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HELENA DIVISION

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PATRICK E. DUFFY, CLERK

BY_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION

JOHN HUBBARD, an individual, Plaintiff, -vs- THE HOME INSURANCE COMPANY, RISK ENTERPRISE MANAGEMENT LTD, ANNE GALASSO and DOES A-Z, Defendants.	Cause No. CV 01-71-GF-SEH COPY **DECLARATION OF ROBERT B. PFENNIGS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

STATE OF MONTANA)
: ss.
County of Cascade)

ROBERT B. PFENNIGS, being first duly sworn upon oath, declares under penalty of perjury, as follows:

1. I am an attorney licensed and admitted to practice in the State and Federal Courts in Montana and have been licensed as such since 1988.

2. I am a shareholder in the Great Falls, Montana law firm of Jardine, Stephenson, Blewett and Weaver, P.C.

3. I make this declaration based upon my own personal knowledge of the facts

contained herein and could and would testify to the truthfulness of the contents of this Declaration if called upon to so testify.

4. My firm was the attorneys of record for Carl Weismann & Sons, Inc., in the case of *Hubbard vs. Carl Weismann & Sons, Inc.*, (CWS), Montana Eighth Judicial District Court, Cascade County Case No. BDV-90-067, (hereinafter referred to as the UNDERLYING CASE).

5. It is my understanding that: on January 22, 1987 John Hubbard, (HUBBARD) sustained severe injuries while greasing a modified crane and that the crane did not have any gear guards in place at the time HUBBARD sustained such injuries. On January 22, 1990, HUBBARD filed the UNDERLYING CASE, pro-se; and the Summons and Complaint was served on CWS on January 18, 1991.

6. CWS tendered the defense of HUBBARD's claim to its insurer, the HOME Insurance Company. Home responded to CWS's tender of the defense by letter dated February 4, 1991 (Exhibit 1), and in his letter admitted the above referenced incident involving HUBBARD'S arm was both an occurrence and an accident:

> "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".

7. Less than three months after answering HUBBARD's complaint, I filed a Motion for Summary Judgment. By August 30, 1991, the initial brief, brief in opposition and reply briefs had been filed with the Court. This Summary Judgment Motion remained pending due to a myriad of reasons, including the change of judges due to retirement and the parties obtaining and changing counsel.

8. Four years later, on August 28, 1995, on behalf of CWS, I filed a Supplemental Reply brief in support, along with a Motion for Hearing which indicated that this long pending Motion for Summary Judgment was fully briefed and ready for disposition by the Court. In CWS's Supplemental Reply Brief I cited a recent Montana Supreme Court Opinion entitled *Kortes vs Pool Company*, 270 Mont. 474, 893 P.2d 322, 52 St. Rep. 291 (1995), as additional authority for the proposition that HUBBARD's complaint failed to state a claim as it did not sufficiently plead a claim outside the exclusivity provisions of Montana's Workers Compensation Act. (Exhibit 2) [UNDERLYING case file bate stamp # 000106].

9. A hearing was held on December 22, 1995, after which the Court in an order dated January 3, 1996, stated "Defendant's motion for summary judgment should be granted." The Court, however, allowed Hubbard an additional 30 days to find an attorney before entry of the order.

10. The Court also subsequently allowed HUBBARD an opportunity to reply. HUBBARD provided the Court with a brief which argued that the Montana Supreme Court had ruled even more recently in the case of *Lockwood v. W.R.*

Grace, 272 Mont. 202, 900 P.2d 314, 52 St. Rptr 705 (1995), that intent to injure does not mean the desire to injure, but rather the harm was substantially certain as a consequence of an unsafe workplace.

11. When no order was issued, I once again on June 12, 1997, requested that the Court set the matter for a hearing. After hearing oral argument on CWS's Motion for Summary Judgment in the UNDERLYING case, the Montana State District Court ruled on November 11, 1997 that, based upon *Lockwood v. W.R. Grace*, supra, that the Montana Supreme Court had expanded the intentional tort exception to the exclusivity rule. The District Court ruled that CWS's Summary Judgement Motion was denied 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." The Court further granted HUBBARD leave to formally amend the complaint to conform to the proof and redraft the complaint to contain such an allegation. (Exhibit 3) [UNDERLYING case file bate stamp # 000058]. Pursuant to the Court's Order HUBBARD then filed his Amended Complaint on November 21, 1997. (Exhibit 4) [UNDERLYING case file bate stamp # 000036].

12. On March 29, 2000 HUBBARD moved for leave to file a Second Amended Complaint. On April 26, 2000 HUBBARD moved for leave to file a Third Amended Complaint. On July 31, 2000 the Court granted HUBBARD'S Motion and the Third Amended Complaint was filed. (Exhibit 5) [UNDERLYING case file bate stamp # 000229].

13. In a letter dated April 14, 2000, to HOME'S claim administrator Anne Galasso, I enclosed HUBBARD'S Second Amended Complaint in the UNDERLYING case and tendered the defense thereof to HOME. (Exhibit 6).

14. By letter dated April 17, 2000, from Ms. Galasso to me, she acknowledged receipt of the Amended Complaint and the tender of the defense thereof by CWS to HOME. Galasso further advised that "HOME has assigned defense counsel" Gary Zadick, Esq., "to represent CWS in this matter." Galasso also stated that HOME was "reserving its right to conduct a coverage investigation in this matter." (Exhibit 7).

15. Three days later by letter dated April 20, 2000, Ms. Galasso advised me she had withdrawn defense counsel Zadick and denied coverage based upon the same exclusion from coverage cited in the initial disclaimer, which 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". (Exhibit 8.)

16. In a letter dated April 21, 2000, from Mr. Zadick to Michael R. Tramelli and Randall Skorheim, (Tramelli), HUBBARD'S counsel of record, Mr. Zadick, advised that he would be "taking over the defense" of CWS in the underlying case. (Exhibit 9). Several weeks later, in a letter dated May 5, 2000 Zadick, informed Tramelli that HOME "determined that it did not have coverage" and "it will not be continuing the defense". I received copies of these letters. (Exhibit 10).

17. As a result of several previous representations by HOME to CWS that it would not need Employers Liability insurance due to Montana being a "Sole Remedy" state

for workers compensation exclusivity purposes, one Christopher Bulger, the insurance Broker on the CWS account informed attorney Zadick, by letter dated May 15, 2000, 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 letter to Ms. Galasso on June 7, 2000. I also received a copy of this letter. (Exhibit 11).

18. In a letter dated May 26, 2000, which I wrote to Ms. Galasso, a demand was made that "HOME INSURANCE COMPANY reinstate the defense and coverage of this matter." Said letter further advised that CWS 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." (Exhibit 12). In a responsive letter dated June 6, 2000, from Ms. Galasso to me, Ms. Galasso stated that:

> "HOME will be reviewing all policies of insurance issued to CWS, as well as the underwriting files for those policies. HOME continues to reserve its rights to conduct a coverage investigation with respect to this matter. By undertaking such a coverage investigation HOME is not waiving any of its rights under the policy."

Further, Galasso advised that, "As soon as we have completed our coverage investigation, we will advise you of HOME'S decision with respect to coverage for this loss." (Exhibit 13). I do not recall receiving any further written

correspondence from Ms. Galasso.

19. On September 6, 2000, I wrote to Ms. Galasso, and enclosed HUBBARD'S settlement demand which has been made on CWS. In that letter I stated,

> 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 or judgment that may result in this case. (Exhibit 14)

20. In my September 6, 2000 letter to Ms. Galasso I further informed her that "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 P.2d 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. I further informed Ms. Galasso that if the HOME was going to once again wrongfully refuse to defend and provide indemnity to my client, CWS, I would encourage her to send this matter to outside counsel for review in light of the *Pablo vs. Moore*, supra, decision.

21. On October 5, 2000, HUBBARD again moved the Court for leave to file his Fourth Amended Complaint. (Exhibit 15) [UNDERLYING case file bate stamp # 000160]. Not having received any response to my Sept. 6, 2000 letter, I wrote to Ms. Galasso again on October 13, 2000, and informed her:

> I take your silence to mean that the HOME Insurance is going

> to continue with its refusal to either defend or indemnify Carl Weissman & Sons under its insurance policy. I believe that the Home has breached its contract with my client. Accordingly, Carl Weissman & Sons is now free to take whatever steps are necessary to protect its interests.
>
> 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. (Exhibit_16)

On October 24, 2000, I again wrote to Ms. Galasso stating that HOME had breached it obligation to defend CWS and informed her that "the opportunity for the HOME Insurance Company to fulfill its contractual obligations to CWS has long since past." (Exhibit 17). I finally received a response from Mrs. Galasso via an e-mail dated October 25, 2000, in which she states:

> "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" (Exhibit 18).

22. I responded via e-mail on Oct. 25, 2000, to Ms. Galasso, informing her that "the opportunity for HOME to retain coverage counsel and assume its duties under the policy has been lost." (Exhibit 19). As with my letters to Ms. Galasso, I received absolutely no response from her, nor did I ever hear from Peter Habein, the attorney identified by Ms. Galasso as being coverage counsel.

23. On November 13, 2000 CWS, confessed liability to HUBBARD for his claims.

(Exhibit 20) [UNDERLYING case file bate stamp # 000153]. CWS also executed a Stipulation related to the Confession of Liability.

24. On November 16, 2000 the Court entered an Order of Liability and set a trial on damages. (Exhibit 21) [UNDERLYING case file bate stamp # 000150].

25. In a letter dated Nov. 28, 2000, I wrote to Ms. Galasso, with an enclosed Confession of Liability and other relevant documents executed by CWS. (Exhibit 22). Still having not received any communication from either Ms. Galasso or Mr. Habein, I wrote an e-mail to Ms. Galasso on December 12, 2000, wherein I stated:

> "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." (Exhibit 23)

26. A trial on damages was held and as a result thereof a Judgement and Order was entered on December 20, 2000 wherein CWS was ordered to pay HUBBARD $2,389,000.00. [UNDERLYING case file bate stamp # 000147].

27. In a letter dated Dec 22, 2000 to Galasso, I enclosed the judgment against CWS and in favor of HUBBARD. (Exhibit 24).

28. HOME had ample opportunity to bring a declaratory relief action on the issue of whether Hubbard's complaint potentially plead a claim that would fall within coverage of its policy, but instead denied insurance coverage and a defense.

29. The exclusions relied upon by HOME are essentially the defenses I asserted in the UNDERLYING action, that being the injury to HUBBARD occurred while in the employ of CWS and that the exclusivity provisions of the Montana Workers

Compensation Act were controlling; however, even though this was the controlling substantive 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.

DATED this 30 day of January, 2003.

ROBERT B. PENNIGS

SUBSCRIBED AND SWORN TO before me this 30th day of January, 2003.

(SEAL)

Notary Public for the State of Montana
Residing at Great Falls
My Commission Expires: May 4, 2004

THE HOME
INSURANCE
COMPANY

5000 GREENWOOD PLAZA BLVD.
GREENWOOD VILLAGE, CO 80111

303-740-1900

February 4, 1991

Carl Weissman & Sons
Attention: Mr. Jerrold A. Weissman,
President
420 Third St., South
P.O. Box 1609
Great Falls, MT 59403-1609

CERTIFIED MAIL RETURN
RECEIPT REQUESTED

RE: John Hubbard v. Carl Weissman & Sons
Date of Occurrence: January 22, 1987
Claim File #: 441-L-721111/600

Dear Mr. Weissman:

We have previously acknowledged receipt of the Summons and Complaint via my correspondence to you of January 29, 1991.

We have now received a copy of your insurance policies which provided coverage for the date of this occurrence in 1987. It is with regret that coverage cannot be afforded to you for the allegations set forth in the Complaint which has been filed by Mr. John Hubbard in the Eighth Judicial District Court, Cascade County, State of Montana, Cause No. BDV-90-067.

Mr. Hubbard states that he was an employee of Carl Weissman & Sons as a crane operator and laborer on January 22, 1987 and that while he was greasing a 30 ton Northwest Crane he was caused to be severely injured.

A review of your policies of insurance, Policy No. GL1488251 with 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.

Coverage is afforded to Carl Weissman & Sons via Comprehensive General Liability Insurance under the Basic Form of H21013F which is modified by Broad Form Comprehensive General Liability Endorsement L-6111 and further modified by Amendatory Endorsement L-6178. Under Form L-6178 coverage would not be provided.

[redacted]

It is agreed that the exclusion relating 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:

(ii) To any obligation of the insured to indemnify or contribute with another because of damages arising out of the bodily injury:"

We have also reviewed your Workers Compensation and Employers Liability policy, Policy No: WC-L 16 94 69-01 which had an effective date of May 15, 1986 and an expiration date of May 15, 1987.

In reviewing your Workers Compensation coverage No. 3.A- Workers Compensation Insurance: it is noted that Workers Compensation insurance is provided in the States of California and Idaho.

Under Section 3. B-Employers Liability Insurance: it is noted that Part 2 of the policy applies to work in each state listed in Item 3.A which has been previously stated as the States of California and Idaho.

It is therefore with regret that coverage cannot be provided for the allegations set forth in the Complaint by your employee Mr. John Hubbard under either your General Liability policy or your Workers Compensation policy.

I have informed your counsel, Mr. Jack Lewis of the Law Office of Jardine, Stephenson, Blewett and Weaver of our decision so that he may communicate with you prior to the due date of this Complaint set for February 7th and take whatever steps are necessary to protect your interests.

Should you have any questions regarding our decision made on this matter, please feel free to call upon me.

Very truly yours,

Robert W. Andrea
Claim Technical Advisor

RWA/ht04

cc Law Office of Jardine, Stephenson, Blewett & Weaver
Attention: Jack Lewis
7th Floor First National Bank Bldg.
P.O. Box 2269
Great Falls, MT 59403

Sedgwick James of Washington, Inc.
West 601 Main, Suite 1400
P.O. Box 2151
Spokane, WA 99210-2051
Attention: Judy Arndt

Bob Ellis, Denver

ROBERT B. PFENNIGS
Jardine, Stephenson, Blewett & Weaver, P.C.
P. O. Box 2269
Great Falls, Montana 59403
Telephone: (406) 727-5000
Attorneys for Defendant

CLERK OF DISTRICT COURT
NANCY NORTON
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FILED
BY _____
DEPUTY

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD,

Plaintiff,

v.

CAUSE NO. BDV-90-067

CARL WEISSMAN & SONS, INC.
P. O. Box 1609
Great Falls MT 59403,

Defendant.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Defendant in the above-entitled case, Carl Weissman & Sons, Inc. (Weissman), has moved the Court for summary judgment on the ground that there are no material issues of fact and that Weissman is entitled to judgment as a matter of law.

As set forth in Weissman's opening brief the issue in this case involves Hubbard's claim that as a result of "gross negligence and of non-compliance of both OSHA's and State of Montana Worker's Compensation Division rules and regulations" Weissman is liable to him for his injuries (Complaint at para. IX). The exclusivity provisions of the Montana Worker's Compensation Act, however, clearly bar this claim. Weissman set forth numerous authorities in its opening brief, many with very analogous facts, all of which uphold the exclusivity provisions of the Worker's Compensation Act.

The purpose of this supplemental brief is to bring to the Court's attention a very recent case, Kortes v. Pool Company, 52

WORD: HUBBARD.SBS/dld

St.Rptr. 291 (April 11, 1995), wherein the Montana Supreme Court once again held in favor of exclusivity. The Kortes case and the case at bar have very similar facts and the claims made by each Plaintiff are the same. In Kortes, the decedent was killed when a traveling block fell on him as a result of the removal of a safety shut-off device. The issue was whether absence of this safety device removed the case from the exclusivity provision of the Worker's Compensation Act such that the decedent's estate could bring an independent action against the employer.

Justice Terry Treiweiller, writing for the Court, stated:

> [The] complaint does not allege that Richard's death was caused by an intentional and malicious act. Her complaint merely asserts that Richard's death was caused by Pool Company's neglect. Although Susan makes reasonable public policy arguments in support of her position, our rule is not to substitute our judgment for that of the legislature on matters of public policy. We are bound by the legislative determination that absent intentional and malicious conduct employees cannot sue their employers for injuries sustained during the course of their employment which are covered by the Worker's Compensation Act.

Id. at 293.

The facts of the present case require the same result. Hubbard has neither alleged nor claimed that Weissman acted intentionally or maliciously. Therefore, pursuant to the provisions of MCA § 39-71-411, Weissman is entitled to summary judgment in its favor.

DATED this 28th day of August, 1995.

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By Robert B. Pennington
ROBERT B. PENNINGS
(Attorney for Defendant)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served upon the person named below by mailing, hand-delivery, Federal Express, or by telecopying to him a true and correct copy of said document:

[X] U.S. Mail [ ] Federal Express [ ] Hand-delivery [ ] Fax

John E. Seidlitz, Jr.
Attorney at Law
18 Sixth Street North, Suite 401
P. O. Box 2325
Great Falls MT 59403

this 28th day of August, 1995.

Robert B. Hubbard, Jr.

WORD: HUBBARD.SBS/dld

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD, Plaintiff, vs. CARL WEISSMAN & SON'S INC. Defendant.	)	CAUSE NO. BDV-90-067 ORDER

This matter came to hearing on Defendant's Motion for Summary Judgment on Wednesday, October 22, 1997, at 10:00 a.m. with Defendant Carl Weissman & Son's Inc. represented by Robert B. Pfennigs and Plaintiff John Hubbard present in Court and represented by Michael R. Tramelli.

This Court, upon considering the briefs and argument of Counsel, has determined to deny the motion for summary judgment in light of the Supreme Court decision Lockwood v. W.R. Grace & Co., 272 Mont. 202, 900 P.2d 314 (1995). The Defendant argues that this lawsuit is precluded by the exclusivity provision of Section 39-71-411, MCA, which makes workers compensation coverage Mr. Hubbard's exclusive remedy. Until the decision in Lockwood, it appears that the Montana Supreme Court has consistently held as stated by Defendant, unless the Plaintiff alleges intentional and malicious conduct and shows actual intent to injure the particular Plaintiff by the employer. Lockwood, however, appears to expand the intentional tort exception to the exclusivity rule when it holds that "intent to injure does not mean desire to injure; it means that the employer intended that the employee should undergo the injury -- the exposure to the harm -- of which the employer knew on a daily basis," citing 2A Larsons's Worker's Compensation Law, Section 68.15(e), at 13-107.

J.S.B.W.

NOV 19 1997

In this case, the Complaint as drafted does not include such an allegation and must be amended, but the information submitted in opposition to the motion for summary judgment and the claims of intentional actions by which the employer knowingly exposed this Plaintiff to the injury which he suffered, indicates that the Plaintiff may be able to present a jury issue on that point and should be allowed to amend the complaint to state a claim.

IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment is denied.

2. Plaintiff is granted ten days within which to amend his Complaint.

DATED this 11th day of November, 1997.

DISTRICT COURT JUDGE

cc: Robert B. Pfennigs
Michael R. Tramelli

MICHAEL R. TRAMELLI
Attorney at Law
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104 Second Street South
Great Falls, MT 59401-3645
(406) 761-0990

Attorney for Plaintiff

CLERK OF DISTRICT COURT
PAMELA MORTON
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FILED
BY _____ DEPUTY

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD, Plaintiff, vs. CARL WEISSMAN & SONS, INC., Defendant.	CAUSE NO. BDV-90-067

AMENDED COMPLAINT AND JURY DEMAND

COMES NOW, the Plaintiff, JOHN A HUBBARD, by and through his attorney MICHAEL R. TRAMELLI, and hereby amends the Complaint as follows:

12/4

I.

That at all times material, herein, Defendant was a corporation, duly organized and existing under the laws of the State of Montana, operating a retail store, automotive store, salvage and scrap yard within the State of Montana and elsewhere in the district and county wherein this action is filed.

II.

That the Plaintiff was employed by said Defendant when on

[redacted]

J.S.B.W.

NOV 2 1 1997

January 22, 1987 he was severely injured while greasing a 30 ton Northwest Crane. The crane latched on to Plaintiff's right hand pulling him into the crane and ripping his arm off at the shoulder. In addition, the Plaintiff suffered other severe trauma to his body, including facial cuts.

III.

The Defendant knowingly and intentionally removed the gear guards from the crane before the Plaintiff was employed by the Defendant. Defendant knowingly and intentionally placed the Plaintiff in a position of extreme danger by ordering Plaintiff to grease the gears of the crane while it was still running.

IV.

As result of the foregoing, the Defendant intended the Plaintiff should undergo the injury the exposure to the harm - of which the Defendant knew on a daily basis.

V.

As a result of said Defendants intentional injury of Plaintiff, Plaintiff has suffered severe permanent physical and emotional injuries and incurred special and general damages in an amount to be determined by a jury.

WHEREFORE, Plaintiff respectfully prays;

1. That Plaintiff be awarded special and general damages in amount to be determined by a jury;

2. That the Plaintiff be awarded punitive damages in an amount to be determined by a jury;

3. Plaintiff be awarded all costs and expenses incurred in bringing this action allowed by law;

4. Any such other further relief that this Court deems just and equitable.

DATED this 21 day of November, 1997.

MICHAEL R. TRAMELLI
Attorney at Law

PLAINTIFF DEMANDS A TRIAL BY JURY.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Amended Complaint and Jury Demand was mailed to the following:

Robert B. Pfennigs
JARDINE, STEPHENSON, BLEWETT & WEAVER P.C.
PO BOX 2269
Great Falls, MT 59403-2269

SKORHEIM LAW OFFICE
Randall O. Skorheim
P.O. Box 401
121 Fourth Street North, Suite 2-G
Great Falls, Montana 59403
(406) 727-1332

MICHAEL R. TRAMELLI
Attorney at Law
104 Second Street South
Great Falls, Montana 59401-3645
(406) 761-0990

Attorneys for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD, Plaintiff, vs. CARL WEISSMAN & SONS INC., Defendant.	CAUSE NO.: BVD-90-067

THIRD AMENDED COMPLAINT AND JURY TRIAL DEMAND

COMES NOW, Plaintiff, John A. Hubbard, by and through his attorneys, Randall O. Skorheim and Michael R. Tramelli, and hereby amends the Complaint as follows:

COUNT I

1. That at all times material, herein, Defendant was a corporation, duly organized and existing under the laws of the State of Montana, operation a retail store, automotive store, salvage and scrap yard within the State of Montana and elsewhere in the district and county wherein this action is filed.
2. That the Plaintiff was employed by said Defendant when on January 22, 1987 he was severely injured while greasing a 30 ton Northwest Crane. The crane latched on to Plaintiff's right hand pulling him into the crane and ripping his arm off at the shoulder. In addition, the Plaintiff suffered other severe trauma to his body, including facial cuts.
3. The Defendant knowingly removed the gear guards from the crane before the Plaintiff was employed by the Defendant. Defendant knowingly placed the Plaintiff in a position of extreme danger by ordering Plaintiff to grease the gears of the crane while it was still running.

4. As a result of the foregoing, the Defendant had knowledge of the facts or intentionally disregarded facts that created a high probability of injury to the Plaintiff and deliberately proceeded to act in conscience disregard of the high probability of injury to the Plaintiff and deliberately proceeded to act with indifference to the high probability of injury to the Plaintiff.
5. As a result of said Defendant's injury of Plaintiff, Plaintiff has suffered severe permanent physical and emotional injuries and incurred special and general damages in an amount to be determined by a jury.

COUNT II

1. Plaintiff repeats and alleges all allegations contained in Count I herein.
2. As a result of the foregoing, the Defendant inflicted emotional distress on the Plaintiff and caused further general and special damages in an amount to be determined by a jury.

COUNT III

1. Plaintiff repeats and alleges all allegations contained in Counts I and II herein.
2. The Plaintiff's injuries were caused in part by Defendant's removal of gear guards in violation of 29 CFR Ch XVII, §1910.179(6). and §1926.550(8).
3. That at the time of Plaintiff's injuries, said crane was not being operated by a licensed crane engineer, in violation of 50-76-100 et seq., M.C.A.
4. That as a result of the forgoing violations, the Defendant was negligent per se in causing Plaintiff's injuries.

WHEREFORE, Plaintiff respectfully prays as follows:

1. That Plaintiff be awarded general and special damages in an amount to be determined by a jury;
2. That Plaintiff be awarded punitive damages in an amount to be determined by a jury;
3. Plaintiff be awarded all costs and expenses incurred in bringing this action allowed by law;
4. Any such other further relief that this Court deems just and equitable.

PLAINTIFF DEMANDS TRIAL BY JURY

DATED this 26th day of April, 2000.

SKORHEIM LAW OFFICE

Randall O. Skorheim

CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the THIRD AMENDED COMPLAINT AND JURY DEMAND was deposited on the 26th day of April, 2000, at the Great Falls, Post Office, postage prepaid and directed to the following:

Ugrin, Alexander, Zadick & Higgins, P.C.
Gary M. Zadick
#2 Railroad Square
Great Falls, MT 59401

Tanya J. Buenneneyer

JAMES E. AIKEN
GARY W. BJELLAND
ALEX BLEWETT
FRANCIS X. CLINCH
DONALD J. HAMILTON
LON T. HOLDEN
JON J. KUDRNA
JACK L. LEWIS
BRION C. LINDSETH
SUE ANN LOVE
GEORGE N. McCABE
ROBERT B. PFENNIGS

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

ATTORNEYS AT LAW

K. DALE SCHWANKE
MARTIN H. SINCLAIR
JOHN D. STEPHENSON
BRIAN L. TAYLOR
PATRICK R. WATT

SPECIAL COUNSEL
TIMOTHY J. WYLDER

RETIRED
JOSEPH G. MUDD
JOHN H. WEAVER

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P.O. BOX 2269
GREAT FALLS, MONTANA 59403-2269
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TEL: (406)543-3547
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E-MAIL: bpfennigs@jardinelaw.com

PLEASE RESPOND TO THE GREAT FALLS OFFICE

April 14, 2000

VIA FAX - (714) 579-2679
Risk Enterprise Management Limited
Attn: Anne Galasso
P.O. Box 600
Brea, CA 92822

Re: John Hubbard v. Carl Weissman & Sons, Inc.
REM's Principal: Home Insurance Company
Insured: Carl Weissman & Sons, Inc.
Claimant: John Hubbard
Home Insurance Claim No: 441-L-721111\600
Home Insurance Policy No: GL1488251
Our File No. 83500-00435

Dear Ms. Galasso:

Pursuant to our recent telephone conversation, forwarded to you with this letter is a copy of the Second Amended Complaint filed against Carl Weissman in the above-referenced matter. Tender of defense for this claim is made to your client, Home Insurance Company. There is some urgency in getting defense counsel assigned to this matter as there are outstanding discovery requests that need to be answered as soon as possible.

I look forward to hearing from you at your earliest opportunity.

Very truly yours,

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: Robert B. Pfennigs

RBP:ls

Enc: Second Amended Complaint

[redacted]

SKORHEIM LAW OFFICE
Randall O. Skorheim
P.O. Box 401
121 Fourth Street North, Suite 2-G
Great Falls, Montana 59403
(406) 727-1332

MICHAEL R. TRAMELLI
Attorney at Law
104 Second Street South
Great Falls, Montana 59401-3645
(406) 761-0990

Attorneys for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOEN A. HUBBARD, Plaintiff, vs. CARL WEISSMAN & SONS INC., Defendant.	CAUSE NO.: BVD-90-067

SECOND AMENDED COMPLAINT AND JURY TRIAL DEMAND

COMES NOW, Plaintiff, John A. Hubbard, by and through his attorneys, Randall O. Skorheim and Michael R. Tramelli, and hereby amends the Complaint as follows:

COUNT I

1. That at all times material, herein, Defendant was a corporation, duly organized and existing under the laws of the State of Montana, operation a retail store, automotive store, salvage and scrap yard within the State of Montana and elsewhere in the district and county wherein this action is filed.

2. That the Plaintiff was employed by said Defendant when on January 22, 1987 he was severely injured while greasing a 30 ton Northwest Crane. The crane latched on to Plaintiff's right hand pulling him into the crane and ripping his arm off at the shoulder. In addition, the Plaintiff suffered other severe trauma to his body, including facial cuts.

3. The Defendant knowingly removed the gear guards from the crane before the Plaintiff was employed by the Defendant. Defendant knowingly placed the Plaintiff in a position of extreme danger by ordering Plaintiff to grease the gears of the crane while it was still running.

4. As a result of the foregoing, the Defendant had knowledge of the facts or intentionally disregarded facts that created a high probability of injury to the Plaintiff and deliberately proceeded to act in conscience disregard of the high probability of injury to the Plaintiff and deliberately proceeded to act with indifference to the high probability of injury to the Plaintiff.

5. As a result of said Defendant's injury of Plaintiff, Plaintiff has suffered severe permanent physical and emotional injuries and incurred special and general damages in an amount to be determined by a jury.

COUNT II

1. Plaintiff repeats and alleges all allegations contained in Count I herein.

2. As a result of the foregoing, the Defendant inflicted emotional distress on the Plaintiff and caused further general and special damages in an amount to be determined by a jury.

WHEREFORE, Plaintiff respectfully prays as follows:

1. That Plaintiff be awarded general and special damages in an amount to be determined by a jury;

2. That Plaintiff be awarded punitive damages in amount to be determined by a jury;

3. Plaintiff be awarded all costs and expenses incurred in bringing this action allowed by law;

4. Any such other further relief that this Court deems just and equitable.

PLAINTIFF DEMANDS TRIAL BY JURY

DATED this 10 day of March, 2000.

SKORHEIM LAW OFFICE

Randall O. Skorheim

TRAMELLI LAW OFFICE

Michael R. Tramelli

REM.

April 17, 2000

Robert B. Pfennigs, Esq.
Jardine, Stephenson, Blewett & Weaver, P.C.
P.O. Box 2269
Great Falls, Montana 59403-2269

RISK
ENTERPRISE
MANAGEMENT
LIMITED

RE: ***John Hubbard vs. Carl Weissman & Sons, Inc.***

REM's Principal:	Home Insurance Company
Insured:	Carl Weissman & Sons, Inc.
Claimant:	John Hubbard
Date of loss:	January 22, 1987
File No.:	441-721111-230

Dear Mr. Pfennigs:

Please be advised Risk Enterprise Management Limited (REM) has been appointed the claims administrator on behalf of Home Insurance Company. By means of this letter we acknowledge receipt of the complaint and the tender of defense of Carl Weissman & Sons, Inc. with respect to this matter.

At this time Home is reserving its rights to conduct a coverage investigation with respect to this matter. We are in the process of having the file recalled from storage and in obtaining a copy of the policy in effect on this date of loss. Potential coverage issues deal with whether Stop Gap coverage was obtained, as generally speaking, injury to employees is excluded from a general liability policy. Also, we note punitive damages are sought, and we will need to review the coverages to ascertain if punitive damages are covered. Again, generally speaking, punitive damages go to potential intentional acts. Intentional acts are not generally covered under a general liability policy.

P.O. BOX 600
BREA, CA 92822
714 579 2500
800 347 2505

Nonetheless, Home has assigned defense counsel to represent Carl Weissman & Sons in this matter. Defense counsel is Gary Zadick, Esq. of the Ugrin, Alexander, Zadick & Higgins firm. 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. We will review

VIEW

the coverages and the file documents immediately upon receipt and advise you of any coverage issues.

At this time we request you forward copies of all pleadings, as well as copies of any of the insured's file documents, copies of any medical reports, investigative reports, demands, correspondence, etc. with respect to this claim to Mr. Zadick.

Should you have any questions, do not hesitate to contact the undersigned at (714)579-2556.

Sincerely,

RISK ENTERPRISE MANAGEMENT LIMITED
ON BEHALF OF HOME INSURANCE COMPANY

Ann E. Galasso

Ann E. Galasso
Claims Supervisor

REM.

April 20, 2000

Robert B. Pfennigs, Esq.
Jardine, Stephenson, Blewett & Weaver, P.C.
P.O. Box 2269
Great Falls, Montana 59403-2269

RISK
ENTERPRISE
MANAGEMENT
LIMITED

RE: ***John Hubbard vs. Carl Weissman & Sons, Inc.***

REM's Principal:	Home Insurance Company
Insured:	Carl Weissman & Sons, Inc.
Claimant:	John Hubbard
Date of loss:	January 22, 1987
File No.:	441-721111-230

Dear Mr. Pfennigs:

Please be advised Risk Enterprise Management Limited (REM) has been appointed the claims administrator on behalf of Home Insurance Company with respect to this matter.

As we advised you in our letter of April 17, 2000, Home Insurance Company was reserving its' rights to conduct a coverage investigation with respect to this matter. Home's coverage investigation has been completed and we must advise you there is no coverage for this loss under the Home general liability policy. This will be discussed in further detail below. As there is no coverage for this claim, Home is advising you, as the insured's personal counsel, that Home is withdrawing from the defense of this matter. We are giving you 30 days notice in this regard. Thus, as of Monday May 22, 2000, Home Insurance Company will no longer be responsible for any defense costs incurred with respect to this matter. By cc of this letter to both the insured and Gary Zadick, Esq., we are advising them of the date of withdrawl of the defense.

Our understanding of the facts of this loss are that Mr. Hubbard was an employee of Carl Weissman & Sons, working as a crane operator and laborer. On January 22, 1987, he was performing some type of greasing operations on the crane when he was severely injured allegedly as a result of these operations.

P.O. BOX 600
BREA, CA 92822
714 579 2500
800 347 2505

[redacted]

000242

A member of the Zurich Financial Services Group

Home issued policy GL 1488251, effective April 1, 1986 to April 1, 1987. Limit of liability was $1 million per occurrence and in the aggregate. The policy states as follows:

The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as damages because of

A. **bodily injury** or
B. **property damage**

to which this insurance applies, caused by an **occurrence**, and the company shall have the right and duty to defend any suit against the **insured** seeking damages on account of such **bodily injury** or **property damage**, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Exclusions
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**;

Definitions
When used in this policy (including endorsements forming a part hereof):

"bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;

"incidental contract" means any written (1) lease of premises, (2) easement agreement, except in connection with construction or demolition operations on or adjacent to a railroad, (3) undertaking to indemnify a municipality required by municipal ordinance, except in connection with work for the municipality, (4) sidetrack agreement, or (5) elevator maintenance agrement;

While there is an endorsement providing Employee Benefits coverage, this coverage does not apply, as the loss does not fall within the administration of Employee Benefits Programs. This is defined as follows:

2. "Employee Benefits Programs": The term "Employee Benefits Programs" means (a) group life insurance, group accident or health insurance, profit sharing plans, pension plans, employee stock subscription plans, workmen's compensation, unemployment insurance, social security benefits, disability benefits, and (b) any other similar employee benefits instituted after the effective date of this endorsement, provided this Company is notified within thirty days after the institution of such benefits.

3. "Administration": The unqualified word "administration" whenever used shall mean:

   (a) Interpreting the Employee Benefits Programs;
   (b) Handling of records in connection with the Employee Benefits Programs;
   (c) Effective enrollment, termination or cancellation of employees under the Employee Benefits Programs; provided all such acts are authiorized by the Named Insured.

Exclusions

1. This endorsement does not apply to:

   (b) bodily injury to or sickness, disease or death, of any person, or to injury to any tangible property, including the loss of use thereof;

Additionally, we note the policy has an amendatory endorsement under Form L8178, which states as follows:

It is agreed that the exclusion relating 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;
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 organizaion 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.**

Coverage was previously disclaimed to the insured for the original suit filed and served in 1991. I enclose a copy of the original declination for your review.

We also note that workers comp coverage appears to have been obtained under Home policy WC-L 169469-01, a copy of which is enclosed for your files. However, this policy appears to apply to California and Idaho only, as listed in section 3 A of the declarations page. As such, it does not appear that the workers comp policy would apply to this loss either. However, I have forwarded a copy of the file and the policy to Maggie Sikes in the workers comp department for review and analysis by workers comp.

As indicated, there is no coverage under the GL policy issued by Home Insurance for this claim. Home will not continue its defense of the insured, nor will they indemnify the insured for any losses arising from this claim. Home's withdrawl of the defense of the insured will be effective Monday May 22, 2000, and Home will not be obligated in any manner to continue providing defense after that date.

This letter is not meant to be an exhaustive recitation of the policy or any other terms, conditions, endorsement or exclusions which may be applicable to this claim. Home reserves the right to amend this disclaimer at any time and reserves the right to cite any other policy terms, conditions, endorsments or exclusions. Home reserves the right to litigate all issues of coverage.

Should you have any questions, do not hesitate to contact the undersigned directly at (714)579-2556.

Sincerely,

RISK ENTERPRISE MANAGEMENT LIMITED
ON BEHALF OF HOME INSURANCE COMPANY

Ann E Galasso

Ann E. Galasso
Claims Supervisor

NEIL E. UGRIN
JOHN D. ALEXANDER
GARY M. ZADICK
MARK F. HIGGINS
NANCY P. CORY
ROGER T. WITT
J. MICHAEL YOUNG
CATHY J. LEWIS

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.
ATTORNEYS AT LAW
#2 RAILROAD SQUARE
P.O. BOX 1746
GREAT FALLS, MONTANA 59403-1746

TELEPHONE
(406)771-0007

FAX
(406)452-9360

E-MAIL
uazh@uazh.com

April 21, 2000

Our File:

Michael R. Tramelli
Attorney at Law
104 - 2nd Street South
Great Falls, MT 59401-3645

Randall O. Skorheim
SKORHEIM LAW OFFICE
P.O. Box 401
Great Falls, MT 59403-0401

RE: *John A. Hubbard v. Carl Weissman & Sons, Inc.*

Gentlemen:

Our firm will be taking over the defense of Carl Weissman Sons Inc. I have not yet received a copy of the file and I need to sit down with Bob Pfennings to get up to speed. I understand that there is outstanding discovery and it will be my first order of business. Your cooperation and forbearance is appreciated.

Please give me a call if you have any questions or concerns.

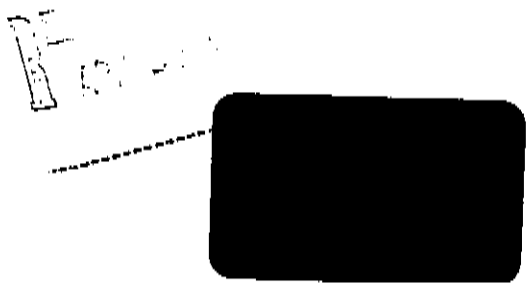
Sincerely,

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

Gary M. Zadick

GMZ/jt

cc: Robert B. Pfennings



NEIL E. UGRIN
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TELEPHONE
(406)771-0007

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(406)452-9360

E-MAIL
uazh@uazh.com

May 5, 2000

Our File: HO5-213

Michael R. Tramelli
Attorney at Law
104 - 2nd Street South
Great Falls, MT 59401-3645

Randall O. Skorheim
SKORHEIM LAW OFFICE
P.O. Box 401
Great Falls, MT 59403-0401

RE: *John A. Hubbard v. Carl Weissman & Sons, Inc.*

Gentlemen:

I previously advised by letter of April 21, 2000 that I would be taking over the defense of Carl Weissman & Sons, Inc. Subsequently, the insurance carrier determined that it did not have coverage for this event and has notified Weissman that it will not be continuing the defense. I would suggest that you contact Bob Pfennings as to whether or not any other carrier is going to take over the defense. It is my present understanding that I will not be involved.

Sincerely,

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

Gary M. Zadick

GMZ/jt

cc: Robert B. Pfennings

[redacted]

Marsh Advantage America
160 Spear Street
San Francisco, CA 94105
415-983-5600 FAX 415-597-1322

MARSH
An MMC Company

May 15, 2000

Mr. Gary Zadick
Ugrin, Alexander & Zadick Law Firm
Two Railroad Square
P.O. Box 1746
Great Falls, MT 59403-1746

Fax: 406-452-9360

RE: John Hubbard Claim - January 22, 1987

Dear Gary:

With respect to the referenced matter, I generally recall having one or more discussions with the Home Insurance Company underwriter, Dave Wood, concerning the possibility of the Home's providing Employer's Liability coverage to the Carl Weissman & Sons, Inc. I was the broker on the Weissman & Sons account from 1980 to 1987. To the best of my recollection, my conversation(s) with Mr. Wood on this particular subject took place on a couple of occasions throughout the mid-1980s. Representatives of the Home advised me that Montana was a "sole remedy" state for workers compensation purposes and that coverage B – Employer's Liability – was therefore neither needed by nor available to Weissmen & Sons. As a result, such coverage was not offered this account, which was continuously placed with the Home from 1980 until 1994.

Please call me if you have questions regarding this issue.

Sincerely,

J. Christopher Burger
Managing Director

JAMES E. AIKEN
GARY W. BJELLAND
ALEX BLEWETT
FRANCIS X. CLINCH
DONALD J. HAMILTON
LON T. HOLDEN
JON J. KUDRNA
JACK L. LEWIS
BRION C. LINDSETH
SUE ANN LOVE
GEORGE N. McCABE
ROBERT B. PFENNIGS

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

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MARTIN H. SINCLAIR
JOHN D. STEPHENSON
BRIAN L. TAYLOR
PATRICK R. WATT

SPECIAL COUNSEL
TIMOTHY J. WYLDER

RETIRED
JOSEPH G. MUDD
JOHN H. WEAVER

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FAX: (406)721-4346

E-MAIL: rpfennigs@jardinelaw.com

PLEASE RESPOND TO THE GREAT FALLS OFFICE

May 26, 2000

Risk Enterprise Management Ltd.
ATTN: Ann E. Galasso
Claims Supervisor
P.O. Box 600
Brea, CA 92822

RE: ***John Hubbard v. Carl Weissman & Sons, Inc.***
REM's Principal: Home Insurance Company
Insured: Carl Weissman & Sons, Inc.
Claimant: John Hubbard
Date of Loss: January 22, 1987
Home Insurance Claim No.: 441-L-721111\600
Home Insurance Policy No.: GL1488251
Our File No.: 83500-00435

Dear Ms. Galasso:

The purpose of this letter is to demand that REM's Principal, The Home Insurance Company, reinstate a defense and coverage for the above referenced matter. I do not intend at this point in time to go into any of the matters contained in your letter of April 20, 2000, and the reasons set forth therein as to why you believe there is no coverage for this claim. I specifically reserve the right to dispute the matters contained in your April 20th letter at a later date.

With the above in mind, it has come to our very recent attention that the insurance agent for Carl Weissman & Sons, Inc., Marsh Advantage America, made repeated inquiry with Home Insurance Company underwriter Dave Wood concerning the purchase of employer's liability coverage. These inquiries were made prior to the date of the Hubbard accident. It is the agent's recollection that representatives of the Home Insurance Company advised that since Montana was a "sole remedy" state, employer's liability coverage was not needed. The information provided by The

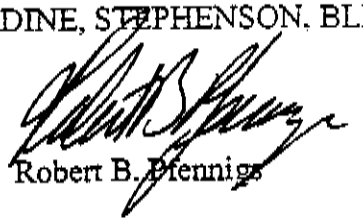
Home's representatives was obviously incorrect and has placed my client in a very precarious situation.

The only acceptable solution is for The Home Insurance Company to accept responsibility for this claim by providing a defense and an agreement to indemnify Carl Weissman & Sons. Inc., for any payment on this claim in an amount equal to the policy limits. The Home must also reimburse my client for all attorney fees and costs incurred in defending this claim to date. If The Home Insurance Company refuses to voluntarily accept responsibility for this claim, my client has directed me to pursue all legal remedies that it might have in this regard.

I look forward to your immediate response.

Very truly yours,

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: 
Robert B. Pfennigs

RBP/sss

REM.

June 6, 2000

Robert B. Pfennigs, Esq.
Jardine, Stephenson, Blewett & Weaver, P.C.
P.O. Box 2269
Great Falls, Montana 59403-2269

RISK
ENTERPRISE
MANAGEMENT
LIMITED

RE: ***John Hubbard vs. Carl Weissman & Sons, Inc.***

REM's Principal:	Home Insurance Company
Insured:	Carl Weissman & Sons, Inc.
Claimant:	John Hubbard
REM File No.:	441-721111-230
Your File No.:	83500-00435

Dear Mr. Pfennigs:

Please be advised that Risk Enterprise Management Limited (REM) has been appointed the claims administrator on behalf of Home Insurance Company. In that regard, we acknowledge receipt of your letter of May 26, 2000.

We are somewhat perplexed at your challenge of the disclaimer. This claim was originally disclaimed to the insured directly in February 1991, and a copy of the disclaimer was sent to your office and to the broker's office. At no time since February 1991 has the insured, your office or the broker challenged or questioned the disclaimer. What is different in May 2000 that for the first time in over 9 years coverage is being challenged? Please identify the agent at Marsh Advantage America who purportedly "...made repeated inquiry with Home Insurance Company underwriter Dave Wood concerning the purchase of employer's liability coverage." You indicate in your letter these inquiries were made prior to the date of the Hubbard accident. Please advise us of when specifically this agent made these inquiries, and provide us with copies of any letters, memorandum, notes, etc. upon which the agent bases their recollection.

P.O. BOX 600
BREA, CA 92822
714 579 2500
800 347 2505

It appears this claim has been ongoing since the insured was originally served with this suit in January 1991. There apparantly was a first amended complaint filed and served in this matter, yet it was never tendered to Home for consideration. The second amended complaint apparantly was filed March 10, 2000, and tendered on April 14, 2000, which

resulted in the aforementioned disclaimer. What has been going on in this litigation for the last nine years? Presumably your firm has been defending Carl Weissman & Sons since 1991 and is in the best position to advise us of the current status of the litigation.

Is there any excess insurance under the workers compensation policy which is applicable to this loss? Has the excess carrier been given notice of this claim? Please advise of the identity of any excess workers compensation insurer, policy number, claim number and the identity/phone number/address of the adjuster who is responsible for this claim at the excess level. If the excess workers comp carrier has not been notified of this claim, then we suggest this be done immediately. We would also like to have a copy of the recent ruling by the Supreme Court of Montana regarding the intentional harm exception you reference in your letter of April 20, 2000.

At this time Home will be reviewing all policies of insurance issued to Carl Weissman & Sons, as well as the underwriting files for those polices. Home continues to reserve its rights to conduct a coverage investigation with respect to this matter. By undertaking such a coverage investigation, Home is not waiving any of its rights under the policy. Home reserves its rights to assert all coverge conditions, exclusions, endorsements and terms which may be applicable to this claim.

At this time, Home will not defend or indemnify Carl Weissman & Sons with respect to this claim. In the event there is coverage for this matter, Home will reimburse defense costs at the rate of $110 per hour from the date of tender of the second amended complaint, which is April 14, 2000. Home Insurance Company is not responsible for any fees or costs incurred prior to tender of this matter.

As soon as we have completed our coverage investigation, we will advise you of the Home's decision with respect to coverage for this loss. Should you have any additional information which you would like to submit to us for consideration, please forward it to the attention of the undersigned.

Sincerely,

RISK ENTERPRISE MANAGEMENT LIMITED
ON BEHALF OF HOME INSURANCE COMPANY

Ann E. Galasso

Ann E. Galasso
Claims Supervisor

JAMES E. AIKEN
GARY W. BJELLAND
ALEX BLEWETT
FRANCIS X. CLINCH
DONALD J. HAMILTON
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ROBERT B. PFENNIGS

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

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TEL: (406)543-3547
FAX: (406)721-4346

E-MAIL: bpfennigs@jardinclaw.com

PLEASE RESPOND TO THE GREAT FALLS OFFICE

September 6. 2000

COPY

Risk Enterprise Management Limited
Attn: Anne Galasso
P.O. Box 600
Brea, CA 92822

Re: John Hubbard v. Carl Weissman & Sons, Inc.
REM's Principal: Home Insurance Company
Insured: Carl Weissman & Sons, Inc.
Claimant: John Hubbard
Home Insurance Claim No: 441-L-721111\600
Home Insurance Policy No: GL1488251
Our File No. 83500-00435

[redacted]

Dear Ms. Galasso:

Enclosed is a copy of a settlement demand made on my client by John Hubbard. You and I have corresponded previously on this issue and, to date. the Home Insurance Company has denied coverage to my client. I believe your declination of coverage is in error and request reconsideration.

I believe that the Home's denial of coverage is based upon an exclusion that involves claims "arising out of" the employment relationship. In that regard, I have enclosed a recent opinion from the Montana Supreme Court that construes the "arising out of" language and it construes it against the Home and in favor of coverage in this case. If the Home is going to once again wrongfully refuse to defend and provide indemnity to my client. I would encourage you to refer this matter to outside counsel for review in light of the Pablo v. Moore decision.

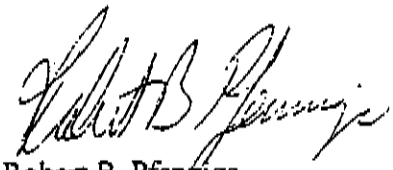
Please consider this letter as the last demand Carl Weissman & Sons will make for a defense and indemnity in this case. Demand is hereby made that the Home settle this case within policy limits. I realize that the 30 day period provided in Randy Skorheim's letter has expired. but I have been informed that the offer is still open. If the 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 duties under the policy, it is liable for any settlement or judgment that may result in this case. In fact, if a defense and a promise of indemnity is not immediately forthcoming, then I will have no choice but to take whatever steps are necessary to protect my client's interests.

Thank you for your immediate attention to this matter.

Very truly yours,

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: 
Robert B. Pfennigs

RBP:ls

Enc: settlement review
Supreme Court opinion

cc: Jerry Weissman

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Attorneys for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD, Plaintiff, vs. CARL WEISSMAN & SONS INC., Defendant.	CAUSE NO.: BVD-90-067

MOTION TO AMENDED COMPLAINT

COMES NOW, Randall O. Skorheim, co-counsel for the Plaintiff herein, moves this Court for its Order allowing Plaintiff to amend his complaint herein.

A copy of said proposed FOURTH AMENDED COMPLAINT is attached hereto by this reference is incorporated herein.

DATED this 5th day of October, 2000.

SKORHEIM LAW OFFICE

Randall O. Skorheim

J.S.B.W.
OCT 0 6 2000

doc [redacted] Amended_Complaint_4.wpd

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Attorneys for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD, Plaintiff, vs. CARL WEISSMAN & SONS INC., Defendant.	CAUSE NO.: BVD-90-067

FOURTH AMENDED COMPLAINT AND JURY TRIAL DEMAND

COMES NOW, Plaintiff, John A. Hubbard, by and through his attorneys, Randall O. Skorheim and Michael R. Tramelli, and hereby amends the Complaint as follows:

COUNT I

1. That at all times material, herein, Defendant was a corporation, duly organized and existing under the laws of the State of Montana, operating a retail store, automotive store, salvage and scrap yard within the State of Montana and elsewhere in the district and county wherein this action is filed.
2. That the Plaintiff was employed by said Defendant when on January 22, 1987 he was severely injured while greasing a 30 ton Northwest Crane. The crane gears latched on to Plaintiff's right hand pulling him into the crane and ripping his arm off at the shoulder. In addition, the Plaintiff suffered other severe trauma to his body, including facial cuts.
3. The Defendant knowingly operated a crane after the gear guard had been removed. Defendant knowingly placed the Plaintiff in a position of extreme danger by exposing Plaintiff to the Crane without any gear guards.

4. As a result of the foregoing, the Defendant had knowledge of the facts or intentionally disregarded facts that created a high probability of injury to the Plaintiff and deliberately proceeded to act in conscience disregard of the high probability of injury to the Plaintiff and deliberately proceeded to act with indifference to the high probability of injury to the Plaintiff.
5. Plaintiff has suffered severe permanent physical and emotional injuries and incurred special and general damages in an amount to be determined by a jury.

COUNT II

1. Plaintiff repeats and alleges all allegations contained in Count I herein.
2. As a result of the foregoing, the Defendant inflicted emotional distress on the Plaintiff and caused further general and special damages in an amount to be determined by a jury.

COUNT III

1. Plaintiff repeats and alleges all allegations contained in Counts I and II herein.
2. The Plaintiff's injuries were caused in part by Defendant's allowing a crane to be operated with no gear guards in violation of 29 CFR Ch XVII, §1910.179(6). and §1926.550(8).
3. That at the time of Plaintiff's injuries, said crane was not being operated by a licensed crane engineer, in violation of 50-76-100 et seq., M.C.A.
4. That as a result of the forgoing violations, the Defendant was negligent per se in causing Plaintiff's injuries.

COUNT IV

1. In the alternative, the Defendant has a duty to provide a reasonably safe workplace and reasonably safe tools and appliances pursuant to 50-71-201, M.C.A.
2. The Defendant failed to provide the Plaintiff with a reasonably safe place to work.
3. Further, the Defendant failed to provide the Plaintiff with reasonably safe tools and appliances.
4. That as a result of the foregoing, the Plaintiff has suffered severe, permanent physical injuries and has suffered general and special damages in an amount to be determined by a jury.

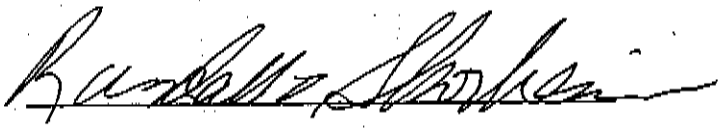
WHEREFORE, Plaintiff respectfully prays as follows:

1. That Plaintiff be awarded general and special damages in an amount to be determined by a jury;
2. That Plaintiff be awarded punitive damages in an amount to be determined by a jury;
3. Plaintiff be awarded all costs and expenses incurred in bringing this action allowed by law;
4. Any such other further relief that this Court deems just and equitable.

PLAINTIFF DEMANDS TRIAL BY JURY

DATED this 5th day of October, 2000.

SKORHEIM LAW OFFICE



Randall O. Skorheim

CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the FOURTH AMENDED COMPLAINT AND JURY DEMAND was deposited on the 5th day of October, 2000, at the Great Falls, Post Office, postage prepaid and directed to the following:

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.
Robert B. Pfennigs, Attorney at Law
P.O. Box 2269
Great Falls, Montana 59403-2269

Tanya J. Buenemeyer

JAMES E. AIKEN
GARY W. BJELLAND
ALEX BLEWETT
FRANCIS X. CLINCH
DONALD J. HAMILTON
LON T. HOLDEN
JON J. KUDRNA
JACK L. LEWIS
BRION C. LINDSETH
SUE ANN LOVE
GEORGE N. McCABE
ROBERT B. PFENNIGS

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

ATTORNEYS AT LAW

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BRIAN L. TAYLOR
PATRICK R. WATT

SPECIAL COUNSEL
TIMOTHY J. WYLDER

RETIRED
JOSEPH G. MUDD
JOHN H. WEAVER

E-MAIL: bpfennigs@jardinelaw.com

PLEASE RESPOND TO THE GREAT FALLS OFFICE

October 13, 2000

VIA FAX
Risk Enterprise Management Limited
Attn: Anne Galasso
P.O. Box 600
Brea, CA 92822

Re: John Hubbard v. Carl Weissman & Sons, Inc.
REM's Principal: Home Insurance Company
Insured: Carl Weissman & Sons, Inc.
Claimant: John Hubbard
Home Insurance Claim No: 441-L-721111\600
Home Insurance Policy No: GL1488251
Our File No. 83500-00435

[redacted]

Dear Ms. Galasso:

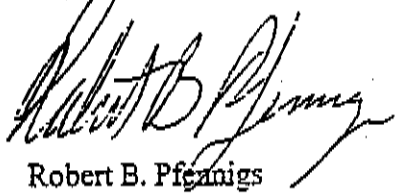
It has been well over one month since my letter of September 6, 2000, in which I requested that The Home Insurance reconsider its denial of coverage and a defense to my client. To date, I have received absolutely no response. I take your silence to mean that The Home Insurance is going to continue with its refusal to either defend or indemnify Carl Weissman & Sons under its insurance policy. I believe that The Home has breached its contract with my client. Accordingly, Carl Weissman & Sons is now free to take whatever steps are necessary to protect its interests.

I am also faxing to you with this letter the plaintiff's motion to file his Third Amended Complaint. As you will see, the motion was filed some time ago but only recently granted by the Judge. I have not yet been served with the Third Amended Complaint and I think that point is now moot as the plaintiff has once again moved to amend his complaint one more time. I know of no grounds to resist the amendment and believe that you should consider the Fourth amended complaint as the most recent pleading. 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 the 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 client's interests and The Home will have to suffer the consequences.

Very truly yours,

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: 
Robert B. Pfennigs

RBP:ls

Enc: Motion to Amend Complaint
Third Amended Complaint
Fourth Amended Complaint

cc: Jerry Weissman

JAMES E. AIKEN
GARY W. BJELLAND
ALEX BLEWETT
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E-MAIL: bpfennigs@jardinelaw.com

PLEASE RESPOND TO THE GREAT FALLS OFFICE

October 24, 2000

VIA FAX AND FEDERAL EXPRESS

Risk Enterprise Management Limited
Attn: Anne Galasso
P.O. Box 600
Brea, CA 92822

Re: John Hubbard v. Carl Weissman & Sons, Inc.
REM's Principal: Home Insurance Company
Insured: Carl Weissman & Sons, Inc.
Claimant: John Hubbard
Home Insurance Claim No: 441-L-721111\600
Home Insurance Policy No: GL1488251
Our File No. 83500-00435

[redacted]

Dear Ms. Galasso:

I faxed the enclosed letter to you on October 13 and have not had a reply. I checked with your receptionist yesterday afternoon and discovered that the number I faxed the letter to, specifically 714-579-2679 is another extension in the office, but that your direct fax number has been changed to 714-579-2679.

In any event, since the first number is the one that I received directly from you, I assume that you received my fax of October 13. Even if you did not, you have also not responded to my letter of September 6. That being the case, I am now going to proceed with the steps that I believe are necessary to protect my client from a judgment in this case. Those steps will be taken at the peril of the Home Insurance Company. The Home has had many opportunities to defend this case pursuant to the obligations its policy, but has breached that obligation. I will keep you copied with documents that may be generated between the plaintiff and myself, but I am afraid that the opportunity for the Home

Insurance Company to fulfill its contractual obligations to Carl Weissman and Sons. Inc. has long since past.

Very truly yours,

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: Robert B. Pfennigs

RBP:ls

Enc: as noted above

cc: Jerry Weissman

Bob Pfennigs

From: ann.galasso@remltd.com
Sent: Wednesday, October 25, 2000 2:35 PM
To: bpfennigs@jardinelaw.com
Cc: phabin@crowleylaw.com
Subject: Hubbard vs. Carl Weissman & Sons, Inc. 441-721111

Mr. Pfennigs:
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. Habin.

[redacted]

Bob Pfennigs

From: Bob Pfennigs [bpfennigs@jardinelaw.com]
Sent: Wednesday, October 25, 2000 8:30 PM
To: 'ann.galasso@remltd.com'
Subject: RE: Hubbard vs. Carl Weissman & Sons, Inc. 441-721111

Dear Ms. Galasso:

As I indicated in yesterday's letter, the opportunity for The Home to retain coverage counsel and assume its duties under the policy has been lost. I wrote to you nearly two months ago requesting that The Home reconsider its denial of coverage and a defense and I also enclosed a copy of the Plaintiff's settlement demand. If The Home had wanted an opportunity to reconsider, it certainly had that chance. The attorneys for Mr. Hubbard are not going to wait any longer and I now have no choice but to proceed with the steps I believe are necessary to protect my client' interests.

——Original Message——
From: ann.galasso@remltd.com [mailto:ann.galasso@remltd.com]
Sent: Wednesday, October 25, 2000 2:35 PM
To: bpfennigs@jardinelaw.com
Cc: phabin@crowleylaw.com
Subject: Hubbard vs. Carl Weissman & Sons, Inc. 441-721111

Mr. Pfennigs:
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. Habin.

[redacted]

Robert B. Pfennigs
Brian L. Taylor
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P. O. Box 2269
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Telephone: (406) 727-5000

Attorneys for Defendant

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD,

Plaintiff,

v.

CAUSE NO. BDV-90-067

CARL WEISSMAN & SONS, INC.

Defendant.

CONFESSION OF LIABILITY

COMES NOW the Defendant, Carl Weissman & Sons, Inc., (CWS) the Defendant in the above-captioned matter, and confesses its liability to Plaintiff John Hubbard for those claims made against it in Plaintiff's Fourth Amended Complaint.

DATED this 13th day of November, 2000.

CARL WEISSMAN & SONS, INC.

By _____
Its President

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **CONFESSION OF LIABILITY** was served upon the person named below by mailing, hand-delivery, Federal Express, or by telecopying to him a true and correct copy of said document:

[X] U.S. Mail [ ] Federal Express [ ] Hand-delivery [ ] Fax

Michael R. Tramelli
Attorney at Law
201 Galleria Building
104 Second Street South
Great Falls MT 59401-3645

Randall O. Skorheim
121 4th Street North, #2G
P. O. Box 401
Great Falls, MT 59401-0401

DATED this 13th day of November, 2000.

By _____

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD,

Plaintiff,

v.

CAUSE NO. BDV-90-067

CARL WEISSMAN & SONS, INC.

Defendant.

ORDER OF LIABILITY AND ORDER SETTING TRIAL ON DAMAGES

Pursuant to Defendant Carl Weissman & Sons, Inc.'s confession of liability, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant Carl Weissman & Sons, Inc. is liable for all matters alleged in Plaintiff's Fourth Amended Complaint.

IT IS FURTHER ORDERED that a trial on the issue of damages to be awarded to the Plaintiff will be held before the Court on Monday, December 11, 2000, at 3:30 p.m.

DATED this 16th day of November, 2000.

By _____
JUDGE
for: MARGE JOHNSON

cc: Michael R. Tramelli
Randall O. Skorheim
Robert B. Pfennigs

doc000082

[redacted]

JAMES E. AIKEN
GARY W. BJELLAND
ALEX BLEWETT
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DONALD J. HAMILTON
LON T. HOLDEN
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E-MAIL: bpfennigs@jardinelaw.com

PLEASE RESPOND TO THE GREAT FALLS OFFICE

November 28, 2000

Risk Enterprise Management Limited
Attn: Anne Galasso
P.O. Box 600
Brea, CA 92822

COPY

Re: John Hubbard v. Carl Weissman & Sons, Inc.
REM's Principal: Home Insurance Company
Insured: Carl Weissman & Sons, Inc.
Claimant: John Hubbard
Home Insurance Claim No: 441-L-721111\600
Home Insurance Policy No: GL1488251
Our File No. 83500-00435

Dear Ms. Galasso:

Enclosed for your information are the following documents:

(1) Confession of Liability;
(2) Notice to Court;
(3) Order of Liability; and
(4) Stipulation.

I am truly sorry that this particular matter has reached this result, but my client had no choice once The Home Insurance Company breached its obligations under the policy. I believe you can expect to hear from the plaintiff in short order regarding collection of his judgment.

Very truly yours.

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: Robert B. Pfennigs

RBP:ls

Encs: as noted above

doc000083

[redacted]

12-2000

Bob Pfennigs

To: anngalasso@remltd.com
Subject: Hubbard v. Weissman

Ann, the court entered judgment following trial yesterday in favor of John Hubbard in the amount of $2,379,000. 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. In any event, I will send you a copy of the judgment as soon as I recieve one. I will also be providing you a demand for reimbursement of the attorney fees and costs expended in defending this claim.

Bob

[redacted]

JAMES E. AIKEN
GARY W. BJELLAND
ALEX BLEWETT
FRANCIS X. CLINCH
DONALD J. HAMILTON
LON T. HOLDEN
JON J. KUDRNA
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E-MAIL: bpfennigs@jardinelaw.com

PLEASE RESPOND TO THE GREAT FALLS OFFICE

December 22, 2000

COPY

Risk Enterprise Management Limited
Attn: Anne Galasso
P.O. Box 600
Brea, CA 92822

Re: John Hubbard v. Carl Weissman & Sons, Inc.
REM's Principal: Home Insurance Company
Insured: Carl Weissman & Sons, Inc.
Claimant: John Hubbard
Home Insurance Claim No: 441-L-721111\600
Home Insurance Policy No: GL1488251
Our File No. 83500-00435

Dear Ms. Galasso:

Enclosed is a copy of the Judgment that has been entered against Carl Weissman & Sons, Inc. in the above-referenced matter.

Very truly yours,

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: Robert B. Pfennigs

RBP:ls

Enc: Judgment

[redacted]