

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

WASHINGTON MUTUAL, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No(s): 08-12229 (MFW)

WASHINGTON MUTUAL, INC.,

Plaintiff,

v.

XL SPECIALTY INSURANCE COMPANY;  
NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA;  
COLUMBIA CASUALTY COMPANY;  
AXIS INSURANCE COMPANY; ACE  
AMERICAN INSURANCE COMPANY;  
ARCH INSURANCE COMPANY; RSUI  
INDEMNITY COMPANY; CHARTIS  
PROPERTY CASUALTY COMPANY,  
formerly known as "AIG Casualty Company";  
HOUSTON CASUALTY COMPANY;  
THOSE CERTAIN UNDERWRITERS AT  
LLOYD'S, LONDON, SUBSCRIBING TO  
POLICY NO. B0509QA027908, also known  
as "Lloyd's Underwriter Syndicate No. 2488  
AGM London"; ALLIED WORLD  
ASSURANCE COMPANY LTD; and  
SCOTTSDALE INDEMNITY COMPANY;

Defendants.

Adv. Proc. No. \_\_\_\_\_

**COMPLAINT FOR BREACH OF CONTRACT, TORTIOUS BREACH OF THE  
DUTY OF GOOD FAITH AND FAIR DEALING, AND DECLARATORY RELIEF**

<sup>1</sup> The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are Washington Mutual, Inc. (3725) and WMI Investment Corp (5395). The Debtors' principal offices are located at 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.



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Plaintiff Washington Mutual, Inc., as debtor in possession (“WMI”), brings this Complaint for Breach of Contract, Tortious Breach of the Duty of Good Faith and Fair Dealing, and Declaratory Relief (the “Complaint”) against the above-captioned defendants (collectively, the “2008-09 Insurers”) based on the following facts:

### **INTRODUCTION**

1. In early 2008, WMI purchased from the 2008-09 Insurers \$250 million of coverage under 12 insurance policies (the “2008-09 Policies”) to provide coverage to WMI and its directors and officers for claims made from May 1, 2008 to May 1, 2009.

2. As set forth more fully below, despite having charged and accepted from WMI \$15,156,500 in exchange for the issuance of the 2008-09 Policies, the 2008-09 Insurers have refused to make available the benefits of the 2008-09 Policies to various insured parties.

3. The circumstances that give rise to this adversary proceeding trace to September 10, 2008, just 15 days before the Office of Thrift Supervision (the “OTS”) seized Washington Mutual Bank (“WMB”). On September 10, 2008, several directors and officers of WMI (collectively, the “D&Os”) caused WMI to make a downstream capital contribution of \$500 million (the “September Downstream”) to WMB.

4. On or about April 2009, following a preliminary investigation, the Official Committee of Unsecured Creditors appointed in WMI’s bankruptcy case (the “Committee”), in its capacity as authorized representative of the WMI’s chapter 11 estate (the “Estate”), sent a letter to WMI and the D&Os providing them “Notice of Circumstances Resulting in Potential Claims” (the “April 27 Letter”). After further investigation, the Committee and WMI sent a demand letter, dated October 13, 2011 (the “Demand Letter”), to several of the D&Os, asserting claims (the “Asserted Claim”) and indicating its intent to pursue litigation against the D&Os in the absence of a negotiated resolution of the D&Os’ liability in connection with the September Downstream. The Demand Letter alleges in substance that (i) the D&Os knew or should have known that it was purposeless, reckless and wasteful to implement the September Downstream; (ii) acting in WMI’s best interests, the D&Os should have preserved funds for the benefit of

WMI and its creditors and shareholders; and (iii) instead of acting in WMI's best interests, the D&Os squandered WMI's financial resources by causing the September Downstream for no apparent reason, thereby breaching their fiduciary duties to WMI and committing corporate waste.

5. Following receipt of the Demand Letter, several of the D&Os and WMI sought coverage for the Asserted Claim under the 2008-09 Policies, which are more particularly described below, on the basis that the 2008-09 Policies require the 2008-09 Insurers to defend and indemnify them in the event that "claims," which include the Demand Letter, are made against them for alleged acts of the D&Os in their capacities as directors or officers of WMI.

6. In response to WMI's and the D&Os' requests, the 2008-09 Insurers denied coverage under the 2008-09 Policies, claiming that (i) the Asserted Claim somehow is connected to wholly unrelated class-action lawsuits brought by WMI's shareholders and therefore falls into certain (inapplicable) policy exclusions; and (ii) the Asserted Claim is excluded under the so-called "Insured v. Insured exclusion" contained in the 2008-09 Policies. Rather than honor their obligations, the 2008-09 Insurers have insisted that the D&Os seek payment from some other source, including nearly exhausted insurance policies that WMI obtained for the 2007-08 period.

7. The D&Os have incurred substantial attorneys' fees and costs defending the Asserted Claim and are likely to spend substantial additional amounts. Because the 2008-09 Insurers have refused to perform their obligations to pay the D&Os' defense costs, the D&Os have insisted that the Estate reserve funds to pay the D&Os' potential defense costs in connection with the Asserted Claim. The D&Os assert that the Estate is required to pay their defense costs if those costs are not paid by insurance. To the extent the Estate is required to reserve for these potential defense costs, the 2008-09 Insurers' failure to honor their obligations will reduce distributions to creditors under WMI's recently confirmed plan of reorganization.

8. The 2008-09 Insurers' interpretation of the 2008-09 Policies is incorrect. As described below, the 2008-09 Insurers' interpretation of the exclusions is so broad that it renders

the coverage that they agreed to provide (and for which they accepted millions of dollars in payment) illusory.

9. This action by WMI – which is a party to all of the 2008-09 Policies, an insured under several of the 2008-09 Policies, and the representative of the Estate (which may be required to pay the D&Os’ defense costs if the 2008-09 Insurers do not fulfill their contractual obligations) – is to seek appropriate remedies for the 2008-09 Insurers’ breaches of contract and misconduct.

### **PARTIES**

10. Plaintiff WMI is a corporation incorporated under the laws of the State of Washington. On September 26, 2008, WMI and one of its subsidiaries, WMI Investment Corp. (collectively, the “Debtors”), each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (as amended, the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”). WMI is currently a debtor in possession in the jointly administered chapter 11 bankruptcy cases that are captioned *In re Washington Mutual, Inc., et al.*, Case No. 08-12229 (MFW) (Bankr. D. Del.) (the “Chapter 11 Cases”) and brings this action solely as debtor in possession.<sup>2</sup>

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<sup>2</sup> On February 24, 2012, the Bankruptcy Court entered its *Findings of Fact, Conclusions of Law, and Order Confirming the Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, ECF No. 9759 (the “Confirmation Order”), which provides that, on the Effective Date, “[t]he Liquidating Trust assets shall be transferred to the [WMI] Liquidating Trust in accordance with the provisions of the Plan, the Liquidating Trust Agreement, and this Order.” Confirmation Order ¶ 25. As amended, the *Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, ECF No. 9178 (as amended, the “WMI Plan”) similarly provides that “*on the Effective Date*, the Debtors shall transfer all of the Liquidating Trust Assets to the [WMI] Liquidating Trust.” Plan § 27.3 (emphasis added). The Plan defines Liquidating Trust Assets as (with certain exceptions not relevant here) “all Assets of the Debtors.” *Id.* § 1.140. “Assets” is defined as (i) all property of the Estate and (ii) “all claims and causes of action, and any subsequent proceeds thereof, that have been or may be commenced by such Debtor in Possession or other authorized representative for the benefit of such Debtor’s estate, unless modified pursuant to the Plan or a Final Order ....” *Id.* § 1.33. WMI anticipates that the Effective Date will occur on or about March 16, 2012. At that time, the WMI Liquidating Trust will substitute as the plaintiff in this lawsuit.

11. WMI is informed and believes and based thereon alleges that defendant XL Specialty Insurance Company is an insurance company incorporated and existing under the laws of the State of Delaware with its principal place of business in Stamford, Connecticut.

12. WMI is informed and believes and based thereon alleges that defendant National Union Fire Insurance Company of Pittsburgh, PA is an insurance company incorporated and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in New York, New York.

13. WMI is informed and believes and based thereon alleges that defendant Columbia Casualty Company is an insurance company incorporated and existing under the laws of the State of Illinois with its principal place of business in Chicago, Illinois.

14. WMI is informed and believes and based thereon alleges that defendant Axis Insurance Company is an insurance company incorporated and existing under the laws of the State of Illinois with its principal place of business in Alpharetta, Georgia.

15. WMI is informed and believes and based thereon alleges that defendant ACE American Insurance Company is an insurance company incorporated and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania.

16. WMI is informed and believes and based thereon alleges that defendant Arch Insurance Company is an insurance company incorporated and existing under the laws of the State of Missouri with its principal place of business in Kansas City, Missouri.

17. WMI is informed and believes and based thereon alleges that defendant RSUI Indemnity Company is an insurance company incorporated and existing under the laws of the State of Georgia with its principal place of business in Atlanta, Georgia.

18. WMI is informed and believes and based thereon alleges that defendant Chertis Property Casualty Company, formerly known as "AIG Casualty Company," is an insurance company incorporated and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in New York, New York.

19. WMI is informed and believes and based thereon alleges that defendant Houston Casualty Company is an insurance company incorporated and existing under the laws of the State of Texas with its principal place of business in Houston, Texas.

20. WMI is informed and believes and based thereon alleges that defendants Those Certain Underwriters at Lloyd's, London, Subscribing to Policy No. B0509QA027908, also known as "Lloyd's Underwriter Syndicate No. 2488 AGM, London," is an unincorporated association that has consented to jurisdiction in the courts of the United States.

21. WMI is informed and believes and based thereon alleges that defendant Allied World Assurance Company LTD is an insurance company incorporated and existing under the laws of Bermuda with its principal place of business in Zug, Switzerland.

22. WMI is informed and believes and based thereon alleges that defendant Scottsdale Indemnity Company is an insurance company incorporated and existing under the laws of the State of Florida with its principal place of business in Scottsdale, Arizona.

### **JURISDICTION AND VENUE**

23. This Court has jurisdiction over the parties and the subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 1332(a).

24. This adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O).

25. Venue of this adversary proceeding is proper in this district pursuant to 28 U.S.C. § 1409(a).

26. This Complaint is appropriately brought as an adversary proceeding in the Bankruptcy Court pursuant to Rules 7001(1) and 7001(9) of the Federal Rule of Bankruptcy Procedure.

### **THE INSURANCE POLICIES**

#### **A. WMI's 2007-08 D&O Insurance Policies**

27. In 2007, WMI contracted with certain insurers to provide \$250 million of liability insurance coverage for, among others, itself and its directors and officers. This coverage was

spread among twelve policies (the “2007-08 Policies”), each of which covered “claims made” (as determined under the provisions of the 2007-08 Policies) from May 1, 2007 to May 1, 2008. The premiums for the 2007-08 Policies totaled approximately \$4.7 million. The insurers that issued the 2007-08 Policies (the “2007-08 Insurers”) are not named as defendants herein, except insofar as they are also 2008-09 Insurers.

**B. WMI’s 2008-09 D&O Insurance Policies**

28. Prior to the expiration of the 2007-08 Policies, WMI purchased \$250 million of liability insurance coverage for the 2008-09 policy year for itself and its directors and officers. WMI was the contracting party and a “Named Insured” or some variant of that defined term under these policies. WMI purchased the 2008-09 Policies to protect itself and its directors and officers for claims against them alleging “individual acts” by them as executives of WMI, as well as WMI from its indemnity obligations to the D&Os. These policies cover “claims made” (as determined under the provisions of the 2008-09 Policies) from May 1, 2008 to May 1, 2009 (the “2008-09 Policy Period”).<sup>3</sup> They are substantively identical to the 2007-08 Policies, except that they purport to preclude coverage for a variety of litigation that was filed against WMI, certain of the D&Os, and others during the pendency of the 2007-08 Policies and before.

29. Despite offering substantially similar coverage as the coverage under the 2007-08 Policies, the 2008-09 Insurers charged, and WMI paid, \$15,156,500 in premiums for the 2008-09

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<sup>3</sup> The policies provide, “[i]f, during the Policy Period, the Insured shall become aware of any circumstances which may reasonably be expected to give rise to a Claim being made against an Insured and shall give written notice to the Insurer of the circumstances, the Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act allegations anticipated and the reasons for anticipating such a Claim, with full particulars as to dates, persons and entities involved, then a Claim which is subsequently made against such Insured and reported to the Insurer alleging, arising out of, based upon or attributable to such circumstances or alleging any Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act which is the same or related to any Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was given.” XL Policy, Endorsement 14 (emphasis added). Thus, under the 2008-09 Policies, a claim that is made after the 2008-09 Policy Period will be treated as a claim made during the Policy Period if the 2008-09 Insurers receive appropriate written notice.

Policies. These premiums were over three times the amount of the premiums for the 2007-08 Policies. The 2008-09 Policies are comprised of the following:

a. XL Specialty Insurance Company Policy No. ELU104380-08 (the “XL 2008 Policy”) is the primary policy. It provides \$25 million of coverage. A true and correct copy of the XL 2008 Policy is attached hereto as Exhibit A. The XL 2008 Policy and the policy that follows it provide three types of coverage:

(1) coverage for losses resulting from claims made against WMI directors and officers for “an individual act”—“Side A” coverage;

(2) coverage for losses sustained by WMI as the result of indemnifying officers and directors for losses—“Side B” coverage; and

(3) coverage for losses sustained by WMI as a result of securities law violations—“Side C” coverage.

b. National Union Fire Insurance Company of Pittsburgh, PA Policy No. 463-33-47 (the “National Union 2008 Policy”) is the first layer excess policy. It provides an additional \$25 million of coverage beyond the coverage of the XL 2008 Policy. According to the National Union 2008 Policy, “[t]his policy shall provide the Insureds and the Company with coverage in accordance with the same terms, conditions, exclusions and limitations of the [XL 2008 Policy]...” National Union 2008 Policy § I.

c. Columbia Casualty Company Policy No. 287127641 (the “Columbia 2008 Policy”) is the second layer excess policy. It provides an additional \$25 million of coverage beyond the coverage of the National Union 2008 Policy. The Columbia Casualty Policy provides Side A coverage only. According to the Columbia 2008 Policy, “[i]n the event of a Non-Indemnified Loss ... that is covered by the [XL 2008 Policy] ... this Policy follows and is subject to the terms and conditions of the [XL 2008 Policy] with respect to such Non-Indemnified Loss except as specifically set forth herein with respect to the premium, Limit of Liability, Defense and Settlement, any notice and reporting provisions and any endorsement to this Policy.” The third, fourth, fifth, sixth,



seventh, eighth, ninth, tenth and eleventh excess policies referenced in Paragraphs 29.d through 29.i below generally follow the terms of the Columbia 2008 Policy, with certain exceptions as noted in the individual policies.

d. Axis Insurance Company Policy No. MNN 713043/01/2008 (the “Axis 2008 Policy”) is the third layer excess policy. It provides an additional \$25 million of coverage beyond the coverage of the Columbia 2008 Policy.

e. ACE American Insurance Company Policy No. DOX G21669994 005 (the “ACE 2008 Policy”) is the fourth layer excess policy. It provides an additional \$30 million of coverage beyond the coverage of the Axis 2008 Policy.

f. Arch Insurance Company Policy No. ABX0027001-00 (the “Arch 2008 Policy”) is the fifth layer excess policy. It provides an additional \$15 million of coverage beyond the coverage of the ACE 2008 Policy.

g. RSUI Indemnity Company Policy No. NHS628955 (the “RSUI 2008 Policy”) is the sixth layer excess policy. It provides an additional \$20 million of coverage beyond the coverage of the Arch 2008 Policy.

h. AIG Casualty Company Policy No. 358-0734 (the “AIG 2008 Policy”) is the seventh layer excess policy. It provides an additional \$25 million of coverage beyond the coverage of the RSUI 2008 Policy.

i. Houston Casualty Company Policy No. 14-MG-08-A9106 (the “HCC 2008 Policy”) is the eighth layer excess policy. It provides an additional \$20 million of coverage beyond the coverage of the AIG 2008 Policy.

j. Lloyds of London Policy No. B0509QA027908 (the “Lloyds 2008 Policy”) is the ninth layer excess policy. It provides an additional \$10 million of coverage beyond the coverage of the HCC 2008 Policy.

k. Allied World Assurance Company LTD Policy No. C009436/001 (the “Allied 2008 Policy”) is the tenth layer excess policy. It provides an additional \$20 million of coverage beyond the coverage of the Lloyds 2008 Policy.

1. Scottsdale Indemnity Company Policy No. XMI0800039 is the eleventh layer excess policy. It provides an additional \$25 million of coverage beyond the coverage of the Allied 2008 Policy.

### **FACTUAL BACKGROUND**

30. WMI was the parent holding company of WMB (and, indirectly, all of WMB's subsidiaries). Before it was seized by the OTS on September 25, 2008, WMB was the largest savings and loan in the United States. On or about March 16, 2012, WMI will abandon its interest in WMB.

#### **A. The Class Action Litigation**

31. On November 1, 2007, the New York Attorney General filed a complaint (the "NYAG Complaint") against First American Corporation and its subsidiary, First American eAppraiseIT ("eAppraiseIT"), an appraisal management company. According to the NYAG Complaint, WMB used eAppraiseIT for real estate appraisals in connection with loans that WMB was contemplating, and WMB was eAppraiseIT's largest customer. The NYAG Complaint further alleged that "eAppraiseIT improperly allows WaMu's loan production staff to hand-pick appraisers who bring in appraisal values high enough to permit WaMu's loans to close, and improperly permits WaMu to pressure eAppraiseIT appraisers to change appraisal values that are too low to permit loans to close." NYAG Complaint. ¶8.

32. In the weeks and months immediately following the filing of the NYAG Complaint, several WMI shareholders filed several class-action complaints against WMI (the "Class Action Litigation"). Although there were over a dozen class-action complaints filed against WMI, all of the complaints were based exclusively on one or more of the following alleged types of misconduct:

- WMB allegedly encouraged appraisers to inflate appraisal values for properties on which it made loans.
- WMI allegedly failed to appropriately disclose the risk of loans offered by WMB.

- WMB allegedly marketed asset-backed bonds without disclosing the fact that it would apply a “charge-off” policy to such bonds.
- WMI management allegedly ignored mortgage write-downs when calculating bonus payments.
- WMB allegedly engaged in unsafe and imprudent lending and underwriting standards in its prime, sub-prime, and Option-ARM loans.
- WMI and the D&Os allegedly inflated WMB’s share price artificially by preparing, certifying, publishing and filing with the Securities and Exchange Commission allegedly misleading and inaccurate financial statements, offering documents, and reports, which allegedly violated GAAP and Securities Exchange Commission rules and regulations.

33. Beginning on February 21, 2008 and continuing for several weeks thereafter, the United States Judicial Panel on Multidistrict Litigation ordered that the various Class Action Litigation cases be consolidated in a new proceeding captioned *In re Washington Mutual, Inc., Securities, Derivative & “ERISA” Litigation*, W.D. Wash. Case No. 2:08-md-1919 MJP (the “Consolidated Litigation”).

34. The Class Action Litigation and the Consolidated Litigation trigger coverage under the 2007-08 Policies and not the 2008-09 Policies, and involve transactions that are wholly unrelated to and independent of those at issue in the Asserted Claim. The 2007-08 Insurers have nearly exhausted the available coverage under the 2007-08 Policies by paying defense costs and settlements of the Consolidated Litigation and other losses.

## **B. The Chapter 11 Cases**

35. On September 25, 2008, the OTS seized WMB and named the Federal Deposit Insurance Corporation Receiver for WMB.

36. On September 26, 2008, the Debtors filed petitions for relief under chapter 11 of the Bankruptcy Code, thereby commencing the Chapter 11 Cases.

37. Pursuant to Bankruptcy Code section 541(a) and subject to the terms thereof, the commencement of the Chapter 11 Cases created the Estate, which is comprised of, among other

things, “all legal or equitable interests of the debtor in property as of the commencement of the case.” The Estate includes WMI’s right to coverage under the 2008-09 Policies.

38. On September 9, 2010, the Committee and the Debtors entered into the *Stipulation Authorizing Official Committee of Unsecured Creditors to Bring Certain Causes of Action on Behalf of the Debtors’ Estates* [Docket No. 5410] (the “Stipulation”). On September 13, 2010, the Bankruptcy Court entered an order approving the Stipulation [Docket No. 5416]. As noted in the Confirmation Order, pursuant to the Stipulation and order approving it, the Committee has standing and authority to pursue, settle and compromise specified claims and causes of action as identified in the Stipulation, including claims and causes of action against the D&Os based on the September Downstream.

### **C. The Demand Letter**

39. As set forth above, on or about April 27, 2009, *i.e.*, during the 2008-09 Policy Period, the Committee provided notice to WMI and the D&Os, via the April 27 Letter, that “the Board of Directors of WMI and each of the directors and officers listed in the attached schedule ... have engaged in certain wrongful acts that have injured the Debtors, the Debtors’ estates, and the creditors of the estates, and may result in claims for money damages.” The April 27 Letter lists the September Downstream and other WMI capital contributions as “wrongful acts that have injured the Debtors” caused by the D&Os.

40. WMI and the D&Os timely provided notice of the April 27 Letter to the 2008-09 Insurers. The April 27 Letter constitutes adequate notice of circumstances under the provisions of the 2008-09 Policies, including the provision set forth in footnote 2 above. In correspondence dated May 26, 2009, XL Specialty Insurance Company wrongfully claimed that the D&Os had not provided an adequate notice of circumstances. WMI is informed and believes and based thereon alleges that none of the other 2008-09 Insurers responded to the April 27 Letter.

41. On or about October 13, 2011, the Asserted Claim was made pursuant to the Demand Letter. WMI and the D&Os timely provided notice of the October 13 Letter to each of the 2008-09 Insurers. All conditions precedent, if any, to coverage for the Asserted Claim under

the 2008-09 Policies have been satisfied, including payment of premiums and timely notice of the Asserted Claim.

42. By letters, dated December 22, 2011 and January 25, 2012, XL Specialty Insurance Company wrongfully denied coverage under the 2008-09 Policies for any loss associated with the Asserted Claim. None of the other 2008-09 Insurers has contradicted the denial or has provided any other response beyond acknowledging receipt of the April 27 Letter and the Demand Letter.

43. By failing to accept the Asserted Claim for coverage, each of the 2008-09 Insurers has failed to honor and has expressly or implicitly repudiated one or more of its obligations under the 2008-09 Policies.

**D. The 2008-09 Insurers' Pretexts for Denying Coverage for the Asserted Claim**

44. In correspondence with the D&Os, XL Specialty Insurance Company purported to rely on four policy exclusions to avoid coverage for the Asserted Claim: (1) the "Specified Claims Exclusion" (XL 2008 Policy, Endorsement 19); (2) a "Prior Notice Exclusion" (*Id.* § III.(E) ); (3) an "Interrelated Wrongful Acts Exclusion" (*Id.* § II.(K) ); and (4) the Insured v. Insured Exclusion (*Id.*, Endorsement Nos. 5 & 31). Collectively, the first three exclusions are referred to herein as the "Prior-Claims Exclusions." WMI is informed and believes and based thereon alleges that the other 2008-09 Insurers have denied their obligations under the insurance policies, purportedly on the same grounds.

45. WMI is informed and believes and based thereon alleges that the 2008-09 Insurers wrongfully have claimed that the Prior Claims Exclusions each have the same impact: According to the 2008-09 Insurers, these exclusions preclude coverage for all claims where the basis of claims is allegations that have even the slightest of connections to the Consolidated Litigation. WMI is informed and believes and based thereon alleges that, based on this pretext, the 2008-09 Insurers deny coverage for all loss associated with the Asserted Claim, including the defense costs. WMI is informed and believes and based thereon alleges that, based on this

pretext, the 2008-09 Insurers continue to refuse to perform their other obligations under the 2008-09 Policies.

46. The 2008-09 Insurers' current interpretation of the Prior-Claims Exclusions is inconsistent with, among other things, the language of the 2008-09 Policies, the understanding of WMI, the D&Os and the 2008-09 Insurers at the time they negotiated the 2008-09 Policies, and common sense. If the 2008-09 Insurers' currently proposed interpretation were correct, it would render the 2008-09 coverage essentially meaningless despite the fact that WMI paid over \$15 million for that coverage (over \$10.5 million more than WMI paid for the 2007-08 Policies).

47. The 2008-09 Insurers' reliance upon the Prior Claims Exclusions is wrongful for at least the following reasons:

a. The Consolidated Litigation is not listed among the proceedings covered in the Specified Claims Exclusion;

b. The "wrongful acts" alleged in the Asserted Claim are factually and legally distinct from the "wrongful acts" alleged in proceedings listed in the Specified Claims Exclusion and the Consolidated Litigation;

c. The "wrongful acts" alleged in the Asserted Claim are not interrelated with any "acts" alleged in the proceedings listed in the Specified Claims Exclusion and the Consolidated Litigation; and

d. The 2008-09 Insurers' interpretation of the Prior Claims Exclusions is contrary to law because, among other reasons, it violates the rule that exclusions be construed strictly and narrowly in the insured's favor.

48. The 2008-09 Insurers' reliance upon the Insured v. Insured Exclusion is wrongful for at least the following reasons:

a. The XL 2008 Policy explicitly provides that the Insured v. Insured Exclusion does not apply where, as here, the claim "is brought by the Bankruptcy Trustee or Examiner of the Company, or any assignee of such Trustee or Examiner, any Receiver,

Conservator, Rehabilitator, or Liquidator *or comparable authority of [WMI]*.” XL Policy, Endorsement No. 31 (emphasis added); and

b. The XL 2008 Policy explicitly provides that the Insured v. Insured Exclusion does not apply where, as here, “a claim is brought by a creditors committee of [WMI] in the event [WMI] files for relief under [the Bankruptcy Code].” XL Policy, Endorsement No. 5.

49. The D&Os have incurred substantial defense costs in connection with the Asserted Claim. None of the 2008-09 Insurers has paid the D&Os amounts owed to them for these defense costs.

50. The D&Os have filed several proofs of claim asserting, *inter alia*, that the Estate is required to indemnify them in connection with the lawsuits that have been filed against them. Those proofs of claim have been numbered, *inter alia*, 2108, 2240, 2241, 2246, 2247, 2248, 2604, 2606, 2629, 2631, 2633, 2634, 2635 and 2637.

51. On November 17, 2010, WMI filed in the Chapter 11 Cases (i) *Debtors’ Sixtieth Omnibus (Substantive) Objection to Claims (Claim Nos. 2108, 2240, 2241, 2246, 2247, 2248, 2604, 2606, 2629, 2631, 2633, 2634, 2635, 2636, 2637, and 3242)* [Docket No. 5970] (the “Omnibus Objection”); and (ii) the *Motion to Estimate the Maximum Amount of Certain Claims for Purpose of Establishing Reserve Under the Debtors’ Confirmed Chapter 11 Plan*, [Docket No. 5971] (the “Estimation Motion”). The Omnibus Objection and Estimation Motion seek disallowance of certain D&Os’ indemnity claims or estimation of those claims at \$0, for the purpose of limiting the reserve that WMI and the Liquidating Trust are required to hold pursuant to the Plan. WMI has asserted, *inter alia*, that it has no indemnification obligation to the D&Os to the extent the 2008-09 Insurers and the 2007-08 Insurers perform their obligations under the policies and pay the D&Os’ defense costs and other losses. Money held in reserve will not be distributed to creditors and other parties in interest as provided in the Plan. Those distributions are scheduled to begin in the next few weeks.

52. In opposition to the Estimation Motion, the D&Os have asserted and continue to assert that WMI must reserve for their potential defense costs in connection with the Asserted Claim. Because the 2008-09 Insurers are denying their obligation to pay defense costs in connection with the Asserted Claim, the D&Os are requiring that WMI reserve substantial amounts for defense costs that the D&Os have incurred and may incur in the future as a result of the Asserted Claim.<sup>4</sup>

**FIRST CLAIM FOR RELIEF**  
**(BREACH OF CONTRACT)**

53. WMI realleges and incorporates by reference paragraphs 1 through 52 of this Complaint, as if fully restated herein.

54. WMI fully performed its obligations under the 2008-09 Policies by, among other things, paying over \$15 million in premiums to the 2008-09 Insurers in return for coverage that should protect WMI and its directors and officers. The 2008-09 Insurers also received adequate notice of the Asserted Claim to trigger coverage under the 2008-09 Policies.

55. All conditions required under the 2008-09 Policies for the 2008-09 Insurers' performance, if there were any, had occurred or were excused.

56. The 2008-09 Insurers breached their obligations under the 2008-09 Policies by failing to pay the D&Os' defense costs associated with the Asserted Claim.

57. The 2008-09 Insurers repudiated their obligations under the 2008-09 Policies by denying coverage for the Asserted Claim.

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<sup>4</sup> On March 1, 2012 the Court entered its *Order Approving Stipulation Regarding Hearing on Estimation Motion and Sixtieth Omnibus Objection to Claims in Connection with Director and Officer Indemnification Claims* [Docket No. 9797] (the "Estimation Order"). Pursuant to the Estimation Order and the stipulation it approves, the Debtors are required to reserve \$55 million for alleged potential defense costs associated with the Estate's claims against certain of the D&Os. See *Stipulation Regarding Hearing on Estimation Motion and Sixtieth Omnibus Objection to Claims in Connection With Director and Officer Indemnification Claims* [Docket No. 9726] at 6 & n.6.



58. As a direct and proximate result of the 2008-09 Insurers' breaches of the 2008-09 Policies, WMI and the Estate have suffered and will continue to suffer damages and out-of-pocket expenses, including attorneys' fees and costs, plus interest. The amount of damages has not yet been precisely ascertained, but the Estate's damages are more than \$350,000, exclusive of interest and costs. When the precise amount of damages is known, WMI or the WMI Liquidating Trust will seek leave to amend this Complaint accordingly.

## **SECOND CLAIM FOR RELIEF**

### **(TORTIOUS BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING)**

59. WMI realleges and incorporates by reference paragraphs 1 through 58 of this Complaint, as if fully restated herein.

60. Implied in each of the 2008-09 Policies is a covenant that each of the 2008-09 Insurers would act in good faith and deal fairly with WMI and its directors and officers, would do nothing to interfere with their insureds' rights to receive the benefits due under the 2008-09 Policies, and would give at least the same level of consideration to their insureds' interests as they give to their own interests. Applicable law further imposes a statutory duty of good faith on the 2008-09 Insurers.

61. The 2008-09 Insurers have breached their duty of good faith under the 2008-09 Policies and applicable law by, among other things:

- a) Relying upon, among other baseless defenses, inapplicable policy exclusions to avoid coverage for the Asserted Claim;
- b) Unreasonably and consciously devising a pretextual scheme to compromise coverage under the 2008-09 Policies by, among other things, interpreting the Prior Claims Exclusions so broadly as to make coverage for claims such as those at issue in the Asserted Claim illusory under the 2008-09 Policies;
- c) Asserting grounds to avoid coverage that they know are not supported by, and are contrary to, the terms of the 2008-09 Policies, the law, insurance industry custom and practice, the parties' course of dealings, and the facts;
- d) Wrongfully depriving WMI and the Estate of the insurance benefits for which WMI contracted pre-petition;

- e) Failing to conduct an adequate investigation of the Asserted Claim; and
- f) Giving greater consideration to their own interests than they gave to their insureds' interests.

62. The 2008-09 Insurers' acts are inconsistent with WMI's and the D&Os' reasonable expectations, are contrary to established claims practices and legal requirements, and constitute bad faith.

63. As a direct and proximate result of the 2008-09 Insurers' acts, WMI and its Estate have been damaged. The amount of damages has not yet been precisely ascertained, but the Estate's damages are more than \$350,000, exclusive of interest and costs. When the precise amount of damages is known, WMI or the WMI Liquidating Trust will seek leave to amend this Complaint accordingly.

64. WMI and its successors, on behalf of the Estate, are entitled to recover all attorneys' fees that the Estate reasonably has incurred, and is incurring, in its efforts to obtain the benefits of the coverage that the 2008-09 Insurers wrongfully have withheld and are withholding in bad faith, plus interest. The total amount of these attorneys' fees is currently unknown. WMI or the WMI Liquidating Trust will seek leave to amend this Complaint to allege the precise amount of these fees when the total amount is known.

65. The 2008-09 Insurers' conduct has been done with a conscious disregard of WMI's and the Estate's rights, constituting oppression, fraud, and/or malice. The 2008-09 Insurers have engaged in a series of acts designed to deny wrongfully the benefits due under their policies. Specifically, the 2008-09 Insurers, by acting as alleged above, in light of the information, facts, and law to the contrary, consciously disregarded their insureds' rights and forced them to incur substantial financial loss, without any assistance from them, thereby inflicting substantial financial damage on their insureds. The 2008-09 Insurers ignored their insureds' interests and concerns, with the requisite intent to injure. Therefore, WMI and its successors, on behalf of the Estate, are entitled to recover punitive damages from the 2008-09 Insurers in an amount sufficient to punish and to make an example of them and in order to deter

similar conduct.

### **THIRD CLAIM FOR RELIEF**

#### **(DECLARATORY RELIEF-DISALLOWANCE OF SUBROGATED CLAIM)**

66. WMI realleges and incorporates by reference paragraphs 1 through 65 of this Complaint, as if fully restated herein.

67. Bankruptcy Code section 502(b) provides, in relevant part:

Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured

11 U.S.C. § 502(b).

68. WMI asserts that the 2008-09 Insurers have no ability to subrogate to the D&Os' indemnity claims against the Estate because of, *inter alia*, (i) the terms of the 2008-09 Policies, (ii) anti-subrogation principles under applicable law, (iii) the 2008-09 Insurers' breach of their obligations under the 2008-09 Policies, and (iv) the 2008-09 Insurers' tortious breach of their duty of good faith.

69. WMI is informed and believes and based thereon alleges that the 2008-09 Insurers assert that they are entitled to subrogate to the D&Os' indemnity claims against the Estate to the extent they pay the D&Os' defense costs in connection with the Asserted Claim.

70. An actual controversy exists between WMI and the 2008-09 Insurers concerning the respective rights of the 2008-09 Insurers to a distribution from the Estate.

71. WMI requests a judicial determination of the rights of the 2008-09 Insurers to subrogate to the indemnity claims of the D&Os. In particular, WMI seeks a declaration that the 2008-09 Insurers may not subrogate to the claims of the D&Os and that any such subrogated

claims will be disallowed.

72. Such a declaration is necessary and appropriate at this time in order that the Estate may appropriately adjust its reserves and make the distributions to creditors required under its Plan.

73. Therefore, the Court should issue a declaratory judgment regarding the subrogation rights of the 2008-09 Insurers.

#### **FOURTH CLAIM FOR RELIEF**

##### **(DECLARATORY RELIEF- SUBORDINATION OF SUBROGATED CLAIM)**

74. WMI realleges and incorporates by reference paragraphs 1 through 73 of this Complaint, as if fully restated herein.

75. Each of the 2008-09 Insurers engaged in the inequitable conduct described in this Complaint. This inequitable conduct includes, but is not limited to, the 2008-09 Insurers' bad-faith denial of coverage.

76. The 2008-09 Insurers' inequitable conduct has resulted in injury to the Estate and its creditors or the conferring of an unfair advantage on the 2008-09 Insurers, particularly with respect to the subrogated claims the 2008-09 Insurers now assert through the D&Os.

77. Bankruptcy Code section 510(c) provides, in relevant part:

Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest.

11 U.S.C. § 510(c).

78. To the extent the 2008-09 Insurers subrogate to the claims of the D&Os and those claims are allowed, any and all claims held now or in the future by the 2008-09 Insurers should be equitably subordinated based upon the inequitable conduct and bad faith of the 2008-09

Insurers as described in this Complaint.

79. Equitable subordination as requested herein would be consistent with the provisions and purposes of the Bankruptcy Code.

80. WMI is informed and believes and based thereon alleges that the 2008-09 Insurers assert that if they are entitled to subrogate to the D&Os' indemnity claims against the Estate, their claims should be treated as general unsecured claims.

81. An actual controversy exists between WMI and the 2008-09 Insurers concerning the respective rights of the 2008-09 Insurers to a distribution from the Estate.

82. WMI requests a judicial determination of the distribution priority of any claims of the 2008-09 Insurers to the extent they subrogate to the indemnity claims of the D&Os. In particular, WMI seeks a declaration that the 2008-09 Insurers' claims will be equitably subordinated to the claims of all other creditors of the Estate in the event and to the extent the 2008-09 Insurers subrogate to the claims of the D&Os.

83. Such a declaration is necessary and appropriate at this time in order that the Estate may appropriately adjust its reserves and make the distributions to creditors required under its Plan.

84. Therefore, the Court should issue a declaratory judgment that the claims of the D&Os will be equitably subordinated to the claims of all other creditors of the Estate in the event and to the extent the 2008-09 Insurers subrogate to the claims of the D&Os and those claims are allowed.

#### **FIFTH CLAIM FOR RELIEF**

#### **(REQUEST FOR ATTORNEYS' FEES)**

85. WMI realleges and incorporates by reference paragraphs 1 through 84 of this Complaint, as if fully restated herein.

86. Based on the 2008-09 Insurers' bad faith conduct alleged herein, and particularly as alleged in paragraphs 60 through 65 of the Second Claim for Relief, WMI and its successors, on behalf of the Estate, seek to recover all attorneys' fees that the Estate reasonably has incurred,

and is incurring, in its efforts to obtain the benefits of the coverage that the 2008-09 Insurers wrongfully have withheld and are withholding in bad faith, plus interest. The total amount of these attorneys' fees is currently unknown. WMI or the WMI Liquidating Trust will seek leave to amend this Complaint to allege the precise amount of these fees when the total amount is known.

87. This Fifth Claim for Relief is being made in accordance with Federal Rule of Bankruptcy Procedure 7008(b).

#### **PRAYER FOR RELIEF**

WHEREFORE, WMI respectfully requests that the Court enter judgment in favor of WMI, and against the 2008-09 Insurers, as follows:

##### **ON THE FIRST CLAIM FOR RELIEF**

1. For damages, plus interest, according to proof at the time of trial.

##### **ON THE SECOND CLAIM FOR RELIEF**

2. For damages, plus interest, according to proof at the time of trial.
3. For reasonable attorneys' fees incurred in obtaining the benefits due under the 2008-09 Policies, plus interest.
4. For punitive damages in an amount to be determined at the time of trial.

##### **ON THE THIRD CLAIM FOR RELIEF**

5. For a declaration that the 2008-09 Insurers' claims will be disallowed to the extent the 2008-09 Insurers subrogate to the claims of the D&Os.

##### **ON THE FOURTH CLAIM FOR RELIEF**

6. For a declaration that the 2008-09 Insurers' claims will be equitably subordinated to the extent the 2008-09 Insurers subrogate to the claims of the D&Os and those claims are allowed.

##### **ON THE FIFTH CLAIM FOR RELIEF**

7. For reasonable attorneys' fees incurred in obtaining the benefits due under the 2008-09 Policies, plus interest.

**ON ALL CLAIMS FOR RELIEF**

8. For costs of suit incurred herein.
9. For such other, further, and/or different relief as may be just and proper.

DATED: March 15, 2012  
Wilmington, Delaware

/s/ Scott D. Cousins  
Scott D. Cousins (No. 3079)  
Paul D. Brown (No. 3903)  
Mark D. Olivere (No. 4291)  
COUSINS CHIPMAN & BROWN, LLP  
1007 North Orange Street, Suite 1110  
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Email: olivere@ccbllp.com

– and –

David M. Stern (admitted pro hac vice)  
Lee R. Bogdanoff (admitted pro hac vice)  
Matthew C. Heyn (admitted pro hac vice)  
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Email: mheyne@ktbslaw.com

*Attorneys to Plaintiff Washington Mutual, Inc.*

## Exhibit A



Policy Number: ELU104380-08

Renewal of Number N/A

☐ Greenwich Insurance Company  
☒ XL Specialty Insurance Company

Members of the XL America Companies

**MANAGEMENT LIABILITY AND  
COMPANY REIMBURSEMENT  
INSURANCE POLICY DECLARATIONS**

Executive Offices  
70 Seaview Avenue  
Stamford, CT 06902-6040  
Telephone 877-953-2636

THIS IS A CLAIMS MADE POLICY. EXCEPT AS OTHERWISE PROVIDED HEREIN, THIS POLICY ONLY APPLIES TO CLAIMS FIRST MADE DURING THE POLICY PERIOD OR, IF APPLICABLE, THE OPTIONAL EXTENSION PERIOD. THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS SHALL BE REDUCED AND MAY BE EXHAUSTED BY THE PAYMENT OF DEFENSE EXPENSES. THIS POLICY PROVIDES FOR THE INSURER TO DEFEND ANY CLAIM MADE AGAINST AN INSURED EXCEPT UNDER THOSE CERTAIN SPECIFIED CIRCUMSTANCES WHERE THE INSURED CHOOSES TO PROVIDE ITS OWN DEFENSE. PLEASE READ AND REVIEW THE POLICY CAREFULLY.

**Item 1. Name and Mailing Address of Parent Company:**

Washington Mutual, Inc.  
1301 Second Avenue  
WMC1201  
Seattle, WA 98101

**Item 2. Policy Period: From:** May 01, 2008 **To:** May 01, 2009

At 12:01 A.M. Standard Time at your Mailing Address Shown Above

**Item 3. Limit of Liability:**

\$25,000,000 Aggregate each Policy Period (including Defense Expenses)

**Item 4. Retentions:**

\$0 each Insured Person under INSURING AGREEMENT I (A)  
\$50,000,000 each Claim under INSURING AGREEMENT I (B)  
\$50,000,000 each Claim under INSURING AGREEMENT I (C)

**Item 5. Optional Extension Period:**

Length of Optional Extension Period:

(Either one year or two years after the end of the Policy Period, at the election of the Parent Company)

Premium for Optional Extension Period: One Year: \$7,787,500.00  
Two Years: N/A  
Three Years: N/A

**Item 6. Pending and Prior Litigation Date:** N/A

**Item 7. Notices required to be given to the Insurer must be addressed to:**

Executive Liability Underwriters  
One Constitution Plaza, 16<sup>th</sup> Floor  
Hartford, CT 06103  
Toll Free Telephone: 877-953-2636

**RECEIVED**

**JUN 03 2008**

Marsh Seattle Finpro Dept  
Valerie Surprenant

# POLICYHOLDER DISCLOSURE

## NOTICE OF TERRORISM INSURANCE COVERAGE

Coverage for acts of terrorism is already included in your current policy. You are hereby notified that under the Terrorism Risk Insurance Program Reauthorization Extension Act of 2007, the definition of "act of terrorism" has changed. As defined in Section 102(1) of the Act: The term "act of terrorism" means any act that is certified by the Secretary of the Treasury in concurrence with the Secretary of the State, and the Attorney General of the United States—to be an act of terrorism; to be a violent act or an act that is dangerous to human life, property, or infrastructure; to have resulted in damage within the United States, or outside the United States in the case of certain air carriers or vessels or the premises of a United States mission; and to have been committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion. Under your existing coverage, any losses caused by certified acts of terrorism may be partially reimbursed by the United States under a formula established by federal law. Under this formula, the United States generally reimburses 85% of covered terrorism losses exceeding the statutorily established deductible paid by the insurance company providing the coverage. However, your policy may contain other exclusions that may affect your coverage. The Terrorism Risk Insurance Program Reauthorization Extension Act contains a \$100 billion cap that limits U.S. Government reimbursement as well as insurers' liability for losses resulting from certified acts of terrorism when the amount of such losses exceeds \$100 billion in any one calendar year. If the aggregate insured losses for all insurers exceed \$100 billion, your coverage may be reduced.

The portion of your annual premium that is attributable to coverage for acts of terrorism is: \$ waived. Any premium waiver is only valid for the current Policy Period.

I ACKNOWLEDGE THAT I HAVE BEEN NOTIFIED THAT UNDER THE TERRORISM RISK INSURANCE PROGRAM REAUTHORIZATION EXTENSION ACT OF 2007, ANY LOSSES CAUSED BY CERTIFIED ACTS OF TERRORISM UNDER MY POLICY COVERAGE WILL BE PARTIALLY REIMBURSED BY THE UNITED STATES AND I HAVE BEEN NOTIFIED OF THE AMOUNT OF MY PREMIUM ATTRIBUTABLE TO SUCH COVERAGE.

Name of Insurer: XL Specialty Insurance Company

Policy Number: ELU104380-08

\_\_\_\_\_  
Signature of Insured

\_\_\_\_\_  
Print Name and Title

\_\_\_\_\_  
Date

## NOTICE TO POLICYHOLDERS

### U.S. TREASURY DEPARTMENT'S OFFICE OF FOREIGN ASSETS CONTROL ("OFAC")

No coverage is provided by this Policyholder Notice nor can it be construed to replace any provisions of your policy. You should read your policy and review your Declarations page for complete information on the coverages you are provided.

This Policyholder Notice provides information concerning possible impact on your insurance coverage due to directives issued by OFAC. **Please read this Policyholder Notice carefully.**

OFAC administers and enforces sanctions policy, based on Presidential declarations of "national emergency". OFAC has identified and listed numerous

- Foreign agents
- Front organizations
- Terrorists
- Terrorist organizations
- Narcotics traffickers

as "Specially Designated Nationals and Blocked Persons". This list can be found on the United States Treasury's web site - <http://www.treas.gov/ofac>.

In accordance with OFAC regulations, if it is determined that you or any other insured, or any person or entity claiming the benefits of this insurance has violated U.S. sanctions law or is a Specially Designated National and Blocked Person, as identified by OFAC, this insurance will be considered a blocked or frozen contract and all provisions of this insurance will be immediately subject to OFAC. When an insurance policy is considered to be such a blocked or frozen contract, neither payments nor premium refunds may be made without authorization from OFAC. Other limitations on the premiums and payments also apply.

- 1) your coverage choices;
  - 2) premiums; billing; and payment records,
  - 3) claims history; and
  - 4) other data related to your account.
- **Claims** – We maintain records on any claims that are made under your policies. The investigation of a claim involves collection of a broad range of information. It also involves many issues, some of which do not directly involve you. We will share with you facts that we collect about your claim; unless prohibited by law. The process of claim investigation also involves advice; opinions; and comments from many people. These may include attorneys and experts. This will help us determine how best to handle your claim. To protect the legal and privileged aspects of opinions and advice, we will not disclose this information to you.
  - **Credit and Financial Reports** – We may receive your credit history. This is to support information you provided during the submission and quote processes. This history will help to underwrite your coverage.

### **Retention and Correction of Personal Information**

We retain personal information only as long as required by law; or as required by our business methods. If we become aware that any information may be incorrect, we will make reasonable effort to correct it.

### **Storage of Personal Information**

Safeguards are in place to protect data and paper files containing personal information.

### **Sharing/Disclosing of Personal Information**

We do not share personal information with a third party outside of Our Group for marketing purposes. This is true unless such sharing is permitted by law. Information may be shared with a third party for necessary servicing of the product. It may also be disclosed for other business reasons as permitted by law.

We do not share personal data outside of Our Group for servicing or joint marketing reasons. We will only disclose such data when a contract containing non-disclosure language has been signed by us and the third party.

Unless a consumer consents, we do not disclose “consumer credit report” type information outside of Our Group. “Consumer credit report type information” means such things as: net worth; credit worthiness; hobbies (piloting, boating, etc.); solvency, etc.

We also do not disclose outside of Our Group personal information for use in marketing. We may share information within Our Group regarding our experience and dealings with the customer.

We may disclose private information about a customer as allowed or otherwise required by law. The law allows us to share a customer’s financial data within Our Group for marketing purposes. The law does not allow customers to limit or prevent such disclosures.

We may also disclose personal information about you or your business to:

- your independent agent or broker;
- an independent claim adjuster; investigator; attorney; or expert;
- persons or groups that conduct scientific studies. This includes actuaries and accountants;
- a medical care facility or professional to verify coverage for a covered person;
- an insurance support group;
- another insurer if to prevent fraud;
- another insurer to properly underwrite a risk;
- insurance regulators;
- governmental authorities pursuant to law;
- an authority in response to a valid administrative or judicial order. This includes a warrant or subpoena;
- a party for the following purposes regarding a book of business: sale; transfer; merger; or consolidation. This applies whether the transaction is proposed or complete;

## MANAGEMENT LIABILITY AND COMPANY REIMBURSEMENT INSURANCE COVERAGE FORM

THIS IS A CLAIMS MADE POLICY WITH DEFENSE EXPENSES INCLUDED IN THE LIMIT OF LIABILITY. PLEASE  
READ AND REVIEW THE POLICY CAREFULLY.

In consideration of the payment of the premium, and in reliance on all statements made and information furnished to Executive Liability Underwriters, the Underwriting Manager for the Insurer identified in the Declarations (hereinafter the Insurer) including the Application and subject to all of the terms, conditions and limitations of all of the provisions of this Policy, the Insurer, the Insured Persons and the Company agree as follows:

### I. INSURING AGREEMENTS

- (A) The Insurer shall pay on behalf of the **Insured Persons Loss** resulting from a **Claim** first made against the **Insured Persons** during the **Policy Period** or, if applicable, the **Optional Extension Period**, for a **Wrongful Act** or **Employment Practices Wrongful Act**, except for **Loss** which the **Company** is permitted or required to pay on behalf of the **Insured Persons** as indemnification.
- (B) The Insurer shall pay on behalf of the **Company Loss** which the **Company** is required or permitted to pay as indemnification to any of the **Insured Persons** resulting from a **Claim** first made against the **Insured Persons** during the **Policy Period** or, if applicable, the **Optional Extension Period**, for a **Wrongful Act** or **Employment Practices Wrongful Act**.
- (C) The Insurer shall pay on behalf of the **Company Loss** resulting solely from any **Securities Claim** first made against the **Company** during the **Policy Period** or, if applicable, the **Optional Extension Period**, for a **Company Wrongful Act**.

### II. DEFINITIONS

- (A) "Application" means:
  - (1) the application attached to and forming part of this Policy; and
  - (2) any materials submitted therewith, which shall be retained on file by the Insurer and shall be deemed to be physically attached to this Policy.
- (B) "Change In Control" means:
  - (1) the merger or acquisition of the **Parent Company**, or of all or substantially all of its assets by another entity such that the **Parent Company** is not the surviving entity;
  - (2) the acquisition by any person, entity or affiliated group of persons or entities of the right to vote, select or appoint more than fifty percent (50%) of the directors of the **Parent Company**; or
  - (3) the appointment of a Receiver, Conservator, Liquidator, Trustee, Rehabilitator, or any comparable authority, with respect to the **Parent Company**.
- (C) "Claim" means:
  - (1) a written demand for monetary or non-monetary relief;
  - (2) any civil proceeding in a court of law or equity, or arbitration;

- (5) the lawful spouse of any person set forth in the above provisions of this definition, but only to the extent the spouse is a party to any Claim solely in their capacity as a spouse of such persons and only for the purposes of any Claim seeking damages recoverable from marital community property, property jointly held by any such person and spouse, or property transferred from any such person to the spouse.

In the event of the death, incapacity or bankruptcy of an individual identified in (J)(1), (2), (3), (4) or (5) above, any Claim against the estate, heirs, legal representatives or assigns of such individual for a **Wrongful Act** or **Employment Practices Wrongful Act** of such individual will be deemed to be a Claim against such individual.

- (K) **"Interrelated Wrongful Acts"** means any **Wrongful Act**, **Company Wrongful Act**, or **Employment Practices Wrongful Act** based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related facts, series of related facts, circumstances, situations, transactions or events.
- (L) **"Joint Venture"** means any corporation, partnership, joint venture, association or other entity, other than a **Subsidiary**, during any time in which the **Parent Company**, either directly or through one or more **Subsidiary(s)**:
- (1) owns or controls at least thirty three percent (33%), but not more than fifty percent (50%), in the aggregate of the outstanding securities or other interests representing the right to vote for the election or appointment of those persons of such an entity occupying elected or appointed positions having fiduciary, supervisory or managerial duties and responsibilities comparable to those of an **Insured Person** of the **Company**, regardless of the name or title by which such position is designated, of a **Joint Venture**; or
  - (2) has the right, by contract, ownership of securities or otherwise, to elect, appoint or designate at least thirty three (33%) of those persons described in (L)(1) above.
- (M) **"Loss"** means damages, judgments, settlements or other amounts (including punitive or exemplary damages, where insurable by law) and **Defense Expenses** in excess of the Retention that the **Insured** is legally obligated to pay. **Loss** will not include:
- (1) the multiplied portion of any damage award;
  - (2) fines, penalties or taxes imposed by law; or
  - (3) matters which are uninsurable under the law pursuant to which this Policy is construed.

**NOTE:** With respect to judgments in which punitive damages are awarded, the coverage provided by this Policy shall apply to the broadest extent permitted by law. If, based on the written opinion of counsel for the **Insured**, punitive damages are insurable under applicable law the Insurer will not dispute the written opinion of counsel for the **Insured**.

- (N) **"Non-Profit Entity"** means a corporation or organization other than the **Company**, which is exempt from taxation under Section 501(c)(3), (4) and (10) of the Internal Revenue Code as amended or any rule or regulation promulgated thereunder.
- (O) **"Parent Company"** means the entity named in ITEM 1 of the Declarations.
- (P) **"Policy Period"** means the period from the Inception Date to the Expiration Date set forth in ITEM 2 of the Declarations or to any earlier cancellation date.

- (C) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged violation of the Employee Retirement Income Security Act of 1974 (ERISA) as amended or any regulations promulgated thereunder or any similar law, federal, state or local law or regulation;
- (D) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act** underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding or arbitration which was brought prior to the Pending and Prior Litigation Date set forth in ITEM 6 of the Declarations;
- (E) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act** which, before the Inception Date of this Policy, was the subject of any notice given under any other Management Liability policy, Directors and Officers liability policy or similar policy;
- (F) brought about or contributed to in fact by any:
  - (1) intentionally dishonest, fraudulent or criminal act or omission or any willful violation of any statute, rule or law; or
  - (2) profit or remuneration gained by any **Insured** to which such **Insured** is not legally entitled;as determined by a final adjudication in the underlying action or in a separate action or proceeding;
- (G) by, on behalf of, or at the direction of the **Company**, except and to the extent such **Claim**:
  - (1) is brought derivatively by a security holder of the **Company** who, when such **Claim** is made and maintained, is acting independently of, and without the solicitation, assistance, participation or intervention of an **Insured Person** or the **Company**; or
  - (2) is brought by the Bankruptcy Trustee or Examiner of the **Company** or any assignee of such Trustee or Examiner, or any Receiver, Conservator, Rehabilitator, or Liquidator or comparable authority of the **Company**;
- (H) by, on behalf of, at the direction of or in the name or right of any **Non-Profit Entity** or **Joint Venture** against an **Insured Person** for a **Wrongful Act or Employment Practices Wrongful Act** while acting in his or her capacity as a director, officer, trustee, regent or governor of such, or persons occupying elected or appointed positions having fiduciary, supervisory or managerial duties and responsibilities comparable to those of an **Insured Person** of the **Company**, regardless of the name or title by which such position is designated; or
- (I) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving an **Insured Person** acting in their capacity as a **Insured Person** of any entity other than the **Company, Non-Profit Entity or Joint Venture**.

No conduct of any **Insured Person** will be imputed to any other **Insured** to determine the application of any of the above EXCLUSIONS.

#### IV. LIMIT OF LIABILITY, INDEMNIFICATION AND RETENTIONS

- (A) The Insurer shall pay the amount of **Loss** in excess of the applicable Retention(s) set forth in ITEM 4 of the Declarations up to the Limit of Liability set forth in ITEM 3 of the Declarations.
- (B) The amount set forth in ITEM 3 of the Declarations shall be the maximum aggregate Limit of Liability of the Insurer under this Policy. Payment of **Loss**, including **Defense Expenses**, by the Insurer shall reduce the Limit of Liability.

under this Policy, the **Insured** and the **Insurer** will use their best efforts to determine a fair and appropriate allocation of **Loss** between that portion of **Loss** that is covered under this Policy and that portion of **Loss** that is not covered under this Policy. Additionally, the **Insured** and the **Insurer** agree that in determining a fair and appropriate allocation of **Loss**, the parties will take into account the relative legal and financial exposures of, and relative benefits obtained in connection with the defense and/or settlement of the **Claim** by, the **Insured** and others.

- (E) In the event that an agreement cannot be reached between the **Insurer** and the **Insured** as to an allocation of **Loss**, as described in (D) above, then the **Insurer** shall advance that portion of **Loss** which the **Insured** and the **Insurer** agree is not in dispute until a final amount is agreed upon or determined pursuant to the provisions of this Policy and applicable law.

## VI. GENERAL CONDITIONS

### (A) NOTICE

- (1) As a condition precedent to any right to payment under this Policy with respect to any **Claim**, the **Insured** shall give written notice to the **Insurer** of any **Claim** as soon as practicable after it is first made.
- (2) If, during the **Policy Period**, the **Insured** first becomes aware of a specific **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act** and if, during the **Policy Period**, the **Insured**:
  - (a) provides the **Insurer** with written notice of the specific **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act**, the consequences which have resulted or may result therefrom (including but not limited to actual or potential damages), the identities of the potential claimants, the circumstances by which the **Insured** first became aware of such **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act**; and
  - (b) requests coverage under this Policy for any subsequently resulting **Claim** for such **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act**;

then any **Claim** subsequently made arising out of such **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act** will be treated as if it had been first made during the **Policy Period**.

- (3) All notices under GENERAL CONDITIONS (A)(1) and (2) must be sent by certified mail or the equivalent to the address set forth in ITEM 7 of the Declarations; Attention: Claim Department.

### (B) INTERRELATED CLAIMS

All **Claims** arising from the same **Interrelated Wrongful Acts** shall be deemed to constitute a single **Claim** and shall be deemed to have been made at the earliest of the time at which the earliest such **Claim** is made or deemed to have been made pursuant to GENERAL CONDITIONS (A)(1) above or GENERAL CONDITIONS (A)(2), if applicable.

### (C) OTHER INSURANCE AND SERVICE IN CONNECTION WITH NON-PROFIT ENTITIES AND JOINT VENTURES

- (1) All **Loss** payable under this Policy will be specifically excess of and will not contribute with any other insurance, including but not limited to any insurance under which there is a duty to defend, unless such other insurance is specifically excess of this Policy. This Policy will not be subject to the terms of any other insurance policy.



**(E) CANCELLATION AND RENEWAL OF COVERAGE**

- (1) Except for the nonpayment of premium, as set forth in (E)(2) below, the **Parent Company** has the exclusive right to cancel this Policy. Cancellation may be effected by mailing to the Insurer written notice when such cancellation shall be effective, provided the date of cancellation is not later than the Expiration Date set forth in ITEM 2 of the Declarations. In such event, the Insurer shall retain the customary short rate portion of the earned premium. Return or tender of the unearned premium is not a condition of cancellation.
- (2) The Insurer may only cancel this Policy for nonpayment of premium. The Insurer will provide not less than twenty (20) days written notice stating the reason for cancellation and when the Policy will be canceled. Notice of cancellation will be sent to the **Parent Company** and the agent of record for the **Insured**, if applicable.
- (3) The Insurer is under no obligation to renew this Policy upon its expiration. Once the Insurer chooses to non-renew this Policy, the Insurer will deliver or mail to the **Parent Company** written notice stating such at least sixty (60) days before the Expiration Date set forth in ITEM 2 of the Declarations.

**(F) OPTIONAL EXTENSION PERIOD**

- (1) If either the **Parent Company** or the Insurer does not renew this Policy, the **Parent Company** shall have the right, upon payment of an additional premium set forth in ITEM 5 of the Declarations, to an extension of the coverage provided by this Policy with respect only to any **Claim** first made during the period of time set forth in ITEM 5 of the Declarations after the Policy Expiration Date, but only with respect to a **Wrongful Act, Company Wrongful Act, or Employment Practices Wrongful Act**, occurring prior to the Policy Expiration Date.
- (2) As a condition precedent to the right to purchase the Optional Extension Period the total premium for this Policy must have been paid in full. The right of the **Parent Company** to purchase the Optional Extension Period will be immediately terminated if the Insurer does not receive written notice by the **Parent Company** advising it wishes to purchase the Optional Extension Period together with full payment of the premium for the Optional Extension Period within thirty (30) days after the Policy Expiration Date.
- (3) If the **Parent Company** elects to purchase the Optional Extension Period as set forth in (F)(1) and (2) above, the entire premium for the Optional Extension Period will be deemed to be fully earned at the Inception Date for the Optional Extension Period.
- (4) The purchase of the Optional Extension Period will not in any way increase the Limit Of Liability set forth in ITEM 3 of the Declarations, and the Limit of Liability with respect to **Claims** made during the Optional Extension Period shall be part of and not in addition to the Limit of Liability for all **Claims** made during the **Policy Period**.

**(G) ASSISTANCE, COOPERATION AND SUBROGATION**

- (1) The **Insured** agrees to provide the Insurer with all information, assistance and cooperation that the Insurer may reasonably request, and further agree that they will do nothing which in any way increases the Insurer's exposure under this Policy or in any way prejudices the Insurer's potential or actual rights of recovery.
- (2) In the event of any payment under this Policy, the Insurer shall be subrogated to all of the potential or actual rights of recovery of the **Insured**. The **Insured** shall execute all papers required and will do everything necessary to secure such rights including but not limited to the execution of such documents as are necessary to enable the Insurer to effectively bring suit in their name, and will provide all other assistance and cooperation which the Insurer may reasonably require.

(L) ENTIRE AGREEMENT

The **Insured** agrees that the Declarations, Policy, including the endorsements, attachments and the **Application** shall constitute the entire agreement between the Insurer or any of its agents and the **Insured** relating to this insurance.

Endorsement No.: 2  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## **TERRORISM PREMIUM ENDORSEMENT**

Please note: The portion of your annual premium set forth in Item 8 of the Declarations that is attributable to coverage for acts of terrorism is: \$ waived.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 4  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## AMEND INSURED V. INSURED EXCLUSION

In consideration of the premium charged, Section III Exclusions (G) of the Policy is amended to read in its entirety as follows:

- (G) by, on behalf of, or at the direction of the Company or Insured Person, except and to the extent such Claim:
- (i) is brought by a security holder of the Company who, when such Claim is made and maintained is acting independently of, and without the active solicitation, assistance, participation or intervention of an Insured Person or the Company;
  - (ii) is brought by the Bankruptcy Trustee or Examiner of the Company, or any assignee of such Trustee or Examiner, any Receiver, Conservator, Rehabilitator, or Liquidator or comparable authority of the Company;
  - (iii) is in the form of a crossclaim, third party claim or other claim for contribution or indemnity by an Insured Person which is part of or results directly from a Claim which is not otherwise excluded by the terms of this Policy;
  - (iv) is an Employment Practices Claim;
  - (v) is brought and maintained in a non-common law jurisdiction outside the United States of America, including its territories and possessions;
  - (vi) is brought and maintained by an Insured Person:
    - (a) who has not served as a director, officer, member of the Board of Managers, or employee of the Company for at least Four (4) years prior to the date such Claim is first made; and
    - (b) who is acting independently of, and without the solicitation, assistance, participation or intervention of an Insured Person or the Company; or
  - (vii) is brought by an employee of the Company pursuant to any federal or state whistleblower protection statute or any rule or regulation promulgated thereunder;

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 6  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## **AMEND SECTION IV ENDORSEMENT**

In consideration of the premium charged, Section IV Limit of Liability, Indemnification and Retentions (F) of the Policy is deleted in its entirety.

All other terms, conditions and limitations of this Policy shall remain unchanged.

- (F) a restatement of the previously filed financial statements of the Company;
- (G) the elimination or suspension of regularly scheduled dividends previously paid by the Company;
- (H) the Company intends to write-off a material amount of its assets;
- (I) the Company has defaulted or intends to default on its debt or intends to engage in a debt restructuring;
- (J) the Company intends to file for bankruptcy protection, a third party is seeking to file for involuntary bankruptcy on behalf of the Company, or bankruptcy proceedings are imminent, whether voluntary or involuntary;
- (K) the commencement or threat of commencement of litigation or governmental or regulatory proceedings against the Company; or
- (L) an unsolicited written offer or bid, whether publicly announced or privately made, by any person or entity, other than an Insured or any affiliate of an Insured, to a director or officer of the Company to effect a Change in Control;

provided that Emergency shall not include any event relating to:

- (1) any fact, circumstance, situation, transaction, event, or wrongful act which was the subject of any notice given under any other policy;
- (2) any fact, circumstance, situation, transaction, event or wrongful act underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding or arbitration which was brought prior to N/A or
- (3) any actual, alleged or threatened discharge, dispersal, release, escape, seepage, transportation, emission, treatment, removal or disposal of pollutants, contaminants, or waste of any kind including but not limited to nuclear material or nuclear waste or any actual or alleged direction, request or voluntary decision to test for, abate, monitor, clean up, recycle, remove, recondition, reclaim, contain, treat, detoxify or neutralize pollutants, contaminants or waste of any kind including but not limited to nuclear material or nuclear waste.

An Emergency shall first occur when any Company or any of its directors or officers first becomes aware of such Emergency. An Emergency shall conclude immediately when the Emergency Firm advises the Company that such Emergency no longer exists or when the applicable limit of liability has been exhausted.

- (d) "Emergency Firm" means any public relations firm, crisis management firm or law firm hired by the Company, with the prior written approval of the Insurer, to perform Emergency Services.
- (e) "Emergency Loss" means:
  - (i) reasonable and necessary fees and expenses incurred by an Emergency Firm in the performance of Emergency Services for the Company;
  - (ii) reasonable and necessary fees and expenses incurred in the printing, advertising, mailing of materials; and

Endorsement No.: 8  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## AMEND LOSS DEFINITION ENDORSEMENT

In consideration of the premium charged, Section II Definition (M) of the Policy is amended to read in its entirety as follows:

"(M) 'Loss' means damages, settlements, judgments (including pre/post judgment interest on a covered judgment), Defense Expenses and Emergency Loss; however, Loss, other than Defense Expenses, shall not include:

- (1) civil or criminal fines or penalties;
- (2) taxes;
- (3) punitive or exemplary damages;
- (4) the multiplied portion of any multiplied damages award;
- (5) any amounts for which an Insured is not financially liable or which are without legal recourse to an Insured; and
- (6) matters which may be deemed uninsurable under the law pursuant to which this Policy shall be construed.

Notwithstanding the foregoing approach, Loss shall specially include:

- (a) civil penalties assessed against any Insured Person pursuant to Section 2(g)(2)(C) of the Foreign Corrupt Practices Act, 15 U.S.C. 78dd-2(g)(2)(C)); and
- (b) punitive, exemplary and multiplied damages imposed upon an Insured.

Enforceability of these subparagraphs (a) and (b) shall be governed by such applicable law that most favors coverage for such penalties and punitive, exemplary and multiple damages.

In the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, Loss with respect to such Claim shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided that this paragraph shall not apply to Defense Expenses or to any Loss in connection with any Claim to which Insuring Agreement (A) applies."

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 10  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## GENERAL E&O EXCLUSION

In consideration of the premium charged:

- (1) No coverage will be available under this Policy for Loss from Claims based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty in connection with the rendering of, or actual or alleged failure to render, any services for others for a fee or commission or on any other compensated basis by any person or entity otherwise entitled to coverage under this Policy.
- (2) Paragraph (1) above is not intended, however, nor shall it be construed, to apply to:
  - (a) Loss resulting from any Securities Claim brought by a security holder of the Company, or from a derivative action brought by or on behalf of, or in the name or right of, the Company, if such Securities Claim or derivative action is brought and maintained independently of, and without the solicitation, assistance, participation or intervention of, any Insured; or
  - (b) Defense Expenses which the Insurer is liable to pay on behalf of the Insured Persons under Insuring Agreement (A) of the Policy.

All other terms, conditions and limitations of this Policy shall remain unchanged.



Utah Federal Savings Bank and Subsidiaries	November 30, 1996
United Western Financial Group and Subsidiaries	January 15, 1997
Industrial Bank and Subsidiaries	December 31, 1998
Long Beach Financial Corporation and Subsidiaries	October 01, 1999
Alta Residential Mortgage Trust and Subsidiaries	February 01, 2000
Mortgage Operations of The PNC Financial Services Group and Subsidiaries	January 31, 2001
Bank United Corp and Subsidiaries	February 09, 2001

It is further understood and agreed that solely with respect to the entities set forth above, the coverage afforded by this Policy shall apply to Wrongful Acts committed or allegedly committed: (a) on, before and after the Acquisition/Creation Date set for above, and (b) prior to the effective date that such Subsidiary ceases to be a Subsidiary.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 13  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## **AMEND NOTICE OF CLAIM ENDORSEMENT**

In consideration of the premium charged, Section VI General Conditions (A)(1) of the Policy is amended to read in its entirety as follows:

- "(1) As a condition precedent to any right to payment under this Policy with respect to any Claim, the Insured shall give written notice to the Insurer of any Claim as soon as practicable after it is first made and the General Counsel and Risk Manager of the Parent Company first becomes aware of such Claim, but in no event later than Sixty (60) days after the expiration of the Policy Period."

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 15  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## **PRIORITY OF PAYMENTS ENDORSEMENT**

In consideration of the premium charged, it is understood and agreed that if Loss, including Defense Expenses, shall be payable under more than one of the Insuring Agreements of this Policy, then the Insurer shall, to the maximum extent practicable and subject at all times to the Insurer's maximum aggregate Limit of Liability as set forth in Item 3 of the Declarations, pay such Loss as follows:

- (1) first, the Insurer shall pay that Loss, if any, which the Insurer may be liable to pay on behalf of the Insured Persons under Insuring Agreement (A);
- (2) second, the Insurer shall pay that Loss, if any, which the Insurer may be liable to pay on behalf of the Company under Insuring Agreement (B); and
- (3) third, the Insurer shall make such other payments which the Insurer may be liable to make under Insuring Agreement (C) or otherwise.

In the event the Insurer withholds payment pursuant to paragraphs (2) and/or (3) above at the written request of the chief executive officer of the Parent Company, then the Insurer shall at such time and in such manner as shall be set forth in such written instructions of the chief executive officer of the Parent Company, remit such payment to a Company or directly to or on behalf of an Insured Person.

The bankruptcy or insolvency of any Company or any Insured Person shall not relieve the Insurer of any of its obligations to prioritize payment of covered Loss under this Policy pursuant to this Endorsement.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 17  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## **DOMESTIC PARTNER ENDORSEMENT**

In consideration of the premium charged, Section II Definition (J)(5) of the Policy shall include the domestic partner of any person set forth in Section II Definition (J)(1) – (J)(4), but only to the extent the domestic partner is a party to any Claim solely in their capacity as a domestic partner to such persons and only for the purposes of any Claim seeking damages recoverable from community property, property jointly held by any such person and domestic partner, or property transferred from any such person to the domestic partner.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 19  
 Named Insured: Washington Mutual, Inc.  
 Policy No.: ELU104380-08

Effective: May 01, 2008  
 12:01 A.M. Standard Time  
 Insurer: XL Specialty Insurance Company

## SPECIFIED CLAIMS EXCLUSION

In consideration of the premium charged, no coverage will be available under this Policy for Loss, including Defense Expenses, in connection with any proceeding set forth below, or in connection with any Claim based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any such proceeding or any fact, circumstance or situation underlying or alleged therein:

1. *South Ferry L.P. #2 v. Killinger et al.*, No. CV04-1599C (W.D. Wa., Filed Jul. 19, 2004) (the "South Ferry Action").
2. *Lee Family Investments, by and through its Trustee W.B. Lee v. Killinger et al.*, No. CV05-2121C (W.D. Wa., Filed Nov. 29, 2005) (the "Lee Family Action").
3. *Koesterer v. Washington Mutual, Inc., et al.*, No. 07-CIV-9801 (S.D.N.Y. Filed Nov. 5, 2007).
4. *Abrams v. Washington Mutual, Inc., et al.*, No. 07-CIV-9806 (S.D.N.Y. Filed Nov. 5, 2007).
5. *Nelson v. Washington Mutual, Inc. et al.*, No. C07-1809 (W.D. Wa. Filed Nov. 7, 2007).
6. *Garber v. Washington Mutual, Inc., et al.*, No. (S.D. N.Y. Filed Dec. 20, 2007).
7. *Sneva v. Killinger, et al.*, No. C07-1826 (W.D. Wa. Filed Nov. 13, 2007).
8. *Harrison v. Killinger, et al.*, No. C07-1827 (W.D. Wa. Filed Nov. 13, 2007).
9. *Catholic Medical Mission v. Killinger et al.*, No. 07-2-36548-6SEA (Wa. Super. Ct. Filed Nov. 16, 2007).
10. *Slater v. Killinger et al.*, No. C08-0005 (W.D. Wa. Filed Jan. 3, 2008).
11. *Procida v. Killinger et al.*, No. 08-Civ-0565 (S.D.N.Y. Filed Jan. 18, 2008).
12. *Ryan v. Killinger et al.*, C08-0095 (W.D. Wa. Filed Jan. 18, 2008).
13. *Breene v. Killinger, et al.*, No. 07-2-41042-2SEA (Wa. Super. Ct. Filed Dec. 28, 2007).
14. *Gibb v. Killinger, et al.*, No. 07-2-41044-9SEA (Wa. Super. Ct. Filed Dec. 28, 2007).
15. *Spears v. Washington Mutual, Inc., et al.*, No. C08-00868-HRL (N.D. Cal. Filed Feb. 8, 2008).

16. ADELE BRODY, Derivatively on Behalf of WASHINGTON MUTUAL, INC., Plaintiff, vs. FIRST AMERICAN CORPORATION, FIRST AMERICAN EAPPRAISEIT, KERRY K. KILLINGER, THOMAS W. CASEY, DEBORA D. HORVATH, STEPHEN J. ROTELLA, JAMES B. CORCORAN, DARYL D. DAVID, AFLRED R. BROOKS, DAVID C. SCHNEIDER, TODD H. BAKER, FAY L. CHAPMAN, JOHN F. WOODS, RONALD J. CATHCART, PHILLIP D. MATTHEWS, ANNE V. FARRELL, WILLIAM G. REED, JR. MICHAEL K. MURPHY, JAMES H. STEVER, STEPHEN E. FRANK, MARY E. PUGH, MARGARET OSMER MCQUADE, CHARLES M. LILLIS, ORINC. SMITH, THOMAS C. LEPPERT and REGINA T. MONTOYA, Defendants, and, WASHINGTON MUTUAL, INC., a Washington Corporation

Endorsement No.: 20  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## **INSURING AGREEMENT (A) ENDORSEMENT**

In consideration of the premium charged, solely with respect to Claims made under Section I Insuring Agreements (A) of the Policy, the Insurer may not void and/or rescind this Policy.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 22  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## **AMEND EXCLUSION (F) ENDORSEMENT**

In consideration of the premium charged, Section III Exclusions (F) of the Policy is amended to read in its entirety as follows:

- (F) brought about or contributed to in fact by any:
- (1) intentionally dishonest, fraudulent or criminal act or omission or any willful violation of any statute, rule or law; or
  - (2) profit or remuneration gained by any Insured to which such Insured is not legally entitled;
- as determined by a final adjudication."

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 24  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## CLARIFICATION ENDORSEMENT

In consideration of the premium charged, in the event that there is an inconsistency between a state amendatory attached to this Policy and any term or condition of this Policy, then it is understood and agreed that, where permitted by law, the Insurer shall apply those terms and conditions of either the state amendatory or the Policy which are more favorable to the Insured.

All other terms, conditions and limitations of this Policy shall remain unchanged.



Endorsement No.: 26  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## **AMEND DEFINITION OF INSURED PERSON**

In consideration of the premium charged, the term "Insured Person" shall include those individuals holding the following positions for the Company:

Risk Manager  
General Counsel  
Trustees

All other terms, conditions and limitations of this policy shall remain unchanged.

Endorsement No.: 28  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

## SPECIFIC REQUEST ENDORSEMENT

In consideration of the premium charged:

- (1) Section II Definition (J)(3) and (4) of the Policy are amended to read in their entirety as follows:
  - "(3) an individual identified in (J)(1) above who, at the specific request of Company, is serving as a director, officer, trustee, regent or governor of a Non-Profit Entity;
  - (4) any individual identified in (J)(1) above who, at the specific request of the Company is serving in an elected or appointed position having fiduciary, supervisory or managerial duties and responsibilities comparable to those of an Insured Person of the Company, regardless of the name or title by which such position is designated, of a Joint Venture; or"
- (2) Section II Definition (S)(2) and (3) of the Policy are amended to read in their entirety as follows:
  - "(2) Insured Person of the Company who, at the specific request of the Company, is serving as a director, officer, trustee, regent or governor of a Non-Profit Entity;
  - (3) Insured Person of the Company who, at the specific request of the Company, is serving in an elected or appointed position having fiduciary, supervisory or managerial duties and responsibilities comparable to those of an Insured Person of the Company, regardless of the name or title by which such position is designated, of a Joint Venture."

All other terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No.: 30  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

XL 80 06 04 00

## DELETE AN ENDORSEMENT

In consideration of the premium charged, Endorsement Nos. 4 and 15 are deleted.

All other terms, conditions and limitations of this policy shall remain unchanged.

**RECEIVED**

JUL - 3 2008

Marsh USA Inc.  
Seattle Finpro Dept.

Endorsement No.: 32  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: May 01, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

Manuscript 8387 06 08

## **PRIORITY OF PAYMENTS ENDORSEMENT**

In consideration of the premium charged, it is understood and agreed that if Loss, including Defense Expenses, shall be payable under more than one of the Insuring Agreements of this Policy, then the Insurer shall, to the maximum extent practicable and subject at all times to the Insurer's maximum aggregate Limit of Liability as set forth in Item 3 of the Declarations, pay such Loss as follows:

- (1) first, the Insurer shall pay that Loss, if any, which the Insurer may be liable to pay on behalf of the Insured Persons under Insuring Agreement (A);
- (2) second, the Insurer shall pay that Loss, if any, which the Insurer may be liable to pay on behalf of the Company under Insuring Agreement (B); and
- (3) third, the Insurer shall make such other payments which the Insurer may be liable to make under Insuring Agreement (C) or otherwise.

In the event the Insurer withholds payment pursuant to paragraphs (2) and/or (3) above, then the Insurer shall at such time and in such manner as shall be set forth in such written instructions of a majority of the Board of Directors of the Parent Company, remit such payment to a Company or directly to or on behalf of an Insured Person.

The bankruptcy or insolvency of any Company or any Insured Person shall not relieve the Insurer of any of its obligations to prioritize payment of covered Loss under this Policy pursuant to this Endorsement.

All other terms, conditions and limitations of this Policy shall remain unchanged.

**RECEIVED**

JUL - 3 2008

Marsh USA Inc.  
Seattle Finpro Dept.

Endorsement No.: 34  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: September 26, 2008  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

XL 80 06 04 00

## **DELETE AN ENDORSEMENT**

In consideration of the premium charged, Endorsement No. 33 is deleted.

All other terms, conditions and limitations of this policy shall remain unchanged.

Endorsement No.: 36  
Named Insured: Washington Mutual, Inc.  
Policy No.: ELU104380-08

Effective: April 15, 2011  
12:01 A.M. Standard Time  
Insurer: XL Specialty Insurance Company

DO 80 78 10 00

## **AMEND PARENT CORPORATION NAME AND ADDRESS ENDORSEMENT**

In consideration of the premium charged, the name and address of the Parent Company set forth in Item 1 of the Declarations is amended to read as follows:

Washington Mutual, Inc.  
925 Fourth Avenue, Suite 2500  
Seattle, WA 98104

All other terms, conditions and limitations of this Policy shall remain unchanged.