutory, or regulatory authority that would govern the interpretation of insurance policies. Rather, the Executive Committee's decision concerning this appeal is to be based on the Pool's rules, regulations, and bylaws.

Likewise, Mr. Marchel, while undoubtedly experienced in many aspects of the traditional insurance market and in insurer/insured relationships has not provided anything to suggest he is qualified to offer opinions regarding the rules, regulations, and bylaws of the Pool. Moreover, many of Mr. Marchel's opinions resemble the sort of legal conclusions that a judge would make in the context of civil litigation involving insurance coverage disputes and the Executive Committee should resist any tendency to regard Mr. Marchel as somehow authoritative when it comes to the policy considerations applicable to the Pool. The invitation to consider and rely in any way on Mr. Marchel's opinions should be declined.

D. WSTIP's Consideration of Exclusion Y in the 2019 Coverage Document Does Not Compel a Conclusion that the Types of "Wage-Hour" Claims Described in Exclusion Y are Covered by the 2018 Coverage Document

Recognizing that Pool members were beginning to assert that the sorts of claims asserted by the putative class in this situation were at least potentially covered under the 2018 Coverage Document, the Pool took steps to ensure that the prior intention *not* to cover these sorts of "wage-hour" claims was made even more clear in the 2019 Coverage Document. Community Transit's argument that this somehow provides evidence of an intent to extend coverage for those sorts of

claim under the prior Coverage Document is without any support. An attempt to clarify what appears to have become a point of dispute cannot change the Pool's collective intent in prior Coverage Documents and Community Transit's attempt to persuade the Executive Committee otherwise should be rejected. In addition, Community Transit's attempt to rely on Washington authority suggesting that a court will consider whether alternative, clearer language was or could have been used is equally unavailing. The Executive Committee's responsibility is *not* to apply Washington insurance law to this situation. Rather it is to ensure that the intentions of all Pool members are carried out in light of the Pool's agreed-to policies and desires.

III. CONCLUSION

As discussed above, the Coverage Document simply does not afford coverage for the claims asserted by the putative class. Those claims do not constitute a loss as contemplated by the Pool, and, if they do, Exclusions E and G apply to bar coverage for any liability Community Transit may have to the putative plaintiffs. As a result, WSTIP has no obligation to defend or indemnify Community Transit under the Coverage document and its decision rejecting the tender of defense and indemnity should be upheld. If the Executive Committee is inclined to depart from the clear intent of the Coverage Document, at this juncture only a defense under a full reservation of rights is an appropriate alternative, with any decision regarding indemnity left until a judgment against Community Transit is entered.

I look forward to meeting with you and the other members of the Executive Committee on October 25, 2018 in order to answer any questions you might have.

Very truly yours,

NICOLL BLACK & FEIG PLLC



Curt H. Feig

cc: Tracey Christianson, Executive Director
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