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BEFORE THE CORT-APPOINTED REFEREE
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION
DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	**2008-HICIL-37**
Proof of Claim Number:	**CLMN 703351-01**
Claimant Name:	**John A. Hubbard**
Claimant Number:	**CDV 2007-745**
Policy or Contract Number:	**GL-1-48 82 51**
Insured or Reinsured Name:	**Carl Weismans & Sons, Inc.**
Date of Loss:	**January 22, 1987**

CLAIMANT'S WRITTEN SUBMISSION RE: DISPUTED CLAIM

STATEMENT OF CONTESTED ISSUES OF FACT AND LAW

Whether Claimant, John Hubbard's claim falls within Class II claims, "Policy Related Claims", or Class V, "Residual Claims, under RSA-C:44.

Whether Claimant, John Hubbard's claim against Carl Weisman & Sons is "within the coverage of" the insurance policy issued by the Home Insurance Company to Carl Weisman & Sons, policy #**GL-1-48 82 51**.

Whether Claimant, John Hubbard's Judgment and decision from the Montana Eighth Judicial District Court, finding that the exclusivity provision of the policy did not exclude coverage under the facts of the case and the law of the state of Montana, is to be considered as collateral estoppel and/or res judicata as to the issue of Hubbard's claim being "within the coverage of" the insurance policy issued by the Home Insurance Company to Carl Weisman & Sons, policy #**GL-1-48 82 51**.

LIST OF EXHIBITS AND AFFIDAVITS SUBMITTED

1. Deposition of John Hubbard, taken March 9, 1999.
   [DOCUMENTS #]
2. (CGL) Basic Form H21013F with Amendatory Endorsement L-6178, to Carl Weissman & Sons, Inc., (CW&S), policy #**GL-1-48 82 51**, effective for Jan. 22, 1987.
   [DOCUMENTS #]
3. Fourth Amended Complaint; *Hubbard vs. Carl Weismann & Sons, Inc.*, (CWS), Montana Eighth Judicial District Court, Cascade County case No. BDV-90-067.
   [Exhibit 17 to Phennings Declaration]
4. January 22, 1991, letter from its then Claims Administrator, Janet Davey of Sedgwick James of Washington, Inc., to HOME.
   [DOCUMENT #]
5. Declaration of Attorney, Robert Pfennigs, January 30, 2003, (with supporting exhibits).
   [DOCUMENTS #]
6. Ann Galasso Deposition, July 1, 2002.
   [DOCUMENTS #]
7. February 4, 1991 HOME letter to CW&S. [Exhibit 1 to Phennigs Declaration]
8. November 11, 1997, Montana Eighth Judicial District Court Order denying CW&S summary judgment motion. **[Exhibit 3 to Phennigs Declaration]**
9. Request to Take Judicial Notice parties agreed to put the UNDERLYING case on hold until the Montana Supreme Court issued its decision in *Sherner vs. Conoco* which was decided on March 30, 2000.
10. Letter dated April 14, 2000, from CWS attorney Robert B. Pfennigs, (Pfennigs) to HOME'S agent, REM, the claim administrator, Anne Glasso re: tender of defense.
    [Exhibit 6 to Phennigs Declaration]
11. Letter dated April 17, 2000 from Galasso on behalf of Home to CW&S attorney

Pfennigs, re: acknowledgment of receipt of the Amended Complaint and the tender of the defense thereof by CW&S to HOME. **[Exhibit 7 to Phennigs Declaration]**

12. Letter dated April 21, 2000 from HOME'S assigned defense counsel, Mr.Zadick, to HUBBARD'S counsel of record, Mr. Zadick indicated that he will be "taking over the defense" of CWS in the underlying case. **[Exhibit 9 to Phennigs Declaration]**

13. Stipulation dated November 13, 2000 in UNDERLYING CASE between Hubbard and CW&S re: Confession of Liability, Assignment, etc.
[DOCUMENTS #]

14. Letter dated April 20, 2000, from Ms. Galasso on behalf of the HOME, to HUBBARD'S counsel, Mr. Pfennigs, withdrawing defense counsel Zadick and denying coverage. **[Exhibit 8 to Phennigs Declaration]**

15. On May 15, 2000 Christopher Bulger, the insurance Broker on the CW&S account informed HOME assigned defense counsel Zadick.
[Exhibit 11 to Phennigs Declaration].

16. May 26, 2000, letter from attorney Phennigs to Glasso (Home) demanding the defense be reinstated. **[Exhibit 12 to Phennigs Declaration].**

17. June 6, 2000 letter from Glasso(Home to attorney Phennigs, re: request for Sherner decision of Montana Supreme Court. **[Exhibit 13 to Phennigs Declaration].**

18. September 6, 2000 letter from Attorney Phennigs to Glasso (Home) re demand.
[Exhibit 14 to Phennigs Declaration].

19. October 25, 2000 email from Glasso (Home) to attorney Phennigs re: coverage counsel retained. **[Exhibit 18 to Phennigs Declaration]**.

20. October 25, 2000 email from attorney Phennigs to Glasso (Home) re: coverage counsel opportunity lost. **[Exhibit 19 to Phennings Declaration]**.

21. November 13, 2000, Confession of Liability by CW&S, filed in UNDERLYING CASE. **[Exhibit 20 to Phennigs Declaration]**.

22. November 16, 2000 the Court entered an Order of Liability and set a trial on damages. **[Exhibit 21 to Phennigs Declaration].**

23. Letter dated Nov. 28, 2000, from Pfennigs to Glasso, encloses the Confession of Liability and other relevant documents, executed by CWS. **[Exhibit 22 to Phennigs Declaration].**

24. December 12, 2000 EMAIL FROM Attorney Phennigs to Glasso (Home), re: no response from Home Judgment will be entered in UNDERLYING CASE. **[Exhibit 23 to Phennigs Declaration].**

25. December 20, 2000, Judgment against CW&S in UNDERLYING CASE in the amount of $2,389,000.00. **[Exhibit 24 to Phennigs Declaration].**

LEGAL BRIEF

FACTS

The Home Insurance Company, (HOME) issued comprehensive general liability (CGL) Basic Form H21013F with Amendatory Endorsement L-6178, to Carl Weissman & Sons, Inc., (CW&S), policy **#GL-1-48 82 51**, effective for January 22, 1987.

On January 22, 1987 HUBBARD, while greasing the gears of a modified crane at the direction of the insured, CW&S, sustained severe injuries, including pulling his arm off at the shoulder socket and sever facial lacerations, while he was. The crane was owned by CW&S and had its gear guards removed by CW&S. If the gear guards had not been removed, John Hubbard's arm would not have been amputated as the gears which pulled his arm off would have been covered thereby disallowing Hubbard's arm to get entangled within the gears of the crane.

On January 22, 1990 HUBBARD filed his initial Complaint in the case of *Hubbard vs. Carl Weismann & Sons, Inc.*, (CWS), Montana Eighth Judicial District Court, Cascade County case No. BDV-90-067 (UNDERLYING CASE). The crane was being operated without required gear guards in violation of 29 CFR Ch. XVII, 1910.179(6) and 1910.550(8).

In addition, at the time of Hubbard's injuries the cran was not being operated by a licensed crane engineer, in violation of Montana's substantive law, 50-76-100, MCA. *See Count III, Fourth Amended Complaint.*

On January 22, 1991, HOME received a letter from its then Claims Administrator, Janet Davey of Sedgwick James of Washington, Inc., which informed HOME to set up a claim under the above referenced General Liability Coverage and refer this matter to an attorney to appear on behalf of C.W. & S., because Hubbard's claim alleged gross negligence.

CW& S tendered the defense of this claim by HUBBARD to The HOME Insurance Company. In its response to CW&S tender of the defense HOME admitted that the above referenced incident involving HUBBARD'S arm was an occurrence and an accident. *See Declaration of Robert Pfennigs, Page 2, paragraph 6.*

On February 4, 1991 HOME wrote to CW&S regarding HUBBARD'S claim. Therein HOME represented to its insured that HUBBARD's claim was an "occurrence" wherein the claimant "sustained injury" "in this accident", by stating:

> "We have now received a copy of your insurance policies which provided coverage for the date of this *occurrence* in 1987." A review of your policies of insurance, Policy No. GL1488251 with an inception date of 4/1/86, expiration date of 4/1/87 discloses that coverage would not respond to the injury sustained by your employee in this *accident*". (Emphasis mine)
> "Coverage is afforded to CW&S via Comprehensive General Liability Insurance under the basic form of H21013F ... Under Form L-6178 [the amendatory endorsement] coverage would not be provided. It is agreed that the exclusion related to bodily injury to any employee of the insured is deleted and replaced by the following:
> "This insurance does not apply:
> (i) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured for which the insured may be held liable as an employer or in any other capacity".

Taking the same position as the liquidator is now taking herein, CW&S moved for Summary Judgment in the UNDERLYING case based upon the exclusivity provision of Montana Workers Compensation statute. CW&S argued that the injuries to HUBBARD

occurred during the scope of his work for CW&S. On November 11, 1997 the Montana Eighth Judicial District Court denied CW&S summary judgment motion, based upon *Lockwood v. W.R. Grace*, 272 Mont. 202, 900 P2d 314, 52 St. Rptr 705, (1995). The basis of the Montana Eighth Judicial District Court's decision was that the Montana Supreme Court had expanded the intentional tort exception to the workers compensation exclusivity rule. The District Court denied CW&S Summary Judgement Motion because "intent to injure does not mean desire to injure; it means that the employer intended the employee should undergo the injury - the exposure to harm - of which the employer knew on a daily basis." *See attached Declaration of Robert Pfennigs, Page 4, paragraph 11.*

Pursuant to an agreed Request to Take Judicial Notice, the parties agreed to put the UNDERLYING case on hold until the Montana Supreme Court issued its decision in *Sherner vs. Conoco* 298 Mont. 401, 995 P.2d 990 (2000), which was decided on March 30, 2000.

In a letter dated April 14, 2000, from CWS attorney Robert B. Pfennigs, (Pfennigs) to HOME'S agent, REM, the claim administrator, Anne Glasso, HUBBARD'S Second Amended Complaint in the UNDERLYING case was enclosed with a notice that tendered the defense thereof to HOME. *See attached Declaration of Robert Pfennigs, Page 5, paragraph 12.*

By letter dated April 17, 2000 from Galasso to Pfennigs, she acknowledged receipt of the Amended Complaint and the tender of the defense thereof by CW&S to HOME. Galasso further indicated that "HOME has assigned defense counsel" Gary Zadick, Esq., "to represent CW&S in this matter". Galasso also stated that HOME was "reserving its right to conduct a coverage investigation in this matter". *See attached Declaration of Robert Pfennigs, Page 5, paragraph 14.*

In a letter dated April 21, 2000 from HOME'S assigned defense counsel, Mr.Zadick, to HUBBARD'S counsel of record, Mr. Zadick indicated that he will be "taking over the defense" of CWS in the underlying case.

Three days after her letter accepting the tender of the defense, April 20, 2000, Ms. Galasso on behalf of the HOME, wrote another letter to Mr. Pfennigs, withdrawing defense counsel Zadick and denying coverage. The HOME based this denial upon the same exclusion from coverage cited in the initial disclaimer. The initial disclaimer occurred before the change in the Montana Law with regard to allowance of a direct civil action against an employer. This change in the law was the basis of the Court's denial of CW&S summary judgment, which was based solely upon the Workers Compensation exclusivity provisions.

On May 15, 2000 Christopher Bulger, the insurance Broker on the CW&S account informed HOME assigned defense counsel Zadick, by letter, that;

> "on a couple of occasions in the mid-1980's representatives of the HOME advised me that Montana was a sole remedy state and that coverage B - Employer's Liability - was therefore neither needed by nor available to Weismann and Sons. As a result such coverage was not offered to this account, which was continuously with HOME from 1980 until 1994."

Mr. Zadick provided Mr. Bulger's above referenced May 15, 2000 letter, to Ms. Glasso, on June 7, 2000.

Ms. Galasso stated she had no idea why Mr. Bulger at Marsh Advantage America wrote a letter to Gary Zadick on May 15th of 2000. Ms. Galasso did not speak with Mr. Bulger about the contents of his May 15, 2000 letter. After reading Mr. Bulger's May 15, 2000 letter to Mr. Zadick, Ms Galasso did not feel it was appropriate to talk with Mr. Wood regarding the allegations made by Mr. Bulger in that letter. *See attached Galasso Deposition P 66, L 4-7; P 68-69.*

HOME was aware of the fact that Employers Liability or Stop-Gap insurance would provide a defense for CW&S in the UNDERLYING CASE. This is because employer's liability insurance covers the defense of the insured in the civil action when they are sued by the employee. In addition, Ms. Galasso was aware of the fact that HOME had offered Employers Liability or Stop-Gap insurance. More specifically, Ms. Galasso was aware that HOME provided stopgap endorsements under the employer's liability coverage for

Montana during the time of HUBBARD's claim. Further, Ms. Galasso knew it was fairly inexpensive, $211. *Galasso Deposition, P 43-44; P 116, L 12-22. P 165, L 2-6.*

Noteworthy is the fact that Ms Glasso's file notes for June 6, 2000 reflect HOMES acknowledgment that;

> "Coverage disclaimed for this loss originally in 1991. Retender in 2000 based upon recent Supreme Court Case allowing exception for direct action by employee against employer. The exception to exclusive remedy is the intentional harm exception. We disclaimed coverage again in April 2000, based on the fact that there is no stop gap coverage on this policy and the workers comp coverage applied solely to California and Idaho. ... Will respond to counsel and advise him we are taking his position under consideration. Ann"

Ms. Galasso received a copy of the *Sherner vs. Conoco* opinion on June 7, 2000

Ms. Galasso was the individual who accomplished each and every item done or task undertaken to complete HOME's coverage investigation, after the tender of the Second Amended Complaint in the UNDERLYING case, which resulted in HOME's withdrawing the defense and denying coverage.

In her deposition, P 155, L 24-25, Ms. Galasso stated she has never had a case in Montana involving any potential coverage issues.

Ms. Galasso did not consult or use any written policies, procedures, rules, manuals, directives, guidelines, standards, etc. setting forth practices, procedures and policies related to claims handling and insurance coverage determinations with regard to any actions she took in the UNDERLYING case.

Ms. Galasso, on behalf of HOME, only reviewed the initial 1991 letter denying coverage and pull the underwriting files, as the totality of the investigation, after CW&S tendered the defense of the Second Amended Complaint.

See attached Galasso Deposition P 36, L 1-8; P 37-38, L 24-25 & 1-9.

In a letter dated May 26, 2000, from CW&S attorney Pfennigs to Ms. Glasso, a demand was made that "HOME INSURANCE COMPANY reinstate the defense and coverage of this matter". Such letter further indicated that CW&S did not obtain

employer's liability coverage because of an affirmative representation by HOME "that since Montana is a "sole remedy" state, employers liability coverage was not needed. *See attached Declaration of Robert Pfennigs, Page 6, paragraph 18.*

Ms Glasso's file notes for June 6, 2000 reflect HOMES acknowledgment that;

> "Coverage disclaimed for this loss originally in 1991. Retender in 2000 based upon recent Supreme Court Case allowing exception for direct action by employee against employer. The exception to exclusive remedy is the intentional harm exception. We disclaimed coverage again in April 2000, based on the fact that there is no stop gap coverage on this policy and the workers comp coverage applied solely to California and Idaho. ... Will respond to counsel and advise him we are taking his position under consideration. Ann"

Galasso Deposition P 80, L 8-24.

Ms. Galasso first received a copy of the Sherner vs. Conoco, 298 Mont. 401, 995 P.2d 990 (2000), opinion on June 7, 2000 at 10:49 a.m. *Galasso Deposition P 74, L 7.* This was the Montana Supreme Court decision providing a direct action against an employer for intentional acts, which was the basis of the Court denying the insured's motion for summary judgment in the UNDERLYING CASE. The insured's summary judgment motion had been based upon the exclusivity provision of the workers compensation statute and the above referenced exclusion.

Ms. Glasso also discussed this matter with HOME's general counsel, Joel Ross, and suggested HOME get a copy of the Montana Supreme Court Case and review to find out if it applies retroactively. Ms. Glasso did obtain a copy of Sherner vs. Conoco, Inc., 298 Mont. 401, 995 P.2d 990 (2000), which she described on June 7, 2000 as "allowing suit against an employer outside the exclusivity provisions of workers comp. *Galasso Deposition P 98, L 20-25.*

In finding that an employee may hold his employer liable in a civil suit, to injuries occurring while working, the Montana Supreme court, in Sherner vs. Conoco, Inc., supra, held;

//

"...that the appropriate definition of "malice" for use in § 39-71-413, MCA, (the workers compensation exclusivity statute) is that found in § 27-1-221(2), MCA;
[a] defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and: (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff. Section 27-1-221(2), MCA.

The term "act" is not defined in the Act and has no technical definition. Therefore, it may also be construed according to its plain meaning. "Act" is "the process of doing or performing something." The American Heritage Dictionary of the English Language, Third Edition, 1996. Finally, the term "omission" may similarly be construed according to its plain meaning; "1. the act or an instance of omitting; 2. the state of having been omitted; 3. something omitted or neglected." The American Heritage Dictionary of the English Language, Third Edition, 1996.

Conoco responds that if we apply the plain language doctrine to the statute, then the exception to the exclusive remedy rule would not apply to this case at all because it only refers to causes of action against fellow employees. However, we have held that while the language of § 39-71-413, MCA, provides for a cause of action only against a fellow employee or other servant of the employer who intentionally and maliciously injures an employee, such an action may be brought against the employer as well. [citation omitted] To fail to hold employers liable in the same manner as their employees by permitting an employer to commit an intentional and malicious act or omission that causes an injury to an employee, and then allowing him to hide behind the exclusivity provision of the Act, would defeat the purpose of the Act."

Ms. Galasso made the determination, because of the fact that the policy said no coverage, that notwithstanding what the *Sherner* decision had to say, it didn't matter, because there was no coverage period, regardless of what Montana law said. *Galasso Deposition P 80, L 16-21.*

Ms. Galasso did not make a request of anyone else to determine whether the Sherner decision would change the CGL policy issued to CW&S, as far as whether there was coverage or not. *Galasso Deposition P 94, L 11-14.*

A letter dated Sept. 6, 2000, from Pfennigs to Glasso, via mail, enclosed HUBBARD'S settlement demand which was made upon CWS. Pfennigs states,

> "Please consider this letter as the last demand CWS will make for a defense and indemnity in this case. Demand is hereby made that the HOME settle this case within policy limits". If HOME continues its refusal to defend and indemnify, it does so at its own peril. I am sure you are aware of the line of Montana cases holding that if the HOME breaches its duty under the policy, it is liable for any settlement of judgment that may result in this case".

Declaration of Robert Pfennigs, Page 7, paragraph 19.

On September 6, 2000 Mr. Pfennigs wrote a letter to Ms. Galasso informing her:

> "the Home's denial of coverage is based upon an exclusion that involves claims "arising out of" the employment relationship. In that regard I enclosed a recent opinion from the Montana Supreme Court entitled *Pablo vs. Moore*, 298 Mont 393, 995 P2d 460 (2000), which I maintained construes the "arising out of" language and construes it against the Home and in favor of coverage in this case.

Mr. Pfennigs further informed Ms. Galasso that if the HOME was going to once again wrongfully refuse to defend and provide indemnity to CWS he would encourage her to send this matter to outside counsel for review in light of the *Pablo vs. Moore* decision. *Declaration of Robert Pfennigs, Page 7, paragraph 20.*

The exclusions relied upon by HOME are the exact same defenses asserted by CW&S in the UNDERLYING action, that being the injury to HUBBARD occurred while in the employ of CWS and the exclusivity provision of the Montana Workers Compensation Act is controlling. However, this was not the determination of the Montana Eighth Judicial District Court, nor was it the final determination of CWS at the time it was forced to confess judgment to HUBBARD. *Declaration of Pfennigs, Page 9-10, par. 29.*

Not having received any response to his Sept. 6, 2000 letter, in another letter dated, Oct 13, 2000, from Pfennigs to Glasso, via fax, Pfennigs discussed HOME'S failure to respond to his letter of September 6, 2000, by stating;

> "I take your silence to mean that the HOME Insurance is going to continue with its refusal to either defend or indemnify". In addition, Pfennigs states, "While I believe that the HOME has already breached its contract, I am willing to allow one more opportunity to assume its duties and responsibilities under the policy. The HOME has until Friday, October 20, to notify me that it is assuming its duties to defend and indemnify under the policy."
>
> "As with the other complaints, I believe the complaint pleads facts that fall within the coverage of The Home's insurance policy. While I believe that the Home has already breached its contract, I am willing to allow it one more opportunity to assume its duties and responsibilities under its policy. The Home has until close of business on Friday, October 20, to notify me that it is assuming its duties to defend and indemnify under the policy. If I have not heard from you by then, I am going to take whatever steps are necessary to protect my clients interests and The Home will have to suffer the consequences."

Declaration of Robert Pfennigs, Page 7-8, paragraph 21.

On Oct 24, 2000 Pfennigs wrote to Glasso, via Fed Ex, indicating that HOME had breached it obligation to defend CWS and he is "afraid that the opportunity for the HOME Insurance Company to fulfill its contractual obligations to CWS has long since past." *Declaration of Robert Pfennigs, Page 8, paragraph 21.*

Ms. Galasso made the decision to retain coverage counsel on October, 17 2000. *Galasso Deposition P 104, L 9-15.* Ms Glasso sent an e-mail dated Oct 25, 2000 to Mr. Pfennigs stating;

> "Please be advised that HOME insurance Company has retained coverage counsel in this matter. Coverage counsel is Peter Habin, Esq., of The Crowley Law Firm. His phone number is (406) 255-7208. Should you have any questions please do not hesitate to contact Mr. Habine"

Mr. Pfennigs responded to Ms Galasso's Oct. 25, 2000 e-mail, by reply e-mail on Oct. 25, 2000, informing her that "the opportunity for HOME to retain coverage counsel and assume its duties under the policy has been lost." Mr. Pfennigs again did not get a response from Ms. Galasso no did he hear from Mr. Habein, the attorney identified by Ms. Galasso as being coverage counsel. *Declaration of Robert Pfennigs, Page 8, paragraph 21 & 22.*

On November 13, 2000 CW&S filed a Confession of Liability in the UNDERLYING case, wherein it confesses its liability to HUBBARD for those claims made in the Fourth Amended Complaint. CW&S also executed a Stipulation related to the Confession of Liability. *Declaration of Robert Pfennigs, Page 8, paragraph 22.* On November 16, 2000 the Court entered an Order of Liability and set a trial on damages. A letter dated Nov. 28, 2000, from Pfennigs to Glasso, encloses the Confession of Liability and other relevant documents, executed by CWS. Still not having received any communication from Ms. Galasso nor Mr. Habein, CW&S attorney Pfennigs wrote an e-mail to Ms. Glasso on December 12, 2000 wherein Mr. Pfennigs indicated;

> "I still am amazed at the lack of response The Home has had to this case as I expected to hear something after my last communication."

A trial on damages was held in the UNDERLYING Montana Eighth Judicial District Court case and as a result thereof a Judgment and Order was entered on Dec. 20, 2000 wherein CW&S was ordered to pay HUBBARD $2,389,000.00. A Letter dated Dec 22, 2000, from Pfennigs to Glasso, enclosed the judgment against CWS and in favor of HUBBARD.

HOME had ample opportunity to bring a declaratory relief action on the issue of coverage in the Montana Eighth Judicial District Court, but instead denied insurance coverage and a defense, even though the Montana Eighth Judicial District Court found that the exclusivity provision of Montana's workers compensation laws was not applicable as to Hubbard's claim. *Declaration of Robert Pfennigs, Page 9, paragraph 24-28.* C.W. & S. stipulated to an assignment of any and all rights it had against its insurer (HOME), to HUBBARD.

HUBBARD independently, and as assignee of C.W. & S.'s rights against HOME, brought an action against HOME for Breach of Contract, Common Law Bad Faith, Actual Malice, Violation of Montana's Unfair Claims Settlement Practices Act, §33-18-201, MCA, an Independent Cause of Action pursuant to §33-18-242, MCA. At the time of the stay being issued as a result of the HOME'S liquidation, HUBBARD'S case against the HOME was in the United States District Court for the District of Montana, Great Falls Division, under Cause No.: CV-01-71-GF-SEH.

LEGAL ARGUMENT

COVERAGE

As has been previously determined by the Montana Eighth Judicial District Court in the underlying case, neither the exclusivity provision of Montana's workers compensation statutes nor the cited exclusion of the CGL policy are applicable. That exclusion states:

> "This insurance does not apply: (i) To bodily injury to any employee of the insured arising out of and in the course of his employment by the insured for which the insured may be held liable as an employer or in any other capacity".

The language of the exclusion (i) mirrors Montana's workers compensation exclusivity

statute. It was determined by the Montana Eighth Judicial District Court in the UNDERLYING case, based upon the public policy enumerated in the case of *Lockwood v. W.R. Grace*, 272 Mont. 202, 900 P2d 314, 52 St. Rptr 705, (1995) and *Sherner vs. Conoco, Inc.*, 298 Mont. 401, 995 P.2d 990 (2000), that the exclusivity provision of the worker's compensation law was not applicable to HUBBARD's injury. The determination that under these circumstances the exclusivity provision is void as being against public policy, also voids the exclusion in the policy. Both the contractual exclusion and the Montana's workers compensation exclusivity provision, 39-71-407(1), MCA, have the exact same wording.

"Exclusions from coverage will be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy." *Marie Deonier & Associates vs. Paule Revere Life Ins. Co.*, 301 Mont 347, 360, 9 P3d 622, 630 (2000) (quoting *Wellcome vs. Home Ins. Co.*, 257 Mont. 354, 356-57, 849 P2d 190, 192 (1993)).

Exclusion (i) relied upon by HOME herein is the same defense CWS first asserted in the defense of the UNDERLYING action brought by Hubbard. CWS argued to the Montana Eighth Judicial District Court that the exclusivity provision of the workers compensation statute and the exclusion were controlling. However, even though that was the defense of CWS in the underlying action, it was not the determination of the Court, nor was it the final determination of CWS at the time it was forced to confess judgment to HUBBARD after the Court's holding.

The Montana Supreme Court has held that the phrase "arising out of and in the course of his employment" in an insurance policy is ambiguous. The phrase "arising out of" is not defined in HOME's insurance policy. This phrase has been deemed to be ambiguous if undefined in the policy or by the context in which the phrase is used. *Pablo vs. Moore*, 298 Mont. 393, 397-98, 995 P2d 460, 462-63 (2000). HOME was made aware of the holding in *Pablo vs. Moore*, supra, by CW&S counsel in the UNDERLYING case.

However, HOME chose to ignore this clear statement of Montana law when it had ample opportunity to defend its insured in the UNDERLYING case. The exclusionary language of the policy, "bodily injury to any employee of the insured arising out of and in the course of his employment", has been deemed to be ambiguous language in an insurance policy.

The exclusionary provision of Montana's workers compensation act, 39-71-407(1), MCA, is identical to the exclusionary language of the policy. Both CW&S and the Court in the UNDERLYING case determined that this language would not bar CW&S's liability to HUBBARD. Accordingly, since "arising out of and in the course of his employment" is ambiguous under Montana law, the interpretation of this identical language in the policy which is most favorable to providing coverage must be given. *Pablo vs. Moore* 298 Mont at 400, *Hudson and Edsall vs. Odysey*, 29 MFR 100, 112 (2001 USDC MT).

The HOME had a duty to act in good faith toward their insured and claimants, which duty exists independent of the above-referenced insurance contract. The conduct of the HOME, above referenced, was a breach of it's contractual duty to act in good faith.

COLLATERAL ESTOPPEL

Collateral estoppel bars the party against whom the claim is asserted, or a party in privity with the earlier party, from relitigating issues which have been decided with respect to a different cause of action." *Federated Mut. Ins. Co. v. Anderson*, 991 P2d 915 (Mont. 1999). The Montana Eighth Judicial District Court has ruled that the exclusion relied upon by the Home, and now the liquidator, is not applicable to Mr. Hubbard's claim. Collateral estoppel, also known as issue preclusion, bars the reopening of an issue in a different cause of action that has been litigated and determined in a prior suit. See *Holtman v. 4-G's Plumbing & Heating, Inc.*, 872 P2d 318 (Mont. 1994). The preclusive effect extends to all issues essential to the prior judgment. Here, that means the preclusive effect of the Montana District Court's holding and judgment requires a finding here that the Home is precluded from relitigating whether the exclusion is effective. The Montana District

Court's ruling on this issue is determinative.

In *Aetna Life Ins. Co. v. McElvain*, 221 Mont. 138, 717 P2d 1081, 43 St. Rep. 697 (1986), Aetna Life Insurance Company contended that the Montana District Court erred in failing to give collateral estoppel effect to a South Dakota District Court judgment. Aetna asserted that the South Dakota decision, holding that Aetna was not guilty of fraud, was entitled to full faith and credit in Montana and conclusively defeated the fraud allegations. The Court held that the South Dakota judgment was entitled to the same effect in Montana, since the requirements for applicability of collateral estoppel outlined in *Aetna Life & Cas. Ins. Co. v. Johnson*, 207 Mont. 409, 673 P2d 1277, 41 St. Rep. 40 (1984), were met. This is very similar to the situation here. A Montana District Court has determined that the exclusion provision at issue does not preclude coverage and therefore Hubbard's claim. This tribunal should give the Montana court's decision full faith and credit. Once it does so, the Home and its liquidator are precluded from relitigating that issue in this forum.

RES JUDICATA

The doctrine of res judicata not only precludes a party from relitigating claims that were litigated in a previous action, but under *Balyeat Law, P.C. v. Hatch*, 284 Mont. 1, 942 P2d 716, 54 St. Rep. 780 (1997), res judicata will also bar an action for a claim that a party had an opportunity to, but did not, litigate in a previous action. *Fisher v. St. Farm Gen. Ins. Co.*, 1999 MT 308, 297 Mont. 201, 991 P2d 452, 56 St. Rep. 1236 (1999). The home had every opportunity to bring a declaratory relief action to determine the issue of coverage and the applicability of the exclusion at issue, at any time after the defense of Hubbard's claim was tendered to them by CW&S. The Home made a conscious choice to refuse coverage and refuse to bring a declaratory relief action.

REASONABLE EXPECTATIONS DOCTRINE MAKES EXCLUSIONS INVALID

Montana has adopted the "reasonable expectations" doctrine which was discussed in *Wellcome vs. Home Ins. Co.*, 257 Mont. 354, 357, 849 P2d 190, 192 (1993), as follows:

> We turn next to the "reasonable expectations" doctrine, first recognized by this Court in *Transamerica Ins. Co. V. Royle*, (1983), 202 Mont. 173, 656 P.2d 820. In that case, we held that a policy exclusion was invalid due to its failure to "honor the reasonable expectations" of the purchaser of the policy. *Royle*, 656 P.2d at 824. We quoted Keeton, Insurance Rights at Variance with Policy Provisions, 83 Harv.L.Rev. 961, 967 (1970), for the proposition that the objectively reasonable expectations of the purchaser would be honored notwithstanding that a "painstaking study" of the policy would have negated the expectations. *Royle*, 656 P.2d at 824. The reasonable expectations doctrine is in accord with our strong public policy that insurance is intended to serve a fundamental protective purpose; to this extent the doctrine goes hand in hand with our rule of strictly construing policy exclusions. See *[Farmers Mutual Ins. Co. vs.] Oakland*, [251 Mont. 352] 825 P.2d at 556.

J. Christopher Bulger, with the insurance brokerage firm of Fred S. James & Co., subsequently known as Sedgwick James, now known as Marsh Advantage America, (James/Marsh), was the broker on the CW&S account from 1980 through 1987 who arranged the insurance at issue herein. James/Marsh, as the insurance producer, solicited, procured and prepared CW&S application for the insurance policy at issue herein. After HOME insured CW&S under the CGL insurance policy, but prior to the accident which resulted in HUBBARD's bodily injury, CW&S requested, on several occasions, additional insurance in the form of Employers Liability coverage. James/Marsh discussed CW&S request for such Employers Liability coverage with HOME. Representative of HOME advised "Montana was a sole remedy state for workers compensation purposes and that coverage B - Employers Liability - was therefore neither needed by nor available to [CW&S]." As a result, such coverage was not offered to CW&S. It was CW&S reasonable expectation, based upon the representations of HOME, that Employers Liability coverage was neither needed nor available to CW&S.

During the UNDERLYING case, upon CW&S's inquiry to HOME about this representation that Employer's Liability coverage was neither needed nor available, CW&S learned that HOME did offer such coverage to insureds for whom they wrote general liability policies. HOME does not dispute that the Employers Liability endorsement to the general liability policy would have provided CW&S with a defense for the claims made by HUBBARD.

Marsh/James was the agent of HOME. The provisions in the policy were formulated by HOME. James/Marsh had no discretion to change the insurance forms of HOME. James/Marsh was soliciting the application and promoting HOME's insurance product. The actions of James/Marsh in soliciting and procuring the insurance and preparing the applications are as agents for HOME. A soliciting agent of an insurance company is the agent of the insurer and not of the insured for the purpose of soliciting and procuring the insurance and preparing the application. *Tynes vs. Bankers Life Co.*, 224 Mont. 350, 730 P.2d 1115 (1986), *Marie Deonier & Assoc. vs. Paul Revere Ins*. Co., 301 Mont. 347, 364-67, 9 P.3d 622 (2000).

As HOME's agent, the acts and representations of Marsh/James to CW&S are imputed to HOME. 28-10-405, MCA, provides that an agent has authority to do everything necessary and proper and usual, in the ordinary course of business, for effecting the purpose of his agency; and make a representation respecting any matter of fact, except the terms of his authority, upon which his right to use his authority depends and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made. Where the words used to create a principal and agent relationship are ambiguous in themselves, they are to be taken most strictly against the principal, and the agent in his dealings with a third person may bind the principal in accordance with usage or by any construction of the ambiguous words that is reasonable. The grant of powers is not to be frittered away by very nice and metaphysical distinctions when the general tenor of the instruments is in favor of what was done under the power and when the principal has reaped the benefit of it. *McLaren Gold Mines v. Morton*, 124 Mont. 382, 224 P2d 975 (1950).

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CONCLUSION

It should be determined by the Referee that Claimant, John Hubbard's claim falls within Class II claims because the issue of coverage has been determined by the Montana District Court. The Referee must give full faith and credit to the determination of the Montana Eighth Judicial Districts courts findings and determinations.

As the District Court in Montana has determined that the exclusions relied upon by Home were not applicable under Montana substantive law, the referee should adopt the decision, and not allow the Home to "relitigate", under the doctrines of res judicata and collateral estoppel.

It clear that under the circumstances and facts of this claim, neither the exclusivity provision of Montana's workers compensation act nor the employment exclusion is applicable to deny coverage.

The Montana Eighth Judicial district Court has entered a Judgment in claimant's favor in the amount of $2,389,000.00. This judgment is based upon the above facts. Thus, pursuant to RSA-C:44, the status of the claim would be a class II rather than a lower residual or judgment class.

Dated this 6th day of February, 2009

David B. Gallik, Esq.
for Claimant, John A. Hubbard

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on the date set forth below, I caused to be electronically served and filed the forgoing Claimant's Written Submission Re: Disputed Claim, to the following individuals by emailing it as a PDF file attachment, along with a PDF file attachment containing the exhibits and affidavits it to the following email addresses:

The Home Insurance Company in Liquidation
c/o Merrimack Superior Court
163 North Main Street
Concord, New Hampshire 03302-2880
E-mail help@hicilclerk.org

Eric A. Smith
Rackemannn, Sawyer & Brewster, P.C.
160 Federal Street
Boston, Massachusetts 02110-1700
E-mail esmith@rackemann.com

DATED this 6 day of February, 2009.