

ORS 734.510
ORS 734.695
retroactive statute
prospective statute
remedial

Roman Catholic Archbishop v. OIGA, Adversary No. 04-3375
Roman Catholic Archbishop of Portland, Case No. 04-37154

08/26/05 ELP unpublished

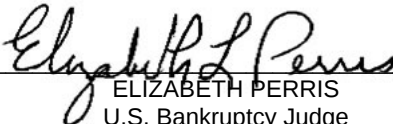
Memorandum Opinion ruling on cross-motions for summary judgment. Issue is whether 2001 amendments to Oregon's insurance guaranty law, which added a net worth limitation, applies to claims by the debtor against OIGA and to claims paid by OIGA that OIGA seeks to recover from the debtor. Discusses whether application of the amendments would constitute a retroactive application or a prospective application under Oregon law, and whether the legislature intended for the amendments to apply retroactively.

FILED

August 26, 2005

Clerk, U.S. Bankruptcy Court

Below is an Opinion of the Court.


ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:

ROMAN CATHOLIC ARCHBISHOP
OF PORTLAND IN OREGON, AND
SUCCESSORS, A CORPORATION
SOLE, dba the ARCHDIOCESE OF
PORTLAND IN OREGON,

Debtor.

ROMAN CATHOLIC ARCHBISHOP
OF PORTLAND IN OREGON, AND
SUCCESSORS, A CORPORATION
SOLE, dba the ARCHDIOCESE OF
PORTLAND IN OREGON,

Plaintiff,

v.

OREGON INSURANCE GUARANTY
ASSOCIATION, an unincorporated
association,

Defendant.

) Bankruptcy Case
) No. 04-37154-elp11

) Adv. Pro. No. 04-3375

) MEMORANDUM OPINION

Plaintiff Roman Catholic Archbishop of Portland (debtor) and

1 defendant Oregon Insurance Guaranty Association (OIGA) have filed cross-
2 motions for partial summary judgment, which raise the purely legal
3 question of whether Oregon's net worth limitation contained in ORS
4 734.510 to 734.710 applies to the claims in this case, subject to a later
5 determination of debtor's actual net worth at the pertinent time.

6 BACKGROUND

7 The relevant facts are undisputed.¹ Debtor was insured by two
8 insurers, Mission and Midland, both of which became insolvent in the
9 1980's. Third parties have asserted and will continue to assert claims
10 against debtor for injuries arising from conduct occurring during the
11 Mission and Midland policy periods (the claims). OIGA has paid
12 approximately \$2.6 million to third parties who made claims against
13 debtor.

14 Debtor filed this adversary proceeding against OIGA, seeking first a
15 declaration that OIGA is obligated to indemnify debtor for amounts debtor
16 becomes obligated to pay on the claims and for any further liability it
17 may have on those claims. Second, it seeks damages for breach of
18 contract, alleging that OIGA breached its duty to indemnify and provide
19 insurance coverage for the claims.

20 As an affirmative defense, OIGA alleges that, under Oregon statute,
21 it is not obligated to provide coverage for or indemnify debtor for its
22 liabilities on the claims, because of debtor's net worth at the time the
23 insurers became insolvent. OIGA also counterclaims for recovery of
24 amounts OIGA has already paid to third-party claimants who made claims

25
26 ¹ The parties filed a Stipulation of Fact that establishes the
facts necessary to a decision on these motions.

1 against debtor, which it alleges debtor is liable to pay because of its
2 net worth at the time of the insurers' insolvency. The statutory net
3 worth provisions on which OIGA relies were added to the OIGA statutes by
4 the 2001 legislature.

5 ISSUE

6 Whether the 2001 amendment to the OIGA statutes, adding the net
7 worth provisions, applies to claims by and against OIGA that arose under
8 insurance policies issued before the effective date of the amendment.

9 DISCUSSION

10 The court shall grant summary judgment if the pleadings,
11 depositions, answers to interrogatories, admissions, and affidavits
12 submitted show that there is no genuine issue of material fact and that
13 the moving party is entitled to judgment as a matter of law. Fed. R.
14 Civ. P. 56(c); Fed. R. Bankr. P. 7056.

15 The relationship between OIGA and debtor is governed by Oregon
16 statute. OIGA is a guaranty association of insurers created by the
17 Oregon legislature to provide coverage for claims against insureds whose
18 carriers become insolvent. See ORS 734.550.

19 The OIGA statutes operate when an insured's liability insurer
20 becomes insolvent. OIGA is an association of insurers created by
21 the Oregon legislature to accumulate and administer funds to pay for
22 the defense of insureds whose insurer becomes insolvent and to pay
23 claims of injured claimants whose claims would have been within the
coverage of the insolvent insurer's policy. ORS 734.510(4). The
law was passed, among other reasons, to protect claimants and
policyholders from loss arising from the insolvency of a liability
insurer.

24 Carrier v. Hicks, 316 Or. 341, 345 (1993).

25 OIGA is required by statute to assume the obligations of an
26 insolvent insurer and to pay "covered claims." ORS 734.570(1); (2). As

1 relevant here, "covered claim" is defined as

2 an unpaid claim . . . that arises out of and is within the coverage
3 and limits of an insurance policy to which ORS 734.510 to 734.710
4 apply and which is in force at the time of the occurrence giving
5 rise to the unpaid claim, made by a person insured under such policy
6 or by a person suffering injury or damage for which a person insured
7 under such policy is legally liable[.]

8 ORS 734.510(4)(a). As originally enacted, the statute did not allow OIGA
9 to recover from an insured any amounts OIGA had paid on covered claims.

10 In 2001, the Oregon legislature amended the OIGA statutes to add a
11 net worth limitation, effective January 1, 2002. This limitation appears
12 in two places.

13 First, the 2001 amendment changed the definition of "covered claim"
14 to exclude from that definition "[a]ny first party claim by an insured
15 whose net worth exceeds \$25 million on December 31 of the year next
16 preceding the date the insurer becomes an insolvent insurer[.]" ORS
17 734.510(4)(b)(D).

18 Second, the 2001 amendment added a provision allowing OIGA for the
19 first time to

20 recover from the following persons the amount of any covered claim
21 paid on behalf of such person under ORS 734.510 to 734.710:

22 (a) Any insured whose net worth exceeds \$25 million on December
23 31 of the year next preceding the date the insurer becomes an
24 insolvent insurer and whose liability obligations to other persons
25 are satisfied in whole or in part by payments made under ORS 734.510
26 to 734.710[.]

ORS 734.695(2)(a).

OIGA argues that, because debtor's net worth was more than \$25
million at the time the insurers became insolvent, those statutes bar

debtor's first-party claims² against it for indemnification and breach of contract, and entitle OIGA to recover from debtor the amounts OIGA has already paid on third-party claims. Debtor argues that the net worth limitations do not apply to these claims, because the limitations were not effective until January 1, 2002, and the insurers' insolvency occurred in the 1980's. According to debtor, applying the net worth limitations under these circumstances would be a retroactive application of the statute, and the legislature never intended for the statutes to apply retroactively.

1. Would application of the net worth limitation to these claims be retroactive?

"[T]he general rule is that the rights and liabilities of a person who is affected by an event are defined and measured by the statutes in effect at the time of the event." Barnes v. City of Portland, 120 Or. App. 24, 27 (1993).

The legislature may intend, however, that a statute apply retroactively. The question of what constitutes a retroactive application of a statute is a "somewhat slippery one." Vloedman v. Cornell, 161 Or. App. 396, 399 (1999). The term "retroactivity" can be used in two different ways:

² "First-party claims" are claims made by the insured for benefits, as opposed to claims made by third persons having claims against the insured. See Calif. Insur. Co. v. Stimson Lumber Co., 2004 WL 1173185 (D. Or. 2004) ("first-party" is descriptive phrase distinguishing claims made by insured from claims made by persons having claims against insured); Baxter Healthcare Corp. v. Calif. Ins. Guar. Assoc., 85 Cal. App. 4th 306 (2000) (reference in California insurance guaranty statute to "first party claim" refers to claim for insurance benefits brought by owner or beneficiary of insurance policy).

1 In the broad sense, the term "retroactive law" refers to any
2 enactment that changes, from its effective date forward in time, the
3 legal effect of past actions. In the narrow sense, the term is
4 limited to enactments that change the effect of past actions
5 automatically upon passage.

6 State ex rel Juvenile Dep't of Multnomah County v. Nicholls, 192 Or. App.
7 604, 608 (2004). Under Oregon law, the term is used "in its broadest
8 sense -- that is, to refer to any enactment that changes, from its
9 effective date forward in time, the legal effect of past actions." Id.

10 Applying this broad view of retroactivity requires a determination
11 of what events, or "past actions," have a legal effect, i.e. give rise to
12 rights and duties. If the events giving rise to the rights and duties of
13 debtor and OIGA asserted in this case arose after the effective date of
14 the 2001 amendment, applying that amendment would not be retroactive.

15 Because this case involves both first-party and third-party claims,
16 thereby implicating both ORS 734.510(4)(b)(D) and ORS 734.695(2)(a), I
17 will analyze the two types of claims separately.

18 A. ORS 734.510(4)(b)(D) - covered claim exclusion

19 OIGA argues that debtor's first-party claims against it for
20 declaratory judgment and breach of contract are barred by ORS
21 734.510(4)(b)(D), which excludes from the definition of "covered claim"
22 any "first party claim" made by an insured with a net worth of over \$25
23 million at the end of the year before the insurer's insolvency.
24 According to OIGA, because debtor did not bring its first-party claims
25 against OIGA until after the effective date of the 2001 amendment,
26 application of the net worth provision to these claims would be
prospective, not retroactive. Debtor argues that the triggering event
for purposes of the retroactivity analysis is the insolvency of the

1 insurers, which occurred years before ORS 734.510(4)(b)(D) was enacted.

2 Debtor relies primarily on Rhode Island Insurers' Insolvency Fund v.
3 Leviton Mfg. Co., Inc., 716 A.2d 730 (R.I. 1998), to argue that the
4 insurer's insolvency is the triggering event for purposes of the
5 retroactivity analysis. In Leviton, the insurance policies that covered
6 the claims against the insured had expired before the legislature enacted
7 a net worth limitation much like the one contained in the Oregon
8 statutes. Thereafter, the insurer became insolvent, and the state's
9 guaranty fund made payments on claims against the insured. It then
10 sought to recover the amount of those payments to third parties under the
11 net worth recovery statute. The insured argued that applying the net
12 worth limitation statute to allow recovery would constitute a retroactive
13 application of the statute, because the statute did not exist at the time
14 it was insured by the insurers.

15 The Rhode Island Supreme Court disagreed. While acknowledging that,
16 at the time the injuries occurred that were ultimately paid by the
17 guaranty fund, the statute prohibited the fund from seeking reimbursement
18 from the insured, the court concluded that it was the date of the
19 insurers' insolvency, not the date of the injury, that triggered
20 application of statute. 716 A.2d at 735.

21 Factual and statutory distinctions between Leviton and this case
22 make the analysis in Leviton of limited utility here. In Leviton, both
23 the insolvency and the assertion of the claim occurred after the
24 effective date of the statute. The court said that "it is the subsequent
25 insolvency of the insurer and the concomitant obligation to pay the
26 statutorily mandated claims that triggered the statute." Id. (emphasis

1 supplied). The court does not explain how the insolvency of the insurer,
2 without more, gives rise to the guaranty fund's obligation to pay. In
3 the present case, although the insolvency occurred before the effective
4 date of the amendment, the claim against OIGA was not asserted until
5 after the effective date.

6 Further, the court's decision in Leviton was based at least in part
7 on Liberty Mut. Ins. Co. v. Rhode Island Insurers' Insolvency Fund, 675
8 A.2d 417, 418 (R.I. 1996)(memorandum), in which the court had held that
9 the date of insolvency was the relevant date for determining whether the
10 1988 act applied to a particular claim. The court relied on the
11 statutory definition of "insolvent insurer," which meant an insurer that
12 was found insolvent after July 1, 1988. The court concluded, based on
13 the requirement that the insurer be found insolvent after July 1, 1988,
14 that the legislature intended the date of insolvency to be the pertinent
15 date for determining whether the July 1988 act applied. This case is
16 distinguishable, because the Oregon net worth limitation is an amendment
17 to the original OIGA statute, and the amendment does not contain any
18 reference to any particular date.³

19 The Oregon statute requires OIGA "to pay covered claims existing at
20 the time of determination of insolvency of an insurer" ORS
21 734.570(1). Because OIGA steps into the shoes of the insolvent insurer,
22 Taylor v. Oregon Ins. Guar. Ass'n, 99 Or. App. 554, 558 (1989), OIGA's
23 rights and obligations with relation to a particular insured cannot arise
24

25 ³ The original OIGA statute defines "insolvent insurer" as an
26 insurer who is found insolvent after September 9, 1971. ORS
734.510(6)(b).

1 before the insurer's obligation arises. The critical question for
2 whether the amendment is being applied prospectively or retroactively is
3 when the insurer's duty to defend or to indemnify arises.

4 Under Oregon law, the duty to defend is based on both the insurance
5 policy and the facts alleged in the complaint. Ledford v. Gutoski, 319
6 Or. 397, 399-400 (1994). The insurer must review the complaint to
7 determine whether it alleges conduct that would impose liability for
8 conduct covered by the policy. Id. Thus, there is no duty to defend
9 until the insurer has notice of the claim. Oregon Ins. Guar. Ass'n v.
10 Thompson, 93 Or. App. 5 (1988). OIGA's duty to defend cannot arise any
11 earlier than the insurer's duty, which is upon notice of the claim.

12 An insurer's duty to indemnify the insured is independent of the
13 duty to defend. Ledford, 319 Or. at 403. The duty to indemnify arises
14 when

15 it is determined, as matter of fact, that the damages awarded to the
16 injured party are actually within the policy's coverage. As a
17 result, the mere fact that the pleadings obligate the insurer to
defend does not mean that the insurer is also obligated to pay if
there is a recovery.

18 Allan D. Windt, Insurance Claims and Disputes § 6:10 (4th ed. 2004).

19 Thus, OIGA's duty to indemnify cannot arise until it is determined that
20 the insured is obligated to pay the injured party, which necessarily is
21 after the claim is filed that gives rise to the obligation to defend.

22 The critical event that gave rise to the rights and duties of OIGA
23 with regard to application of the 2001 net worth amendment was the point
24 at which OIGA had a duty to defend and/or to pay. Accord In the Matter
25 of the Ancillary Liquidation of Integrity Ins. Co., 217 Wis.2d 252 (1998)
26 (insurance guaranty net worth limitation's application to claims made

1 after effective date of net worth provision was prospective application,
2 despite earlier insolvency, because insurer had no obligation to defend
3 or to indemnify insured until suit initiated). Although insolvency was a
4 necessary predicate to OIGA's obligations, insolvency did not, without
5 more, give rise to an obligation to defend or indemnify debtor. A
6 "statute is not made retroactive by the mere fact that it draws upon an
7 antecedent status in its operation." Rogers v. Dept. of Revenue, 7 Or.
8 Tax 256, 260 (1977), aff'd, 284 Or. 409 (1978). The insurers' insolvency
9 was "merely an antecedent status," but did not by itself give rise to any
10 rights or obligations of either debtor or OIGA.

11 Debtor argues that the net worth statute's requirement that the
12 insured's net worth be measured as of the end of the year before the
13 insurer's insolvency is an indication that the statute was intended to
14 apply only to insolvencies that occur after the effective date of the
15 amendment. Debtor points out that the insolvency can occur many years
16 before any claim is asserted against the insured for conduct occurring
17 during the coverage period, and it does not make sense to require a
18 determination of net worth many years in the past, at a time when the
19 concept of net worth was not part of the statute. Further, it is
20 possible that an insured could have a net worth of more than \$25 million
21 as of the time of the insurer's insolvency,⁴ but have a much reduced net
22

23 ⁴ Although the question of whether debtor had a net worth of more
24 than \$25 million is left for later determination, it is worth noting that
25 debtor's liabilities on the pertinent date may include the claims
26 asserted many years later, if the conduct giving rise to debtor's
liability occurred before the date on which net worth is determined.
There is a distinction between whether there was a claim against debtor
(continued...)

1 worth as of the time the claim is asserted against it.

2 I agree with OIGA's observation at the hearing on these motions that
3 the requirement that net worth be determined as of the end of the year
4 before the insurer's insolvency does not affect retroactivity; it is
5 merely a date the legislature has chosen for testing the insured's net
6 worth. Although the legislature's choice of that date may cause some
7 practical problems, debtor has not convinced me that the insolvency of an
8 insurer by itself gives rise to any rights or obligations of OIGA with
9 regard to covered claims. That is the pertinent inquiry with regard to
10 whether application of a new statute would be prospective or retroactive.

11 The parties agree that debtor made its first-party claims against
12 OIGA after January 1, 2002, the effective date of the 2001 amendment.
13 Before that date, OIGA had neither an obligation to defend nor an
14 obligation to indemnify. Thus, applying the 2001 amendment to claims
15 asserted against OIGA after the effective date is a prospective, not a
16 retroactive, application of the amendment. OIGA is entitled to partial
17 summary judgment that ORS 734.510(4)(b)(D) applies to debtor's first-
18 party claims against OIGA.

19 B. ORS 734.695(2)(a) - recovery by OIGA

20 OIGA seeks in its counterclaim to recover amounts it has paid on
21 third-party claims made against debtor, relying on ORS 734.695(2)(a). It
22 argues that application of the 2001 amendments to allow it to recover
23 under that statute would not be retroactive, because none of the third-
24 party claims were paid until after January 1, 2002, the effective date of

25 _____
26 ⁴(...continued)
by an injured party, and whether debtor had any rights against OIGA.

1 the amendment. According to OIGA, the triggering event is payment of the
2 claims, not the insolvency of the insurer. Debtor again argues that the
3 pertinent event is the insurers' insolvency, which occurred before the
4 effective date of the amendment.

5 The question again is what event triggers the parties' rights and
6 obligations with regard to covered claims. As I explained above, OIGA's
7 obligations with regard to covered claims arise when it receives notice
8 of the claims; before that, it does not have any rights against or duties
9 to the insured. Application of the law in effect at the time the rights
10 and obligations are fixed is a prospective, not a retroactive,
11 application of the law.

12 Before January 1, 2002, OIGA had no right to recover payments made
13 on covered claims; after January 1, 2002, it did if the insured had a
14 sufficient net worth as of the pertinent date. Applying the 2001
15 amendment to ORS 734.695(2)(a) to claims asserted before the effective
16 date of the amendment would alter the parties' rights and obligations,
17 and thus constitute a retroactive application of the statute.

18 There is no dispute that two of the claims OIGA paid were tendered
19 to OIGA before the effective date, and the remainder were tendered
20 after.⁵ Application of the recovery statute to claims tendered before
21 January 1, 2002 would constitute a retroactive application; application
22

23 ⁵ Although the parties did not specifically stipulate to the
24 dates the claims were tendered to OIGA, debtor said in its response to
25 OIGA's Concise Statement of Material Facts that it "accepts" ¶¶ 1-9 of
26 OIGA's statement of facts, which I understand to be a stipulation to the
dates set out in OIGA's proof of claim, which was attached to the
statement of facts.

1 to claims asserted after that date would not. Thus, application of ORS
2 734.695(2)(a) to claims tendered after January 1, 2002 is a prospective,
3 not a retroactive, application of the statute.

4 2. Does ORS 734.695(2)(a) apply retroactively?

5 Because application of the net worth provision of ORS 734.695(2)(a)
6 to the two claims tendered before January 1, 2002 would be a retroactive
7 application of the statute, the next question is whether it should be
8 applied retroactively.

9 Whether a statute applies retroactively depends on the intent of the
10 legislature. State ex rel Juvenile Dept. of Multnomah County v.
11 Nicholls, 192 Or. App. 604, 609 (2004). The court applies the usual
12 methods for construing statutes to determine whether the legislature
13 intended an enactment to have retroactive application. Id.

14 Under Oregon law, the court first looks at the text and context of
15 the statute. Id.; PGE v. Bureau of Labor and Industries, 317 Or. 606,
16 610 (1993). If text and context do not provide a clear answer, the court
17 next looks at legislative history. Nicholls, 192 Or. App. at 609. If
18 legislative history is not helpful, the final step is to apply maxims of
19 statutory construction. Id. With regard to determining whether a
20 statute is intended to apply retroactively, in the final step the court
21 usually resorts to the maxim that a remedial provision presumptively
22 applies retroactively, while a substantive one applies only
23 prospectively. Id.

24 If, at the first, textual level of analysis, the pertinent statute
25 does not contain an express retroactivity clause, the court considers
26 other language "cues" such as the tense in which the statute has been

1 written. Newell v. Weston, 150 Or. App. 562, 569 (1997). The parties
2 agree that there was no express retroactivity provision in the 2001
3 amendments that added the net worth limitation to the OIGA statute. I
4 have reviewed Senate Bill 977, which added the net worth limitations, and
5 also agree that it does not contain any express retroactivity clause.

6 Debtor argues the lack of a retroactivity clause strongly suggests
7 that the legislature did not intend the provision to apply retroactively.
8 It also argues that there are verb "tense" clues that the legislature
9 intended the net worth limitation to apply only to those claims that
10 arise from insurers who become insolvent after the effective date of the
11 act. It points to the language of ORS 734.695(2)(a) saying that the
12 limitation applies to parties whose net worth "exceeds" \$25 million at
13 the end of the year before the insurer's insolvency. If the legislature
14 intended retroactive application, it argues, it would have said
15 "exceeded." Although debtor does not point it out, the statute also
16 refers to "the date the insurer becomes an insolvent insurer" (emphasis
17 supplied), which could indicate prospective application, rather than
18 "became" an insolvent insurer, which could indicate retroactive
19 application.

20 A problem with this analysis is that I have already explained that
21 the relevant event for determining application of the amendment is the
22 time a claim is tendered to OIGA, not the time the insurer becomes
23 insolvent. Therefore, while the legislature's use of the terms "exceeds"
24 and "becomes" with regard to insolvency provides some indication that the
25 limitation is not intended to apply retroactively, it is not particularly
26 helpful in discerning legislative intent.

1 Because the text and context do not provide the answer, I look to
2 legislative history. I agree with the parties that the legislative
3 history does not provide any helpful clues as to the legislature's
4 intention about whether the net worth limitation is to apply
5 retroactively.

6 That leads to application of maxims of construction. Depending on
7 the substance of the enactment, the court is often

8 left to examine whether a provision is "remedial" versus
9 "substantive" in nature. If it is remedial, it presumptively
10 applies retroactively; if it is substantive, it presumptively
11 applies prospectively only. In determining whether a particular
enactment is remedial or substantive, we avoid invoking the terms as
mere labels and strive instead to examine meaningfully the substance
of the legislation.

12 Nicholls, 192 Or. App. at 610 (citations omitted). Although the
13 distinction between remedial and substantive is not always clear, id. at
14 613, a substantive provision is one that "impair[s] existing rights,
15 create[s] new obligations or impose[s] additional duties with respect to
16 past transactions" Kempf v. Carpenters & Joiners Local Union,
17 229 Or. 337, 343 (1961)(quoted with approval in Joseph v. Lowery, 261 Or.
18 545, 547 (1972)). A remedial provision, on the other hand, is "one that
19 affects the remedies that a party may receive for a violation of its
20 legal rights[.]" Black v. Arizala, 182 Or. App. 16, 31 (2002), aff'd,
21 337 Or. 250 (2004).

22 Not surprisingly, debtor argues that the net worth limitation is
23 substantive, in that it "affects the Archdiocese's rights and obligations
24 for torts allegedly committed in the distant past[,]" Memorandum in
25 Support of Plaintiff's Motion for Partial Summary Judgment at 7, and OIGA
26 argues that it is remedial: "The entire OIGA Act is remedial[; it]

1 creates a remedy that never existed." Defendant OIGA's Opposition to
2 Plaintiff's Motion for Partial Summary Judgment at 10.

3 The Oregon courts are not consistent in whether a court should look
4 at the statutory scheme as a whole to determine whether an amendment to
5 that scheme is substantive or remedial. In Vloedman v. Cornell, 161 Or.
6 App. 396, 401 (1999), for example, the court considered "the essentially
7 remedial nature of the statute as a whole" in determining that the
8 addition of an attorney fee provision was remedial. On the other hand,
9 in Nicholls, the court recognized the generally rehabilitative focus of
10 the juvenile justice system, but concluded that the enactment of a
11 statute that extended the time a juvenile court could exercise
12 jurisdiction over a youth was substantive, in that it had "the effect of
13 changing the legal obligations and burdens imposed on youth based on his
14 past conduct." 192 Or. App. at 613.

15 Where, as in Nicholls, an amendment to a statutory scheme has a
16 different purpose than the purpose of the overall statutory scheme, I
17 conclude that the inquiry must focus on the purpose of the changes made
18 by the amendment, not on the purpose of the statutory scheme as a whole.

19 Although I agree that the OIGA statutory scheme was intended to
20 provide a remedy to entities insured by insurers that became insolvent,
21 see ORS 734.520, the net worth limitation was not enacted as part of that
22 overall scheme, but was enacted later. Its purpose was not to expand or
23 provide a remedy to insureds of insolvent insurers; the purpose was to
24 exclude insureds from its protection who are best able to absorb the
25 loss. See Bd. of County Rd. Comm'r v. Mich. Prop. & Cas. Guar. Ass'n,
26 456 Mich. 590 (1998)(discussing similar net worth limitation in Michigan

1 guaranty statute). That is not a remedial goal.

2 At the time debtor made its pre-2002 claims against OIGA, it had a
3 right to have OIGA pay those claims, and OIGA had no right of recovery
4 against debtor. With the enactment of the net worth limitation, however,
5 the parties' substantive rights changed. See Agency Budget Corp. v.
6 Wash. Ins. Guar. Ass'n, 93 Wash.2d 416 (1980)(change in definition of
7 covered claim in insurance guaranty statute created new cause of action
8 and corresponding liabilities). OIGA is now entitled to recover amounts
9 paid on covered claims if the insured has a sufficient net worth, a right
10 that did not exist before the enactment.

11 Because the application of the net worth limitation would subject an
12 insured to a claim by OIGA for reimbursement for amounts paid to third
13 parties, which right did not exist when the claim was asserted, I
14 conclude that the enactment is substantive, in that it affects the legal
15 obligations and burdens imposed on the insured and OIGA. Thus, it is
16 presumptively applied prospectively only.

17 This case differs from Kentucky Ins. Guaranty Ass'n v. Jeffers, 13
18 S.W.3d 606 (Ky. 2000), on which OIGA relies. In Jeffers, the legislature
19 amended Kentucky's insurance guaranty association statute to increase the
20 maximum coverage provided by the guaranty association from \$100,000 to
21 \$300,000. The court concluded that the increased coverage applied to
22 claims pending at the time the amendment became effective, because the
23 increase in coverage was remedial. "Remedial means no more than the
24 expansion of an existing remedy without affecting the substantive basis,
25 prerequisites, or circumstances giving rise to the remedy." 13 S.W.3d at
26 609. Amendments that provide an increase of coverage were held to be

1 remedial and therefore retroactively applicable. Id. at 611.

2 The net worth limitation is not an expansion of coverage, but a
3 contraction of protection afforded to the insured for those insureds best
4 able to absorb the cost. This contraction of protection is not remedial,
5 as an expansion of coverage was held to be in Jeffers.

6 CONCLUSION

7 Application of ORS 734.510(4)(b)(D) to debtor's first-party claims
8 against OIGA is a prospective application. Therefore, OIGA is entitled
9 to partial summary judgment that ORS 734.510(4)(b)(D) applies to debtor's
10 first-party claims against OIGA.

11 Application of ORS 734.695(2)(a) to claims asserted after January 1,
12 2002, is a prospective application of that provision. Therefore, OIGA is
13 entitled to partial summary judgment that the net worth limitation of ORS
14 734.695(2)(a) applies to claims tendered to it after January 1, 2002.
15 ORS 734.695(2)(a) does not apply retroactively. Therefore, debtor is
16 entitled to partial summary judgment that ORS 734.695(2)(a) does not
17 apply to claims tendered to OIGA before January 1, 2002.

18 Mr. Langslet should submit an order consistent with this ruling.

19
20 cc: Jerry B. Hodson
21 John L. Langslet
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