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
Claimant Number:	CDV 2007-745
Policy or Contract Number:	
Insured or Reinsured Name:	John A. Hubbard
Date of Loss:	

ORDER ON THE DISPOSITION OF CLAIM

This is a dispute regarding whether there is coverage under a Home policy issued to Carl Weissman & Sons, Inc. for claims made against it by John A. Hubbard. A related question is whether an order of the Montana trial court in the underlying action has res judicata or collateral estoppel effect on the coverage issues in this dispute with Home. The third issue is whether Mr. Hubbard's claim, to the extent it is more than a claim for coverage under the policy, is a Class II or Class V claim.

RELEVANT FACTS

Home issued a comprehensive general liability policy, number GL 1 488251 to Carl Weissman & Sons, Inc. (CW&S) for the period April 1, 1986 to April 1, 1987 ("the Home policy"). The Home policy includes several provisions which are at issue in this dispute. Those policy provisions include exclusions in the policy which state:

> 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 workers 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;...

The Home policy also includes endorsement L6178 which states:

> 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 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.

On January 22, 1987, John A. Hubbard was working at the direction of the insured and sustained severe injuries including pulling his arm off at the shoulder socket, and severe facial lacerations. Mr. Hubbard collected workers compensation insurance as a result of his injury.

On January 22, 1990, Mr. Hubbard filed a complaint against CW&S in the Montana Eighth Judicial District Court. Mr. Hubbard alleged several tort claims against CW&S. CW&S provided notice of the lawsuit to Home through the broker on January 22, 1991. Home acknowledged receipt of the claim by letter dated January 29, 1991. Home informed CW&S that copies of the policies issued to CW&S had been requested and that Home would be in further contact with the insured regarding whether there was coverage under the Home policy. Home issued a letter on February 4, 1991 advising CW&S that there was no coverage under the Home policy for the claims by Mr. Hubbard. The Home denial letter specifically referenced endorsement L6178, quoted above.

The litigation between Mr. Hubbard and CW&S proceeded with CW&S represented by its own counsel. CW&S moved for summary judgment based on the workers compensation exclusive remedy provision of the Montana WCA, Mont. Code Ann. §39-71-411. By Order dated November 11, 1987, the Montana trial court denied CW&S' motion for summary judgment and allowed Mr. Hubbard to amend his complaint to include allegations of intentional conduct that might fall within an intentional conduct exception to the exclusivity rule of the Montana Workers Compensation Act. The parties to the underlying action agreed to stay that case until the Montana Supreme Court issued a decision in a similar case *Sherner v. Conoco*, 995 P.2d 990 (2000). The *Sherner* decision was issued on March 30, 2000.

By letter dated April 14, 2000, CW&S advised Home of Mr. Hubbard's Second Amended Complaint and requested defense of the tort action by Home. The Second Amended Complaint asserted claims based on alleged deliberate acts by CW&S. Home responded in a letter dated April 17, 2000 in which it reserved its right to conduct a coverage investigation, and indicated it would recall the file from storage and obtain a copy of the general liability policy. Home assigned defense counsel to represent CW&S but stated that it was reserving its right to withdraw from the defense if the coverage investigation revealed no duty to defend or indemnify CW&S. In a letter dated April 20, 2000, Home advised CW&S that it had completed its coverage investigation and there was no coverage for the claim. Therefore, Home gave CW&S 30 days notice that it was withdrawing from the defense. The April 20, 2000 letter referenced portions of the general liability policy and endorsement L6178.

After the April 20, 2000 denial there was correspondence between counsel for CW&S and Ann Galasso, who was handling the claim for Home, in which CW&S made various demands that Home revisit its decision and provide defense and indemnification. Home did not change its position and maintained its denial of coverage.

On November 13, 2000 Mr. Hubbard and CW&S entered into a Stipulation regarding the tort action. In the Stipulation CW&S agreed to confess liability for Mr. Hubbard's injuries as set forth in the Fourth Amended Complaint. CW&S also assigned to Mr. Hubbard all its rights under the Home policy with respect to the matter to which CW&S confessed liability. Mr. Hubbard agreed not to levy execution or otherwise seek to enforce judgment in the tort action against CW&S. A Judgment in the amount of $2,389,000 plus interest was entered against CW&S in the tort action on December 20, 2000.

Mr. Hubbard filed an action against Home both individually and as assignee of CW&S' rights. The action against Home asserts claims for breach of contract, bad faith, malice, violation of Montana's Unfair Claims Settlement Practices Act, §33-18-201, and a claim pursuant to MCA §33-18-242. That action has not proceeded because of the liquidation proceeding.

LEGAL ANALYSIS

I. Whether the Home policy provides coverage for Mr. Hubbard's claim against CW&S for bodily injury while working for CW&S

Mr. Hubbard argues that the Home policy provides coverage for his claims against CW&S because the employee exclusion has been found to be ambiguous by Montana courts. Specifically, he asserts the phrase "arising out of and in the course of his employment" in an insurance policy has been found ambiguous by the Montana Supreme Court.

The Liquidator asserts that the Home policy expressly excludes coverage for claims for bodily injury by employees arising out of and in the course of employment and therefore, Home had no duty to defend CW&S and has no duty to indemnify CW&S. The Liquidator argues that the phrase "arising out of and in the course of employment" is not ambiguous, and has not been found to be ambiguous by Montana courts.

Mr. Hubbard asserts that the exclusionary language "arising out of and in the course of employment" has been found by Montana courts to be ambiguous. Mr. Hubbard relies on *Pablo v. Moore*, 995 P.2d 460 (2000) for the proposition that the phrase "arising out of" is ambiguous in the employee exclusion. In *Pablo*, the Montana Supreme Court reviewed the automobile and mobile equipment exclusions in a commercial general liability policy. The Montana Supreme Court determined that the phrase "arising out of" was not defined in the First Financial policy being interpreted in that case. The Montana Supreme Court then discussed its own determination that the phrase "arising out of" was ambiguous in the context of an uninsured motorist benefit provision. The *Pablo* Court next found that the phrase was reasonably subject to more than one interpretation in the two exclusions at issue in that case based on the District Court's findings, and the split of authority as to the meaning of the phrase in those exclusions. *Id. at 462.* In *Pablo* the Montana Supreme Court did not indicate that the phrase "arising out of" is always ambiguous in an insurance policy. It discussed the phrase specifically in the context of the two policy exclusions, the auto exclusion and the transportation of mobile equipment exclusion. *Id.* *Pablo* does not

lead to a conclusion that the phrase "arising out of" is always ambiguous as used in an insurance policy or that the phrase "arising out of and in the course of employment" has been found to be ambiguous in an insurance policy.

Since *Pablo* was decided, the Supreme Court of Montana has held that an exclusion very similar to the employee exclusion in the Home policy eliminated coverage for the claims of the spouse of an employee for loss of consortium from the death of the employee in an accident while in the course of his employment. *Farmers Union Mut. Ins. Co. v. Horton*, 67 P.3d 285 (Mont. 2003). Although the *Horton* Court did not specifically interpret the phrase "arising out of and in the course of employment" the Court applied the principles of policy interpretation and found that a consumer of average intelligence, not trained in the law or insurance business, would understand that similar policy language excluded coverage for bodily injury sustained by employees while in the course of employment. *Id. at 289. Horton* was decided three years after *Pablo.* The Montana Supreme Court did not expand *Pablo* and did not find "arising out of or in the course of employment" to be ambiguous in an insurance policy employee exclusion.

Mr. Hubbard also relies on *Sherner v. Conoco, Inc., 995 P.2d 990 (2000).* In *Sherner*, the Montana Supreme Court discussed the exception to the exclusivity provision of the Montana Workers Compensation Statute. The Montana Supreme Court determined that in cases involving an intentional and malicious act or omission, if an employer has knowledge of facts or intentionally disregards facts that create high probability of injury to an employee, and acts in conscious or intentional disregarding of high probability of injury to an employee or deliberately acts with indifference to the high probability of injury to an employee, the exclusivity of the workers compensation statute does not apply. The Montana Supreme Court found certain terms in the exception to the exclusivity provision in the statute should be construed according to their plain meaning. *Id.* The Court then determined that there were genuine issues of material fact as to whether the injuries sustained by Mr. Sherner fell outside of that exclusivity provision. *Id.*

Nowhere in the *Sherner* decision did the Montana Supreme Court specifically discuss the phrase "arising out of and in the course of employment." Nor does the decision discuss or interpret the phrase as used in an exclusion in an insurance policy. The Montana Supreme Court has not determined that the exclusion for injuries "arising out of or in the course of employment" in a general liability policy is ambiguous. In fact, the Montana Supreme Court has applied a similar exclusion. *See Horton, supra.*

Montana courts have established the principles of interpretation of insurance policies. In general, the terms used in an insurance contract are to be given their usual meaning and construed using common sense and courts 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). If there is a question of ambiguity, the court reads the policy as a whole and, if possible, reconciles its various parts to give meaning and effect to each. *Montana Petroleum Tank Release Compensation Board v. Crumleys, Inc.,* 174 P.3d 948, 957 (Mont. 2008), citations omitted. If parties dispute the meaning of a term, the court determines 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 is reasonably subject to two different interpretations. *Id.* If the language is clear and explicit, a court may not rewrite an insurance contract, but must enforce it as written. *Id.* Where expectations which are

contrary to a clear exclusion from coverage are not objectively reasonable, courts are not to distort covenants expressed in plain English so as to include risk clearly excluded by the insurance contract. *Id.* However, exclusions from coverage will be narrowly and strictly construed. *Marie Deonier & Associates v. Paul Revere Life Ins. Co.*, 9 P3d 622, 630 (Mont. 2000). It is these principles of interpretation that guide the Referee in determining whether the employee exclusion, as written in the Home policy is ambiguous.

The exclusion states 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. The exclusion applies to all claims and suits by any person or organization for damages because of such bodily injury. Mr. Hubbard suffered bodily injury. That injury occurred while he was in the course of his employment for CW&S. Mr. Hubbard seeks to hold CW&S liable for that bodily injury. The Referee is not persuaded that Mr. Hubbard has offered a reasonable reading of the exclusion that would mean the exclusion does not apply in this case. Based on the Montana Supreme Court decisions discussed above, the rules of policy interpretation relied upon by the Montana Supreme Court, and the language of the Home policy, the Referee finds that the exclusion for injury "arising out of and in the course of employment" in the Home policy is not ambiguous. [1]

Mr. Hubbard also asserts that Home is responsible to CW&S for defense and indemnification for his claims based on the doctrine of "reasonable expectations." That doctrine holds that the objectively reasonable expectations of the purchaser would be honored, not withstanding that a "painstaking study" of the policy would have negated those expectations. *Wellcome v. Home Ins. Co.*, 849 P.2d 190, 193 (1993), *citations omitted*. Under Montana law, the reasonable expectations doctrine is inapplicable where the terms of the insurance policy clearly demonstrate an intent to exclude coverage. *Newbury v. State Farm Fire & Cas. Ins. Co.* 184 P.3d 1021, 1027 (2008). The Montana Supreme Court has found that a reasonable insurance consumer would understand a policy with this exclusion as excluding coverage for employer liability for bodily injury sustained by employees while in the course of employment. *Horton at 289.* Therefore, the reasonable expectations doctrine does not apply to lead to coverage for Mr. Hubbard's claims under the Home policy.

Applying Montana's articulated principles of interpretation of insurance policies, and the decisions of the Montana Supreme Court, the employee exclusion is not ambiguous and operates to eliminate coverage for Mr. Hubbard's claims.

II. The Montana Court's Decision – Res judicata and Collateral Estoppel

Mr. Hubbard argues that the Liquidator is precluded from asserting that the employment exclusion in the Home policy eliminates coverage by the doctrines of res judicata and collateral estoppel. Mr. Hubbard

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[1] The Liquidator also points out that the exclusion is not limited to claims within workers compensation coverage. The Liquidator points out that there is a separate exclusion for workers compensation related claims. The employee exclusion is broader, and reading the policy as a whole, the employee exclusion eliminates claims beyond those not allowed because of the exclusivity of the Montana Compensation Act. The Referee agrees.

asserts that the Montana Eighth Judicial District Court has ruled that the exclusion is not applicable to Mr. Hubbard's claims. Therefore, collateral estoppel operates to bar the reopening of this issue in this case, since it has been litigated and determined in the prior action. Mr. Hubbard also argues that res judicata precludes the Liquidator from raising these issues because Home had the opportunity to raise the coverage issues in a declaratory relief action and made a conscious choice to refuse coverage and refuse to bring a declaratory judgment action.

The Liquidator argues that the trial court's order denying CW&S' motion for summary judgment against Mr. Hubbard does not have res judicata or collateral estoppel effect because Home was not a party to the suit or in privity to the underlying tort action. The Liquidator further asserts that the case and order did not involve or decide any coverage issue.

Preliminary to a discussion of collateral estoppel and res judicata is a review of the Montana Eighth Judicial District Court's decision on Defendant's Motion for Summary Judgment in *Hubbard v. Carl Weissman & Sons, Inc., Cause No. BDV-90-067.* In its Order dated November 11, 1997, the Montana Eighth Judicial District Court determined that based on *Lockwood v. W.R.Grace & Co.*, 900 P.2d 314 (1995), Mr. Hubbard may have been able to present a jury issue as to whether his employer knowingly exposed hoe to the injury which he suffered. Nowhere in that decision does the Montana Eighth Judicial District Court discuss insurance policies or language of the exclusion "arising out of and in the course of employment."

The doctrine of collateral estoppel bars litigants from reopening all questions essential to the judgment which were determined by a prior judgment. *Baltrusch v. Baltrusch, 130 P.3d 1267 (2006).* There are four necessary elements for collateral estoppel to apply:

> (1) the identical issue raised was previously decided in a prior adjudication;
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> (2) a final judgment on the merits was issued in the prior adjudication;
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> (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 was afforded the opportunity to obtain " 'a full and fair adjudication [of the issue] in the initial action.

Id. at 1274, citations omitted.

The first element is that the identical issue was decided in a prior adjudication. The only prior adjudication was the Montana Eighth Judicial District Court's decision on Defendant's Motion for Summary Judgment in *Hubbard v. Carl Weissman & Sons, Inc., Cause No. BDV-90-067.* In the Order dated November 11, 1997, the Montana Eighth Judicial District Court determined that based on *Lockwood v. W.R.Grace & Co.*, 900 P.2d 314 (1995), Mr. Hubbard may have been able to present a jury issue as to whether his employer knowingly exposed him to the injury which he suffered. Nowhere in that decision does the Montana Eighth Judicial District Court discuss insurance policies or language of the exclusion "arising out of and in the course of employment." Therefore, the identical issue was not previously decided. As to the second element, since the issue of the application of the employee exclusion was not raised and decided, there was no issue on the merits.

The third element is that the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication. The fourth is that Home was afforded the opportunity to obtain full adjudication of the issue of the application of the employee exclusion in the initial action. Home was not a party to *Hubbard v. Carl Weissman & Sons, Inc., Cause No. BDV-90-067.* Mr. Hubbard does not articulate the basis for his assertion that Home was in privity with CW&S, except to say that Home had the choice to defend CW&S in that litigation. However, to be in privity with CW&S, Home must have both been involved in the case and had the ability to litigate the issue of whether the employee exclusion applied in the same action. Home was not a party to the case, and, as Mr. Hubbard points out, would have had to bring a separate declaratory judgment action to determine the application of the exclusion.

Privity does not apply to an insurer and insured where the insurer has not provided a defense and become involved in the action. Where insurers are barred by the doctrine of res judicata and/or collateral estoppel from asserting the same or similar claims, the insurer, although not a party to the original action, was providing a defense to the insured. 17 Couch on Ins. § 239:34; *see also Preferred America Ins. v. Dulceak*, 706 N.E.2d 529 (2d Dist. 1999); *Empire Mut. Ins. Co. v. United Service Auto. Ass'n*, 375 N.Y.S.2d 209 (3d Dep't 1975). In those cases, the insurer had control of the defense, employed counsel that had defended action, and had interest directly related to that of insured defendant. *Id.* The third and fourth elements are not met.

Turning to the issue of res judicata, it bars a party from relitigating a matter it has already had an opportunity to litigate. In *Baltrusch,* the Montana Supreme Court also set forth the test for when res judicata applies, requiring the following criteria be met:

> (1) The parties or their privies are the same;
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> (2) The subject matter of the action is the same;
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> (3) The issues related to the subject matter are the same; and
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> (4) The capacities of the person are the same in reference to the subject matter and the issues between them.

Id. at 1273, citations omitted.

As discussed above, Home was not a party to the case *Hubbard v. Carl Weissman & Sons, Inc., Cause No. BDV-90-067.* Nor was Home in privity with CW&S in that action. Also discussed above is the fact that the subject matter of this action is not the same as that in *Hubbard v. Carl Weissman & Sons, Inc., Cause No. BDV-90-067.* Therefore, the doctrine of res judicata does not apply to eliminate Home's right to deny a duty to defend and indemnify CW&S for Mr. Hubbard's claims.

Neither collateral estoppel nor res judicata preclude the Liquidator from relying on the employee exclusion in the Home policy to eliminate coverage for Mr. Hubbard's claims against CW&S.

III. Whether Mr. Hubbard's claim is for anything other than coverage, and if so, whether it is a Class II or Class V claim

Mr. Hubbard has asserted that Home should have offered an Employers Liability Endorsement to CW&S and that, if it had, there would have been coverage for Mr. Hubbard's claims under the Home policy.

The Liquidator alleges that because Mr. Hubbard does not have a claim against Home based on the language of the policy nor based on the trial court's denial of CW&S' motion for summary judgment, the only other claims he may be asserting fall in Class V. These include claims that Home and/or the broker should have offered an Employers Liability Endorsement. Because there are not expected to be assets sufficient to make any distribution on Class V claims, the Liquidator argues the Referee should not address those claims.

RSA 402-C:44 sets forth the priority classes for payment in the Liquidation. Class II is policy related claims, which includes all claims by policyholders and insured arising from and within the coverage of the applicable limits of insurance policies. Class V is a residual classification, including all other claims that are not otherwise articulated in a different class in the statute. RSA 402-C:44.

If Home had a duty to defend and indemnify CW&S for Mr. Hubbard's claims based on the policy language, those claims would fall in Class II. Because the Referee has found that there was no coverage for Mr. Hubbard's claims under the Home policy, the only claims against Home which Mr. Hubbard could pursue are claims not based on the policy language itself, such as for failing to offer an Employers Liability Endorsement when the policy was sold to CW&S. Such claims do not fall within any other category outlined in RSA 402-C:44, and, therefore fall within Class V – Residual Classification. To address the remaining claims by Mr. Hubbard would require significant discovery and additional briefing. Because there is no expectation that there will be assets sufficient to make a distribution for claims in Class V, the Referee will not address those claims at this time.

CONCLUSION

For the reasons set forth above, the Referee finds that the Home policy excludes coverage for the claims by Mr. Hubbard. The decision of the Montana Eighth Judicial District Court in *Hubbard v. Carl Weissman & Sons, Inc., Cause No. BDV-90-067* does not preclude this determination because res judicata and collateral estoppel do not apply. Any remaining claims that Mr. Hubbard may have fall within Class V pursuant to RSA 402:c-44 and the Referee will not address them at this time.

So Ordered.

Date: June 4, 2009

Melinda S. Gehris

Referee, Melinda S. Gehris