

Montana Supreme Court Tackles Decade-Old Coverage Dispute Concerning Asbestos Mineworker Claims

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WHETHER THE INSURER BREACHED THE DUTY TO DEFEND DEPENDED UPON THE TIMEFRAME

The court looked at whether (1) the insured provided sufficient information to bring the claims within the possibility of coverage under the subject policy and (2) the insurer gave "the necessary substance to" fulfilling its duty to defend at four points in the relevant timeframe:

1. The insurer did not breach its duty at the time the State initially tendered the Libby Mine claims because the State defended the claims through its self-insurance program, hired its own counsel, managed the litigation, made its own defense decisions, and took the position with the insurer that the matter was "under control" and "nothing was left to be done[.]"
2. The insurer breached when, in response to the State's subsequent request for a complete defense, the insurer agreed to pay only its pro rata share of defense costs. Because Montana's "mixed-action rule" requires a carrier to defend the entire action so long as one count is covered, the court reasoned that the insurer's attempt "to limit its defense responsibility to a pro rata portion of the[] claims violated the Policy and the duty to defend."
3. The insurer was not in breach when it later offered to pay 100% of the defense costs conditioned on a right of recoupment, because Montana law permits carriers to seek recoupment in certain circumstances and does not "restrict[] the right to reserve coverage questions to those claims that 'are not potentially covered' . . ." (In a separate concurring opinion, one justice expressed the view that recoupment of defense costs should be permitted only when expressly allowed in the policy.)
4. Even though "there is no categorical rule [requiring] an insurer to file a declaratory judgment within a certain amount of time," the court found that the insurer breached its duty to defend again by delaying in bringing a declaratory judgment action to resolve the disputed coverage issues, reasoning that the delay was "so long as to prejudice the State by forcing it to litigate and settle cases in coverage darkness."

INSURER ESTOPPED FROM ASSERTING COVERAGE DEFENSES AS TO CLAIMS FOR WHICH IT BREACHED DUTY TO DEFEND

The court held that the insurer was estopped under Montana law from asserting coverage defenses concerning claims for which it had not provided a full defense as of the date settlements of those claims were approved by the trial courts. With respect to claims for which the insurer had offered to provide a full defense or that were not reduced to judgment before the insurer initiated the declaratory judgment action, the insurer was not in breach of the duty to defend and, therefore, not estopped from asserting the coverage defenses discussed below.

MERITS OF INSURER'S COVERAGE DEFENSES

- **Known Loss Doctrine Not Applicable:** The court held that Montana's known loss doctrine did not bar coverage because the doctrine applies only to a loss that the insured "either knows of, planned, intended or is aware is substantially certain to occur." Although the State knew, as a result of inspections of the Libby Mine, that its owner was "doing nothing to protect the workers from the toxins in their midst," the court found it "incomprehensible" that the State's efforts to enhance safety could be declared decades later to be "not helpful, but harmful to thousands of people" based on how it handled notification of the hazards.
- **Qualified Pollution Exclusion Not Applicable:** The court determined the "sudden and accidental" pollution exclusion in the policy did not bar coverage, interpreting the exclusion to apply only to discharges of pollutants by the insured and not to discharges by third parties, such as the owner of the Libby Mine.
- **Injuries Resulted from an "Occurrence":** The court concluded that the underlying injuries resulted from an "occurrence" because the State did not objectively intend or expect injuries to be sustained as a result of its actions within the meaning of Montana law.
- **Number of "Occurrences" Remanded for Further Proceedings:** Applying Montana's "cause theory" to determine the number of "occurrences," the Supreme Court found that the cause of the claimants' injuries was the State's separate failure to warn of the hazardous conditions at the Libby Mine and not its "singular decision" to withhold the results of its workplace inspections and not advise workers of the hazards. Due to an insufficient factual record, the Supreme Court remanded to the trial court for further proceedings necessary to determine the exact number of "occurrences."
- **Pro Rata Allocation Rejected:** Addressing an issue of first impression in Montana, the court held that the State (which was self-insured for decades) was not required to share pro rata responsibility for settlement and defense costs that the insurer had paid under the policy. While acknowledging that the policy required an event "which results in bodily injury . . . during the policy period," the court found it would be wrong to "give double effect to [that language] as limiting both the trigger and the scope and extent of coverage." The court distinguished cases applying Montana law cited by the insurer on the basis that they involved allocation of defense costs among carriers, and determined that the State's self-insurance reserve fund was not "other insurance" for purposes of allocating responsibility under the "other insurance" clause in the policy.
- **"Exposure Trigger" Rejected:** Referencing "the ongoing progressive nature of asbestos injury," the court held that "[a] Claimant exposed either during or prior to the Policy period may, despite a lack of manifestation of injury during the Policy period, be covered under the Policy as long as it can be determined, even retroactively, that some injury did occur during the policy period as a result of the State's failure to warn." On this basis, the trial court erred by holding that claimants exposed solely before the policy period could not qualify for coverage, and the case was remanded for further proceedings with respect to the amount of damages attributable to those claimants.

PRE-JUDGMENT INTEREST PROPERLY AWARDED

While the Supreme Court found merit in the insurer's argument that awarding pre-judgment interest would be a windfall under the circumstances, it saw no error in the trial court's awarding of \$31 million in interest under Montana Code § 27-1-211 on the settlement amounts and defense costs assessed against the insurer for its breaches of its duties under the policy. The Supreme Court reasoned that, *inter alia*, although the insurer contested liability for the settlements and defense costs, those amounts were known from the time of their court approval and payment.

NO VIOLATION OF CONSTITUTIONAL RIGHTS

Finally, the court held that the rulings below did not violate the insurer's rights under the Montana and U.S. Constitutions, including the right to due process, reasoning, among other things, that the insurer was not being "punished" for its actions but rather was being held to account for breaches of its contractual and legal duty to defend under "long-established" Montana law.

DISSENTING OPINION

In a dissenting opinion, one justice concluded:

- The insurer did not breach its duty to defend, reasoning, in part, that reservation-of-rights letters "do not constitute a breach of contract or in any way suggest an insurer has breached a duty to defend; policyholders do not risk losing any rights that they would have otherwise had under the terms of the policy."
- The "plain language" of the policy limited the insurer's liability "to the defense of suits for harm and the indemnification of sums that the State becomes obligated to pay for bodily injuries that occurred 'during the policy period.'" The insurer's statement that it would pay only its pro rata share, thus, was "a lawful reservation of rights"

CONCLUSION

The Libby Mine has been the subject of decades of litigation. It remains to be seen what impact the remand on the number of occurrences and "trigger" issues will have on the ultimate award in this case. It is not clear that courts applying Montana law will ultimately reach the same conclusion on allocation when presented with a case involving coverage issued by other insurers as opposed to self-insurance (though it is disappointing that the court here failed to recognize the significance of an insured deciding to take on its own risk literally for decades without being held responsible for that decision.)

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