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PORTLAND, OREGON

1 Dianne K. Dailey, OSB #82433  
E-Mail: dianne.dailey@bullivant.com  
2 Beth Skillern, OSB #86288  
E-Mail: beth.skillern@bullivant.com  
3 BULLIVANT HOUSER BAILEY, PC  
300 Pioneer Tower  
4 888 SW Fifth Avenue  
Portland, OR 97204-2089  
5 Telephone: (503) 228-6351  
Facsimile: (503) 295-0915

6  
7 Attorneys for PLAINTIFFS THE HOME INDEMNITY  
COMPANY and CALIFORNIA INSURANCE COMPANY

8 Jan K. Kitchel, OSB #78471  
SCHWABE WILLIAMSON & WYATT, PC  
9 1600-1900 Pacwest Center  
1211 SW Fifth Avenue  
10 Portland, OR 97204  
Telephone: (503) 222-9981  
11 Facsimile: (503) 796-2900  
E-Mail: jkitchel@schwabe.com

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13 Attorney for PLAINTIFFS WAUSAU BUSINESS INSURANCE  
14 COMPANY, WAUSAU UNDERWRITERS INSURANCE  
15 COMPANY, and EMPLOYERS INSURANCE OF WAUSAU, A  
16 MUTUAL COMPANY

17 UNITED STATES DISTRICT COURT  
18 DISTRICT OF OREGON

19 THE HOME INDEMNITY COMPANY,  
a New Hampshire corporation; WAUSAU  
20 BUSINESS INSURANCE COMPANY,  
WAUSAU UNDERWRITERS  
21 INSURANCE COMPANY, and  
EMPLOYERS INSURANCE OF  
22 WAUSAU, A MUTUAL COMPANY,  
Wisconsin corporations; and  
23 CALIFORNIA INSURANCE  
COMPANY, a California corporation;

24 PLAINTIFFS,

25  
26 STIMSON LUMBER COMPANY, an  
Oregon corporation; NATIONAL

Civil No. CV 01-514 HU

FIRST AMENDED  
COMPLAINT FOR  
DECLARATORY RELIEF

16

1 SURETY CORPORATION, an Illinois  
corporation; NORTHWESTERN  
2 PACIFIC INDEMNITY COMPANY, An  
Oregon corporation; AMERICAN  
3 NATIONAL FIRE INSURANCE  
COMPANY, a New York corporation;  
4 AMERICAN HOME ASSURANCE  
COMPANY, a New York corporation;  
5 THE INSURANCE COMPANY OF  
THE STATE OF PENNSYLVANIA, a  
6 Pennsylvania corporation; and  
NATIONAL UNION FIRE  
7 INSURANCE COMPANY OF  
PITTSBURGH, a Pennsylvania  
8 corporation,

9 DEFENDANTS.

10 Plaintiffs, for their claim for relief against Defendants, hereby  
11 allege as follows:

12 NATURE OF THE ACTION

13 1.

14 Plaintiffs are insurance companies that issued contracts of  
15 primary liability insurance to defendant Stimson Lumber Company  
16 ("Stimson"). Defendants other than Stimson are insurance companies that  
17 issued contracts of excess liability insurance to Stimson ("the excess  
18 insurers"). The subject of this litigation is a determination of the rights and  
19 obligations of Plaintiffs, Stimson and the excess insurers with respect to an  
20 actual controversy arising in connection with claims by Stimson for coverage  
21 under the contracts of insurance. Plaintiffs seek a declaration pursuant to the  
22 Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, of the Plaintiff insurance  
23 companies' obligations to Stimson in connection with Stimson's claims for  
24 insurance coverage. Plaintiffs additionally seek a declaration of the excess  
25 insurers' obligations to Stimson and to the Plaintiffs with regard to payment  
26

1 of any damages insured under contracts of insurance issued by Plaintiffs or  
2 the excess insurers.

### 3 JURISDICTION AND VENUE

#### 4 2.

5 This Court has jurisdiction over the subject matter of this action  
6 pursuant to 28 U.S.C. § 1332(a), because there is complete diversity of  
7 citizenship between the parties. The amount in controversy exceeds,  
8 exclusive of interest and costs, the sum of \$75,000. Venue lies with this  
9 court under 28 U.S.C. § 1391(a), because the events which gave rise to this  
10 dispute occurred in the District of Oregon.

### 11 PARTIES

#### 12 3.

13 Plaintiff The Home Indemnity Company ("The Home") is a  
14 corporation formed under the laws of the state of New Hampshire and  
15 authorized to do business in Oregon. Its operations are under the control of  
16 the Department of Insurance for the state of New Hampshire.

#### 17 4.

18 Plaintiffs Wausau Business Insurance Company, Wausau  
19 Underwriters Insurance Company, and Employers Insurance of Wausau  
20 (collectively known as "Wausau") are corporations authorized to do business  
21 in Oregon. Their principal places of business are in Wisconsin. Wausau  
22 Business is a corporation formed under the laws of Illinois, and Wausau  
23 Underwriters and Employers are corporations formed under the laws of  
24 Wisconsin.

25 ////

26 ////

1 5.

2 Plaintiff California Insurance Company ("CIC") is a corporation  
3 formed under the laws of the state of California and authorized to do business  
4 in Oregon. Its principal place of business is California.

5 6.

6 Defendant Stimson is an Oregon corporation organized and  
7 existing under the laws of the state of Oregon. Its corporate headquarters and  
8 principal place of business are in Portland, Oregon.

9 7.

10 Defendant National Surety Corporation ("National Surety") is a  
11 corporation formed under the laws of the state of Illinois and authorized to do  
12 business in Oregon. Its principal place of business is Illinois.

13 8.

14 Defendant Northwestern Pacific Indemnity ("Northwestern") is a  
15 corporation formed under the laws of the state of Oregon and authorized to do  
16 business in Oregon. Its principal place of business is Oregon.

17 9.

18 Defendant American National Fire Insurance Company  
19 ("American National") is a corporation formed under the laws of the state of  
20 New York and authorized to do business in Oregon. Its principal place of  
21 business is New York.

22 10.

23 Defendant American Home Assurance Company ("American  
24 Home") is a corporation formed under the laws of the state of New York and  
25 authorized to do business in Oregon. Its principal place of business is New  
26 York.

1 11.

2 Defendant The Insurance Company of the State of Pennsylvania  
3 ("ICSP") is a corporation formed under the laws of the state of Pennsylvania  
4 and authorized to do business in Oregon. Its principal place of business is  
5 Pennsylvania.

6 12.

7 Defendant National Union Fire Insurance Company of Pittsburgh  
8 ("National Union") is a corporation formed under the laws of the state of  
9 Pennsylvania and authorized to do business in Oregon. Its principal place of  
10 business is Pennsylvania.

11 STATEMENT OF FACTS

12 13.

13 Plaintiffs, the excess insurers and other insurers provided certain  
14 liability insurance to Stimson during all or part of the period from 1980 to  
15 the present date. On information and belief, Stimson also purchased liability  
16 insurance prior to 1980.

17 14.

18 Plaintiffs and the excess insurers, through their Oregon offices or  
19 using Oregon insurance agents and brokers, negotiated with Stimson in  
20 Oregon for the issuance of various written contracts of liability insurance.  
21 These contracts of insurance were issued and performed in Oregon.

22 15.

23 Stimson manufactures reformulated exterior hardboard siding and  
24 other wood products, including the Forestex Series 400 and Series 500  
25 hardboard siding products. Upon information and belief, Stimson  
26 manufactured the Forestex siding ("the siding") from 1986 until on or about

1 June 1997 at its plant in Forest Grove, Oregon. Stimson sold these products  
2 throughout the western United States.

3 16.

4 Stimson notified the Plaintiffs and some or all of the excess  
5 insurer of various suits and claims arising out of the use of the siding ("the  
6 Siding Claims"). Stimson maintains that its insurers are obligated to defend  
7 and/or indemnify Stimson in connection with the Siding Claims.

8 17.

9 Wausau, The Home and CIC are insurers who have provided  
10 certain primary liability insurance to Stimson and who have investigated the  
11 Siding Claims and have agreed to defend Stimson as to certain of the Siding  
12 Claims, subject to a reservation of rights to later disclaim certain duties to  
13 defend and certain duties to indemnify Stimson in connection with the Siding  
14 Claims. Wausau, The Home and CIC also have denied duties to defend or  
15 indemnify Stimson in connection with other of the Siding Claims or certain  
16 parts of those claims.

17 18.

18 The excess insurers provided certain excess liability insurance to  
19 Stimson, and that excess liability insurance may be impacted as a result of  
20 the payment of sums by or on behalf of Stimson in connection with the Siding  
21 Claims.

22 19.

23 Stimson contends that Plaintiffs are obligated to defend and/or  
24 indemnify Stimson more broadly than Plaintiffs have agreed to do with  
25 respect to the Siding Claims.

26 ////

1 **FIRST CLAIM FOR RELIEF**  
2 **(Declaratory Judgment)**  
3 **(Against Stimson Lumber Co.)**

4 **20.**

5 Plaintiffs reallege and incorporate by this reference the preceding  
6 paragraphs.

7 **21.**

8 There has arisen and now exists an actual controversy between  
9 Stimson and Plaintiffs concerning their respective rights and obligations  
10 under the potentially relevant primary insurance policies in connection with  
11 the Siding Claims.

12 **22.**

13 Plaintiffs contend they have no duty to defend and/or indemnify  
14 Stimson with respect to certain Siding Claims or certain damages alleged in  
15 the Siding Claims because those claims and/or damages are not insured under  
16 the insurance policies for a variety of reasons, including, but not limited to  
17 the following reasons:

- 18 (a) Plaintiffs have no obligations in connection with costs  
19 incurred by Stimson before it notified Plaintiffs of the  
20 claim out of which those costs arise;
- 21 (b) Plaintiffs have no obligations in connection with damage  
22 that is not caused by an "occurrence" or "accident" or a  
23 fortuitous event;
- 24 (c) Plaintiffs have no obligations in connection with damage  
25 that does not constitute "property damage" as the various  
26 insurance policies define that phrase;
- (d) Plaintiffs have no obligations in connection with

1 "property damage" that did not occur during each  
2 insurer's respective policy period(s);

3 (e) Plaintiffs have no obligations in connection with damage  
4 to Stimson's own product, including any goods or  
5 products manufactured by Stimson, or sold, handled,  
6 distributed or disposed of by Stimson, or anyone trading  
7 under Stimson's name, or any person or organization  
8 whose business or assets Stimson acquired;

9 (f) Plaintiffs have no obligations with certain claims in  
10 connection with damages for breach of any warranties or  
11 representations made at any time with respect to the  
12 fitness, quality, durability, performance, or use of  
13 Stimson's product, or failure to provide warnings or  
14 instructions;

15 (g) Plaintiffs have no obligations in connection with damage  
16 to Stimson's work or product arising out of that work or  
17 product or any part of it and included in the "products-  
18 completed operations hazard"; additionally, Plaintiffs  
19 have no obligations in connection with work or operations  
20 performed by Stimson or on Stimson's behalf, or for  
21 materials, parts or equipment furnished in connection with  
22 such work or operations. Further, plaintiffs have no  
23 obligations in connection with certain claims arising out  
24 of warranties or representations made at any time with  
25 respect to the fitness, quality, durability, performance or  
26 use of Stimson's work, or for the providing of or failure to



1 provide warnings or instructions associated with that  
2 work;

3 (h) Plaintiffs have no obligations in connection with  
4 "property damage" to "impaired property" or for property  
5 not physically injured arising out of any defect,  
6 deficiency, inadequacy, or dangerous condition in  
7 Stimson's product or work, or for a failure of Stimson or  
8 anyone acting on Stimson's behalf to perform a contract or  
9 agreement in accordance with its terms;

10 (i) Plaintiffs have no obligations in connection with damage  
11 caused by or resulting from any recall, withdrawal, repair,  
12 replacement, or removal of Stimson's product if that  
13 product is recalled or withdrawn from the market because  
14 of a known or suspected defect, deficiency, inadequacy,  
15 or dangerous condition;

16 (j) Plaintiffs have no obligations in connection with  
17 "property damage" expected or intended by Stimson;

18 (k) Plaintiffs have no obligations to defend Stimson in  
19 connection with any Siding Claims that do not constitute a  
20 "suit" as the various insurance policies define that term;

21 (l) Plaintiffs have no obligations in connection with any  
22 losses that were in progress at the time Stimson obtained  
23 liability insurance; and

24 (m) Plaintiffs have no obligations in connection with any risks  
25 that were known to Stimson at the time it obtained  
26 liability insurance.

1  
2 Plaintiffs, therefore, owe no indemnity to Stimson for the  
3 following:

- 4 (a) For any alleged damage not caused by an "occurrence," as  
5 defined in the policies;  
6 (b) For any alleged damages due to intentional or fraudulent  
7 conduct;  
8 (c) For any alleged damage or deterioration to the siding itself;  
9 (d) For any alleged costs of removal of the siding;  
10 (e) For any alleged costs of replacement siding;  
11 (f) For any alleged costs associated with the installation of the  
12 replacement siding;  
13 (g) For any alleged damages or diminution of value associated  
14 with the underlying structure unless that structure suffers  
15 actual physical injury, or loss of use, as defined by the  
16 policy, and caused by Stimson's product;  
17 (h) For any damages that exceed the Limits of Insurance as set  
18 forth in the policies;  
19 (i) For any damages for which insurance is prohibited under  
20 applicable state law;  
21 (j) For any other damages excluded or otherwise not covered  
22 under applicable policies.

## 23 24.

24 Pursuant to 28 U.S.C. §§ 2201-2202, Plaintiffs seek a judicial  
25 determination as to Plaintiffs' and Stimson's rights and obligations under the  
26 various liability insurance policies in connection with the Siding Claims.

1                                   **SECOND CLAIM FOR RELIEF**  
2                                   (Declaratory Judgment)  
3                                   (Against The Excess Insurers)

4                                   **25.**

5                                   Plaintiffs reallege and incorporate the preceding paragraphs.

6                                   **26.**

7                                   The excess insurers also may have an obligation to contribute to  
8 payment of any sums by or on behalf of Stimson in connection with the  
9 Siding Claims.

10                                   **27.**

11                                   Plaintiffs seek a declaration of the excess insurers' obligations to  
12 Stimson in connection with the payment of any sums by or on behalf of  
13 Stimson in connection with the Siding Claims.

14                                   **28.**

15                                   Plaintiffs also seek a declaration of the proper allocation among  
16 Stimson's primary and excess insurers and between those insurers and  
17 Stimson of liability for any sums for which Stimson may be obligated in  
18 connection with the Siding Claims.

19                                   **PRAYER**

20                                   WHEREFORE, Plaintiffs pray for the entry of a judgment:

- 21                                   1.    Declaring Plaintiffs' obligations to Stimson in connection  
22 with the Siding Claims.  
23                                   2.    Declaring the excess insurers' obligations to Stimson in  
24 connection with the Siding Claims.  
25                                   3.    Declaring the allocation of liability among all of Stimson's  
26 insurers and between Stimson and its insurers for payment of any sums for  
which Stimson may be liable in connection with the Siding Claims.

1 4. Awarding Plaintiffs their costs and disbursements incurred  
2 in this action.

3 DATED this 1<sup>st</sup> day of June, 2001.

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5  
6 By Beth Skillern  
DIANNE K. DAILEY, OSB #82433  
7 BETH SKILLERN, OSB #86288  
BULLIVANT HOUSER BAILEY, PC  
8 Telephone: (503) 499-4430  
Attorneys for PLAINTIFFS  
9 The Home Insurance Company and  
California Insurance Company

10  
11 By [Signature]  
12 JAN K. KITCHEL, OSB #78471  
SCHWABE WILLIAMSON & WYATT, PC  
13 Telephone: (503) 796-2939  
Attorney for PLAINTIFFS  
14 Wausau Business Insurance Co., Wausau  
Underwriters Insurance Co., and Employers  
15 Insurance of Wausau, A Mutual Company  
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