IN THE SUPREME COURT FOR THE STATE OF OREGON

MURRAY L. BLACK; MELRHEA E. BLACK; JACK BOERSMA and BARBARA J. BOERSMA as Trustees for the Boersma Family Trust; J.K. (KELLY) HOLA; JEANNIE HOLA; ALBERT F. LAURIE and MARLENE D. LAURIE as Trustees of the A. F. Laurie Trust; DONALD J. MEIS and NADINE E. MEIS, as Trustees for the Meis Family Trust UTA 8/22/95; JOEL E. COLLEY; MICKELL A. COLLEY; RICHARD MELOY; SEATTLE ATC PARTNERSHIP, a partnership consisting of DAVID ANDREWS, JOHN MITCHELL, THOMAS PARKS, DONALD STOBIE and GERALD TRAYNOR,

Plaintiffs,

and

JOHN J. LENAHAN; MARILYN S. LENAHAN; WILLOWRUN, L.P., an Oregon limited partnership;

Plaintiffs-Appellants and RESPONDENTS ON REVIEW,

v.

GARY H. ARIZALA; QUENTIN L. BREEN; BREEN FAMILY TRUST; JOHN DUFFY; ANTHONY EASTON; SUSAN D. EASTON; SDE TRUST; FRANK R. GOLDSTEIN; ED JANOWSKI; JAVIER O. LAMOSO; MORGAN, LEWIS & BOCKIUS, LLP, a limited liability partnership; FRED H. MARTINEZ; THERESA MILLER; MARGARET W. M. MINNICH; GARY NORTH; LAWRENCE ODELL; JAMES T. PERRY; MOHAMMAD RAHMAN; ROMULUS CORPORATION, a Delaware corporation; ROMULUS TELECOMMUNICATIONS, INC., a Puerto Rico corporation; ROMULUS ENGINEERING, INC., a Delaware corporation; UNICOM CORPORATION, a Puerto Rico corporation; SUPERTEL COMMUNICATIONS CORPORATION, a Puerto Rico corporation, and CLEARCOMM L.P., a Delaware limited partnership, formerly known as PCS 2000, L.P.,

Defendants-Respondents, and PETITIONERS ON REVIEW.

Multnomah County Circuit Court
Case No. 9611-09017

CA A104791

S Ct S49774

PETITIONERS' BRIEF ON THE MERITS

FEBRUARY 2003

BROWN AND BOSTON PCS 2000, a partnership consisting of CONRAD BROWN and NIXON RAY BOSTON; KENNETH BROWN, as Trustee for the Brown Family Trust; WILLIAM SEAN CONWAY; LISA M. CONWAY; GREG DOWNING; DONALD F. ESCHER and SHIRLEY P. ESCHER, Trustees for the Escher Daughters Trust; HARVEY A. GILBERT and DEANNE E. GILBERT, as Trustees for the Gilbert Family Trust; KURT GRUEN; REYNA GRUEN; JOSEPH M. HA; JOHN F. JOHNSON and ANNE R. JOHNSON, Trustees for the John F. and Anne R. Johnson Trust; HAROLD E. JONES as Trustee for the Harold E. Jones Profit Sharing Trust; VIRGINIA J. JONES; CAROLINE B. KAZMANN, Trustee for the Belle M. Beem Trust; HOLLIS KAZMANN; INGRID KLUK; KNOXVILLE IVDS GROUP, a partnership consisting of ROBERT SEAMAN and others; DONALD C. LINKEM; DONALD J. MEIS; NADINE E. MEIS; EDMUND J. MOONEY, Trustee for the Edmund J. Mooney Trust; J. RAY O'CONNOR and MAURINE O'CONNOR, Trustees for the J. Ray O'Connor Revocable Family Trust; BILL OHMAN; COLLEEN OHMAN; JAMES POPA; RPM2 GROUP LIMITED PARTNERSHIP, a partnership consisting of MICHAEL SUENRAM, PAMELA SUENRAM, MELBURN E. SUENRAM and ROSE M. SUENRAM; NANCY L. RYAN; THE ESTATE OF ARTHUR J. RYAN; S&L PROPERTIES, a partnership consisting of DOUGLAS A. SHINSTINE and ERIC A. LUTHER; ELIZABETH J. SEAMAN; SHELLEY A. MCCOY; RALPH L. STEAN, Trustee for the Ralph L. Stean Revocable Living Trust U/A APRIL 14, 1992; JAMES F. STENGEL, Trustee for the James F. Stengel Living Trust dated 9/28/94; GRETCHEN B. STENGEL as Trustee for the Gretchen B. Stengel Living Trust Dated 9/28/94; and RUSSELL S. WUNSCHEL,

Plaintiffs,

v.

GARY H. ARIZALA; QUENTIN L. BREEN; BREEN FAMILY TRUST; JOHN DUFFY; ANTHONY EASTON; SUSAN D. EASTON; SDE TRUST; FRANK R. GOLDSTEIN; ED JANOWSKI; JAVIER O. LAMOSO; MORGAN, LEWIS & BOCKIUS, LLP, a limited liability partnership; FRED H. MARTINEZ; THERESA MILLER; MARGARET W. M. MINNICH; GARY NORTH; LAWRENCE ODELL; JAMES T. PERRY; MOHAMMAD RAHMAN; ROMULUS CORPORATION, a Delaware corporation;

Multnomah County Circuit Court
Case No. 9708-06851

ROMULUS TELECOMMUNICATIONS, INC., a Puerto Rico corporation; ROMULUS ENGINEERING, INC., a Delaware corporation; ROMULUS ENGINEERING (MAS) INC., a Delaware corporation; DATALINK NETWORK, INC., a purported corporation; ROMULUS ENGINEERING (IVD), INC., a Delaware corporation; WIRELESS EXPRESS LIMITED PARTNERSHIP, a Delaware limited partnership, fka IVDS Auction Consortium Limited Partnership; IVDS MANAGEMENT, INC., a Delaware corporation; UNICOM CORPORATION, a Puerto Rico corporation; SUPERTEL COMMUNICATIONS CORPORATION, a Puerto Rico corporation, and CLEARCOMM L.P., a Delaware limited partnership, fka PCS 2000 L.P.,

Defendants.

PETITIONERS' BRIEF ON THE MERITS

Petition to Review the Decision of the Court of Appeals
on Appeal from the Judgment of the Circuit Court
for the County of Multnomah
The Honorable Nely L. Johnson, Judge

Decision filed:	June 5, 2002
Author of Opinion:	Walter I. Edmonds, Presiding Judge
Joined by:	Rives Kistler, Judge
Concurrence by:	Rex Armstrong, Judge

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PETITIONERS' BRIEF ON THE MERITS

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LEGAL QUESTIONS PRESENTED ON REVIEW AND PROPOSED RULES OF LAW

1. The Court of Appeals held that the trial court erred when it granted defendants' motion to dismiss the Lenahans' claims on the basis of a forum selection clause contained in the limited partnership agreement that governed the parties' relationship. A determination of whether the Court of Appeals erred in making its ruling requires this Court to address the following legal questions:

a. May the application of a forum selection clause be resolved by means of an early motion to dismiss, with any factual issues to be resolved by the court?

Proposed rule of law: **The application of a forum selection clause may be resolved on an early motion to dismiss pursuant to ORS 1.160, in a manner similar to the resolution of a dispute regarding subject matter or personal jurisdiction.**

b. Does a forum selection clause that applies to "any legal action arising from this Agreement" cover disputes arising from conduct that allegedly induced the plaintiffs to become parties to the Agreement?

Proposed rule of law: **A forum selection clause that applies to "any legal action arising from this Agreement" applies as a matter of law to claims based on conduct that allegedly induced the plaintiffs to enter into the Agreement.**

2. The Court of Appeals reversed the trial court's ruling that, as a result of the 1995 amendments to ORS 166.725, the Lenahans failed to state a claim under ORICO. In making its holding, the panel (a) rejected textual evidence that the legislature intended the 1995 amendments to be applied retroactively and (b) held that retroactive application would impair a substantive right. A

determination of whether the Court of Appeals erred requires this Court to address the following legal questions:

a. Did the Court of Appeals err in ignoring verb tense in the ORICO amendments as textual evidence of legislative intent of retroactive application of those amendments?

Proposed rule of law: **Statutory verb tense should be taken as an indication of legislative intent regarding retroactivity as to verbs setting in motion the statutory consequence.**

b. Is an accrued ORICO cause of action a substantive right that may not be impaired retroactively?

Proposed rule of law: **An amendment to a purely statutory remedy, including a cause of action under ORICO, is not a substantive right and, in the absence of express legislative direction, is presumed to apply retroactively.**

STATEMENT OF THE CASE

A. Nature of the Action, Relief Sought in the Trial Court, and Nature of the Trial Court Judgment

Plaintiffs John J. Lenahan, Marilyn S. Lenahan, and Willowrun, L.P. ("the Lenahans"), along with a number of other plaintiffs, brought suit against defendants based on their investment in PCS 2000, L.P. ("PCS").[1] (Pl Ab A-23)[2]

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[1] Some of the other plaintiffs asserted claims related to different investments as well as the same claims related to PCS. The other plaintiffs dismissed their appeals of the ruling dismissing their claims prior to oral argument in the Court of Appeals.

[2] The Lenahans filed briefs in the Court of Appeals separately from the other plaintiffs. The Abstract filed by plaintiffs other than the Lenahans is cited herein as "Pl Ab."

The Lenahans alleged that, in the process of selling limited partnership interests in PCS, defendants violated federal and state securities laws, as well as securities laws of other jurisdictions; committed common-law fraud; and violated the Oregon Racketeer Influenced and Corrupt Organization Act (ORICO), ORS 166.715 to ORS 166.735. (Pl Ab A-34-41)

Defendants moved (a) to dismiss the complaints of all the plaintiffs on the grounds that a forum selection clause in a limited partnership agreement between the parties designated San Juan, Puerto Rico as the venue for any legal action; and (b) to dismiss the ORICO claims of all the plaintiffs because they had not alleged that criminal convictions had been obtained against the defendants as required under the statute as amended in 1995. (Supp Ab A-2)[3] At the hearing on the motion to dismiss, the trial judge orally granted the motion to dismiss plaintiffs' ORICO claims. (Tr 122) Shortly after the hearing, the trial judge issued a memorandum opinion granting defendants' motion to dismiss the complaint based on the application of the forum selection clause. (Pl Ab A-42-47)

B. Statement of Facts

The Lenahans' claims stem from their investment in PCS. (Pl Ab A-34-41) Among other things, they allege that defendants, during the course of offering partnership interests in PCS, represented that PCS could purchase licenses from the FCC at a certain price when defendants actually had no idea what the licenses would cost; did not disclose the cost of engineering, acquiring, and installing necessary equipment; did not disclose the risks of not raising sufficient capital or

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[3] Defendants' Supplemental Abstract of Record filed in the Court of Appeals is cited herein as "Supp Ab."

building the infrastructure within the times specified in FCC regulations; and did not disclose estimated or likely start-up expenses. (Pl Ab A-34-35) According to the Lenahans, these misrepresentations were made prior to their investment in PCS. (*Id.*)

To invest in PCS, plaintiffs purchased limited partnership interests. (*Id.* at A-32) As part of this purchase, plaintiffs became parties to the PCS Agreement of Limited Partnership ("the Agreement"). (App-1-28)[4] The Agreement contained a choice of law, forum selection, and arbitration clause providing as follows:

> "This Agreement shall be construed and enforced in accordance with and governed by the law of the State of Delaware, excluding that body of law relating to conflicts of law. Any dispute under this Agreement shall be submitted to binding arbitration in San Juan, Puerto Rico under the rules of the American Arbitration Association concerning commercial disputes, and the parties agree to be bound by any decision reached under such rules. Any arbitrator shall be specifically bound by the provisions respecting limitation of liability set forth in this Agreement. *Venue for any legal action arising from this Agreement, including enforcement of any arbitration award, shall be in San Juan, Puerto Rico.*" (App-25) (Emphasis added)

SUMMARY OF THE ARGUMENT

The trial court correctly dismissed all of the Lenahans' claims on the basis of the forum selection clause. In reversing the trial court, the Court of Appeals (1) applied the wrong standard of review; and (2) incorrectly concluded that the forum selection clause was ambiguous.

The trial court enforced the forum selection clause on a motion to dismiss (Pl Ab A-42-47). The Court of Appeals held that, because ORCP 21 A does not

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[4] The Appendix to the Court of Appeals brief filed by plaintiffs other than the Lenahans is cited herein as "App."

specifically provide for a motion to dismiss as a mechanism for enforcing a contractual forum selection clause, defendants' motion was procedurally improper. *Black v. Arizala*, 182 Or App 16, 28, 48 P3d 843 (2002). Therefore, on review, the Court of Appeals treated defendants' motion as a motion for summary judgment, and remanded to the trial court because it found a question of fact regarding interpretation of the clause.[5] In treating defendants' motion as a motion for summary judgment, the Court of Appeals ignored the trial court's authority under ORS 1.160 to fashion an appropriate procedural mechanism for enforcing the forum selection clause. Because Oregon statutes do not specifically provide a procedure for enforcing forum selection clauses, and no adequate procedure otherwise exists under Oregon law, the trial court properly adopted a procedure conformable to the spirit of Oregon's procedural statutes and consistent with the uniform practice of courts in other jurisdictions. Accordingly, the Court of Appeals should have reviewed defendants' motion as a motion to dismiss.

Regardless of the standard of review applied by the Court of Appeals, the trial court's ruling should have been affirmed because the language of the forum selection clause unambiguously applies to "any legal action arising from this Agreement." (App-25) Because none of the Lenahans' claims would exist had they not entered the Agreement, those claims "arise from" the Agreement as a matter of law. Under the only reasonable interpretation of the forum selection clause, venue was proper only in San Juan, Puerto Rico, and the Court of Appeals erred in reversing the dismissal of the Lenahans' claims.

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[5] 182 Or App at 28.

The Court of Appeals also erred in reversing the trial court's dismissal of the Lenahans' ORICO claims. The trial court correctly held that the 1995 Amendments to ORS 166.725[6] ("the Amendments") were intended to apply to claims based on events that predated the Amendments. (Tr 122) The Court of Appeals' reversal of the trial court was flawed in two respects. First, the Amendments, on their face, provide evidence of the legislature's intent to apply them retroactively, and the Court of Appeals should not have reached the issue of whether the Amendments were "substantive" or "remedial" in light of such clear textual evidence. Second, the Court of Appeals conclusion that the Amendments were "substantive" ignores the remedial purpose of ORICO as a whole.

ARGUMENT

A. The Court of Appeals erred in reversing the trial court's judgment of dismissal based on the forum selection clause.

In reversing the trial court's judgment of dismissal, the Court of Appeals concluded that the language of the forum selection clause was ambiguous.[7] Because the court also concluded that the application of the forum selection clause could only be decided on a motion for summary judgment under ORCP 47 C,[8] it remanded for a factual determination regarding the application of the clause. The Court of Appeals committed two legal errors. First, its application of the summary judgment standard was erroneous, as the trial court properly resolved the enforceability of the forum selection clause on a motion to

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[6] 1995 Or Laws, ch 619, § 1 (SB No. 386), codified at ORS 166.725.

[7] 182 Or App at 29-30.

[8] *Id.* at 28.

dismiss. Second, under either standard of review, defendants were entitled to prevail because the forum selection clause was not ambiguous in any event.

1. A motion to dismiss was the appropriate procedural mechanism for enforcing the forum selection clause.

The trial court dismissed this matter on defendants' motion to dismiss under Rule 21 A. (Pl Ab A 42-47) The Court of Appeals held that ORCP 21 A does not authorize a motion for dismissal on the basis of a forum selection clause, and proceeded to review the trial court's dismissal under the summary judgment standards of ORCP 47 C.[9] Though the court was correct in observing that ORCP 21 A does not explicitly provide for a motion to dismiss based on a contractual forum selection clause,[10] the court's ruling ignores the authority

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[9] 182 Or App at 28.

[10] Rule 21 A provides, in pertinent part:

> "The following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleadings show that the action has not been commenced within the time limited by statute. * * * * If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until

conferred on the trial court by ORS 1.160, which allows the trial court to adopt a suitable mode of procedure where the course of proceeding is not specifically provided for by statute.[11]

The trial court's decision to determine the enforceability of the forum selection clause on a motion to dismiss was a proper exercise of its jurisdiction under ORS 1.160, which provides:

> "When jurisdiction is, by the Constitution or by statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, *if the course of proceeding is not specifically pointed out by the procedural statutes, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the procedural statutes.*" (Emphasis added.)

> further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint."

[11] The Lenahans erroneously assert that defendants did not raise the "issue" of ORS 1.160 in the trial court or the Court of Appeals "and therefore are precluded from raising it here." (Resp Pet Rev at 7) Defendants confuse "issues" that must be preserved with *legal theories* explaining why the trial court was correct in its ruling, which may be raised at any time on appeal. *See Donaca v. Curry Co.*, 303 Or 30, 38 n. 8, 734 P2d 1339 (1987) (distinguishing between an issue raised for the first time on appeal and a theory or source of law available to support a party's position). Defendants contended in the trial court and in the Court of Appeals that the forum selection clause was properly resolved on a motion to dismiss, and now argue that the trial court was correct on the theory set forth in Judge Armstrong's concurring opinion. *See State v. Rogers*, 330 Or 282, 295, 4 P3d 1261 (2000) ("When a trial court makes a ruling, we will affirm that ruling on appeal, even if the trial court's legal reasoning for the ruling was erroneous, if another legally correct reason and, to the extent necessary, the record developed in the trial court support the ruling"). Although appellate courts may be reluctant to *reverse* a trial court on grounds or theories not presented, they will *affirm* a trial court for any proper basis for the result. *State Farm Fire v. Sevier*, 272 Or 278, 537 P2d 88 (1975).

ORS 1.160 has been explicitly employed by Oregon courts in a variety of circumstances.[12] In addition, ORS 1.160 has provided implicit authority for addressing pre-trial motions based on *forum non conveniens* which were not specifically authorized by the Oregon Rules of Civil Procedure.[13]

The Oregon legislature has not "specifically pointed out" a procedure for enforcing forum selection clauses. Accordingly, the trial court was free to adopt a procedure most conformable to Oregon's procedural statutes, and did so by resolving the issues regarding enforceability of the forum selection clause in a manner similar to the procedure for a Rule 21 A motion to dismiss for lack of jurisdiction. On such a motion -- in contrast to other motions to dismiss -- parties may submit relevant evidence and the court decides the motion, resolving any factual issues that may exist. *See* ORCP 21 A.[14] The use of a similar procedure for enforcing forum selection clauses is necessary to give the parties the benefit of their bargain. By allowing the court to resolve factual issues regarding the enforcement of the clause, the parties are able to determine at an early date whether the clause is enforceable -- before both parties have so heavily invested

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[12] *See Black*, 182 Or App at 37-38 (Armstrong, J., concurring) (discussing appellate court uses of ORS 1.160).

[13] *Black*, 182 Or App at 38 (Armstrong, J. concurring) (*citing Novich v. McClean*, 172 Or App 241, 244, 18 P3d 424, *rev den* 323 Or 137 (2001), and *Fenn and Fenn*, 63 Or App 506, 512, 664 P2d 1143 (1983)).

[14] The majority opinion comments that, because the PCS Agreement was not attached to the pleadings, defendants' motion could not be considered a motion to dismiss for failure to state a claim under Rule 21 A(8) which must be resolved solely on the facts set forth in the pleadings. 182 Or App at 26-27. However, such evidence can be considered in a Rule 21 motion based on lack of jurisdiction. Accordingly, the trial court, treating defendants' motion as one similar to a motion to dismiss for lack of jurisdiction, properly considered the forum selection clause in the PCS Agreement, which was attached as an exhibit to an affidavit filed with the motion.

in litigating the enforceability of the forum selection clause that it is no longer advantageous to transfer the case to the contractually stipulated forum.

Despite the fact that Oregon statutes do not "specifically point out" a procedural mechanism for enforcing forum selection clauses so as to preclude the application of ORS 1.160, the Court of Appeals majority refused to apply ORS 1.160 because such clauses may be dealt with on the pleadings, on summary judgment, or at trial.[15] According to the majority, "the availability of those procedures obviate the need for the court to create a different procedure, and where the legislature has provided adequate procedures, this court should not create a different procedure pursuant to ORS 1.160."[16] The conclusion is not supported by the plain language of the statute or the case law cited by the majority. The mere existence of alternative procedures is not enough to divest the trial court of the authority provided by ORS 1.160. Rather, the statute's authority may be invoked any time a procedure is not "specifically" provided by the legislature.[17] If the legislature had intended to grant authority to adopt procedures only where absolutely no procedure was available, it could have done so. Instead the legislature opted to confer broader authority that allows the trial court to adjust to the changing needs of litigants, so long as the court's procedures do not conflict with those prescribed by statute.

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[15] 182 Or App at 28.

[16] *Id.*

[17] ORS 1.160.

Contrary to the view expressed in the majority opinion,[18] this Court did not hold in *Amer. Timber/Bernard v. First Nat'l*, 263 Or 1, 500 P2d 1204 (1972), that ORS 1.160 may not be invoked any time that alternative procedures exist. Instead, this Court stated:

> "[T]raditionally, the formation of procedural rules in this state has been considered to be a function of the legislature. Where a procedure at law has been provided for the vindication of a claim, we do not believe it to be our function under [ORS 1.160] to provide another procedure at law *in a situation in which the legislature considered the other procedure and has limited its use to equitable proceedings.*"[19]

In quoting this passage, the majority opinion leaves off the crucial last part of the sentence.[20] This Court did not refuse to invoke ORS 1.160 simply because other procedures were provided; it refused to invoke ORS 1.160 because of evidence that the legislature had considered and declined the proposed procedure.[21] In this matter, there is no indication that adoption of Rule 21 A included consideration of contractual forum selection clauses and purposeful omission of them from the scope of that rule.

Even assuming that ORS 1.160 may be invoked "only when there is no adequate existing procedure already available,"[22] the majority's conclusion that a judgment on the pleadings, summary judgment, or trial will be "adequate" for dealing with forum selection clauses is erroneous and is inconsistent with the

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[18] 182 Or App at 28.

[19] 263 Or at 10 (emphasis added).

[20] 182 Or App at 28.

[21] 263 Or at 10.

[22] *Black*, 182 Or App at 27.

conclusion reached by every other court to examine the issue. As noted in Judge Armstrong's concurring opinion, if a forum selection clause is to have any practical effect, there must be a procedural mechanism that allows a court to determine at an early date whether the clause is enforceable.[23] Under the approach proposed by the majority opinion, if factual issues regarding the enforcement of the provision are present, the parties will be required to wait for trial to determine whether they even belong in an Oregon court.[24] The procedural mechanisms advocated by the Court of Appeals in fact result in inefficiency and erode any benefit of the bargain of the forum selection clause.

The approach adopted by the trial court in this matter is consistent with the approach that has been adopted uniformly by courts that have confronted this issue. Although courts differ as to the basis for the procedure,[25] every jurisdiction that has considered the appropriate method for enforcing forum selection clauses

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[23] *Id.* at 35 (Armstrong, J., concurring).

[24] 182 Or App at 35 (J. Armstrong, concurring) ("If there are factual issues, a motion for summary judgment will be useless * * *.")

[25] *Compare Perkins v. CCH Computax, Inc.*, 333 NC 140, 423 SE2d 780 (1992) (treating enforcement of forum selection clause as a matter of venue), with *Scott v. Tutor Time Child Care Sys., Inc.*, 33 SW3d 679, 682 (Mo App WD 2000) (treating motion to dismiss for improper venue relating to a forum selection clause as an issue of jurisdiction), and *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 SW2d 66 (Tex App 1996) (concluding that a motion to dismiss is a proper mechanism to enforce a forum selection clause without identifying any particular rule as a basis for that conclusion). *See also Alpha Systems Integration, Inc. v. Silicon Graphics, Inc.*, 646 NW2d 904, 907-08 (Minn App 2002) (enforcing forum selection clause on pre-trial motion without determining proper procedural mechanism); *Bennett v. Appaloosa Horse Club*, 201 Ariz 372, 375, 35 P3d 426 (Ariz App 2001) (reviewing motion to dismiss based on forum selection clause without determining proper procedural mechanism).

has provided for resolution by an early pre-trial motion.[26] The trial court did not depart from Oregon law; rather, it was *authorized* by Oregon law to adopt the appropriate procedure, and followed the approach adopted by every other court that has examined the issue.

2. Defendants should have prevailed under either standard of review because the forum selection clause is unambiguous.

The trial court granted defendants' motion to dismiss based on the forum selection clause in the Agreement, holding that the Lenahans' claims against defendants for securities fraud, common law fraud, and ORICO violations in selling them securities "aris[e] from" the Agreement. (Pl Ab A-42-47) Contrary to the Court of Appeals' finding that an ambiguity prevented judgment enforcing the clause, the term "arising from" has only one reasonable construction as applied to the Lenahans' claims.

This Court set forth the standard for contract analysis under Oregon law in *Yogman v. Parrott*, 325 Or 358, 361-64, 937 P2d 1019 (1997). The court's task is (1) to examine the text of the disputed provision in the context of the document as a whole and, if it is not ambiguous, to construe it as a matter of law; (2) if the agreement is ambiguous, to examine extrinsic evidence of the parties' intent; and (3) if the contractual provision remains ambiguous after that examination, to rely on appropriate maxims of construction to construe the provision.

Ambiguity arises if *the meaning of the language* of a contract is subject to more than one reasonable interpretation. *Pacific First Bank v. New Morgan Park*

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[26] Defendants' research has not revealed any cases in which courts have determined a motion for summary judgment, or trial, to be the appropriate procedure for enforcing forum selection clauses.

Corp., 319 Or 342, 347-48, 876 P2d 761 (1994). It does not arise simply because the application of clear language to a particular set of facts is disputed. *See e.g.*, *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 406-07, 900 P2d 475 (1995). In *Eagle Industries*, the defendant (an attorney) was hired by the plaintiffs to represent them against a third party. The plaintiffs and the defendant entered into various fee arrangements during the course of the representation. Ultimately, the defendant negotiated a settlement agreement between the plaintiffs and the third party, which provided for an attorney's lien. The settlement documents purported to "supersede all prior written and oral communications or understandings and agreements between the parties relating to the subject matter hereof."[27] Later, the plaintiffs made claims against the defendant for excessive charges and billings under the previous fee arrangements. The defendant moved for summary judgment on the ground that the settlement agreement superseded any prior agreements. On appeal, the plaintiffs argued that there was a question of fact as to whether the parties intended the settlement agreement to supersede the prior fee agreements. The Court of Appeals agreed with the plaintiffs, and found the clause ambiguous. This Court reversed, holding that the term "supersedes" and the phrase "subject matter hereof," which "supersedes all prior * * * agreements" on the subject were not ambiguous, and proceeded to determine the legal effect of that language.[28]

In this matter, as in *Eagle Industries*, the dispute is not over the meaning of the words, but over the *legal effect* of those words. The language of the forum

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[27] 321 Or at 406.

[28] *Id.* at 407.

selection clause is not subject to more than one meaning. The forum selection clause states that "[v]enue for any legal action arising from this Agreement, including enforcement of any arbitration award, shall be in San Juan, Puerto Rico." (App. 25) This Court relies on dictionary definitions of contractual terms to determine how those terms should be construed. *Yogman*, 325 Or at 362-63. The relevant dictionary definitions of "arise" include "to originate from a specific source," "to come into being," and "to become operative."[29] "From" is "used as a function word to indicate the source or original or moving force of something as * * * (4) the place of origin, source, or derivation of a material or immaterial thing."[30]

Given the dictionary definitions of "arise" and "from", the only reasonable interpretation of the term "arise from" in the context of the Agreement is that the forum selection clause includes each of the Lenahans' claims. If the Lenahans had not entered into the Agreement, they would have suffered no damages and would have no claim. Thus, each of their claims (and any damages) "originate from" or "come into being" as a result of the Agreement as a matter of law.

That defendants' alleged misrepresentations predate the Agreement does not change the fact that the Lenahans' *legal action* "arose from" the Agreement. In his concurring opinion, Judge Armstrong states that because the Lenahans were not parties to the Agreement at the time of the alleged misrepresentations, "it is

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[29] Webster's Third Int'l Dictionary, 117 (unabridged ed 1993), cited in *Black*, 182 Or App at 29.

[30] Webster's Third Int'l Dictionary at 913, cited in *Black*, 182 Or App at 29.

difficult to see how the Agreement could be the point of origin of this legal action."[31] Such a conclusion confuses the "origin" of the alleged misrepresentations with the "origin" of the legal action. The forum selection clause does not cover "*misrepresentations* arising from this Agreement," but rather covers "*any legal action* arising from this Agreement." (App-25, emphasis added) Defendants' alleged misrepresentations -- in the absence of a purchase of interests in PCS -- did not give rise to any legal action. The Lenahans' legal action arose from the Agreement by which they became investors in PCS. They could not have invested without entering the Agreement and, without investing, they would have no claims.

Although the issue has not been addressed by Oregon courts, courts in other jurisdictions have applied similar forum selection clauses against non-contractual claims as a matter of law.[32] In *Roby v. Corporation of Lloyd*'s, the Second Circuit examined whether a forum selection clause applied to securities fraud claims "in connection with" the agreement at issue.[33] The Court noted that "there is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses."[34] Although the forum selection clause in *Roby* contained slightly different language than the clause in this matter, the court in *Roby* found that there is "no substantive difference in the

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[31] *Black v. Arizala*, 182 Or App at 41 (Armstrong, J., concurring).

[32] This Court has found relevant the views of other courts as to whether particular contractual language is ambiguous. See *Eagle Industries*, 321 Or at 406, n 6 (noting that the highest courts in other states have reached the same conclusion that Oregon has with respect to whether "supersedes" is ambiguous).

[33] 996 F2d 1353, 1361 (2d Cir), *cert den* 510 US 945 (1993).

[34] *Id.*

present context between the phrases 'relating to,' 'in connection with,' or 'arising from.'"[35] Other courts have applied clauses containing equivalent language to securities and RICO violations and fraud.[36]

B. The Court of Appeals erred in reversing the trial court's dismissal of the Lenahans' ORICO claims.

The trial court correctly held that the 1995 Amendments to the ORICO statute applied retroactively to claims based on conduct that predated the Amendments. The statute, on its face, uses verbs that indicate legislative intent to apply the Amendments retroactively.[37] The Court of Appeals erred in disregarding that plain textual evidence. The Court of Appeals also erred in considering the Amendments to be substantive when the purpose of ORICO is patently remedial.

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[35] *Id.*

[36] *See Rodriguez de Quijas v. Shearson/Am. Exp.*, 490 US 477, 478-79, 109 S Ct 1917, 104 L Ed 2d 526 (1989) (clause referring to any controversies "relating to [the] accounts" at issue applied to claims for securities fraud); *Shearson/American Express, Inc. v. McMahon*, 482 US 220, 223-24, 238, 242, 107 S Ct 2332, 96 L Ed 2d 185 (1987) (applying clause covering claims "arising out of or relating to my accounts, to transactions with you for me or to this agreement" to claims for securities and RICO violations, fraud, and breach of fiduciary duty); *Scherk v. Alberto-Culver Co.*, 417 US 506, 508-09, 519-20, 94 S Ct 2449, 41 L Ed 2d 270, *reh'g den* 419 US 885 (1974) (applying clause covering "any controversy or claim [that] shall arise out of" a contract for a business sale to claims for securities violations based on alleged fraudulent representations concerning the status of trademark rights purchased under the contract); *Gregory v. Electro-Mechanical Corp.*, 83 F3d 382, 383, 386 (11th Cir 1996) (interpreting clause in stock purchase agreement referring to disputes "arising hereunder," and finding that the phrase included the plaintiffs' claims for fraud and fraudulent inducement). Although these cases interpret the respective language in the context of arbitration clauses, the words have the same meaning in a forum selection clause and should be similarly construed. *See Roby*, 996 F2d at 1361 (noting that broad construction is appropriate in light of strong public policy in favor of forum selection and arbitration clauses).

[37] 1995 Or Laws, ch 619, § 1 (SB No. 386), codified at ORS 166.725.

1. The Court of Appeals improperly disregarded textual evidence of legislative intent regarding the retroactive application of the ORICO amendments.

In *Whipple v. Howser*, 291 Or 475, 632 P2d 782 (1981), this Court established the framework for analyzing whether a statutory provision is given retroactive effect. "[I]n determining whether to give retroactive effect to a legislative provision, it is not the proper function of this court to make its own policy judgments, but its duty instead is to attempt to 'discern and declare' the intent of the legislature."[38] The starting point in the analysis, therefore, must be the language of the statute itself.[39] If the language the statute is sufficiently clear so as to reveal the legislature's intent, it is both unnecessary and improper to resort to "rules" or "maxims" of construction.[40] A statute need not expressly state the intent of the legislature; rather, intent is sufficiently clear if it "is the logical inference to be drawn from the language of the statute."[41]

The tense of key verbs in the ORICO amendments provides clear evidence of legislative intent to apply those amendments retroactively. The critical verbs setting in motion the statutory consequences at issue are drafted in the past perfect tense ("criminal conviction *** <u>has been obtained</u>") rather than present tense (criminal conviction <u>is</u> obtained).[42] This Court has recognized that "[t]he use of a particular verb tense in a statute can be a significant indicator of the

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[38] *Id.* at 480.

[39] *Id.* at 479.

[40] *Id.* at 487.

[41] *Id.* at 486.

[42] 1995 Or Laws, ch 619, § 1 (SB No. 386), codified at ORS 166.725 (emphasis added).

legislature's intention,"[43] and the Court of Appeals has relied on the use of past tense as an indicator that statutory provisions are intended to be applied retroactively.[44] For example, in *Newell*, the Court of Appeals applied retroactively an amendment to a statute providing costs for the cleanup of hazardous materials. In analyzing the text of the statute, the court focused on the fact that the statute provides that "[a]ny owner or operator at or during the time of the acts or omissions *that resulted* in the release" of hazardous materials shall be strictly liable "for remedial action costs *incurred* by the state or any other person."[45] The Court reasoned that if the legislature had intended the statute to apply prospectively only, it presumably would have referred to "acts or omissions that result in the release" or that "*may* result in the release."[46] Similarly, in *Dwight*, the Court of Appeals applied retroactively an amendment to the paternity statute that referred to a "husband who *was* not impotent or sterile at the time of the conception."[47] The court reasoned that if the legislature had intended the amendment to be applied prospectively only, it would have used the present tense of the verb to refer to a husband who "is not impotent."[48]

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[43] *Martin v. City of Albany*, 320 Or 175, 181, 880 P2d 926 (1994).

[44] *Newell v. Weston*, 150 Or App 562, 570, 946 P2d 691 (1997); *State ex rel Dwight v. Justice*, 16 Or App 336, 338-39, 518 P2d 668 (1974).

[45] *Newell*, 150 Or App at 570 (emphasis supplied by the court).

[46] *Id.*

[47] *Dwight*, 16 Or App at 339 (emphasis supplied by the court).

[48] *Id.*

Yet, in this matter, the Court of Appeals rejected as evidence of legislative intent the tense of key verbs in the statute.[49] With respect to the issue of verb tense, the Court of Appeals stated as follows:

> "Defendants argue that, because ORS 166.725(6) and (7) refer to a conviction that 'has been obtained' a phrase that is in the past tense, the legislature intended the amendments to operate retroactively. That phrase does not refer to when the defendant engaged in the conduct that resulted in the conviction. It creates no requirement concerning the nature of that conduct. Rather, it refers to the situation at the time that the plaintiff brings the action. That in itself is sufficient to distinguish this case from *Newell v. Weston* * * *, on which defendants rely." 182 Or App at 31 n. 7 (internal citation omitted)

The panel's suggestion that verb tense is probative of legislative intent regarding retroactivity <u>only</u> when applied to verbs referencing the conduct of the defendant is inconsistent with its prior case law and has no rational basis. The court in *Newell* did not limit its discussion to the verbs referencing the defendant's conduct, addressing also whether remediation costs were "incurred."[50] In *Dwight* -- which the panel did not even attempt to distinguish -- the past tense verbs in the statute addressed the husband's state of fertility at a given point in time.[51]

More importantly, the panel's distinction based on language related to the "conduct of the defendant" is nonsensical. The purpose of verb tense analysis is to discern when the legislature intended for the statutory consequence to be set in motion. The use of past tense verbs relating either to conduct of the defendant or

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[49] *Black*, 182 Or App at 31 n. 7.

[50] *Newell*, 150 Or App at 570.

[51] *Dwight*, 16 Or App at 339.

to the circumstances surrounding that conduct are equally probative of legislative intent to set the statutory consequence in motion retroactively. By using the past tense to describe the circumstances surrounding the events giving rise to a claim under ORICO, the legislature adopted a backward-looking approach to the Amendments, and that approach should have been recognized by the Court of Appeals.

Because the logical inference from the verb tense of the ORICO amendments is that the legislature intended retroactive application, the Court of Appeals should have affirmed the trial court's ruling without resorting to an analysis of the remedial/substantive nature of the statute. Accordingly, the Court of Appeals' holding regarding the retroactive effect of the ORICO amendments should be reversed.

2. **The Court of Appeals' characterization of the 1995 ORICO amendments as "substantive" was flawed in light of the remedial nature of the ORICO statute as a whole.**

Even in the event that this Court is not persuaded by the textual evidence regarding verb tense, the ORICO amendments must be presumed to apply retroactively because of their remedial nature. A cause of action under ORICO is a statutory privilege providing enhanced remedies for offenses otherwise actionable at common law and under federal securities laws. Thus, because ORICO does not create rights and duties independent of those otherwise existing under the law, amendments to ORICO pertain only to remedies and must be presumed to apply retroactively.

If (and only if) courts are unable to discern legislative intent from the text of a statute, they may resort to certain maxims of constructions regarding

retroactivity.[52] Generally, a statutory change that affects a legal right or obligation arising out of past acts is not retroactive, but a change that affects the remedies a party may receive for a violation of legal rights is retroactive. *Compare Joseph v. Lowery*, 261 Or 545, 548-49, 495 P2d 273 (1972) (noting that this Court has refused to give retroactive application to the provisions of statutes which affect legal rights and obligations arising out of past actions), with *Spicer v. Benefit Ass'n of Ry. Emp.*, 142 Or 574, 602, 21 P2d 187 (1933) (basing its decision in favor of retroactive application on the statutory language, but noting that the remedial nature of the statute provided additional support for retroactive application). The purpose of the ORICO statute, and the legislative history of the 1995 amendments, indicate that ORICO is a remedial statute that increases the amount a plaintiff may recover for claims for which common law and statutory remedies are already provided.

The purpose of ORICO is patently remedial. *See* ORS 166.735(2)(referring to the statute's "remedial purpose"). A civil ORICO cause of action provides a treble damages remedy for actions for which actual damages are already provided for under the common law and federal securities laws.[53] In fact, to prove a violation

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[52] *Whipple*, 291 Or at 487.

[53] *See* ORS 166.725(7)(a) ("Any person who is injured by reason of any violation of the provisions of ORS 166.720(1) to (4) shall have a cause of action for three-fold the actual damages sustained and, when appropriate, punitive damages* * *."); ORS 166.720(12)("The application of one civil remedy under any provision of ORS 166.715 to 166.735 shall not preclude the application of any other remedy, civil or criminal, under ORS 166.715 to 166.735 or any other provision of law. Civil remedies under ORS 166.715 are supplemental and not mutually exclusive.").

of ORICO, a plaintiff must prove a violation of a civil or criminal duty owed *independently* of the statute itself.[54]

That point is emphasized in the legislative history, in the testimony by John Dilorenzo of the Oregon Litigation Reform Coalition advocating the amendments at issue:

> "[P]arties in ordinary commercial disputes based on fraud or securities claims already have other remedies. * * * All the addition of a RICO claim does is enhance damages which are already designed * * * to make the plaintiff absolutely whole.
>
> "* * *
>
> "My main point is that the securities laws already provide a full and complete remedy. So do many other laws that are listed under the RICO statute and the ORICO statute, and all that RICO or ORICO does is to provide a mechanism for just enhancing those damages without much more."

Tape recording, Senate Judiciary Subcommittee on Civil Process, SB 386, February 1995, Tape 5, Side A, and Tape 6, Side A.

The Amendments deprived the Lenahans of only their treble damages remedy under ORICO. Based on the same set of facts that gave rise to their ORICO claim, the Lenahans alleged causes of action for securities fraud under ORS 59.115 and 59.135 (and the securities laws of other states), and for common law fraud. (Pl Ab A-35-40) The rights and duties of the Lenahans and the defendants were unchanged by the ORICO amendments: defendants had an obligation to comply

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[54] The predicate acts for liability under ORICO -- "racketeering activity" or collection of an "unlawful debt" -- are defined as violations of other state and federal laws. *See* ORS 166.715(6) (defining "racketeering activity" as "[a]ny conduct that constitutes a crime, as defined in ORS 166.515, under any of the following provisions of the Oregon Revised Statutes* * * ."), and ORS 166.715(7)(defining "unlawful debt" as debt that is unenforceable because the debt was incurred in violation of Oregon statutes of federal law).

with securities laws and to avoid misleading the Lenahans, and the Lenahans had a right to recover for losses as a result of security law violations and false representations by defendants (should they prove that they suffered such losses). Before the Amendments, the Lenahans could have recovered under ORICO for three times their actual damages based on the allegations in the complaint; after the Amendments, their remedies were limited to those provided under the securities laws and the common law.

The Court of Appeals relied on *Thornton v. Hamlin*, 41 Or App 363, 366, 597 P2d 1307 (1979), in which the court refused to retroactively apply an amendment to the Tort Claims Act, to conclude that the ORICO amendments "impaired the plaintiff's existing rights."[55] However, *Thornton* involved retroactive application of amendments that would *immunize* the defendant from liability.[56] Retroactive application of the ORICO amendments would not immunize defendants from liability, but simply would limit the amount the Lenahans are entitled to recover.[57]

Where, as with ORICO, the legislature has provided a remedy beyond what existed under common law or the constitution, it may limit or amend that remedy as it sees fit, and such limitations or amendments will be presumed to have been intended to apply retroactively. Accordingly, the ORICO amendments, which limit a statutory remedy without changing the rights and duties of individuals under the common law and constitution, must be given retroactive application.

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[55] 182 Or App at 32.

[56] *Id.*

[57] Significantly, unlike the ORICO amendments which contain, on their face, textual evidence regarding retroactivity, the amendments to the Tort Claims Act at issue in *Thornton* were "silent" on their retroactive effect. 41 Or App at 366.

CONCLUSION

For the reasons discussed above, this Court should reverse the decision of the Court of Appeals.

DATED this 19th day of February, 2003.

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 19, 2003, I filed the original and 12 copies of **PETITIONERS' BRIEF ON THE MERITS** with the State Court Administrator by United States Postal Service, first class mail, postage prepaid, addressed as follows:

State Court Administrator
Records Section
Supreme Court Building
1163 State Street
Salem, OR 97310

I certify that on February 19, 2003, I served two true and correct copies of the original **PETITIONERS' BRIEF ON THE MERITS** on Counsel for the Parties as set forth in the attached List of Counsel.

I further certify that said copies were placed in sealed envelopes addressed as indicated herein and deposited in first class mail and that the postage thereon was prepaid.

DATED this 19th day of February, 2003.

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