**SC96885**

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**IN THE SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI *ex rel.***
**ATTORNEY GENERAL JOSHUA D. HAWLEY and**
**THE BOARD OF TRUSTEES OF THE MISSOURI**
**PETROLEUM STORAGE TANK INSURANCE FUND,**

**Plaintiffs-Appellants,**

**vs.**

**PILOT TRAVEL CENTERS, LLC,**

**Defendant-Respondent.**

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**Appeal from the Circuit Court of Cole County, Missouri**
**The Honorable Jon Beetem, Circuit Judge**

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# SUBSTITUTE BRIEF OF APPELLANTS

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## INTRODUCTION

This case addresses whether the Attorney General or the Board of Trustees of the state-created Petroleum Storage Tank Insurance Fund can sue to stop a third party from inflicting serious financial injury on that Fund. The General Assembly created the Fund to provide insurance to those who store petroleum in tanks, and the program brings stability to an industry on which all Missourians rely and ensures that the financial resources are available for prompt clean-up of petroleum storage leaks. Yet the trial court held that the State has *no* interest in suing to stop Pilot from unjustly enriching itself—to the tune of more than $700,000—at the Fund's expense. The trial court also held that the Board responsible for overseeing and operating the Fund has no power to enter into subrogation contracts—agreements where a party assigns to an insurer its liability claims in exchange for insurance—even though those contracts are ubiquitous in and integral to the insurance industry. The trial court's decision undermines the State's ability to maintain the financial integrity of an important public program by obstructing the State's authority to recoup funds expended in cleaning up petroleum spills from those responsible. And its logic would permit beneficiaries of the Fund, such as Pilot, to obtain double recovery for the costs of environmental clean-up. The decision should be reversed.

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## JURISDICTIONAL STATEMENT

This case involves the timely appeal of a final judgment of dismissal, so it falls within this Court's appellate jurisdiction. Mo. Const. art. V, § 3.

On June 22, 2016, the Circuit Court entered an order of dismissal in favor of Respondent. LF 24. Thirty days later, Appellants filed an authorized after-trial motion to amend the judgment, LF 25, 150, which extended the trial court's jurisdiction for ninety days.

On October 11, 2016, eighty-one days after Appellants filed their motion, the trial court vacated its June 22 order, leaving nothing to appeal. LF 25. The court then issued a new final order on January 24, 2017, in favor of Respondent. LF 2, 4–19. The judgment became final thirty days later. Rule 81.05(a)(1). Eight days later, Appellants timely filed a notice of appeal. Rule 81.04(a); LF 361–62.

## STATEMENT OF FACTS

In 1996, the General Assembly replaced a previous insurance fund with the Petroleum Storage Tank Insurance Fund. § 319.129, *et seq.*, RSMo. The Fund provides owners of underground storage tanks with the opportunity to insure against petroleum spills. § 319.129.1, RSMo. The fund promotes the stability of the fuel industry—on which all consumers depend—and ensures that financial resources are available for prompt clean-up of petroleum spills, thus protecting the public from the environmental hazards of spills. LF 33.

The General Assembly also created a Board of Trustees and vested it with broad powers to manage the fund, including the powers to oversee the "general administration of the fund," to exercise "the responsibility for the proper operation of the fund," and to make "all decisions relating to payments from the fund." § 319.129.4, RSMo. The Board also has the power to decide who can obtain coverage. Owners of storage tanks who wish to participate in the fund must apply to the Board for admission and, if admitted, pay routine participation fees, analogous to premiums, set by the Board. §§ 319.131.3, 319.133.1, RSMo; LF 34.

Pilot Travel Center's predecessor, Williams TravelCenters Inc., applied to the Board for insurance coverage. LF 34. Exercising its power of "general administration" over the Fund, the Board agreed to admit Williams only if Williams entered into a Participation Agreement "in return for coverage." LF

34–35. The Participation Agreement contained terms frequently used in insurance contracts, providing details of the insurance agreement between the Fund as insurer and Williams as the insured. *Id.*

Under the Participation Agreement, Williams agreed that if it ever incurred a claim against a third party in relation to a petroleum spill that the Fund helped pay to clean up, then Williams would assign to the Board its rights against that third party and help the Board pursue those claims. LF 35. Such assignments are known as subrogation agreements. *Id.* In the subrogation clause, Williams agreed to "cooperate with [the Board] in the investigation, settlement or defense" of any claim it had against- a third party who caused a petroleum spill. *Id.* It also transferred to the Board all recovery rights, agreed not to "impair them," and agreed to "help [the Board] enforce them." *Id.* Pilot later succeeded Williams, assumed these duties under the Participation Agreement, and acquired the benefits of participation in the Fund. LF 34. Pilot reapplied annually to continue its participation in the Fund, each year signing an acknowledgement that its annual application would become part of a contractual agreement between it and the Board. LF 34.

In June 2007, one of Pilot's storage tanks spilled petroleum in Higginsville, Missouri. LF 36. Under the Participation Agreement that granted Pilot insurance coverage, Pilot filed twenty-four reimbursement

requests, totaling $723,932.20; the Board fulfilled those requests. LF 36–37. An investigation revealed that a defective pipe manufactured by a company called Environ Products caused the spill. LF 36–37.

The Board filed a products liability suit against Environ to recoup the damages Environ's defective pipe had caused. Pilot's involvement was "instrumental to the case," and Pilot was required to "cooperate" and "assist" the Board with the suit under the Participation Agreement. LF 35, 39. But when the Board contacted Pilot about assisting in the suit and signing over its liability claims against Environ, Pilot ignored the Board. For five years, the Board repeatedly contacted Pilot, reminding Pilot of its obligations under the Participation Agreement. LF 38–39. Pilot ignored these communications every time. *Id.* Just two days before the statute of limitations would run, the Board sued Environ, having still not heard back from Pilot. LF 37. The Board continued trying to contact Pilot for two more years. LF 40. But Pilot remained steadfast in its refusal to assist the Board. Pilot refused even to sign a Standstill Agreement—foregoing future action against Environ—that would have allowed the suit to proceed. LF 39. Without Pilot's cooperation, the Board ultimately was forced to dismiss the suit against Environ. LF 40.

The Attorney General and the Board then sued Pilot for breach of contract and, in the alternative, for unjust enrichment. LF 37–43. Pilot moved to dismiss for lack of standing. LF 81–108. On June 22, 2016, the trial

court granted Pilot's motion to dismiss. The trial court acknowledged that the Attorney General may bring all suits to "protect the rights and interests of the state," § 27.060, RSMo, and has similar powers at common law, but it determined that the State had *no* interest in the lawsuit because the General Assembly administratively separated the Fund from general revenue, leaving the State with no pecuniary interest and the Fund with no sovereign immunity. App. 5–6. The trial court also held that the Board had no power to sue and could not even enter into subrogation agreements—which are ubiquitous in insurance contracts—because the court determined that it could not locate a statute expressly granting the Board those powers. App. 3–4, 7–8. The trial court did not mention the claim for unjust enrichment.

This Court then issued two decisions that cast doubt on the trial court's holding. In one case, this Court held that "[t]he Board certainly has the right to sue to recover moneys owed to the Fund." *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397, 404 (Mo. banc 2016). This opinion also cited section 27.060 and stated that the Attorney General had authority to sue to rectify harms against the Board. *Id.* In another opinion, this Court recognized the validity of suits against the Board despite the lack of a sue-or-be-sued clause in the enabling statutes. *City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738, 752 (Mo. banc 2016).

On July 22, 2016, the Attorney General and the Board timely moved to amend the judgment in the light of these authorities. LF 150. That after-trial motion extended the trial court's jurisdiction until October 20, 2016. Rule 81.05(a). On October 11, 2016, the trial court vacated its June 22 order, 81 days after its entry. LF 360. The order vacating the June 22 judgment stated, "Judgment set aside. Revised judgment due 10/25/16. Cmts. by state 10 days later." LF 360. The accompanying docket entry read, "Order to Vacate/Set Aside." LF 25.

On January 24, 2017, the trial court entered a new judgment rejecting the State's argument that this Court's intervening decisions conflicted with the trial court's initial order, and interpreting the statements in those decisions as non-binding dicta. LF 4–19. The trial court also reasserted the same justifications for dismissing the other issues. *Id.* And for the first time, it addressed the claim for unjust enrichment. Even though it had already determined that no subrogation contract existed, it dismissed the claim for unjust enrichment because the Board "has entered into an express contract." LF 18.

The January 24, 2017 order became final on February 23. Eight days later, the Attorney General and Board timely appealed. LF 361–62.

## POINTS RELIED ON

**I. This Court has appellate jurisdiction because the Attorney General and the Board timely appealed the January 24, 2017 order, in that a party can appeal only final judgments, and the trial court vacated its June 22, 2016 order before it became final, leaving nothing to appeal until the court issued its January 24, 2017 order.**

– *Steiferman v. K-Mart Corp.*, 746 S.W.2d 145 (Mo. App. W.D. 1988)

– *Scott v. Smith*, 34 S.W. 864 (Mo. 1896)

**II. The trial court erred when it held that the Attorney General lacked standing to sue, because the Attorney General can sue when the State's interests are implicated, in that the State has an interest in maintaining the fiscal integrity of the Fund and in fostering the goals the Fund pursues: stabilizing the petroleum industry and providing for prompt cleanup of environmental spills.**

- § 27.060, RSMo
- *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122 (Mo. banc 2000)
- *Thatcher v. City of St. Louis*, 122 S.W.2d 915 (Mo. 1938)
- *Fogle v. State*, 295 S.W.3d 504 (Mo. App. W.D. 2009)

**III. The trial court erred when it held that the Board lacked standing to sue, because the Board's powers include all powers that promote the Board's ability to carry out the "general administration of the fund" and "the proper operation of the fund," in that (1) this Court has expressly held that the Board has the right to sue, and (2) entering into subrogation contracts and suing to enforce those contracts are inherent tasks in the general administration of insurance funds.**

- § 319.129.4, RSMo
- *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397 (Mo. banc 2016)
- *State ex inf. Fuchs v. Foote*, 903 S.W.2d 535 (Mo. banc 1995)
- *State ex rel. Sch. Dist. of City of Indep. v. Jones*, 653 S.W.2d 178 (Mo. banc 1983)

**IV. The trial court erred when it dismissed the claim for unjust enrichment, because an unjust enrichment claim can be pleaded in the alternative, in that it would be unjust to allow Pilot to retain the benefit of insurance coverage when it obtained that benefit only because it agreed to subrogate.**

- 16 *Couch on Ins.* (2017)
- *Steelhead Townhomes, L.L.C. v. Clearwater 2008 Note Program, LLC*, 2017 WL 4890796 (Mo. App. W.D., Oct. 31, 2017)

## SUMMARY OF THE ARGUMENT

The Attorney General and the Board timely filed a notice of appeal from the order of January 24, 2017. That the trial court had issued an order in June 2016 does not deprive this Court of jurisdiction. While the trial court retained jurisdiction, it unambiguously vacated that order, leaving nothing to appeal. It had the power to do so at common law and under this Court's rules. And even if its decision to vacate were erroneous, that decision would not have prejudiced Pilot. Pilot would have had the duty to challenge the vacatur. It never tried to do so.

The Attorney General has authority to sue. Under the powers granted him by the common law and by statute, the Attorney General has broad authority to sue to vindicate the State's interest. The trial court held that the Attorney General could not sue because, according to the trial court, the State has no direct pecuniary interest in this suit. The trial court neglected to consider that the State has a pecuniary interest because the Fund is, by statute, located "within the state treasury." But more importantly, the trial court should not have focused solely on pecuniary interest. The Fund is a creature of State statute, and the State has a strong interest in maintaining the integrity of its programs—especially when the program stabilizes the petroleum industry (on which all Missourians rely) and protects both the public and the environment by ensuring prompt cleanup of petroleum spills.

The Board also has independent authority to sue. This Court has already expressly held that "[t]he Board certainly has the right to sue to recover moneys owed to the Fund." *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397, 404 (Mo. banc 2016). When this Court did so, it cited the specific statute that gives the Board this authority, § 319.129.4, RSMo. That statute gives the Board the power to make "all decisions relating to payments from the fund," the power to ensure the "general administration of the fund," and the power to ensure "the proper operation of the fund." The Board conditioned Pilot's enrollment into the insurance program on Pilot's agreeing to subrogate. That decision "relat[es] to payments from the fund" because Pilot never could have received "payments from the fund" but for its agreement. Entering into subrogation agreements is also part of the "general administration" and "proper operation" of the Fund because those agreements are ubiquitous in and integral to insurance arrangements. Subrogation agreements are tailor-made to advance the specific purpose for which the Fund was created.

Even if the subrogation agreement were invalid, the Attorney General and the Board could still sue under their claim for unjust enrichment. The trial court contradicted itself when—having determined that no subrogation contract existed—it dismissed the claim for unjust enrichment because the Board "has entered into an express contract." LF 18. A plaintiff can plead

both a claim for breach of contract and a claim for unjust enrichment in the alternative. The Board accepted Pilot into the program only because Pilot agreed to subrogate. It would be unjust for Pilot to obtain over $700,000 in payments by agreeing to subrogate, and then to turn around and renege on that obligation after it obtained payments.

## STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to dismiss a petition for failure to state a claim. *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 413 (Mo. banc 2014). "The facts alleged in the petition are assumed to be true and are construed liberally in favor of the plaintiff." *Id.*

## ARGUMENT

### I. This Court has appellate jurisdiction because the Attorney General and the Board timely appealed the January 24, 2017 order, in that a party can appeal only final judgments, and the trial court vacated its June 22, 2016 order before it became final, leaving nothing to appeal until the court issued its January 24, 2017 order.

This Court has jurisdiction because the Appellants timely filed a notice of appeal. The district court entered a final judgment on January 24, 2017. When the Attorney General and the Board failed to file after-trial motions, that order became final on February 23, 2017. Mo. Sup. Ct. R. 81.05. The

Attorney General and the Board then had until March 5, 2017, to invoke appellate jurisdiction by filing a notice of appeal. Rule 81.04. They satisfied that requirement by filing the notice on March 3, 2017.

Appellants had no opportunity or obligation to appeal the June 22, 2016 order that the trial court had entered, because the trial court unambiguously vacated that order before it became final. The Attorney General and the Board filed an authorized after-trial motion on July 22, 2016, extending the trial court's jurisdiction for ninety days until October 20, 2016. Rule 81.05. On October 11, 2016—the eighty-first day—the trial court, referring to the June 22 order, entered an order that read, "Judgment set aside. Revised judgment due 10/25/16. Cmts. by state 10 days later." LF 360.

It is well established that "setting aside" an order is equivalent to "vacating" that order. "Black's Law Dictionary defines the word 'vacate' as: 'To annul; to set aside.' The trial court's order which 'set aside' the judgment had the effect of 'vacating' the judgment." *Steiferman v. K-Mart Corp.*, 746 S.W.2d 145, 147 (Mo. App. W.D. 1988) (ellipsis and internal citation omitted). "[S]ince the trial court acted to set aside the . . . judgment on [October 11], the judgment never became final." *Id.*

When the trial court "set aside" the order, it deliberately vacated that order. In the docket sheet, the trial court referred to its order as an "Order to Vacate/Set Aside." LF 25. Rule 81.05 determines when a "judgment becomes

final," but when the trial court vacated its order, no judgment remained, and nothing could become final. The trial court retained jurisdiction and issued a new order on January 24, 2017, from which the Attorney General and the Board timely appealed.

The trial court was fully within its power to vacate the June 22, 2016 order for at least two reasons. First, as this Court has long held, courts have "unquestionable" authority at common law to vacate any order over which they still retain jurisdiction. "[A] trial court possessing general jurisdiction, and proceeding according to the course of the common law, has control of its judgments . . . during the term at which they are rendered, and power to vacate them in its discretion." *Scott v. Smith*, 34 S.W. 864, 865 (Mo. 1896); *State ex rel. Brainerd v. Adams*, 84 Mo. 310, 314 (Mo. 1884) ("The authority of the court, on motion of the party complaining to set aside the verdict, at common law, is unquestionable."). The trial court still had jurisdiction over the June 22 order because it had not yet become final. *Scott*, 34 S.W. at 865.

Second, the court retained the power to vacate the order under Rule 75.01. Some decisions have held that a motion to amend the judgment is not "ruled" under Rule 81.05 unless "(1) the motion is explicitly denied; (2) the trial court takes no action on it; or (3) an amended judgment is actually executed and filed." *In re Marriage of Noles*, 343 S.W.3d 2, 9 (Mo. App. S.D. 2011). But courts have been clear that Rule 81.05 only extends the length of

the court's jurisdiction; it does not strip the court of the inherent authority over its own judgments that it always has when it possesses jurisdiction and nothing in the text of Rule 81.05 says otherwise. "During this 90-day period [created by Rule 81.05], the court retains the same power under Rule 75.01 and may vacate, reopen, correct, amend or modify the judgment." *Steiferman*, 746 S.W.2d at 147 (emphasis added). The trial court did not have to "rule[]" on the motion to amend to vacate the June 22 judgment, because it possessed independent authority to vacate that order.

Even if the trial court erroneously vacated the order (it did not), that error would not deprive this Court of jurisdiction. Once the court vacated the order, the Attorney General and Board had nothing left to appeal. Any notice of appeal they filed would have been needlessly wasteful and sewn confusion. And the vacatur disfavored Pilot, not the Attorney General and the Board. If Pilot believed the vacatur was improper, it had the obligation to challenge that vacatur. Pilot never did so.

## II. The trial court erred when it held that the Attorney General lacked standing to sue, because the Attorney General can sue when the State's interests are implicated, in that the State has an interest in maintaining the fiscal integrity of the Fund and in fostering the goals the Fund pursues: stabilizing the petroleum industry and providing for prompt cleanup of environmental spills.

The Attorney General has authority to bring any civil suit to vindicate the State's interests regardless of whether the Board has the right to sue. The Attorney General thus has standing to sue here to protect the financial integrity of the State's program, stabilize the petroleum industry, and protect the environment and the public by ensuring resources are available for prompt cleanup of petroleum spills.

### A. The Attorney General has authority to bring suits that implicate the interests of the State.

The Constitution, the common law, and state statutes vest the Attorney General with substantial powers to pursue the public interest. The Attorney General is the "only constitutional officer whose powers and duties are not specifically provided for or limited by the constitution." *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. banc 2000). The General Assembly can pass statutes granting the Attorney General powers. *Id.* And because the

Constitution itself does not spell out the Attorney General's power, the Attorney General is automatically vested "with all of the powers of the attorney general at common law." *Id.*; § 1.010, RSMo (adopting the common law).

Those powers at common law are substantial. When the position of the Attorney General first emerged, its duty was to pursue the interests of the crown. The Attorney General was "chief legal representative of the king" but also possessed a substantial "repository of power and discretion" to pursue "the public interest." *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir. 1976). Those powers shifted and enlarged when the institution moved to the United States. "[A]ll of the prerogatives which pertain to the crown in England under the common law are here vested in the people." *Fergus v. Russel*, 110 N.E. 130, 143 (Ill. 1915). So in the United States, the Attorney General is "the law officer of the people." *Id.* Because the Attorney General had a broad duty and discretion to pursue the king's interests at common law, the Attorney General now has broad powers to pursue the interests of the People today. The modern Attorney General is "the great officer of state to whom the responsibility of safeguarding and representing the public interest is entrusted." Nat'l Assoc. Attys. Gen., *State Attorneys General Powers and Responsibilities* 31 (Emily Myers ed., 3d ed. 2013) (quoting Edwards, *The Law Offices of the Crown* 295 (1964)).

As this Court has held, the Attorney General's powers at common law to pursue the public interest are "so varied and numerous that they have perhaps never been specifically enumerated." *Thatcher v. City of St. Louis*, 122 S.W.2d 915, 916 (Mo. 1938). Yet the General Assembly has enumerated some of those powers. Specifically, the General Assembly expressly vested the Attorney General with authority to "institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state." § 27.060, RSMo. And because the General Assembly declares the interests of the State by passing statutes, "[t]he Attorney General is, of course, generally authorized to seek enforcement of the General Assembly's statutory purposes." *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. App. W.D. 2009).

The Attorney General's authority to pursue the public interest reaches even farther. It is well-settled that the Attorney General can sue where there is "no other remedy for a great wrong, and public justice and individual rights were likely to suffer for want of a prosecutor." *American Tobacco*, 34 S.W.3d at 135 (quoting St*ate ex rel. McKittrick v. Mo. Public Serv. Comm'n*, 175 S.W.2d 857, 864 (Mo. banc 1943)). Even if the trial court had been correct when it determined that the Board lacked standing to sue, that determination would only support the authority of the Attorney General to sue in its place. If no one else is available to vindicate a public interest, the

Attorney General has inherent authority to do so. This doctrine has its roots in the power of the Attorney General to sue where a trust was established "for the benefit of an indefinite number." *Dickey v. Volker*, 11 S.W.2d 278, 281–82 (Mo. banc 1928) ("[I]f no individuals are entitled to sue, the Attorney General may sue."). The General Assembly established something similar—a "special trust fund" for the general benefit of the public—when it created the Fund. § 319.129, RSMo. If the Board has no authority to sue, the Attorney General certainly does.

The General Assembly did not remove this authority when it granted the Attorney General specific authority to enforce subrogation interests in other areas. The trial court referred to a provision in the Tort Victim's Compensation Fund that creates a subrogation interest and provides the Attorney General authority to "enforce" that provision. LF 10 (citing § 537.693, RSMo). But that provision does not imply that the Attorney General lacks authority to enforce other subrogation interests not specifically enumerated by statutes. First, the General Assembly can restrict the Attorney General's authority only "by a statute enacted *specifically* for the purpose of limiting his power." *Am. Tobacco*, 34 S.W.3d at 136 (emphasis added). Nothing about this statute specifically strips the Attorney General of its powers. At most, it merely delineates in a specific statute the broad general powers the Attorney General already possesses. *See Yates v. United*

*States*, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting) (noting that overlapping grants of statutory authority often "reflect[] belt-and-suspenders caution" by legislators). Second, this Court has also acknowledged that the Attorney General's powers are "so varied and numerous that they have perhaps never been specifically enumerated." *Thatcher*, 122 S.W.2d at 916. That no statute specifically gives the Attorney General authority to enforce the Board's subrogation interests does not mean it lacks that authority. The Attorney General has broad, sweeping authority to sue to vindicate any public interest. § 27.060, RSMo.

Because the Attorney General has such broad powers to safeguard and protect the interest of the State and the people, the Attorney General has standing to bring this suit if doing so would pursue a public interest. The "Attorney General, both because of his statutory and common law powers, is a proper party to bring an action for the state . . . which would prevent injury to the general welfare." *State ex rel. Taylor v. Wade*, 231 S.W.2d 179, 182 (Mo. banc 1950).

**B. The Attorney General has authority to bring this suit because it implicates the interests of the State.**

The trial court did not dispute that the Attorney General has the power to bring this suit if it is in the public interest. It acknowledged that section 27.060 and the common law provide the Attorney General authority to

"protect the rights and interests of the state." LF 9–10 (quoting § 27.060). Yet it determined that the State has *no* interest in this suit because the General Assembly chose to separate the Fund from the general revenue, stripping the Fund of sovereign immunity and removing from the State its pecuniary interest. LF 9–10. And it held that it could identify no other statutory authority that gave the Attorney General authority to sue. LF 10.

The trial court erred when it held that the State had no pecuniary interest in the Fund. Although the General Assembly separated money in the Fund from the general revenue, the State has a pecuniary interest in the Fund because all money in the Fund still lies "within the state treasury." § 319.129, RSMo.

More importantly, the trial court should not have focused narrowly on the State's pecuniary interest. The trial court failed to identify a single authority to support its determination that the State could have an interest only if it were pecuniary. And this Court has expressly rejected that position. Even if the State "ha[d] no pecuniary interest in the controversy," this Court has held, "it would not follow that the action could not be maintained." *State ex rel. Delmar Jockey Club v. Zachritz*, 65 S.W. 999, 1000 (Mo. banc 1901). "The obligations which [the Attorney General] is under to promote . . . the general welfare, is often of itself sufficient to give it a standing in court." *Id.* (quoting *In re Debs*, 158 U.S. 564, 584 (1895)).

Even if the State had no pecuniary interest, it still possessed substantial interest in this suit that justified the Attorney General's involvement. First, the State has an interest in this suit because it affects the financial integrity of the Fund, a creature of the State's creation. The Attorney General's power to sue to vindicate the public interest under section 27.060 includes "enforcement of the General Assembly's statutory purposes." *Fogle*, 295 S.W.3d at 510. The Attorney General can sue to enforce the State's statutory purpose because a legislative enactment "is in itself a declaration of public interest and policy." *See Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). The public, through its representatives, created the Fund. When the public did so, its purposes certainly did not include rendering the Fund unstable and financially unhealthy. The Attorney General can sue Pilot because Pilot's decision to renege on its agreement caused the Fund to suffer more than $760,000 in damages, and the State has an interest in maintaining the fiscal health of its programs. LF 42, ¶ 31.

Maintaining the fiscal integrity of the Fund is critical not only because the Fund is a State program, but also because the Fund further serves other public interests. All Missourians rely on the petroleum industry because that industry is involved in almost all transportation of people and commercial goods. The Fund, by providing an insurance option for owners of petroleum storage tanks, reduces the likelihood of price shock to that industry caused by

environmental spills. The Fund also serves the critical purpose of "limit[ing] environmental and public health hazards from leaking underground storage tanks containing regulated substances." *Rees Oil Co. & Rees Petroleum Products, Inc. v. Director of Revenue*, 992 S.W.2d 354, 356 (Mo. App. W.D. 1999). Without the Fund, environmental spills would remain unrectified if caused by companies that lacked sufficient resources or motive to clean up spills quickly. The Fund enables the prompt remediation of environmental emergencies by providing a funding source for immediate cleanup.

The State's administrative decision to separate the Fund from the general revenue (but maintain the Fund within the treasury) does not undermine these interests. Missouri has separated 80 statewide funds from the general revenue, including the Motor Fuel Tax Fund, which collects gasoline taxes, and the Antiterrorism Fund. *Fund Descriptions*, Mo. Dep't Rev. 2, 10, 12 (2016), available at http://dor.mo.gov/cafr/documents/funds.pdf. These two funds, respectively, allocate money to the Department of Transportation for road construction and to the Missouri Office of Homeland Security to use "for antiterrorism activities." *Id*. If administrative separation of a fund from the general revenue terminates the State's interest in that fund, then it would follow that the State has no interest in combatting terrorism or building roads. That conclusion cannot be true, so separation of a fund from the general revenue does not remove a State's interest.

If anything, separating a program from the general revenue suggests the State has a *heightened* interest in the financial integrity of the program. By isolating and earmarking separate funds for special programs, the General Assembly insulates those programs from both lawmakers and litigants, ensuring that the program funds are not diverted to unrelated purposes. Lawmakers cannot redirect those funds as easily as they can redirect general revenue during times of budgetary volatility. *See Gasconade Cty. v. Gordon*, 145 S.W. 1160, 1164 (Mo. 1912) (determining that the legislature created funds to restrict how money in those funds was spent). Nor can litigants who prevail against the State in suits unrelated to the Fund access money set aside after being earmarked for programs unrelated to the litigation. *E.g.*, § 319.131.4, RSMo. Segregating funds reflects an increased, not decreased, State interest in the underlying program.

Although the trial court was obligated to construe the law, *Gershman Inv. Corp. v. Danforth*, 517 S.W.2d 33, 36 (Mo. banc 1974), it also should have deferred to the Attorney General about whether this suit factually falls within the public interest. Courts in Missouri grant agencies and state officials "considerable deference" in areas of their special competence. *State ex rel. Webster v. Missouri Res. Recovery, Inc.*, 825 S.W.2d 916, 931 (Mo. App. S.D. 1992). That deference should be especially weighty where the question is whether a suit is in the public interest, for "the attorney general has wide

discretion in making the determination as to the public interest." *Exxon Corp.*, 526 F.2d at 268–69. That discretion stems from the modern Attorney General's role as "the great officer of state to whom the responsibility of safeguarding and representing the public interest is entrusted." *State Attorneys General Powers and Responsibilities*, *supra*, at 31.

The State has an interest in this suit because the people, through their representatives, created a public program "within the state treasury" to ensure prompt clean-up of environmental spills and bring stability to an important industry that affects all Missourians. The Attorney General had authority under section 27.060 and the common law to vindicate those interests. And if this Court agrees with the trial court that the Board lacked authority to sue, then the Attorney General would be the *only* party capable of enforcing these substantial interests, which necessarily would give him authority to sue. *American Tobacco*, 34 S.W.3d at 135. The trial court erred when it held that the Attorney General lacked authority to sue.

## III. The trial court erred when it held that the Board lacked standing to sue, because the Board's powers include all powers that promote the Board's ability to carry out the "general administration of the fund" and "the proper operation of the fund," in that (1) this Court has expressly held that the Board has the right to sue, and (2) entering into subrogation contracts and suing to enforce those contracts are inherent tasks in the general administration of insurance funds.

In construing the enabling statutes for the Fund, this Court held that "[t]he Board certainly has the right to sue to recover moneys owed to the Fund." *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397, 404 (Mo. banc 2016), *reh'g denied* (Aug. 9, 2016). That statement is a holding, but even if it were dictum, this Court should adopt the same position here because the statute this Court cited in support of that statement establishes that the Board has authority to sue. The statute gives the Board the power to make "all decisions relating to payments from the fund." § 319.129.4, RSMo. The subrogation agreement in this appeal "relat[es] to payments from the fund" because the Board required Pilot to agree to assist with subrogation as a condition of eligibility for payments. That statute also gives the Board the broad power to conduct the "general administration of the fund" and "the

responsibility for the proper operation of the fund." *Id*. Because the insurance industry makes ubiquitous use of subrogation, the power of "general administration" and the authority to ensure "proper operation" of an insurance fund includes the power to enter into subrogation agreements and to sue to enforce those agreements.

**A. This Court has held that the Board has authority to sue.**

The trial court erroneously determined that the statement in *ConocoPhillips* that "[t]he Board certainly has the right to sue to recover moneys owed to the Fund" was dictum. A statement is generally considered dictum if it is not "necessary for the actual decision of any question before the court." *State ex rel. Anderson v. Hostetter*, 140 S.W.2d 21, 24 (Mo. banc 1940). As one recent treatise puts it, a statement "isn't binding under the doctrine of stare decisis" if it "is in the nature of a peripheral, off-the-cuff judicial remark." Bryan A. Garner, Neil M. Gorsuch, et al., *The Law of Judicial Precedent* 62 (2016). The trial court determined that the statement was dictum because the suit concerned a plaintiff's attempt to intervene. LF 12.

The trial court concluded that the statement was dictum because *ConocoPhillips* concerned a motion to intervene, but the trial court neglected to consider *why* this Court denied the motion to intervene. The text of the opinion establishes that this Court rejected the attempt to intervene *because* the Board had the power to sue. In *ConocoPhillips*, as here, the "Board . . .

brought suit . . . to recover certain costs previously reimbursed by the Board from the Fund." *ConocoPhillips*, 493 S.W.3d at 398. A private plaintiff sought to intervene to sue the defendant so the plaintiff could help ensure that the Fund recouped as much money as possible. *Id.* at 404. In rejecting that argument, the Supreme Court stated, "when the legislature has established *other means of enforcement*, we will not recognize a private civil action unless such appears by clear implication to have been the legislative intent." *Id.* (quoting *Johnson v. Kraft Gen. Foods, Inc.*, 885 S.W.2d 334, 336 (Mo. banc 1994) (emphasis added)). This Court held that the "legislature ha[d] established other means of enforcement" because the legislature gave the "Board . . . the right to sue to recover moneys owed to the Fund." *Id.*

In other words, *ConocoPhillips* held that the motion to intervene was unwarranted because the Board has the power to sue. In fact, this Court's determination that the Board has the authority to sue was the central rationale for its decision not to recognize a private right of intervention. The statement that the Board has the power to sue is therefore binding because it was "necessary for the actual decision of any question before the court." *Hostetter*, 140 S.W.2d at 24. It was not an "off-the-cuff judicial remark," Garner, Gorsuch, et al., *supra*, at 62, but a holding of this Court that the trial court should have followed.

This Court's holding in *ConocoPhillips* comports with this Court's holding elsewhere that the Board can be sued. *City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738, 752 (Mo. banc 2016). The enabling statutes nowhere declare that the Board can be sued. But it would be anomalous for those statutes to be construed to allow the Board to be sued, but not to sue.

The trial court also refused to abide by this Court's holding because *ConocoPhillips* did not cite two cases that the trial court said "hold that an agency must have statutory authority to sue." LF 12–13 (citing *Mo. Pub. Ser. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134 (Mo. App. W.D. 2009); *In re Exhumation of Body of D.M.*, 808 S.W.2d 37 (Mo. App. S.D. 1991)). The trial court construed the holding in *ConocoPhillips* as if it were dictum to avoid the conclusion that *ConocoPhillips* overruled those decisions by implication. LF 12–13.

This reasoning was erroneous because the presumption against this Court overruling precedent *sub silentio* applies to this Court's *own* decisions, not to decisions of the Court of Appeals. When this Court announces a legal rule, it is not required to scour the opinions of lower courts and enumerate every prior inconsistent opinion of the lower courts before its precedents must be followed. Rather, a lower-court opinion that is inconsistent with one of this Court's decisions is impliedly overruled.

In any event, there is no inconsistency between *ConocoPhillips* and the two decisions cited by the trial court. The trial court's determination stems from a fundamental misreading of *ConocoPhillips*, which is fully consistent with cases that hold that agencies must have statutory authority to sue. Rather than hold that the Board could sue *without* statutory authority, *ConocoPhillips* identified the precise statutory provision that *gave* the Board authority to sue. *ConocoPhillips Co.*, 493 S.W.3d, at 404 (citing § 319.129.4, RSMo). This is the very same provision that the Board relies on in this case. Under *ConocoPhillips*, there is a specific statutory provision that vests the Board with the authority to sue, and the putative conflict with *Oneok* and *Body of D.M.* is illusory.

**B. The Board's statutory powers include the power to enter into and sue to enforce subrogation agreements.**

This Court has held "that administrative agencies—legislative creations—possess only those powers expressly conferred or necessarily implied by statute." *Bodenhausen v. Missouri Bd. of Registration for Healing Arts*, 900 S.W.2d 621, 622 (Mo. banc 1995). Powers necessarily implied are "those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes." *State ex inf. Fuchs*

*v. Foote*, 903 S.W.2d 535, 538 (Mo. banc 1995), *abrogated on other grounds by State v. Olvera*, 969 S.W.2d 715 (Mo. banc 1998).

In concluding that the Board entirely lacked capacity to enter into subrogation contracts or sue, the trial court focused on four provisions in the enabling statutes that discuss contracts (all for hiring individuals or hiring an auditing company). LF 17. Concluding that none of those provisions expressly granted a right to contract for subrogation, the trial court held that the Board had no right to subrogate. LF 17.

But the trial court looked at the wrong subsection. When this Court held that "[t]he Board certainly has the right to sue to recover moneys owed to the Fund," it cited the precise statutory subsection that grants the Board that authority. *ConocoPhillips*, 493 S.W.3d, at 404 (citing § 319.129.4, RSMo). That statute gives the Board broad powers to make "all decisions relating to payments from the fund" and to ensure the "general administration of the fund." § 319.129.4, RSMo. These powers enable the Board to enter into subrogation agreements, which entail arrangements by which the insurance organization agrees to insure the client in return for the client's assigning its related liability claims to the insurance organization. *Subrogation*, *Black's Law Dictionary* (10th ed. 2014). These powers also entail the right to sue to enforce those agreements.

**a. Subrogation contracts "relat[e] to payments from the fund."**

The power to make "all decisions relating to payments from the fund," § 319.129.4, RSMo, encompasses the power to enter into subrogation agreements and to sue to enforce those agreements. Companies are not automatically entitled to the benefits of the Fund. They must apply to the Board for admission into the program. *E.g.*, § 319.131.3(1). Pilot's predecessor gained admission only because it consented to subrogation "in return for coverage." LF 35 ¶ 14. When the Board conditioned admission into the program on an applicant's willingness to subrogate, it made a decision "relating to payments from the fund." § 319.129.4.

Although the decision to require subrogation is not itself a payment, the inclusion by the legislature of the words "relating to" plainly encompasses subrogation decisions. The U.S. Supreme Court has held that the ordinary meaning of "relating to" is "a broad one—'to stand in relation; to have bearing of concern; to pertain; refer, to bring in association with or connection with." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citation omitted). Dictionaries similarly define the term as "to show or establish a logical or causal connection between." *Relate*, *Webster's International* 1916 (3d ed. 1981). Pilot's agreement to subrogate was a necessary condition of Pilot's receipt of payments from the Fund. The decision to admit Pilot on

condition that it agree to subrogation therefore constitutes a decision "relating to payments from the fund."

Thus, the Board's express authority encompassed the power to enter into the subrogation contract. And the ability to enter into subrogation contracts necessarily implies the power to sue to enforce those agreements. "Having the power to make contracts or suffer wrongs, [the Board] has the inherent right to bring a suit to enforce the one or redress the other." *State ex rel. Barker v. Chicago & A.R. Co.*, 178 S.W. 129, 142 (Mo. 1915).

**b. "General administration" and "proper operation of the fund" include entering into subrogation agreements because those agreements are common, necessary tools in the insurance industry.**

The Board also possesses authority to enter into subrogation agreements because of its statutory authority to conduct the "general administration of the fund" and ensure "the proper operation of the fund." § 319.129.4, RSMo. General administration encompasses "*all* the actions that are involved in managing the work of an organization." *Administration*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added). This Court has held that public organizations tasked with accomplishing general duties implicitly have the same powers that similarly situated private organizations have in pursuing those same duties. Recognizing that "there [wa]s no express

statutory authorization" for a school district to sue, this Court nonetheless held that "the capacity of a school district to sue . . . is necessarily implied from the district's duty to maintain schools." *State ex rel. Sch. Dist. of City of Indep. v. Jones*, 653 S.W.2d 178, 184–85 (Mo. banc 1983). Because similarly situated private parties had the power to sue, the public school district "[wa]s empowered to initiate any action that would be available to a private individual in the same circumstances." *Id.* at 186. Thus, under *Jones*, the Board's general duties toward the insurance Fund include the general powers similarly situated private insurance companies would have.

Private insurance organizations routinely use subrogation to pursue their general purposes. Subrogation occurs when "an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." *Subrogation*, *Black's Law Dictionary* (10th ed. 2014). That principle is not just common in the insurance industry; it is pervasive. *See* 16 *Couch on Ins.* § 222:4 (2017) (stating that "subrogation is a time-honored theory" and is ubiquitous because of "the lack of good alternatives"); 2 *Insurance Claims and Disputes* § 10:5 (6th ed. 2017) ("Insurance policies routinely include a provision entitling the insurer, on paying a loss, to be subrogated . . . ."). Subrogation serves a critical purpose in the insurance field because it enables insurance companies to pay their clients immediately,

knowing they will often have the opportunity to recoup those funds. Without subrogation, any insurance fund would be at risk of insolvency.

Because subrogation agreements are both common in the insurance field and critical to the intelligent operation of an insurance fund, the Board has the power to enter into those agreements. Entering into subrogation agreements "serve[s] to promote the accomplishment of the principal purposes" of an insurance program. *Foote*, 903 S.W.2d at 538. The Fund's power to generally administer the insurance fund includes entering into subrogation agreements because those agreements are central to the purpose of insurance agreements.

The Court of Appeals' decision in *Oneok* is not to the contrary. The trial court cited that decision to suggest that organizations with general administrative powers could not sue. LF 13. But the plaintiff in that decision "acknowledge[d] that no specific statute authorize[d] the actions it took." *Oneok*, 318 S.W.3d at 138. Here, the State contends, and this Court has held, that the opposite is true. Moreover, *Oneok* determined that the power to sue was not implied because the Commission had not been injured; it had merely been assigned rights by other parties. *Id.* at 136–37. The court also did not even mention *Jones*. Unlike in *Oneok*, the Fund itself was injured, and the Board has statutory responsibility for the Fund's administration. Moreover, the power to enter into subrogation agreements is integral to the Board's

primary function—managing an insurance organization. *Oneok* is therefore inapposite. And to the extent those two decisions conflict, *Jones* controls because it was decided by this Court.

**c. None of the other statutory provisions undercut the power of the Board to enter into subrogation agreements.**

Because the Board's powers to make "all decisions relating to payments from the fund" and to ensure the "general administration of the fund" give it authority to enter into subrogation agreements, § 319.129.4, RSMo, this Court need not consider other provisions within the enabling statutes. But even if this Court does so, none of those provisions undercut the power of the Board to enter into subrogation agreements.

The trial court identified four provisions in the enabling statutes that specifically mention the term "contract." LF 17. Two of those provisions concern contracting to hire staff, a third concerns contracting with other parties to perform audits, and a fourth concerns contracting with third parties to implement a training program for storage tank operators. §§ 319.129.9–10, 17, 319.130.3, RSMo. Because none of these "contract" provisions explicitly authorizes subrogation agreements, the trial court held that the Board could not enter into those agreements. LF 17.

That decision was erroneous for several reasons. Without expressly stating so, the trial court applied the negative-implications canon, inferring that the Board could contract only in areas where contracting powers were expressly mentioned. But the negative-implications canon "should be invoked *only* when it would be natural to assume by a *strong contrast* that that which is omitted must have been intended for the opposite treatment." *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 270 (Mo. banc 2005) (emphases added). No "strong contrast" exists here. The express mention of the power to contract in four discrete, unrelated situations does not imply inability to contract in other situations. In fact, the enabling statutes never give the Board authority to "contract" for insurance policies, but an insurance policy is "a contract." *Insurance*, *Black's Law Dictionary* (10th ed. 2014). The Board can enter into insurance "contracts" despite the lack of an express provision enabling it to "contract" because entering into such contracts "serve[s] to promote the accomplishment of the principal purposes" of an insurance fund. *Foote*, 903 S.W.2d at 538. The same is true of subrogation agreements. Those agreements are integral to the administration of insurance funds and foster the quick transfer of insurance payouts from the Fund to members. They "promote the accomplishment of the principal purposes" of the Fund. *Id.*

Similarly, the express grant of authority to hire "legal counsel to *defend* third-party claims," § 319.129.10, RSMo (emphasis added), does not negate the Board's power to sue. That provision bears no relevance to whether the Board can sue through *government* counsel—provided by the Attorney General—whom it does not have to hire.

### C. Construing the enabling statutes to bar the Board from suing would lead to "unreasonable or absurd results."

If this Court were to adopt the trial court's interpretation of the enabling statutes, it would dismantle the Board's ability to maintain the financial integrity of the Fund. "[C]onstruction of a statute should avoid unreasonable or absurd results." *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012) (citing *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010)). It is unreasonable to believe that the General Assembly left the Board wholly defenseless to recoup lost funds. If this Court adopts the trial court's position, then the Board could never obtain recourse for harms committed against it. Critically, the logic of the trial court's decision entails that the Board would lack authority to sue Pilot even if Pilot had obtained a full recovery of its cleanup costs from Environ, instead of merely refusing to cooperate in the suit against Environ. The order thus permits those covered by the Fund to enjoy a double recovery for the costs of environmental cleanup. Because this Court presumes that the General

Assembly intended to act rationally, *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. banc 1999), it should not readily assume that the General Assembly left the Board entirely defenseless to enterprising third parties who enjoy the benefits of the Fund's coverage but refuse to bear the burdens of cooperating with the Board in recouping cleanup costs.

## IV. The trial court erred when it dismissed the claim for unjust enrichment, because an unjust enrichment claim can be pleaded in the alternative, in that it would be unjust to allow Pilot to retain the benefit of insurance coverage when it obtained that benefit only because it agreed to subrogate.

Even if the Board lacked power to enter into a subrogation agreement, the Board could still sue here because the Second Amended Petition adequately alleges a claim of unjust enrichment—a form of quasi-contract that enables a party to sue for enforcement. *See Lowe v. Hill*, 430 S.W.3d 346, 349 (Mo. App. W.D. 2014); *Chicago & A.R. Co.*, 178 at 142.

### A. The trial court erred when it held that the Attorney General and Board were precluded from pleading a claim for unjust enrichment.

The trial court contradicted itself when it held that the Attorney General and Board could not raise an unjust enrichment claim. It held that the Board could not sue because no valid subrogation contract existed, but

then reversed course and held that a claim for unjust enrichment was improper because the Board "has entered into an express contract." LF 17–18 (citation omitted). Both statements cannot both be correct.

To the extent the trial court instead meant to hold that an unjust enrichment claim was improper because the Attorney General and the Board also raised a claim for breach of contract, that holding would conflict with settled precedent. "[I]t is well-established that a party may plead claims both for breach of contract, and on equitable theories which are only available in the *absence* of a contract." *Steelhead Townhomes, L.L.C. v. Clearwater 2008 Note Program, LLC*, 2017 WL 4890796, at *6 (Mo. App. W.D., Oct. 31, 2017); *accord* Mo. Sup. Ct. R. 55.10 ("A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses."). When a plaintiff asserts claims for both unjust enrichment and breach-of-contract, the unjust enrichment claim remains available unless "the parties entered into an *enforceable* contract." *Steelhead Townhomes*, 2017 WL 4890796, at *4 (emphasis added). The Attorney General and Board were not precluded from raising a claim for unjust enrichment in the alternative, merely because they also raised a claim for breach of contract. Only if this Court agrees that a contract exists and that it is enforceable does the claim for unjust enrichment become dismissible.

### B. If the Board lacks authority to enter into subrogation contracts, then the Petition pleads a valid claim for unjust enrichment.

Unjust enrichment occurs if "(1) [the Board] conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. App. W.D. 2010). Whether each element occurred is a question of fact. *See, e.g.*, *Chouteau Dev. Co., LLC v. Sinclair Mktg., Inc.*, 200 S.W.3d 68, 71 (Mo. App. W.D. 2006) ("The extent of [Defendant's] unjust enrichment is a question of fact to be decided on remand."); *Pitman v. City of Columbia*, 309 S.W.3d 395, 403 (Mo. App. W.D. 2010). The Attorney General and the Board pleaded the all three elements.

As to the first two elements, the Board conferred to Pilot at least three benefits, all of which Pilot appreciated. First, the Board paid Pilot more than $700,000 in insurance proceeds to cover the costs of remediating the petroleum spill. Pilot plainly appreciated that benefit.

Second, because it agreed to subrogation, Pilot obtained the benefit of lower fees to participate in the Fund, similar to premiums. Subrogation "has the objective of reimbursing the insurers," substantially reducing costs for insurance companies. 16 *Couch on Ins.* § 222:8 & n.53 (2017). The Board has

authority to set participation fees paid by tank owners who choose to obtain insurance coverage from the Fund. § 319.133, RSMo. Understanding that it had the power to enter into subrogation agreements, the Board set the participation fees lower than it otherwise would, because it reasonably expected that it would be able to recover from third parties under subrogation agreements. These lower participation fees substantially reduced Pilot's costs of coverage.

Third, Pilot obtained the benefit of receiving payments promptly. If the Board had admitted Pilot to coverage without requiring a subrogation agreement, Pilot's recovery would almost certainly have been delayed. Because subrogation agreements substantially reduce costs for insurers, the lack of a subrogation agreement can "cause delay in insurance companies paying claims to make injured parties whole." *Associated Int'l Ins. Co. v. Scottsdale Ins. Co.*, 862 F.3d 508, 510 (5th Cir. 2017). Without subrogation, many insurance companies would delay recovery "pending a determination of the third party's liability." 16 *Couch on Ins.* § 222:4 (2017). The Fund undoubtedly might have done so here.

It was unjust for Pilot to retain these benefits without complying with its promise to subrogate. Failure to abide by one's duty to subrogate is well recognized as a classic example of unjust enrichment. As this Court has held, "[s]ubrogation exists to prevent unjust enrichment." *Keisker v. Farmer*, 90

S.W.3d 71, 75 (Mo. banc 2002); *accord Tucker v. Holder*, 225 S.W.2d 123, 126–27 (Mo. 1949) ("[Subrogation] is the device of equity to prevent unjust enrichment and to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it."); 16 *Couch on Ins.* § 222:8 (2017) ("The concept of unjust enrichment can best describe the reasoning of some courts, as well as the legislative history behind the doctrine of subrogation."). Pilot obtained the insurance benefits only because it agreed to subrogate "in return for" insurance coverage. LF 35. It would be unjust for Pilot to gain access to the benefits of the program by agreeing to subrogation only to turn around and renege on that obligation after it obtained lower premiums and prompt payment.

## CONCLUSION

The decision of the trial court should be reversed and this matter remanded for further proceedings.

March 22, 2017

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on March 22, 2018, to all counsel of record. The undersigned further certifies that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 9,508 words.

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