THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

BEFORE THE COURT-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**
Insured or Reinsured Name:	**Carl Weisman & Sons, Inc.**

LIQUIDATOR'S SECTION 15 SUBMISSION

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), makes this submission in support of the Liquidator's determination of the claim of John A. Hubbard ("Hubbard") pursuant to § 15 of the Revised and Restated Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation ("Claims Procedures Order"). As directed in the January 2, 2009 Scheduling Order, the Liquidator addresses "the issue of whether there is coverage under the Home policy."

Introduction

Hubbard objected to the Liquidator's determination denying his claim for coverage of his lawsuit against Carl Weissman & Sons, Inc. ("CWS") under the Home policy issued to CWS. The Liquidator's determination should be sustained because there is no coverage for the claim under the terms of the Home general liability policy. Employee bodily injury claims are excluded from the Home policy by the employee exclusion, which unambiguously excludes employee claims against employers for bodily injury. Employers such as CWS who wish to obtain insurance against employee claims need to purchase employer's liability coverage, and

CWS did not purchase such coverage from Home. Hubbard's assertions that the Montana trial court addressed the employee exclusion in a decision in the underlying tort case are mistaken. That decision is irrelevant. It construed the employer exclusivity provision of the Montana Workers Compensation Act ("WCA") and said nothing about insurance coverage. For these and the additional reasons set forth below, the Referee should sustain the Liquidator's determination that Hubbard has no claim under the Home policy.

I. Issues to be determined:

1. Whether Home's policy provides coverage for Hubbard's claim against CWS for bodily injuries sustained while working for CWS.

2. Whether an order of the Montana trial court in the underlying tort action between Hubbard and CWS that denied CWS' motion for summary judgment based on employer immunity under the WCA has res judicata or collateral estoppel effect on coverage issues in a dispute with Home.

3. Whether Hubbard's claim, to the extent it asserts matters other than coverage under the Home policy, is Class II or Class V.

II. Exhibits:

The Liquidator relies upon the following exhibits (cited as "Liq. Ex."):

1. Proof of Claim CLMN703351 submitted by John Hubbard (without exhibits) dated June 7, 2004

2. Liquidator's Notice of Redetermination dated March 31, 2008

3. The Home Insurance Company general liability policy GL 1488251 issued to Carl Weissman & Sons

4. The Home Indemnity Company workers compensation policy WC-L169449-01 issued to National General Supply, Inc. & Carl Weissman & Sons, Inc.

5. CWS letter to Home dated January 25, 1991

6. CWS letter to Fred S. James & Co. dated January 26, 1987

7. Sedgewick James letter to Home dated January 22, 1991, with enclosed fax from CWS dated January 18, 1991

8. Complaint filed January 22, 1990 in Hubbard v. Carl Weissman & Sons, Inc.

9. Home letter to CWS dated January 29, 1991

10. Home letter to CWS dated February 4, 1991

11. Order on CWS' Motion for Summary Judgment dated November 11, 1997

12. CWS (Jardine, Stephenson, Blewett & Weaver, P.C.) letter to Home dated April 14, 2000

13. Second Amended Complaint in Hubbard v. Carl Weissman & Sons, Inc. dated March 10, 2000

14. Home letter to CWS dated April 17, 2000

15. Home letter to CWS dated April 20, 2000

16. Fourth Amended Complaint in Hubbard v. Carl Weissman & Sons, Inc. dated October 5, 2000

17. Stipulation in Hubbard v. Carl Weissman & Sons, Inc. dated November 13, 2000

18. Confession of Judgment in Hubbard v. Carl Weissman & Sons, Inc. dated November 13, 2000

19. Judgment in Hubbard v. Carl Weissman & Sons, Inc. dated December 20, 2000

III. Factual Background

1. The Home general liability policy and pertinent exclusions. The Home Insurance Company issued general liability policy No. GL-1488251 to CWS for the period April 1, 1986 to April 1, 1987. Liq. Ex. 3. Among its other provisions, the policy includes exclusions providing:

This insurance does not apply: . . .

(i) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;

(j) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the insured under an incidental contract;

Liq. Ex. 3 at 3. The policy also includes Endorsement L6178 (Liq. Ex. 3 at 26), which provides that:

It is agreed that the exclusion relating to bodily injury to any employee of the insured [Exclusion (j) above] 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;

ii) to any obligation of the insured to indemnify or contribute with another because of damages arising out of the bodily injury; . . .

This exclusion applies to all claims and suits by any person or organization for damages because of such bodily injury including damages for care and loss of services.

This exclusion does not apply to liability assumed by the insured under an incidental contract.

2. CWS' workers compensation coverage. In the state of Montana, CWS was provided workers compensation coverage by the Montana State Fund. See Liq. Ex. 6. The Home Indemnity Company issued a workers compensation and employers liability policy No. WC-L169469-01 to CWS for the policy period May 15, 1986 to May 15, 1987, but it only provided coverage for the states of California and Idaho. Liq. Ex. 4 at 1. As Hubbard concedes, CWS did not obtain employer's liability coverage in Montana. Claimant's Written Submission re: Disputed Claim ("Cl. Sub.") at 8-9, 17.

3. Hubbard's injury and workers compensation claim. Hubbard was injured on January 22, 1987. CWS advised the Montana Division of Workers' Compensation of the accident. See Liq. Ex. 6. On information and belief, the Montana State Fund provided Hubbard with workers compensation benefits. See Liq. Ex. 5.

4. Hubbard's lawsuit against CWS, CWS' 1990 tender to Home, and Home's 1990 denial of coverage. Hubbard filed a tort action against CWS on January 22, 1990. CWS provided notice of the lawsuit, including the Complaint (Liq. Ex. 8), to Home through the broker on January 22, 1991 and also by letter dated January 25, 1991. Liq. Exs. 5, 7.

Home acknowledged receipt of the Complaint in a letter dated January 29, 1991. Liq. Ex. 9. Home informed CWS that copies of CWS' policies had been requested and that when the policies were received Home "will be in further contact with you advising whether or not coverage will respond for the allegations set forth in this Complaint." Id. Home then obtained the general liability and workers compensation policies and, on February 4, 1991, issued a letter advising CWS that there was no coverage for the Complaint. Liq. Ex. 10. The letter specifically advised that there was no coverage under the Home general liability policy in light of the Exclusion contained in Endorsement L6178 (the employee bodily injury exclusion quoted above). Id. at 1-2. The letter also advised that there was no coverage under the Home workers compensation policy because it only provided coverage in the States of California and Idaho. Id. at 2.

5. The 1997 denial of summary judgment. After January 1991, the litigation between Hubbard and CWS, represented by its own counsel, proceeded without Home involvement. CWS moved for summary judgment based on the workers compensation exclusive remedy provision of the Montana WCA, Mont. Code Ann. § 39-71-411. In an Order dated

November 11, 1997, the Montana trial court denied CWS' motion for summary judgment and allowed Hubbard to amend his complaint to include allegations of intentional conduct that might fall within an intentional conduct exception to the exclusivity rule. Liq. Ex. 11.

6. CWS' 2000 tender and Home's 2000 denial of coverage. Nine years after Home's denial of coverage, counsel for CWS advised Home of Hubbard's Second Amended Complaint and tendered the defense of the tort action to Home by letter dated April 14, 2000. Liq. Ex. 12. Hubbard's Second Amended Complaint asserted claims based on alleged deliberate acts by CWS. Liq. Ex. 13.

Home responded in a letter dated April 17, 2000. Liq. Ex. 14. In the letter, Home reserved its right to conduct a coverage investigation, as it was in the process of recalling the file from storage and obtaining a copy of the general liability policy. While Home assigned defense counsel to represent CWS, Home's letter stated that "Home is reserving its rights to withdraw from the defense if our continuing coverage investigation reveals there is no duty on the part of Home Insurance Company to defend or indemnify the insured in this matter." Id. at 1.

Three days later, in a letter dated April 20, 2000, Home advised CWS' counsel that its coverage investigation had been completed and that there was no coverage for the claim. Liq. Ex. 15. Home accordingly gave CWS thirty days notice that Home was withdrawing from the defense and would not be responsible for defense costs incurred after that period. Id. The letter cited provisions of the general liability policy, including the exclusion in Endorsement L8178. Id. at 3.

7. The Hubbard-CWS Stipulation and Judgment. On November 13, 2000, Hubbard and CWS entered a Stipulation regarding the tort action. Liq. Ex. 17. The Stipulation has three principal elements. First, CWS agreed to confess liability for Hubbard's injuries and the matters

set forth in the Fourth Amended Complaint. Second, CWS assigned to Hubbard all its rights under the Home policy with respect to the matters as to which CWS confessed liability. Third, Hubbard covenanted not to levy execution or otherwise seek to enforce any judgment in the tort action against CWS. CWS filed a Confession of Liability in the tort action on November 13, 2000. Liq. Ex. 18. A Judgment in the amount of $2,389,000 plus interest against CWS entered in the tort action on December 20, 2000. Liq. Ex. 19.

ARGUMENT

The core issue in this matter is whether Hubbard's claim against CWS is covered by the general liability policy Home issued to CWS. It is not. The Home policy expressly excludes employee claims, and Home consistently denied coverage for the claim on that basis. The exclusion clearly and unambiguously excludes claims for bodily injury by employees arising out of and in the course of their employment, and the allegations of Hubbard's various complaints and the Stipulation itself make plain that Hubbard's claim falls in the excluded class. The trial court's order denying CWS' motion for summary judgment against Hubbard does not have res judicata or collateral estoppel effect because Home was not a party or privy to the underlying tort action and, in any event, that case and the order did not involve or decide any coverage issue. Hubbard accordingly has no claim under the Home policy. To the extent he is asserting any other claim against Home, such as a claim for negligent misrepresentation, the claim would be a Priority Class V claim that the Referee should not address because there are not expected to be assets sufficient to make any distribution on such claims.

I. HUBBARD'S CLAIMS AGAINST CWS ARE EXCLUDED FROM COVERAGE UNDER THE HOME POLICY.

The Home general liability policy clearly excludes Hubbard's claims for bodily injury against CWS because Hubbard's injury occurred during the course of his employment by CWS. Endorsement 6178 – the "Employee Exclusion", also sometimes referred to as the "Employer's Liability Exclusion" – provides that the policy "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;
>
> ii) to any obligation of the insured to indemnify or contribute with another because of damages arising out of the bodily injury; . . .

Liq. Ex. 3 at 26 (emphasis added). The broad reach of the Employee Exclusion is confirmed by its additional statement that: "This exclusion applies to all claims and suits by any person or organization for damages because of such bodily injury including damages for care and loss of services." Id. (emphasis added). This provision clearly and unambiguously excludes from coverage all claims for bodily injury by CWS employees like Hubbard against their employer.

There is no doubt that Hubbard's injuries arose out of and in the course of his employment with CWS. Hubbard was injured while performing work for CWS. Hubbard repeatedly asserted as much throughout his lawsuit against CWS. Hubbard's Complaint against CWS filed January 22, 1990 stated:

> That the plaintiff was employed by said defendant as a crane operator and laborer when on January 22, 1987 he was severely injured in an accident on the employer's crane . . . .

Liq. Ex. 8, ¶ II (emphasis added). Hubbard's Second Amended Complaint stated:

> That the Plaintiff was employed by said Defendant when on January 22, 1987 he was severely injured while greasing a 30 ton Northwest Crane.

Liq. Ex. 13, ¶ 2 (emphasis added). The Fourth Amended Complaint contains the same allegation. Liq. Ex. 16, ¶ 2. Finally, and most tellingly, the Stipulation between Hubbard and CWS leading to the judgment against CWS recited that:

> The claim being made against Carl Weissman & Sons, Inc. by John A. Hubbard arises as the result of an accident occurring on or about January 22, 1987, when during the course and scope of his employment with Carl Weissman & Sons, Inc., John A. Hubbard's arm became entangled in the gears of a crane, causing him to suffer serious bodily injury.

Liq. Ex. 17, second unnumbered recital (emphasis added). Hubbard's injury thus plainly "arises out of and in the course of" his employment by CWS. In arguing to the contrary, Hubbard seeks to find coverage by creating an ambiguity in the Employee Exclusion where none exists.

The principles of policy interpretation are well established in Montana. "The terms and words used in an insurance contract are to be given their usual meaning and construed using common sense," and "th[e] Court will not create an ambiguity in an insurance policy where none exists." Newbury v. State Farm Fire & Cas. Ins. Co., 184 P.3d 1021, 1025 (Mont. 2008). With respect to ambiguity, the Montana Supreme Court recently summarized the applicable principles:

> First, in interpreting an insurance policy, we read the policy as a whole and if possible, reconcile its various parts to give each meaning and effect. If the parties dispute the meaning of a term, we determine whether the term is ambiguous by viewing the policy from the viewpoint of a consumer with average intelligence but not trained in the law or insurance business. An ambiguity exists when a contract taken as a whole in its wording or phraseology is reasonably subject to two different interpretations.
>
> However, the counter-balance rule to the foregoing is that if the language is clear and explicit this Court may not rewrite an insurance contract, but must enforce it as written. This Court has held, in fact, that expectations which are contrary to a clear exclusion from coverage are not objectively reasonable. Further, courts should not seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.

Montana Petroleum Tank Release Compensation Bd. v. Crumleys, Inc., 174 P.3d 948, 957 (Mont. 2008) ("Crumleys") (citations, quotations and ellipses omitted). Under these principles,

the Employee Exclusion should be enforced as written to bar coverage, and where the claim is excluded, Home has no duty to defend. See Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 108 P.3d 469, 479 (Mont. 2005) (where pollution exclusion applies, "Travelers had no duty to defend."); Braebeck v. Employers Mut. Cas. Co., 16 P.3d 355, 359 (Mont. 2000) (where automobile exclusion applies, "EMC does not owe BCI a duty to defend.").

A. The Employee Exclusion Is Unambiguous.

The meaning of the Employee Exclusion is plain. The policy "does not apply" 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", and this exclusion applies to "all claims and suits by any person or organization for damages because of such bodily injury". Hubbard's bodily injury occurred while performing his work duties for CWS, and his claim is accordingly excluded from coverage.

1. Courts including the Montana Supreme Court have repeatedly held that the employee exclusion is not ambiguous.

The Montana Supreme Court has addressed an effectively identical exclusion and concluded that it unambiguously barred coverage for employee claims. In Farmers Union Mut. Ins. Co. v. Horton, 67 P.3d 285 (2003) ("Horton"), the Court held that an employer's liability exclusion in a CGL policy barred coverage for an employee's spouse's claims for loss of consortium from death of the employee in an on-the-job accident.[1] The Court first noted that

[1] In Horton, 67 P.3d at 287, the Court quoted the exclusion to the comprehensive general liability policy as providing: "This insurance does not apply to":

> (e) Employer's Liability.
>
> 'Bodily Injury' to: (1) An 'employee' of the insured arising out of and in the course of: (a) Employment by the insured; or (b) Performing duties related to the conduct of the insured's business . . . .
>
> This exclusion applies: (1) Whether the insured may be liable as an employer or in any other capacity; and (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

"the pivotal issue is whether the employer's liability exclusion of the CGL policy is clear and unambiguous, and whether it operates to bar coverage for [the employee's spouse's] claims against [the employer]." Id. at 288. In discussing what a consumer would understand about the policy and the exclusion, the Court stated:

> As the District Court noted, upon reading the CGL policy, a reasonable insurance consumer of average intelligence, but not trained in the law or insurance business, would understand that the primary purpose of the policy is to insure for damages for bodily injury or property damage. The same consumer would also understand the policy as excluding coverage for employer liability for bodily injury sustained by employees while in the course of employment.

Id. at 289 (emphasis added). The Court thus held that the exclusion was clear and unambiguous, and it concluded that "because Gary Trader was an employee of Horton, the employer's liability exclusion provision contained in the CGL policy bars coverage for Gary's injuries." Id. See id. (Gray, C.J., concurring) ("I join in the Court's opinion which effectively holds that, because coverage is precluded via the clear and unambiguous 'employee' exclusion, no other exclusion in the policy need be addressed and the case is at an end.").

The Montana court is not alone in finding employee exclusions unambiguous. The New Hampshire Supreme Court recently held that an employee exclusion is unambiguous. Merchants Mut. Ins. Co. v. Laighton Homes LLC, 153 N.H. 485, 491 (2006) ("Laighton"). In Laighton, the New Hampshire Supreme Court noted that the language of the exclusion (identical to that in note 1 above, see id. at 487) "excludes coverage for claims of 'bodily injury' to an employee 'arising out of and in the course of' his or her 'employment by the insured.' This language clearly and unambiguously applies to claims for bodily injury damages that arise out of an employee's employment by the insured." Id. at 491 (emphasis added). As noted by a leading commentator: "The exclusion of injuries covered by workers compensation and for all bodily injuries sustained by employees arising out of and in the course of their employment is generally clear,

unambiguous and enforceable." 21 E.M. Holmes, Appleman on Insurance 2d § 132.5 at 67 (2002 & Supp. 2008) (emphasis added). The courts have consistently applied such employee exclusions to bar coverage and defense of employee bodily injury claims under general liability policies.[2] Indeed, two cases have specifically addressed employee bodily injury claims for intentional torts not within workers compensation exclusivity and held that coverage for such claims is precluded by the employee exclusion. Penn Traffic Co. v. AIU Ins. Co., 790 N.E.2d 1199, 1205 (Ohio 2003) (no coverage under CGL policy); Erie Ins. Proper. & Cas. Co. v. Stage Show Pizza, JTS, Inc., 553 S.E.2d 257, 267 (W. Va. 2001) (coverage was "clearly excluded" from CGL policy; coverage found under employer's liability endorsement).

2. Hubbard's arguments for ambiguity are unsupported.

Notwithstanding these cases, Hubbard contends that the Employee Exclusion, specifically the phrase "arising out of," is ambiguous. His argument fails for several reasons.

a. As an initial matter, Hubbard does not offer any reasonable reading of the Employee Exclusion that would not bar his claim for injury while performing work duties. Ambiguity only exists "when a contract taken as whole in its wording or phraseology is reasonably subject to two different interpretations." Crumleys, 174 P.3d at 957 (quotations omitted). Thus, to support a claim of ambiguity, Hubbard must propose a reasonable reading of the Exclusion that would that would permit his claim to fall outside it. See id. ("If the parties dispute the meaning of a term, we determine if it is ambiguous . . . "). Hubbard's approach skips this essential first step. He does not proffer any reasonable interpretation of the language "bodily

[2] See, e.g., Hemstad v. Jefferson Parish Sch. Bd., 916 So.2d 1174 (La. App. 2005) (no coverage for employees' claims in light of "clear and explicit" exclusion); American Family Mut. Ins. Co. v. Tickle, 99 S.W.3d 25, 29 (Mo. App. 2003) (no duty to defend employee's claim; no ambiguity as to who is employee); Sennett v. United States Fidelity & Guar. Ins. Co., 757 So.2d 206, 212 (Miss. 2000) (no duty to defend employee's claim; no ambiguity); National Union Fire Ins. Co. v. Kasler Corp., 906 F.2d 196, 199-200 (5th Cir. 1990) (argument for ambiguity "unconvincing"; exclusion "discharges the insurer from any duty to defend").

injury arising out of and in the course of his [Hubbard's] employment by the insured [CWS] for which the insured may be held liable as an employer or in any other capacity" that would not encompass his claim. This language excludes any claim for liability against CWS, in any capacity, where the bodily injury arose out of and in the course of employment by CWS. Here, Hubbard was injured while performing his work duties for CWS, so his injuries were "sustained by [an] employee[] while in the course of employment" and excluded. Horton, 67 P.3d at 289.

b. Hubbard's position rests almost exclusively on Pablo v. Moore, 995 P.2d 460 (Mont. 2000), but this reliance is misplaced – particularly where the Montana Supreme Court subsequently found no ambiguity in the employee exclusion. See Horton, 67 P.3d 285; id. at 289 (Gray, C.J., concurring). The Pablo case involved auto and equipment transportation exclusions, not an employee exclusion. 995 P.2d at 461-62. The Court's conclusion that there was ambiguity in those exclusions – that the phrase "arising out of" was "reasonably subject to more than one interpretation" – rested on the existence of a "split of authority" in cases concerning that phrase "in exclusionary clauses relating to the use of motor vehicles." Id. at 462. (Some jurisdictions focused on factual causation and others on legal theories. Id. at 463-64.) There is no such split of authority concerning employee exclusions, as shown by the numerous cases cited above, which weigh strongly against ambiguity. See Crumleys, 174 P.3d at 957 ("The precedent of these other states, though not controlling, is instructive in our analysis of this issue."). The mere fact that an exclusion contains the words "arising out of" does not create ambiguity. See Horton, 67 P.3d at 289; Counterpoint, Inc. v. Essex Ins. Co., 967 P.2d 393, 396 (Mont. 1998) (employment termination exclusion containing the phase is unambiguous). Moreover, the Employee Exclusion contains language that can only be read as focusing on the factual context in which the injury occurred. The exclusion specifically applies to "all claims and suits by any

person or organization for damages because of such bodily injury." Liq. Ex. 3 at 26 (emphasis added). This language demonstrates that the exclusion encompasses all legal theories ("all claims and suits") that could support damages because of the bodily injury. See Newbury, 184 P.3d at 1027 ("[A]n ambiguity exists only when the policy, *taken as a whole*, is reasonably subject to two different interpretations.") (emphasis in original).

c. Hubbard suggests that the Employee Exclusion merely excludes coverage for claims that are within workers compensation coverage. This interpretation violates the principle that isolated provisions in policies should not be read to make other parts superfluous. See Lambert Well Serv., Inc. v. Wellington Specialty Ins. Co., 186 P.3d 1255, 1258 (Mont. 2008) ("We construe an insurance policy according to the entirety of its terms and conditions as set forth in the policy, meaning that we will read the contract as a whole and attempt to reconcile its parts to give each meaning and effect.") (citations and quotations omitted). In this case, the Home general liability policy contains a separate Workers Compensation Exclusion – Exclusion (i). Liq. Ex. 3 at 3.[3] In view of the Workers Compensation Exclusion, the Employee Exclusion must be read to exclude something beyond workers compensation claims. See Laighton, 153 N.H. at 490-91 (in light of separate workers compensation exclusion, employee exclusion bars claims where "the genesis of the action is an employee's work-related bodily injury"); Meridian Mut. Ins. Co. v. Wypij, 573 N.W.2d 320, 324 (Mich App. 1997) ("Here, the policy contained a separate clause that made it clear that any claims covered under the workers compensation laws are excluded from coverage. Thus, in order to give meaning to all terms in

[3] The Workers Compensation Exclusion provides that the policy does not apply:

> (i) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;

the contract, we must assume that the employee exclusion clause had some purpose beyond simply excluding worker's compensation claims."), overruled on other grounds, Norris v. State Farm Fire & Cas. Co., 581 N.W.2d 746, 750 (Mich. App. 1998).

3. The exclusion of employee claims serves to distinguish general liability policies from other types of insurance coverage.

As a final point, application of the Employee Exclusion and Workers Compensation Exclusion together to exclude all employee bodily injury claims serves to coordinate the different standard types of insurance coverage. General liability policies are not intended to provide coverage for employee claims. Such claims would fall under employer liability coverage, which CWS did not purchase. See Cl. Sub. 8-9, 17. As summarized by the West Virginia Court of Appeals:

> In many states, insurance companies offer businesses three types of insurance coverage: commercial general liability coverage; workers' compensation coverage; and 'stop gap' employers' liability coverage. A commercial general liability policy protects a business against numerous kinds of liability claims, but it is generally accepted that the standard policy does not provide coverage for any claim brought by an employee against his or her employer arising out of the employment.

Stage Show Pizza, 553 S.E.2d at 261. Accord, Tickle, 99 S.W.3d at 29 ("A commercial general liability policy does not cover the insured's obligations under a workers' compensation policy or bodily injury to the insured's employees arising out of the employment. The primary purpose of an employee exclusion clause is to draw a sharp line between employees and members of the general public.") (citations and quotations omitted). Accordingly, the Employee Exclusion should be applied as written to preclude Hubbard's claim for coverage under the Home general liability policy.

B. CWS Had No Reasonable Expectation Of Coverage.

Hubbard also contends that CWS should have coverage under the doctrine of "reasonable expectations." That doctrine does not apply here because the Employee Exclusion unambiguously precludes coverage. "The reasonable expectations doctrine is inapplicable where the terms of the insurance policy clearly demonstrate an intent to exclude coverage." Newbury, 184 P.3d at 1027 (citing cases). Montana's "average consumer" standard for evaluating reasonable expectations "is an objective one." Crumleys, 174 P.3d at 958. "[E]xpectations that are contrary to a clear exclusion from coverage are not objectively reasonable." Newbury, 184 P.3d at 1027. See Wellcome v. The Home Ins. Co., 849 P.2d 190, 194 (Mont. 1993). The Montana Supreme Court has already noted that a reasonable insurance consumer of average intelligence, but not trained in the law or insurance business, would understand a policy with an employee exclusion "as excluding coverage for employer liability for bodily injuries sustained by employees while in the course of employment." Horton, 67 P.3d at 289.

II. THE INTERLOCUTORY DECISION IN THE UNDERLYING TORT CASE BETWEEN HUBBARD AND CWS DOES NOT HAVE RES JUDICATA OR COLLATERAL ESTOPPEL EFFECT REGARDING HOME'S POLICY.

Hubbard also contends that the decision of the Montana trial court denying CWS' motion for summary judgment somehow has res judicata or collateral estoppel effect on coverage under the Home policy. These assertions are erroneous for several reasons. Most significantly, Home was not a party to the tort suit, and the decision did not concern Home's coverage obligations.

The Supreme Court of Montana has recently summarized the requirements for res judicata and collateral estoppel in Baltrusch v. Baltrusch, 130 P.3d 1267 (Mont. 2006). With respect to res judicata, the Court stated:

> Res judicata bars a party from relitigating a matter that she has already had an opportunity to litigate. Res judicata applies when the following criteria are met:
>
> > (1) The parties or their privies are the same;
> > (2) The subject matter of the action is the same;
> > (3) The issues related to the subject matter are the same; and
> > (4) The capacities of the person are the same in reference to the subject matter and the issues between them.
>
> This Court has previously stated that res judicata bars the relitigation of an entire cause of action once a final judgment has been entered.

Id. at 1273. None of these elements is satisfied in this case. First, Home was not a party to the underlying tort action between Hubbard and CWS. Nor was Home in privity with the defendant CWS. At the time of the summary judgment motion, Home had denied coverage and was not involved in the case. Hubbard does not even contend that Home could have litigated coverage in the tort action, only that Home could have brought a declaratory action. Cl. Sub. at 16. Second, the tort claims presented in the underlying action are not the same "subject matter" as the claim for coverage under the Home policy presented in this disputed claim proceeding. Cf. Bayleat Law P.C. v. Hatch, 942 P.2d 716, 718 (Mont. 1997) (res judicata where two actions between same parties both involved liability of one to the other for service provided by a third).

Collateral estoppel is equally inapplicable. That doctrine "bars litigants from reopening all questions essential to the judgment which were determined by a prior judgment." Baltrusch, 130 P.3d at 1274. It has four elements:

> > (1) the identical issue raised was previously decided in a prior adjudication;
> > (2) a final judgment on the merits was issued in the prior adjudication; and
> > (3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication. . . . [and]
> > (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred.

Id. These requirements are not satisfied here. As noted above, Home was not a party or in privity with a party in the underlying tort case. Further, the issue decided in the denial of summary judgment was whether the exclusivity provision of the Montana WCA, Mont. Code Ann. 39-71-411,[4] barred the tort suit against CWS. See Liq. Ex. 11. The Montana trial court held Section 411 did not preclude the tort suit because it might fall within the intentional conduct exception to exclusivity. Id. That exception is found in Mont. Code Ann. 39-71-413(1).[5] See Sherner v. Conoco, Inc., 995 P.2d 990 (Mont. 2000). The trial court did not decide any issue concerning insurance coverage, see Liq. Ex. 11, and the statutory workers compensation exclusivity issue is not the "identical issue" as the question presented here: whether the Employee Exclusion precludes coverage under the Home policy.

In his brief, Hubbard seeks to conflate CWS' workers compensation exclusivity defense with the Home policy's Employee Exclusion, but they are not the same. Hubbard appears to contend that because the trial court held he could sue CWS the suit must be covered by the Home policy. However, the question of tort liability of CWS is separate from the question of the contractual obligations of Home under the policy. Contrary to Hubbard's assertion, the decision did not construe Mont. Code Ann. 39-71-407(1), which provides for workers compensation

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[4] Section 411 provided at the time of Hubbard's injury and provides today in pertinent part: "Except as provided in part 5 of this chapter for uninsured employers and except as otherwise provided in the Workers' Compensation Act, an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act or for any claims for contribution or indemnity asserted by a third person from whom damages are sought on account of such injuries or death." Mont. Code Ann. §39-71-411 (2007).

[5] Section 413(1) as in effect at the time of Hubbard's injury provided: "If an employee receives an injury while performing the duties of his employment and the injury or injuries so received by the employee are caused by the intentional and malicious act or omission of a servant or employee of his employer, then the employee or in case of his death his heirs or personal representatives, in addition to the right to receive compensation under the Workers' Compensation Act, have a right to prosecute any cause of action he may have for damages against the servants or employees of his employer causing the injury." Mont. Code Ann. § 39-71-413 (See 2001 Mont. Laws 229).

insurance.[6] In any event, the language of Section 407(1) has no bearing on coverage under the policy. As noted above, the Employee Exclusion is not concerned with workers compensation obligations. The policy has a separate Workers Compensation Exclusion that precludes coverage for workers compensation claims. The Employee Exclusion has a different purpose – excluding non-workers' compensation tort claims such as the Hubbard claim at issue here.

III. HUBBARD'S CLAIMS OTHER THAN FOR COVERAGE UNDER THE HOME POLICY ARE CLASS V CLAIMS THAT ARE PROPERLY DEFERRED.

The Scheduling Order issued in this matter on January 2, 2009 directed that the parties were to address "the issue of whether there is coverage under the Home policy at issue." This limitation reflects that the value of the claim need not be addressed in the absence of coverage and, as discussed below, claims against Home other than for coverage are Class V claims. The New Hampshire Insurer Rehabilitation and Liquidation Act assigns claims against an insurer in liquidation into a number of successive priority classes and specifies that the claims in each class must be paid in full before any distribution is made to claims in the next class. RSA 402-C:44. See In the Matter of the Liquidation of The Home Ins. Co., 154 N.H. 472, 475-76 (2006). In this case, Hubbard asserts a right to proceeds under the liability policy issued by Home to CWS as assignee of the policyholder CWS and as a third-party claimant under the Act's provision permitting direct claims against policies by "third-party claimants" against insureds. See RSA 402-C:40. If these claims were valid (i.e., if there were coverage under the Home policy), they would fall within Priority Class II – "Policy Related Claims" – which are defined in pertinent part as claims by policyholders (such as CWS) or liability claimants (such as Hubbard) that are

[6] Section 407(1) (1) as in effect at the time of Hubbard's injury provided: "Every insurer is liable for the payment of compensation, in the manner and to the extent hereinafter provided, to an employee of an employer it insures who receives an injury out of and in the course of his employment or, in the case of his death from such injury, to his beneficiaries, if any." Mont. Code Ann. § 39-71-407(1) (See 1987 Mont. Laws 464).

"within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company." RSA 402-C;44, II. However, as shown above, there is no coverage for Hubbard's claims under the Home policy.

Hubbard may also assert other claims against Home. For instance, Hubbard asserts that CWS was erroneously advised by Home that employer's liability coverage was neither needed by nor available to CWS. Cl. Sub. at 17. This allegation is essentially a claim against Home for negligent misrepresentation. Such a tort claim directly against the insurer is not a Class II claim because it is not a claim for coverage under a policy. Such claims fall into Priority Class V – the "Residual Classification" for "[a]ll other claims . . . not falling within other classes under this section." RSA 402-C:44, V. "[I]t is unlikely that there will be sufficient assets to make distributions to classes beyond Class II." In the Matter of the Liquidation of The Home Ins. Co., 2009 N.H. LEXIS 22, *2 (N.H. February 20, 2009), quoting Matter of the Liquidation of Home, 154 N.H. at 477. Accordingly, determination of the merits of any Class V claims asserted by Hubbard should be deferred. There is no reason for the parties or the Referee to devote time and resources to determining claims where there is no expectation that a distribution will be made on them.[7]

[7] The Liquidator has determined certain Class V claims, but generally where either (1) those claims will in turn generate a recovery for the estate, as in the case of claims under reinsurance contracts that will allow Home in turn to assert a claim against another reinsurer, see Matter of the Liquidation of Home, 154 N.H. at 487-88, or (2) the claims are readily determined, as in the case of attorney's fees billed by Home's attorneys for pre-liquidation services. See Matter of the Liquidation of Home, 2009 N.H. LEXIS 22. The Class V claims that may be asserted by Hubbard will not generate a recovery for the Home estate, and they pose potentially complex issues concerning, among other things, statutes of limitations, whether the alleged statements of Home personnel during the 1980s were made, and whether the alleged statements were negligent (as Hubbard concedes, the later decisions allowing a direct action against the employer constituted a "change" in Montana law, see Cl. Sub. at 7).

CONCLUSION

For the reasons set forth above, the Referee should sustain the Liquidator determination to deny Hubbard's Class II claim under the Home policy for lack of coverage under the Home policy and defer any Class V claims.

Respectfully submitted,

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March 6, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Section 15 Submission and the Liquidator's Exhibits were sent via e-mail on March 6, 2009 to all persons on the following service list:

Eric A. Smith