IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CASE NO. DA 19-0533

NATIONAL INDEMNITY COMPANY,

Plaintiff/Appellant/Cross-Appellee,

vs.

STATE OF MONTANA,

Defendant/Appellee/Cross-Appellant,

and

TERRY JELLESED, et al.,

Intervenors.

APPELLEE/CROSS-APPELLANT STATE OF MONTANA'S ANSWER AND CROSS-APPEAL BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, Cause No. XDDV 2012-140,
the Honorable Holly Brown Presiding

[*Appearances on next page*]

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STATEMENT OF ISSUES

NIC sold the State an intentionally broad "all sums" liability policy. Now, after avoiding its obligations to defend and indemnify the State for almost 20 years and, having received the benefit of the bargain it crafted, NIC claims it is unfair and the bargain should not be enforced. The District Court properly rejected NIC's efforts. This Court should do the same.

The District Court correctly entered summary judgment in favor of the State. The question here is whether the District Court should have awarded the State additional relief. Accordingly, the State cross-appeals the following issues:

1. Whether the District Court erred in holding the State's 2002 tender did not trigger NIC's duty to defend and NIC's duty to defend did not begin until 2005.

2. Whether the District Court erred in holding NIC could condition its defense offers.

3. Whether the District Court erred in holding no coverage exists for Claimants who inhaled asbestos only before the policy period even though they had ongoing bodily injury during the policy period.

STATEMENT OF THE CASE

In 2012, nearly ten years after the State tendered the Claims to NIC, NIC filed its declaratory action, contending it has no duty to defend or indemnify. (CR6-¶75.)[1] The State counterclaimed contending NIC breached its duties to

[1] "CR" references District Court docket numbers.

defend (beginning in 2002) and indemnify (each time NIC refused to pay a settlement). (CR12-pp.17-19.)

On February 27, 2018, the District Court granted the State summary judgment and denied NIC's cross-motion. (CR265.) The Court held NIC's duty to defend was not triggered until 2005, but that NIC breached its duty to defend by conditioning defense upon NIC paying a "pro-rata share" of defense costs. (*Id.*-pp.32,36-37.)

NIC asked the Court to "clarify" its decision, asserting it should not apply to Claims after May 10, 2006. On that date, NIC offered to "advance" all defense costs, but made the offer "subject in all respects" to the conditions NIC stated in its July 18, 2005 letter: payment of "pro-rata" defense costs, recoupment of defense costs advanced to defend potentially-covered Claims, and reservation of coverage defenses NIC failed to timely assert. (CR298,299;StAppx.054.)[2] NIC also filed a second summary judgment motion. (CR296,297.)

The Court held that NIC's 2006 conditional offer was lawful but denied NIC's second summary judgment motion. (CR343-p.8;CR377.) In addition to its

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[2] Documents included in the State's two-part Appendix are Bates-numbered and pinpoint cited to Bates numbered pages as "StAppx" for non-sealed documents or "StAppxSld" for sealed documents. Documents included in the State's Appendix are cited only to the Appendix, and do not include the corresponding District Court record citation. Sealed documents are on a separate flash drive provided only to members of the Court and NIC.

prior holding that NIC breached by its 2005 "pro-rata" defense condition, the Court also concluded NIC breached its duty to defend by delaying its declaratory action until February 2012, and that this breach made NIC responsible for Claims settled before February 23, 2012 ($43 million). (*Id*.-pp.13-14,33.) The Court held Claims settled after that date were covered, no exclusions apply, and there is one "occurrence" for each Claimant "exposed to asbestos during the Policy period." (*Id*.-p.33.) In a separate Order, the Court awarded the State its defense costs and prejudgment interest on settlements and defense costs, and fees and expenses for this action. (CR379-pp.4-6.)

The State requested entry of judgment; NIC objected. (CR381,382, 389.) On May 21, 2019, the Court held there is no coverage for Claimants whose only exposure to asbestos was prior to the policy period. (CR404-p.4.) The State filed an amended request for judgment, with documentation of Claimants' exposures; NIC again objected. (CR405-407,410.)

On August 6, 2019, the Court rejected NIC's challenges to the exposure documentation; made awards for settlements, costs, and interest; granted the State time to submit clarifying Claimant declarations regarding their exposure; and ordered the State to submit a new judgment with updated interest calculations to August 16, 2019. (CR420-pp.5,7,9.)

On August 12, 2019, the State filed clarifying exposure declarations for 27 Claimants and the new proposed judgment. (CR421-425.) On August 16, 2019, the District Court denied NIC's request to further object and entered judgment against NIC for $97,883,193.39. (CR429,430.)

On September 5, 2019, NIC filed a motion to amend the 10% interest rate the State had been using, without objection, since March 2018. (CR433-435.) The Court denied NIC's motion. (CR440.) NIC timely appealed and the State timely cross-appealed. (CR439,442.)

STATEMENT OF FACTS

The relationship between the State and NIC and the circumstances underlying the State's requests to NIC for unconditional defense and coverage of the Claims is decades-long. NIC's efforts to avoid its duties to defend and indemnify the State implicate this history. The following facts provide the necessary background.

I. The District Court correctly held the Policy provides "all sums" indemnity coverage. It does not allow for "pro-rata" indemnity coverage or defense. The Policy has no aggregate CGL limit. The policy limit is $3 million per occurrence.

On July 1, 1973, the same day the State lost sovereign immunity, NIC sold the State "all-sums" occurrence-based comprehensive general liability (CGL) insurance. 1972 Mont. Const. Art. II, § 18;(StAppx.009-010). The occurrence-CGL policy form used by NIC was introduced by the insurance industry in 1966

after a lengthy drafting process. (StAppx.090,096 (this document was submitted in Montana federal court by a company that, like NIC, is wholly-owned by Berkshire Hathaway (Tab416-p.5-n.1;CR32-¶1)).)

To compete with London and other insurers offering U.S. policyholders broader coverage than the previous "accident" form, the American insurance industry wrote the occurrence-CGL to cover liability for injuries and damages that occur over extended periods of time. (StAppx.090-91,100-103.) Under the occurrence-CGL, coverage is triggered if there is some injury or damage during the policy period. (StAppx.090.) Once triggered, the scope and extent of coverage is "all-sums" for the insured's "whole liability and not just part of it." (StAppx.090.) In other words, the insured can look to any trigged policy "for full indemnity," up to the policy limits. (StAppx.123.)

NIC knew how to limit coverage to causal events or exposures taking place only during the policy period. (*See e.g.* StAppx.012 (coverages E and F, which require the covered offense be "committed during the policy period").) However, the CGL coverages (A and B) do not exclude liability for pre-Policy events or exposures to conditions if some injury results during the policy period. (StAppx.013(definition of "occurrence");StAppxSld.230.) Here, Claimants who inhaled asbestos either before or during the '73-'75 policy period experienced ongoing injury during the policy period. (StAppxSld.160.) For competitive

reasons, the drafters of the occurrence-CGL decided *not* to include a pro-rata provision limiting the "all-sums" coverage to just the policy period, but instead made clear that the "all sums' coverage was for the insured's total liability. (StAppx.090-91,112-16.)

The Policy requires NIC "to defend any suit" against the State seeking potentially-covered damages and to "pay, in addition to the applicable limit of liability," the cost of that defense. (StAppx.010-013.) No Policy provision allows NIC to limit its duty to defend to pay only part of or to conditionally advance defense costs.

The policy limits provisions are in three subsections of Endorsement 1. Subsection (a) provides coverage of $3 million per occurrence. Subsection (b)—which NIC admits does not apply to the CGL coverages—provides an aggregate limit of $3 million. (StAppx.232-33.) Subsection (c) provides that "all bodily injury . . . arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." (StAppx015.) The phrase "substantially the same general conditions" is not defined, and each Claimants' exposure is unique in locations, activities, routes, circumstances, times and levels. (*See* flash drive that is Tab384[3] and flash drive

[3] "Tab" references exhibits in the District Court record. Tab documents were filed at CR122-125,128,154-156,183-184,210-211,353,359,407,415, and 421-423. Documents cited to a "Tab" in this brief are not included in the State's Appendix.

filed with CR407-Exs.A-J). Because there is no aggregate limit on the CGL coverages, the Policy's reference to "single limit" does not provide a coverage "cap" of $3 million. (StAppx.014-15.)

NIC's president admitted NIC understood the risk NIC undertook by selling "a $3 million per occurrence general liability policy" for "the entire state government," so NIC spread its risk by buying reinsurance for 97% of it. (StAppxSld.151-52;StAppxSld.261[4].)

II. The State's potential liability and the Claimants' injuries were unknown when the Policy was issued.

A. The Claims allege the State failed to disseminate information in inspection reports issued between 1956 to the end of the policy period in 1975 and those alleged failures resulted in the Claimants suffering bodily injuries which were unknown until diagnosed beginning in the late 1990's.

Claimants are former Grace employees and subcontractors, their immediate families, and other community members. They allege they suffered injury because the State negligently failed to disseminate information about asbestos risks in inspection reports about Grace's operations in and near Libby. (CR12-p.14;CR32-¶7); *Orr v. State of Montana*, 2004 MT 354, ¶¶ 5-7, 47, 324 Mont. 391, 106 P.3d 100. Pertinent are multiple State and federal inspection reports issued from August

[4] Over objection by the State, the District Court erroneously excluded this document, which is Tab 332 in the District Court record. (CR163-pp.15-16;StAppx.007.)

1956 to July 1, 1975, the end of the policy period. (Tabs205-225.) NIC admits Claimants allege the State negligently failed to adequately disseminate information about asbestos risks in the reports; each alleged failure to disseminate each report is a separate failure to warn; and, as a result, Claimants suffered injuries. (Tab247-p.7,¶¶49-50;StAppxSld.234-35.); *Orr*, ¶ 7.

The District Court initially mischaracterized as "uncontested facts" several of NIC's incorrect assertions about *Orr* and the State's knowledge of the situation at Grace's operations. But, after reviewing the motion addressed in *Orr* and the undisputed historical record, the Court agreed "with the State's summary of the facts relating to its knowledge and intent" and discussion of *Orr* and corrected its prior ruling. (CR377-p.21, (referring specifically to the State's brief, CR346-pp.6-12).)

First, contrary to NIC's assertions, *Orr* did not "determine" facts adverse to the State. Rather, *Orr* addressed a motion to dismiss and the Court assumed the truth of plaintiffs' allegations. *Orr*, ¶ 9. *Orr* held the Claims for negligent failures to warn could proceed, but that Claimants "still face the daunting task of establishing that the State breached its duty to them and in doing so, caused their damages and injuries." *Id.*, ¶¶ 47, 81. NIC admits *Orr* was "incomplete," focused only on "the State's potential legal duty to persons employed at the Libby Mine,"

and "d[id] not even remotely touch on any potential liability of the State to the general public in the Libby area." (StAppx.048.)

Next, the undisputed historical record shows that the State could not have foreseen its potential liability or that the Claimant's alleged injuries were highly certain. The State's 1942 report says nothing about asbestos, injuries, or death. (Tab3.) A 1944 follow-up report found Grace made "extensive and successful efforts to deal with the dust hazard," which was "well below" the acceptable limit, and that "[p]roper and adequate means of controlling the dust have been or are in the process of being installed at all necessary points." (CR346-Ex.C.)

NIC's reference to three Grace employees' death certificates filed with the State does not support NIC's claim about the State's knowledge. (Tabs13-15.) Only one of those shows asbestos as a contributing factor to an employee's death, in 1961, but hospital records show that he had worked at Grace long before an asbestos risk was first identified in 1956. (Tab12-p.1;Tab205D;Tab13.) Further, his asbestosis diagnosis was deemed "questionable," and he declined a biopsy that could have confirmed the diagnosis. (Tab12-p.2.) None of the three individuals or their estates are Claimants.

When the State identified an asbestos risk in 1956, the State corresponded with federal officials, who advised that with a dust level of 50mppcf (million particles per cubic foot of air) "the asbestosis and silicosis hazards would certainly

be minimal." (StAppx.017.)[5] The State targeted a more conservative dust level of 25 to 30mppcf and recommended respirators for dry mill employees. (Tab205D-Report,pp.3,6,¶7.) Grace implemented this recommendation and in 1957 made respirators "required rather than optional equipment." (Tab410,¶3.)

The State's 1959 inspection found "progress had been made in reducing the dust concentrations in the dry mill." (Tab206-Report,pp.1,8.) Quoting the Journal of Industrial Hygiene, the 1959 report states: "Inhalation of asbestos dust must be expected sooner or later to produce pulmonary fibrosis, *depending upon (a) length of exposure and (b) nature and concentration of the dust*." (*Id.*-p.7 (emphasis added); *see also* Tab209A-Report,p.3 (advising Grace "the asbestos content of the material with which you are working appears to provide some serious potential for the development of disease *if not properly controlled*") (emphasis added).)

The State's 1962 inspection found dust concentrations had "increased substantially," and airborne asbestos was believed to be 40%, resulting in a recommendation that "immediate attention" be given to reducing overall dust to

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[5] In 1956, the accepted threshold limit value (TLV) for asbestos was 5mppcf and Grace estimated the asbestos content of the dust was about 10%. The recommended 50mppcf level was arrived at by dividing the asbestos TLV by the 10% asbestos content of the dust. TLVs are based on a working lifetime of exposure to conditions "within which it is felt that workers may be repeatedly exposed, day after day, without their health being adversely affected." (Tab208A-Report,p.1;Tab360-p.5;Tab376-p.657.) The State had no knowledge of work-life exposure above a TLV for any Claimant. (StAppx.061.)

12mppcf. (Tab207C-Report,pp.3-4.) The State inspected the dry mill three times in the next two years. (Tabs208-210.) The State's April 1964 report concluded "a considerable change had been made in the ventilation system of the dry mill which appeared to reduce dustiness in some areas considerably." (Tab209A-Report,p.1.)

By 1967, the State found that "dustiness in the dry mill had been reduced substantially from previous periods." (StAppx.019.) A 1968 federal report found that "[c]onditions at the mine would appear satisfactory by the [existing] 5 mppcf TLV" but not the "tentative" proposed TLV of 12 fibers/cc.[6] (Tab212C-Report,p.3.) Moreover, the report specifically stated that "Bureau of Mines approved dust respirators are appropriate means of control." *Id.* The State confirmed with Grace that federally-approved respirators were being used and "furnished to all employees working in areas where we have found the exposure to be high," and "it is mandatory that they be worn in these areas, and we try to strictly enforce this rule." (Tab411.)

In the early 1970's, in response to more restrictive TLVs, Grace began replacing the dry mill with a new "wet" mill. (Tab215-pp.6-7(000031-32).) Grace completed the new wet mill in 1973, the same year the Policy was issued, and Grace met and did not exceed the new TLVs after December 1974. (Tab224-pp.2-

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[6] In 1973, when the Policy was issued, the proposed asbestos TLV was 5 fibers/milliliter. (Tab 378.) In 2008 the asbestos TLV was lowered to 0.1 fiber/cc, a limit 50 times more stringent. (Tab 379.)

3(000810-811);Tab225A-p.2(11-159);Tab225B.) During this time the respirator requirement was in effect and federal officials concluded that "employees were protected even though environmental levels in the plant exceeded the [federal] standard." (StAppx.034.)

The State did not "conceal its knowledge" of the asbestos risk. The State sent its reports and recommendations to Grace and, no later than 1962, Grace was providing the State reports to the workers' Union. (StAppx.041-42.) In 1964 the Union thanked the State for its efforts, acknowledged considerable progress, and requested the State's ongoing assistance, which the State provided. (StAppx.043;Tabs209-211.) In 1968, when the federal government assumed the inspection lead, its reports were sent directly to the Union. (*E.g.* Tabs214A,221,225B.) The attorney NIC hired to provide "an independent analysis" of the Claims advised NIC "the State reasonably could have concluded the Union advised its members" of the contents of those reports. (Tab402-p.1; StAppxSld.277-78.)

After being provided the above information, NIC told the State its liability "is highly questionable" and the alleged failures to warn were "not a cause of injury" to Grace workers, because they "already had sufficient information concerning both the presence of asbestos and the dangers of asbestos exposure." (StAppx.048-49.) Many Claimants never worked at Grace, and no reports

contained information about their asbestos exposure. (StAppx.061)*; Orr*, ¶ 25 (State had discretion about what information to gather). NIC told the State it did not owe a duty to the "general public" in "the Libby area," and "could not have foreseen, and therefore cannot be legally liable for, any injury to any person who was not a full-time employee at the Libby Mine." (StAppx.048;StAppx.057.)

B. When the Policy was issued, the State could not foresee being sued and the Claims did not exist.

Contrary to NIC's arguments that the State concealed information when the Policy was issued, NIC has produced no evidence that it requested an application or other information from the State when NIC submitted its bid to sell the Policy to the State. (Tab404-p.106:10-24;Tab405(NIC Expert)-p.97:21-25.) NIC's assertion of omissions in the Underwriting Data is immaterial because NIC did not incorporate it as required by the Policy's "all agreements and representations" condition. (StAppx.009,013.) Additionally, NIC knew when it issued the Policy that the State had responsibilities for air pollution and occupational health, and that these responsibilities included regulation of mining. (Tab405-p.159:5-22.) Moreover, unlike with coverages E and F, NIC did not exclude pre-Policy negligence from the CGL coverages. (StAppx.009,013.)

In 1973, when the Policy was issued, the Claims did not exist and would not exist until nearly 25 years later. Claimants' injuries were unknown to both the Claimants and the State. (StAppxSld.166;Tab403-p.247:10-p.248:18.) No

Claimant was diagnosed with an asbestos-related injury until more than 25 years after the Policy was issued. (CR346-Ex.B,¶6;flash drives at Tab384 and accompanying CR407-Exs.A-J.) Until the late 1970s, medical science was unaware of the injury that may begin with inhalation of asbestos and continue during a person's lifetime. (StAppxSld.160,163,166.) In addition, because the State had sovereign immunity until the day the Policy was issued, the State had "no reason" to "anticipate that it would be liable for any acts or omissions it committed prior to July 1, 1973." (CR377-pp.18-19.)

III. Although the State tendered the Claims to NIC in 2002, NIC did not offer to defend until 2005. Even then, its defense "offer" was subject to the State agreeing to conditions not in the Policy and untimely coverage defenses. NIC delayed filing this declaratory judgment action until after the State entered into and paid the $43 million settlement.

The State learned of NIC's potential coverage in late 2001 or early 2002. (Tab428-p.32:24-p.33:9.) The State located the Policy's declarations page and, on June 27, 2002, tendered Claimants' complaints to NIC and requested a complete copy of the Policy. (*Id.*-p.32:10-21,p.37:15-22;Tab434-p.21:12-p.22:4;StAppx.021-22.) Internally, but not disclosed to the State, NIC acknowledged the State's tender was notice of and a tender for defense of the Claims. (Tab440-p.2(State's tender letter "tenders defense");StAppxSld.263[7]

[7] The District Court excluded this admission, although no request to exclude it was made. (StAppx.007;CR229-p.1;CR230-pp.2-3.)

(State's tender letter was notice to NIC of the Claims);StAppxSld.280-81(NIC manager admits when insured "tenders" a claim, NIC knows insured is asking NIC "to not only defend but indemnify");StAppxSld.236(NIC admits that, based on lawsuits sent with the State's 2002 letter, NIC "had an obligation to provide a defense to the State");StAppxSld.293(NIC admits the State's "tender" was a request to respond based on its Policy obligations).)

In July 2002, the State confirmed the State's tender was for defense and indemnity. (StAppx.038.) NIC told the State not to send anything else until NIC confirmed that it insured the State. (StAppx.039-40.)

On July 15, 2002, NIC located the Policy, but did not send it to the State until April 2005, nearly three years later. (StAppxSld.194,205-06;StAppx.146-47;Tab285-p.25:13-21,p.26:14-18,p.37:22-25;Tab282-p.38:10-20,p.46:8-11;StAppx.022;StAppx.024.)

On November 1, 2002, NIC opened a file and set a $25,000 reserve for defense. (StAppx.023;StAppxSld.181,201,216-17.) NIC also identified coverage issues but withheld them from the State until 2005. (StAppx.023("Coverage Issue-yes");StAppxSld.175,213;StAppxSld.224-25;StAppx.026-27;StAppx.028-33.)

NIC did not contact the State again until December 12, 2002. (StAppxSld.182-83;StAppxSld.243-44.) The State confirmed most of the Claims had been dismissed, but the Claimants had recently filed the *Orr* appeal.

(StAppxSld.184;*see also* Tab249;StAppxSld.182,217.) Eight days later, NIC increased the defense reserve to $200,000. (StAppx.036;StAppxSld.152.)

NIC knew it had to hire lawyers to defend the *Orr* appeal, but made no offer to defend the appeal. (StAppxSld.240-41;StAppxSld.184,210.) The State never said it did not want NIC to defend. (StAppxSld.292.) NIC did not contact the State again until August 2003, after the *Orr* appeal had been briefed and argued. (StAppxSld.288.)

In December 2004, *Orr* reversed Judge Sherlock's ruling resulting in the State losing important legal defenses applicable to all past and future Claims. *Orr*, ¶¶ 10-40, 49-80. NIC admits *Orr* "dramatically increased" the State's liability exposure, resulting in the State's later decisions to settle Claims. (StAppxSld.254[8]; CR145-p.3.)

NIC agrees it "had an obligation to provide a defense to the State" when the State sent NIC "copies of suits" alleging negligence and injury during the policy period. (StAppxSld.236.) The Claims allege negligence, *see Orr*, ¶ 7; (CR12-p.14;CR32-¶7), and NIC admits the Claimants "allege they suffered bodily injury daily throughout the two-year Policy Period," (StAppxSld.267).[9] NIC also admits

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[8] The District Court erroneously excluded this admission, although no request to exclude it was made. (StAppx.007;CR229-p.1;CR230-pp.1-2.)

[9] Over the State's objection, the District Court erroneously excluded this admission. (CR163-pp.15-16;StAppx.007.)

the Claims were "possibly subject" to the Policy, because NIC "did not believe it could make an unequivocal showing that the [NIC] policy did not apply" to the Claims. (StAppxSld.228;StAppxSld.149(admitting NIC's "potential obligation" to defend and indemnify the State and that NIC "has posted a $500,000 reserve for defense costs").) Despite these admissions and a $500,000 defense reserve, NIC told the State in April 2005 that NIC still had not determined its defense and coverage obligations. (StAppxSld.245.)

On July 18, 2005, three years after the State tendered the Claims to NIC, NIC made its conditional offer to defend. (StAppx.028-33.) This offer contained three conditions, all of which the State challenged, as follows: (1) NIC need pay only a "pro-rata" percentage of the State's defense costs, asserting its duty to defend was limited to "time on the risk," i.e., the two-year policy period "in comparison with the underlying claimants' alleged total period of injury"; (2) NIC could recoup defense costs for Claims NIC admits are potentially covered, should it later be determined there is no coverage; (3) NIC could reserve "all of its rights," including alleged coverage defenses it believed it had since 2002, but had never before asserted. (StAppx.030-32;StAppxSld.255,257.)

On March 27, 2006, NIC told the State that NIC "believes it has no obligation whatsoever to indemnify the State." (StAppxSld.269;Tab310-

Interrog.4.) The State disputed NIC's denial of indemnity and rejected its conditional offer to defend. (Tab361;StAppx.052-53;StAppxSld.247.)

On May 10, 2006, NIC changed its pro-rata condition and offered to advance "100% of the cost of defending the State," subject "in all respects" to the conditions and reservations in NIC's July 18, 2005 offer. (StAppx.054; *see* StAppx.031.) Alternatively, NIC said it might consider making a pro-rata offer and waiving its purported right to recoupment. (StAppx.054-55.)

On May 19, 2006, the State rejected NIC's conditional defense offer as improper "under the insurance contract" and "a failure to defend." (StAppx.045-46;CR12-p.16;CR32-¶12.) The State has always provided and paid for its own defense.

As additional Claims were filed and sent to NIC, the State continued to challenge NIC's conditional defense, but NIC refused to budge. (*See* CR346-pp.3-4,Exs.A,B,¶2;StAppxSld.302;StAppxSld.307-08;CR359.)

NIC knows a declaratory action is "a common way" coverage issues are resolved and a "judicial determination" is needed when "there's not a mutual agreement amongst the parties." (StAppxSld.208-09.) NIC made no effort to stay prosecution of the Claims and waited until 2012 to seek judicial resolution of the impasse.

The State never agreed to defer coverage litigation. The 2007 correspondence dealt with the ongoing defense and coverage dispute; it contains no agreement to defer coverage litigation. (*See e.g.* CR352-Exs.14-23;StAppxSld.302-03;StAppxSld.304-05;StAppxSld.306;CR359.) The same is true of the 2008 and 2009 correspondence about the Claimants' settlement demands, and NIC's failure to respond as the State requested. (StAppx.051; StAppxSld.272-73;StAppxSld.274;StAppxSld.275-76;StAppxSld.299; StAppx.128.)[10]

On July 24, 2009, NIC proposed that coverage litigation be deferred pending mediation between the State and NIC. (CR352-Ex.26,p 2.) The State did not agree. The State and NIC met on October 7, 2009, about how to respond to Claimants' settlement proposals, not the defense and coverage dispute. (StAppxSld.135; StAppxSld.309.)

In November 2009, NIC made proposals dealing with resolution of the defense and coverage dispute. (StAppxSld.136-37;StAppxSld.138-41.) The State rejected NIC's proposals on November 6, 2009. (StAppx.128.) Two weeks later,

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[10] Although NIC claims it offered "to contribute the Policy's full $3 million limit," (NICAppellantBr.-p.15), the policy limit is $3 million *per occurrence*, (StAppxSld.151), not $3 million; NIC's offer required "a complete" settlement for no more than $3 million; and NIC reserved "its rights," which include its asserted right to seek recoupment from the State. (StAppxSld.272-73;StAppx.031.)

the Claimants and the State mediated and agreed to a $43 million settlement of all then-existing Claims. (StAppxSld.310-12.) NIC rejected the State's demands that NIC pay the settlement. (StAppx.051;StAppxSld.276;StAppxSld.299.) To secure the benefit of the settlement, the State agreed to pay $26.8 million. NIC agreed to advance $16.1 million subject to a later claim for reimbursement, (StAppxSld. 313-15), and the Montana Guaranty Association agreed to contribute $100,000 for the insolvent Glacier General, which insured the State for two years after NIC, (StAppxSld.310-12).[11] NIC had over seven years before that settlement to seek declaratory resolution of its duty to defend and to prevent this additional harm to the State.

In June 2010, eight years after the State tendered the Claims, the State and NIC agreed "to toll any statutes of limitations that may be applicable to whatever claims they may have against each other." (StAppxSld.142-43.) This agreement only tolled statutes of limitation; it did not require either party to defer litigation. In fact, NIC filed this action while the agreement was in effect. (StAppxSld.316.)

At a September 8, 2011 hearing, Judge Sherlock approved, without objection by NIC, the reasonableness of the $43 million settlement. (Tab260;

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[11] In November 2010, amendments were made to the settlement agreement, but the amendments did not alter the essential terms or amount of the settlement. (*See* Tabs368,369.)

StAppxSld.250.) After the settlement was paid on September 30, 2011, NIC proposed a mediation and the State agreed, for the first and only time, to a brief deferral of the defense and coverage litigation. (Tab372;StAppxSld.251-52;CR352-Ex.32;StAppxSld.144-45.) Mediation was unsuccessful. NIC filed this case the same day mediation ended.

Although NIC told the State there is no "occurrence" to which the Policy "applies," NIC was concurrently telling its reinsurers the Claims presented an occurrence to which the Policy applies.[12] (StAppxSld.259("State's decision not to publicly disclose its test results" is an occurrence "to which the Policy applie[s]"); StAppxSld.265(State's failure to disclose "air quality tests" is an occurrence "to which the Policy applies").)[13]

Since NIC filed this action, the State has settled Claims totaling an additional approximately $44 million. NIC has refused the State's demands that NIC settle and pay the settlements. (CR346-Ex.B,¶7;CR402-Decl.¶8.) Although given prior notice of each settlement-approval hearing, NIC did not intervene to

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[12] NIC's expert opined that if the Policy "applies," exclusions from coverage do not. (Tab405-p.187:17-24.)

[13] NIC told its reinsurers there were "at least" two covered occurrences and "at least" $6 million of coverage. (StAppxSld.265.) NIC never unconditionally offered to pay the State $6 million plus its defense costs. (*See* StAppxSld.136-37.)

contest their reasonableness, they were approved, and the State has made the payments required to date. (Tab454-¶2;CR238-p.1;CR247-p.1;CR368-p.1.)

STANDARDS OF REVIEW

Summary judgment is reviewed de novo. *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶ 18, 321 Mont. 99, 90 P.3d 381. Interpretation of an insurance policy is a question of law. *Fisher v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶ 15, 371 Mont. 147, 305 P.3d 861. Disagreement about interpretation of facts does not amount to an issue of fact. *Sprunk v. First Bank Sys.*, 252 Mont. 463, 466, 830 P.2d 103, 105 (1992).

SUMMARY OF THE ARGUMENT

This case comes down to basic insurance law principles. NIC breached its duty to defend and indemnify the State. These breaches entitle the State to recover all settlements, defense costs, and prejudgment interest. Because of NIC's failure to defend the *Orr* appeal and the continuing harm to the State caused by the loss of that appeal, NIC must also defend and indemnify the State against all pending and future Claims. By establishing either breach of the duty to defend or indemnify, the State is entitled to its declaratory action fees and expenses.

NIC committed three separate breaches of its duty to defend. Each of these breaches deprived the State of the defense it was entitled to receive and NIC had a duty to provide.

First, NIC failed to defend beginning in 2002 after the State tendered notice of potentially-covered Claims. NIC knew its duty to defend had been triggered; it reserved money for defense and admitted to its reinsurers the Claims are covered. This breach includes NIC's failure to defend the *Orr* appeal, in which the State lost important defenses applicable to all Claims. NIC admitted this loss was the reason the State has settled thousands of Claims.

Second, NIC attempted to impose three unlawful conditions when NIC finally offered to defend in 2005: (1) NIC would advance only a "pro-rata" share of defense costs; (2) NIC could later seek recoupment of defense costs for even potentially-covered Claims; and (3) NIC could assert coverage defenses it believed it had in 2002, but did not tell the State about for nearly three years.

Third, NIC delayed filing its declaratory action until 2012, during which time the State defended itself, agreed to a $43 million settlement, and paid $26.8 million to secure the benefit of that settlement, which NIC did not timely challenge.

The District Court correctly held NIC breached its duty to defend by offering "pro-rata" defense costs and delaying its declaratory action. The District Court should have also held, however, that NIC's duty to defend began in 2002, rather than July 18, 2005, and that, without the State's agreement, NIC could not condition defense "offers."

Even if the Court holds NIC did not breach its duty to defend, NIC breached its duty to indemnify because most Claims are covered under the Policy and NIC refused to settle or pay those settlements. The District Court correctly ruled that Claimants exposed to asbestos during the policy period are covered and the settlements to date are within coverage limits. The District Court should have also held that Claimants who inhaled asbestos only prior to the policy period were covered because the undisputed medical evidence demonstrates those Claimants' exposures resulted in ongoing bodily injury during the policy period.

ARGUMENT

I. Because NIC breached its duty to defend, it forfeited coverage defenses and policy limits and is estopped from denying coverage.

NIC breached its duty to defend from 2002 through the present. Those breaches caused NIC to forfeit coverage defenses and policy limits and estop NIC from denying coverage. As a result, NIC is responsible for all settlements, defense costs and prejudgment interest.

A. NIC's duty to defend was triggered in 2002 when the State tendered the Claims.

NIC's duty to defend was triggered on July 1, 2002, when NIC received the State's notice and tender of potentially-covered Claims. (StAppx.021(date stamp).) NIC's Vice President of Claims, its 30(b)(6) witness, admitted NIC's "obligation to provide a defense" arose when the State sent NIC "copies of suits" alleging

negligence by the State resulting in injury during the policy period, and that the Claims are potentially covered because NIC could not make an unequivocal showing the Policy did not apply. (StAppxSld.228,236;StAppxSld.267(NIC admits Claimants allege injury throughout the policy period).)

The duty to defend is triggered when an insurer is notified of potentially-covered claims. *Staples,* ¶¶ 20-21; *Tidyman's Mgmt. Servs. v. Davis*, 2014 MT 205, ¶ 27, 376 Mont. 80, 330 P.3d 1139 [*Tidyman's I*]. A potentially-covered claim is one as to which the insurer cannot unequivocally demonstrate the absence of coverage, i.e., one that alleges facts which, if proven, would result in coverage. *Staples,* ¶¶ 21, 24; *State Farm Fire & Cas. Co. v. Schwan,* 2013 MT 216, ¶¶ 15-16 and n.2, 371 Mont. 192, 308 P.3d 4. When an insurer recognizes claims are potentially covered, no analysis of coverage is needed to trigger the duty to defend. *Tidyman's I,* ¶ 30. If any part of an underlying complaint alleges a potentially-covered claim, the insurer must immediately defend the entire suit, including payment of "all expenses" incurred for the defense. *State Farm Mut. Auto. Ins. Co. v. Freyer,* 2013 MT 301, ¶ 37, 372 Mont. 191, 312 P.3d 403 [*Freyer II*]; *Schwan,* ¶ 16 n.2; (StAppx.010,013).

NIC's establishment of and subsequent increases in defense cost reserves confirm NIC was aware of its duty to defend. *See Samson v. Transamerica, Ins., Co.,* 636 P.2d 32, 44 (Cal. 1981) (insurer's establishment of a reserve for defense

indicates insurer awareness of its duty to defend); *see also Regence Group v. TIG Specialty Ins. Co.*, 903 F. Supp. 2d 1152, 1168-69 (D. Or. 2012) (admission of coverage to reinsurers estops insurer from denying coverage).

Although NIC's duty to defend was triggered in 2002, NIC made no offer to defend until July 2005. During this interval, the State lost the *Orr* appeal. NIC admits this loss dramatically increased the State's liability exposure and resulted in the State's decisions to settle the Claims. (StAppxSld.254;CR145-p.3.) Because NIC failed to defend, including the ongoing harm to the State's defense from the loss of the *Orr* appeal, NIC forfeited its coverage defenses and policy limits, is estopped from denying coverage, and is responsible for all past and future settlements and defense costs. *See J&C Moodie Props., LLC v. Deck*, 2016 MT 301, ¶ 38, 385 Mont. 382, 384 P.3d 466; *Staples*, ¶ 27. The fact the State has defended itself, including in the *Orr* appeal, does not absolve NIC's failure to defend. *Tidyman's I,* ¶ 31 (insured's defense by its own counsel does not excuse insurer's breach of its duty to defend).

The District Court used the date of NIC's first offer to defend, July 18, 2005, as the date NIC's duty to defend began, instead of the date NIC received notice of the Claims via the State's tender: July 1, 2002. (CR265-pp.32,35,40; StAppx.021(date stamp).) The Court erred based on Montana law about what

triggers the duty to defend and undisputed facts showing those requirements were met by the State's 2002 tender.

B. The District Court correctly held NIC's 2005 pro-rata defense offer was unlawful. The District Court should have also held that NIC could not condition defense on purported rights to recoup defense costs advanced for potentially-covered Claims and untimely coverage defenses or later re-assert its pro-rata defense.

When NIC initially offered to defend on July 18, 2005, it imposed three unlawful conditions: pro-rata defense, recoupment for potentially-covered Claims; and reservation of belated policy defenses. (StAppx.030-32.) NIC continues to maintain these conditions. (CR346-p.1-4,Exs.A,B,¶2.) Those conditions are each a breach of NIC's duty to defend.

Pro-rata Defense Condition: The District Court correctly held NIC's pro-rata offer breached its duty to defend. (CR265-pp.32,36-37.) The District Court should have also held that NIC's May 10, 2006 and subsequent offers purporting to advance 100% of defense costs did not actually change NIC's breach of its duty to defend because those offers simultaneously continued to condition NIC's defense on payment of pro-rata defense costs. (CR343-pp.7-8;CR377-pp.8-10; StAppx.030-32;StAppx.054;CR346-p.1-4,Exs.A,B,¶2;StAppxSld.130-33.)

No provision of the Policy allowed NIC to offer a pro-rata defense. (StAppx.010,013.) An insurance policy "contain[s] the entire contract between the parties," and can only be modified with both parties' written agreement to the

revision. (StAppx.013); § 33-15-302, MCA. Furthermore, "[a]n offer of partial performance is of no effect." Section 28-1-1203, MCA; *see Schwan*, ¶ 16. An offer of pro-rata defense is therefore a denial of the defense. *Haskel, Inc. v. Superior Court*, 33 Cal. App. 4th 963, 976 n.9 (Cal. App. 1995).

Recoupment Condition: When NIC informed the State on May 10, 2006, that it would advance all defense costs, it knew and had admitted to its reinsurers that the Claims are potentially covered. (StAppxSld.228;StAppxSld.149.)

Insurers who offer to defend with a condition of recoupment for defense costs of potentially-covered claims breach their duty to defend. The Court made this clear in *Schwan*, quoting with approval "the seminal case" of *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997). *Schwan*, ¶ 16 n.2. As stated in *Schwan*, insurers may obtain reimbursement of defense costs only for claims not even potentially covered. *Id*. For potentially-covered claims, an insurer "may not proceed by means of a 'reservation' of its 'right' of reimbursement. It simply has no such 'right' to 'reserve.'" *Buss*, 939 P.2d at 776. Assertion of a "right of reimbursement" for potentially-covered claims "amount[s] to a pro-tanto supersession of the policy—which would require a separate contract supported by separate consideration." *Id.*; § 28-1-1211(1), MCA ("An offer of performance must be free from any conditions the creditor is not bound to perform.").

Under Montana law, an insurer may recoup defense costs only where: (1) the claim itself is not potentially covered; (2) the insurer nonetheless offers to defend and timely asserts a right to recoup; and (3) the insured accepts this offer. *See Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶¶ 48-50, 326 Mont. 174, 108 P.3d 469. None of these circumstances are present here.

NIC admitted not only that the Claims are potentially covered, but there is *actual coverage*. *See Regence*, 903 F. Supp. 2d at 1168-69 (admission of coverage to reinsurers estops insurer from denying coverage). Further, NIC's conditional offer was not timely asserted; it was not made for nearly three years after NIC's duty to defend was triggered and the harm to the State from the loss in *Orr* had already occurred. Finally, the State never accepted NIC's offer.

Untimely Asserted Coverage Defenses Condition: NIC improperly insisted it could reserve coverage defenses it believed it had since 2002 but failed to assert until 2005. An insurer's reservation of a challenge to coverage must be timely asserted. 14 COUCH ON INS. § 202:44 (Dec. 2019 Update); § 33-18-201(2), (5), MCA (insurer must promptly respond to insured's request for coverage); *Northland Cas. Co. v. Mulroy*, 2015 U.S. Dist. LEXIS 94631, *13 (D. Mont. 2015) (reservation of rights must be timely asserted and inform insured of all policy defenses). NIC's delay in asserting or even telling the State about coverage

defenses for nearly three years, during which time the State was defending itself and lost the *Orr* appeal, is not timely.

In sum, the District Court erred in not holding that each of these three unlawful conditions was not a breach of NIC's duty to defend. Each breach forfeited NIC's right to rely on coverage defenses and policy limits. *See Moodie*, ¶ 38.

C. The District Court correctly held that NIC breached its duty to defend by delaying its declaratory action until 2012.

NIC breached its duty to defend by delaying its declaratory action until after the State agreed to the $43 million settlement.

This Court has admonished insurers who question coverage to defend under a reservation of rights and file a declaratory action to resolve coverage questions. *Moodie*, ¶ 22. When the duty to defend is at issue, the declaratory action may be filed upon tendering defense under a reservation of rights. *Id.*, ¶ 27. A declaratory action is "the normal course of business" for an insurer "when it exercises its duty to defend under a reservation of rights." *Horace Mann Ins. Co. v. Hanke*, 2013 MT 320, ¶ 38, 372 Mont. 350, 312 P.3d 429.

As discussed above, the State never agreed to defer litigation. NIC's reliance on the Tolling Agreement is misplaced; it was not entered into until *after* the $43 million settlement was agreed to and it does not provide that coverage litigation be deferred. Because it would not be completed within a year, any

purported agreement to defer coverage litigation had to be in writing and signed by an agent of the State. *See* § 28-2-903(1)(a), MCA. The District Court correctly declined to credit the existence of any purported deferral agreement. (CR377-pp.13-14.)

When the State refused NIC's conditional defense in May 2006, the parties were at impasse about the duty to defend. Authorities agree that "[w]here an insured refuses to consent to a defense under a reservation of rights, the insurer must . . . seek immediate declaratory relief including a stay of the main case pending a final resolution of the declaratory judgment action." 44 Am. Jur. 2d *Insurance* § 1422 (Feb. 2020 Update); 14 COUCH ON INS. § 202:44. NIC did neither. NIC never requested a stay and delayed seeking declaratory relief until 2012, well after the $43 million settlement. (Tab260;Tab 372;CR1;CR 377-p.14.) Estoppel is the proper remedy to redress this breach. *See e.g. Employers Ins. v. Ehlco Liquidating Trust,* 708 N.E.2d 1122, 1138 (Ill. 1999) (insurer is estopped to deny coverage by waiting to file its declaratory action until after underlying action was resolved).

NIC incorrectly asserts *Draggin' Y Cattle Co. v. Junkermier, et al.*, 2019 MT 97, 395 Mont. 316, 439 P.3d 935, absolves its delay. *Draggin' Y* is readily distinguishable. In *Draggin' Y,* the Court declined to require "a defending insurer" to file a declaratory action before "resolution of the liability case." *Id.*, ¶

38. But there the insured agreed the duty to defend was *not* an issue. *Id.*, ¶ 21. Here, NIC has never defended the State.

The *Draggin' Y* insurer disclaimed coverage only for fraud and punitive damages. *Id.*, ¶ 9. Here, NIC denies all indemnity coverage. The *Draggin' Y* insured paid nothing for the settlement, which was much more than the policy limit and the amount recommended by defense counsel. *Id.*, ¶¶ 14-16. Here, except for the $100,000 MIGA paid and the $16.1 million NIC conditionally advanced, the State paid all settlements, and they were all recommended by defense counsel and within the policy limit as determined by the District Court. (CR402-Decl.¶¶2,8; CR377-p.33;StAppx.014-15.)

NIC's excuse that it delayed filing this action to avoid prejudicing the State rings hollow because at the time NIC filed this action, there were hundreds of new Claims pending against the State. Further, since this action was filed, approximately 1,500 Claims have been filed. All of these (except currently pending Claims after January 2018) have been reasonably settled by the State, with no contribution by NIC. (CR402-Decl.¶8;CR377-p.13.)

The District Court correctly held that NIC's failure to timely file its declaratory action was a breach of NIC's duty to defend, this failure estops NIC from denying coverage and makes NIC responsible for the $43 million settlement. (CR377-pp.12-14.)

D. NIC's breaches of its duty to defend make it liable for all settlements, plus defense costs and pre- and post-judgment interest at 10%.

NIC's failure to immediately defend beginning in 2002; failure to defend the *Orr* appeal; untimely, partial, and improperly-conditioned offers to defend; and unjustified delay in filing its declaratory action are each a breach of NIC's duty to defend. The District Court correctly held that "detrimental reliance by the insured is [not] required before estoppel will be applied in a situation where the insurer breaches its duty to defend." (CR265-p.38.)

As the District Court correctly held, when an insurer breaches the duty to defend, it is estopped from denying coverage. (CR265-p.38 (citing *Tidyman's I*, ¶ 25; *Staples*, ¶¶ 20-29)); *see also Moodie*, ¶ 38 (by breaching its duty to defend, insurer forfeits coverage defenses and policy limits). Breach of the duty to defend does not require a complete refusal to defend. It occurs when an insurer "neglects to defend" in response to a tender of potentially-covered Claims. *See* § 28-11-316, MCA; *Staples*, ¶ 27; *Tidyman's I*, ¶ 41 n.2.

NIC's breach of its duty to defend makes it responsible for all consequential damages from that breach, including the full amount of the settlements of all Claims and the State's defense costs from the date of tender in 2002 forward. *See* § 27-1-311, MCA; *Staples*, ¶ 27; *Tidyman's I*, ¶ 25. The State's damages for

breach of the duty to defend do not reduce NIC's policy limits, because an insurer who breaches its duty to defend forfeits its policy limits. *Moodie,* ¶ 38.

NIC's responsibility includes the contingent amounts the State will be required to pay for the second and third global settlements, because they are part of the court-approved settlements. (CR404-p.5.) NIC cannot challenge the reasonableness of the settlements, because it failed to do so when the settlements were approved. (CR265-p.38.) *See AbbeyLand L.L.C. v. Interstate Mechanical., Inc.*, 2015 MT 77, ¶ 15, 378 Mont. 372, 345 P.3d 1032 (challenges to settlements are to be made when presented for approval in the underlying case, not a later coverage case); *Scentry Biologicals, Inc. v. Mid-Continent Cas. Co.*, 2014 MT 39, ¶ 38, 374 Mont. 18, 319 P.3d 1260 (insurers cannot use a coverage case to obtain rulings they should have obtained in the underlying case).

In addition, NIC must pay prejudgment interest for settlements and defense costs. (CR379-pp.4-5.) *See Tidyman's I,* ¶¶ 52-53; § 27-1-211, MCA. Prejudgment interest is proper where: (1) an underlying monetary obligation exists; (2) the amount is certain or capable of being made certain; and (3) the right to recover the obligations vests on a particular day. Here, the settlements and defense costs meet all three criteria.

Upon court approval, the State owed the settlements. The settlement amounts and right to recover were known that same day.[14] The different judgments the State submitted in District Court were to account for different interest calculations and the Court's reduction of the amounts requested in rulings the State challenges on appeal. The State's defense costs were sums certain the date the State paid them. NIC admits they are reasonable, with minor exceptions the District Court allowed and the State does not challenge on appeal. (CR379-p.3;CR420-pp.6-7.)

NIC incorrectly asserts that prejudgment interest should be denied on defense costs because NIC offered to pay them. NIC's offer was always a conditional offer of an advance, not a payment, and the State could not accept NIC's offer without also accepting NIC's unlawful conditions. *See Ribi*, ¶ 49;(StAppxSld.130). Although NIC admits it had a duty to defend, NIC never unconditionally offered to fund the State's defense.

The District Court correctly applied a 10% interest rate, because this was the rate in effect when this case was filed in 2012, and this case is within the exception

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[14] NIC misleadingly cites the *Tidyman's* cases as authority that only post-judgment interest is allowed for the settlements. (NICAppellantBr.-p.65,n.16.) *Tidyman's* is distinguishable. (CR379-p.4.) The interest award in *Tidyman's* was made in the underlying case, not a later coverage case. In this case the District Court's award of interest correctly runs from the date each settlement was approved in an underlying case.

of the savings clause in the 2017 change in the law. (CR440-pp.2-4.) NIC also waived its challenge to the 10% rate by not objecting until after judgment was entered. (*Id*.-pp.3-5); *Nelson v. Driscoll*, 285 Mont. 355, 361, 948 P.2d 256, 259 (1997).

In sum, because NIC breached its duty to defend, NIC is liable for the State's settlements to date, the State's defense costs since NIC's receipt of the State's tender on July 1, 2002, and prejudgment interest on both. Because of NIC's failure to defend the *Orr* appeal and the ongoing, significant harm caused by the loss of that appeal, NIC must also defend and indemnify the State against all pending and future Claims.

Complete relief can be granted based on NIC's breach of its duty to defend. There is no need to decide whether there is indemnity coverage. *Staples*, ¶ 29. But even if the Court proceeds, NIC also breached its duty to indemnify.

II. The District Court correctly held that Claimants exposed during the policy period are covered Claims but should have also held Claimants exposed only pre-policy were also covered Claims. Because NIC failed to pay the settlements of those Claims, it breached its duty to indemnify under its "all sums" Policy.

If this Court concludes NIC did not breach its duty to defend, the State is still entitled to recovery under the Policy for Claims with any injury during the policy period. Despite NIC's promise to pay "all sums" for settlements of covered Claims, it failed to indemnify the State for those Claims. This breach entitles the

State to consequential damages, including settlements, defense costs, and prejudgment interest. *See* § 27-1-311, MCA; *see also* § 27-8-313, MCA.

A. NIC breached its duty to indemnify by not paying the State's settlements.

An insurer breaches its duty to indemnify by refusing to pay reasonable settlements of covered claims within policy limits. *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 275, 682 P.2d 725, 730 (1984). As discussed in detail below, the District Court correctly held that most Claims are covered, and their settlements are within policy limits. (CR377-p.33;StAppx.014.) Because NIC denied indemnity coverage, the State was entitled to settle the Claims. *Freyer II*, ¶ 41 n.6 (when insurer denies coverage the insured may settle "without voiding the insurance contract"). NIC's denial of indemnity coverage forced the State to settle and pay tens of millions of dollars in settlements, all approved as reasonable without contest by NIC. (CR347-Decl.¶7;CR402-Decl.¶¶8-9;StAppxSld.250; Tab454-¶2;CR 238-p.1;CR247-p.1;CR368-p.1.)

When a settlement offer is made, the duty to indemnify is implicated if there is "potential liability." *Iowa Mfg. Co. v. Joy Mfg. Co.*, 206 Mont. 26, 33-34, 669 P.2d 1057, 1061 (1983); *EBI/Orion Group v. State Compensation Ins. Fund*, 240 Mont. 99, 104, 782 P.2d 1276, 1279 (1989); 43 Am. Jur. 2d *Insurance* § 675 (Feb. 2020 Update) (to recover a settlement from a liability insurer, pursuant to the insurer's duty to indemnify, "an insured does not need to establish actual liability

to the party with whom it settled so long as potential liability on facts known to the insured is shown to exist"). NIC admitted the State faced significant potential liability. (StAppxSld.254(*Orr* dramatically increased the State's exposure); CR145-p.3 (*Orr* subjected the State to "potential liability" and resulted in the State's decisions to settle).) Because, as discussed in detail below, most Claims are covered, NIC had a duty to indemnify the State for the settlements of those Claims.

NIC cannot escape liability by advancing coverage defenses to the State while admitting coverage to its reinsurers. Nor can NIC rely on the delay occasioned by this coverage action, which NIC failed to timely pursue. NIC put its interest in delaying resolution of this dispute over its duty to "look after" the State's interests. *See Fowler v. State Farm Mut. Auto. Ins. Co.*, 153 Mont. 74, 79, 454 P.2d 76, 78 (1969).

B. The District Court correctly held that NIC's "all sums" Policy means what it says: The State is entitled to indemnity for the full amount of its liability for Claims triggering coverage.

The Policy's insuring provision requires NIC to indemnify the State for "all sums" the State is "legally obligated to pay" as damages (the settlements) because of bodily injury to which the Policy "applies, caused by an occurrence." (StAppx.010.) Ignoring this provision, NIC asserts it should pay only a pro-rata fraction of the State's liability, based on the Policy's two-year policy period in

comparison to the total time of Claimants' injury process. The Policy has no such limitation. It does not say NIC shall pay only "part of the sums" or a pro-rata share of the insured's liability. It says NIC must pay "all sums" the State is "legally obligated to pay," i.e., the entirety of any judgment or settlement within policy limits.

NIC's pro-rata argument confuses the trigger of coverage and the extent and scope of coverage. The Policy's "trigger of coverage" determines whether the Policy "applies" to a claim. The Policy "applies" if there is an "occurrence": an event or a continuous or repeated exposure to conditions, which results in bodily injury during the policy period. (StAppx.013.)

Events or exposures to conditions are the elements that give rise to the insured's liability. Here, the liability allegation is that the State failed to warn on multiple occasions over 20 years, and these failures resulted in Claimants' injuries. The Policy does not require that the causal events or exposures resulting in injury must happen during the policy period. Coverage applies to events and exposures that occur either before or during the policy period if they result in some injury during the policy period. NIC admitted this interpretation is correct. (StAppxSld.230.) It is also the one accepted by courts and insurance commentators. *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 890-92, 901 (Cal. 1995) (no requirement the injury-causing event or conditions giving

rise to injury occur within the policy period for potential liability coverage to arise); *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 39-40 (Cal. App. 1996) (coverage is triggered by injury "during the policy period," and "is not limited to the policy in effect at the time of the precipitating event or conditions").

There is also no requirement that all covered injury must occur during the policy period. Instead, the Policy applies "as long as it can be determined, even retroactively, that *some* injury did occur during the policy period." *Swank Enters. v. All Purpose Servs., Ltd.*, 2007 MT 57, ¶ 20, 336 Mont. 197, 154 P.3d 52 (emphasis added); *Aerojet-General Corp. v. Transport Indemnity Co.*, 948 P.2d 909, 919 (Cal. 1997) (all sums coverage "extends to all specified harm caused by an included occurrence, even if some such harm results beyond the policy period"). In such instance, the amount of indemnity coverage, subject to the overall policy limit, is "all sums" the insured is "legally obligated to pay" for a settlement or judgment.

This difference between the trigger of coverage and the extent and scope of coverage is succinctly stated as follows:

> Although a policy is triggered only if . . . damage takes place "during the policy period," once a policy is triggered, the policy obligates the insurer to pay "all sums" which the insured shall become liable to pay as damages for bodily injury or property damage. The insurer is responsible for the full extent of the insured's liability (up to the policy

> limits), not just for the part of the damage that occurred during the policy period.

Armstrong, 45 Cal. App. 4th at 105. Courts in many jurisdictions interpreting "all sums" policy language like that in the Policy agree with California, including Delaware, the District of Columbia, Illinois, Indiana, Missouri, Ohio, Pennsylvania, Washington, and Wisconsin. *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 490, 494 (Del. 2001); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1054, 1058 (Ind. 2001); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 840, 841 (Ohio 2002); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506-08 (Pa. 1993); *American Nat'l Fire v. B&L Trucking*, 951 P.2d 250, 253, 253-57 (Wash. 1998); *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 626-27 (Wis. 2009); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1039, 1046-51 (D.C. Cir. 1981); *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30, 33, 35 (Del. 1994) (applying Missouri law); *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150, 154, 165 (Ill. 1987); *see also Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750, 757-59 (Tex. 2013) (no pro-rata under a policy requiring indemnity for "the total amount" of the insured's loss).

An expert for another Berkshire-owned company explained in a report filed in Montana federal court why this "all sums" interpretation is correct. (StAppx.087;Tab416-p.5 n.1;CR30-¶1.) He confirmed that a triggered occurrence

policy "responds to the whole liability and not just part of it," and that, for competitive reasons, this was the insurance-industry drafters' intended result. (StAppx.090.) Specifically, the insurance industry intended the occurrence-CGL to cover liability for injuries and damages that occur over extended periods of time. (StAppx.090-91,100-03.) Although the drafters considered adding a pro-rata provision, they rejected it, thereby confirming that "all sums" coverage means the insured can look to any triggered policy "for full indemnity." (StAppx.091,112-16,123.)

Adopting NIC's pro-rata interpretation would require omitting "all sums," and rewriting the insuring provision to say there is coverage only for "those sums the State becomes legally obligated to pay *for only that part of the injury during the policy period*." This would violate Montana law, for four reasons.

First, courts may not rewrite insurance policies by inserting what has been omitted. *A.M. Welles, Inc. v. Mont. Materials, Inc.*, 2015 MT 38, ¶ 13, 378 Mont. 173, 342 P.3d 987 (quoting § 1-4-101, MCA); *Am. States. Ins. Co. v. Flathead Janitorial*, 2015 MT 239, ¶ 12, 380 Mont. 308, 355 P.3d 735. Courts adopting pro-rata admit they are not following the policy's language, but rewriting it based on their own views of fairness and equity. *See e.g. Owen-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 992-93 (N.J. 1994) (pro-rata is not in the "language of the

policies" and depends on purported "public interest factors" and "principles of simple justice").

Second, under Montana law, all parts of a contract are to be given effect if reasonably practicable, and even clauses in apparent conflict must be reconciled to give some effect to each, consistent with the purpose of the contract. *See* §§ 28-3-202 and 204, MCA; *Marie Deonier & Assocs. v. Paul Revere Life Ins. Co.*, 2000 MT 238, ¶ 45, 301 Mont. 347, 9 P.3d 622. The State's interpretation accomplishes this by giving effect to "injury during the policy period" as the trigger of coverage and "all sums" as defining the scope and extent of coverage once the Policy is triggered. This is consistent with the drafters' intent to cover the insured's entire liability for injuries that occur over long periods of time. *See Plastics*, 759 N.W.2d at 626-27 (injury during the policy period triggers coverage, but "the definition of 'bodily injury' is not a limitation of liability clause"). By contrast, the pro-rata interpretation advanced by NIC erroneously gives double effect to "during the policy period" as limiting both the trigger and the scope and extent of coverage, while disregarding the promise to pay "all sums" the insured is legally obligated to pay.

Third, limitations of coverage "must be clear and unequivocal; otherwise the policy will be strictly construed in favor of the insured." *Winter v. State Farm Mut.*

Auto. Ins. Co., 2014 MT 168, ¶ 13, 375 Mont. 351, 356, 328 P.3d 665, 669. At best, the language NIC relies on for its pro-rata argument is equivocal.

Fourth, if Policy language is subject to two reasonable interpretations, it is ambiguous, and the ambiguity must be resolved in favor of coverage. *Ribi,* ¶ 17. Ambiguity "entitles [the insured] to entry of judgment in its favor." *Park Place Apts., LLC v. Farmers Union Mut. Ins. Co.*, 2010 MT 270, ¶ 19, 358 Mont. 394, 247 P.2d 236; *accord Plastics*, 759 N.W.2d at 626 (even if there is arguably some support for pro-rata, that renders an "all sums" policy ambiguous). NIC cannot credibly claim the "all sums" interpretation adopted by the District Court is unreasonable, when it has been endorsed by another Berkshire company in Montana federal court, and when this is how the Policy was marketed by the insurance industry.

The Montana cases NIC cites allow pro-rata contribution only *among insurers* after the insured receives full coverage. *See Guaranty Nat'l Ins. Co. v. American Motorists Ins. Co.*, 758 F. Supp. 1394 (D. Mont. 1991); *Liberty Mut. Ins. Co. v. United States Fidelity & Guaranty Co.*, 232 F. Supp. 76, 84-85 (D. Mont. 1964). "Equitable contribution applies *only* between insurers, and *only* in the absence of contract." *Aerojet,* 948 P.2d at 930 (citations omitted). It "has no place between insurer and insured." *Id.* Likewise, "sound public policy" does not "permit the insurer to sue its own insured for a liability covered by the insurance

policy." *Home Ins. Co. v. Pinski Bros.*, 160 Mont. 219, 225, 500 P.2d 945, 949 (1972).

The District Court correctly rejected NIC's pro-rata argument and held the State is not an "other insurer" under the Policy's "Other Insurance" provision. (CR265-pp.33-36.) "Other insurance" does not include an insured's self-insurance, because insurance requires a transfer of risk from one entity to another and "other insurance" requires "collectible insurance" from the "other." Section 33-1-201(5)(a), MCA; (StAppx.013). Both risk transfer and collectability from another are absent from self-insurance. *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 21, 315 Mont. 210, 69 P.3d 663 (discussing lower court's holding that self-insurance is "the antithesis of insurance"); *Aerojet*, 948 P.2d at 930 n.20 (self-insurance is no insurance); *see also Plastics*, 759 N.W.2d at 626-27. Consequently, the State's self-insured tort fund is exempt from Montana's Insurance Code. Section 33-1-102(8), MCA; *Shattuck v. Kalispell Regional Medical Center*, 2011 MT 229, ¶¶ 13-15, 362 Mont. 100, 261 P.3d 1021.

NIC misquotes COUCH ON INSURANCE on this point. Section 220:31 of volume 15 refers only to those courts that erroneously interpret "all sums" policies as pro-rata. However, § 220:28 of the same volume states that in "all sums" jurisdictions, "an insured is not to be held liable for periods of self insurance

because the insurer is obligated to pay 'all sums' for which the insured is liable under its policy."

As stated above, many courts nationwide have rejected the pro-rata interpretation advocated by the insurance-industry amici. As the Berkshire company expert put it, insurers may not "sell broad and pay narrow." (StAppx.125.) "All sums" is not a windfall. It is what an "all sums" policy says and what the insurance industry intended it to mean, for their own competitive reasons. Pro-rata, on the other hand, is a bailout for insurers because it re-writes the "all sums" coverage and relieves insurers from honoring the coverage they agreed to provide. Assessing the risk assumed under a policy's coverage and setting an appropriate premium is the insurer's responsibility before a policy is sold. Asking a court to re-write a policy after-the-fact is not only unfair, it is expressly prohibited by Montana law regarding the interpretation of insurance policies.

If NIC wanted to provide only partial indemnity coverage, it could have made that limitation clear by rewording or eliminating the "all sums" provision or by including a pro-rata provision. It also could have required the State to share the loss during times of self-insurance or to continuously maintain other commercial insurance after NIC cancelled the Policy. NIC chose none of these options.

NIC knew the risk it was assuming and "spread the risk" by reinsuring 97% of it. To competitively market its Policy to the State, NIC made a choice to offer broad coverage and reinsure its risk with other insurers. (StAppxSld.151-52; StAppxSld.261.) NIC cannot now renege on the promises it made and saddle the State with a risk NIC and its reinsurers willingly assumed. NIC "drafted the policy language; it cannot now argue its own drafting is unfair." *B&L Trucking*, 951 P.2d at 257; *accord Aerojet*, 948 P.2d at 932. The State is entitled to the benefit of the Policy NIC sold: "all sums."

C. The District Court correctly held that coverage applies to Claimants exposed to asbestos during the policy period. The District Court should also have held that coverage applies to Claimants exposed to asbestos only prior to the policy period, because they too suffered ongoing injury during the policy period.

Claimants who inhaled asbestos either before or during the policy period experienced ongoing injury "during the policy period." This is because, for these Claimants, the asbestos stayed in their bodies and caused ongoing injury to their cells and tissues. (Tab288(NIC's Expert)-p.35:24-p.36:17,p.48:3-9,p.78:2-p.79:17,p.83:4-18,p.88:8-13,p.93:4-22,p.98:6-p.99:19;StAppxSld.160-61.) Courts refer to this as "exposure-in-residence," i.e., exposure inside the body as previously-inhaled asbestos injures new cells and tissues. *Keene*, 667 F.2d at 1042, 1047; *J.H. France*, 626 A.2d at 506-07.

In *Swank*, ¶ 20, this Court recognized exposure-in-residence by citing with approval *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 415 (Minn. 2003). *Silicone Implant* held injury caused by breast implants triggered all policies in effect from implantation to disease manifestation because of the "continuously occurring injuries" caused by interaction of the implants on a cellular level. *Id.* Adopting *Silicone Implant*, this Court held that a "physical injury" can occur "even though the injury is not 'diagnosable,' 'compensable,' or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period." *Swank*, ¶ 20; *see also Aerojet*, 948 P.2d at 919 (all sums policy is "triggered if specified harm is caused by an included occurrence, so long as at least some harm results within the policy period").

None of the jurisdictions the District Court cites for its occurrence ruling limit coverage to Claimants who inhaled asbestos during the policy period. (*See* CR377-p.30.) Instead, they follow either the "continuous trigger" rule or the similar "injury-in-fact" rule and recognize that Claimants suffer new injury triggering coverage during the policy period by the deleterious effects of asbestos inside the body, even after the inhalation of asbestos has ended. *See R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 156 A.3d 539, 571-72 (Conn. App. 2017); *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1198-99 (2d Cir. 1995); *National Union Fire Ins. Co. v. Porter Hayden Co.*,

331 B.R. 652, 664-65 (D. Md. 2005); *Armstrong*, 45 Cal. App. 4th at 46-7; *Resco Holdings, L.L.C. v. AIU Ins. Co.*, 112 N.E.3d 503, ¶ 23 (Ohio App. 2018).

There is no merit to NIC's assertion that the undisputed evidence of bodily injury is insufficient. All Claimants with whom the State settled have an asbestos-related diagnosis. (*See* flash drive that is Tab384 and flash drive filed with CR407-Exs.A-O.) Because of the ongoing nature of asbestos injury to these Claimants, all Claimants who inhaled asbestos either before or during the policy period had injury during the policy period. (*See* CR407-Decl.,pp.1-15 and accompanying flash drive containing Exs.A-J,U-pp.D-1,DS-3-6,DS-46-48,W-pp.1-3,X-Decl.¶4;CR414-pp.1-7;CR415-Decl.,Exs.FF,GG;CR425.)

To defeat summary judgment, NIC had to submit substantial evidence to rebut the undisputed medical evidence of injury during the policy period. *See Apple Park, L.L.C. v. Apple Park Condos., L.L.C.*, 2008 MT 284, ¶ 11, 345 Mont. 359, 192 P.3d 232. NIC cannot rely on conclusory assertions of insufficiency by its Chicago attorney. (CR409-Ex.B); *Apple Park,* ¶ 11. NIC experts, Drs. Moolgavkar and Weill, are also of no help to NIC. They do not say settled Claimants had no injury during the policy period, or that they even reviewed settled-Claimant records. The State, on the other hand, presented expert medical testimony based on a review of settled-Claimant records that Claimants exposed to Libby Asbestos before or during the policy period suffered bodily injury during the

policy period. (StAppxSld.159-60;Ex.X-Decl.,¶4, on flash drive submitted with CR407.)

There is no requirement injury manifest during the policy period. *Swank,* ¶ 20 (injury triggers coverage even though it "is not … manifest during the policy period"). Under the Policy, "bodily injury" includes "bodily injury, sickness or disease," and means "physical injury to a person." (StAppx.012); *Bain v. Gleason,* 223 Mont. 442, 452, 726 P.2d 1153, 1159 (1986). Injury that triggers coverage means "any part of the single injurious process that asbestos-related diseases entail." *Keene,* 667 F.2d at 1047.

NIC's reliance on *Murphy v. State,* 248 Mont. 82, 809 P.2d 16 (1991), is misplaced. *Murphy* involved a claim under Coverage E, which requires the alleged offense be "committed during the policy period." (StAppx.012.) Moreover, the statement NIC cites from *Murphy* is not exclusive: both manifestation and injurious negligence during the policy period trigger coverage, but so also do latent injury during the policy period and pre-Policy events and exposures causing injury during the policy period. (StAppx.012;StAppxSld.230.) *Allstate v. Wagner-Ellsworth,* 2008 MT 240, ¶ 40, 344 Mont. 445, 188 P.3d 1042, is also inapposite because it dealt only with psychological injuries, which are not involved in this case.

In sum, both pre-Policy and policy-period inhalation of asbestos resulted in ongoing injury during the policy period for these Claimants. Thus, the District Court correctly held Claimants exposed to asbestos during the policy period were covered Claims. The District Court erred, however, by not holding that Claimants who inhaled asbestos only prior to the policy period were not covered Claims because they too had ongoing bodily injury during the policy period. The settlement amount for these Claimants is explained in the Conclusion.

D. The District Court correctly held there are multiple occurrences.

Under the Policy, an "occurrence" is "an event, or a continuous or repeated exposure to conditions, which results in bodily injury … during the policy period." (StAppx.013.) To determine the number of occurrences, Montana uses the "cause" test, focusing on the "cause or causes of the damage or injury." *Heggem v. Capitol Indem. Corp.*, 2007 MT 74, ¶ 31, 336 Mont. 429, 154 P.3d 1189.

The "cause" test may be applied here by focusing on either: (1) the State's alleged multiple failures to warn; or (2) each Claimant's exposure to injury-causing asbestos. *Compare e.g. Heggem*, ¶¶ 66, 67 (Nelson, J., concurring) (discussed in CR216-pp.49-52[15]) *with e.g.* CR377-pp.27-31; *Plastics*, 759 N.W.2d at 620-23 (under cause rule each claimant's repeated exposure to asbestos is a separate

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[15] In the District Court, the State argued the number of occurrences equaled the number of its alleged failures to warn, based on language appearing to suggest this in the majority and concurrence in *Heggem.* (*See* CR216-pp.49-51.)

occurrence); *CSX Transp. v. Continental Ins. Co.*, 680 A.2d 1082, 1092-94, 1097-98 (Md. 1996) (cited in *Heggem*, ¶ 31, as an example of the cause rule (one occurrence per claimant for railroad's failure to mandate hearing protection resulting in long-term, noise-induced hearing loss to thousands of workers)).

Faced with competing interpretations, the Court concluded that "the causal occurrence … is the occasion of injurious exposure to asbestos, not the antecedent act of the defendant." (CR377-pp.30.) Accordingly, the Court held there is a separate occurrence for each Claimant exposed to asbestos during the policy period. (*Id.*-pp.31,33); *see Ribi*, ¶ 17 (policy subject to different interpretations must be interpreted to extend coverage).

NIC asserts the District Court erred, that "occurrence" means the insured's acts or omissions, and that there is only one occurrence because the State made a "singular decision" to rely on an Attorney General's opinion. NIC is wrong. The State's potential liability is not based on a single decision to follow an Attorney General's opinion, but on multiple alleged failures to disseminate information contained in separate inspection reports at different times over two decades with different information in each report. NIC's 30(b)(6) witness admitted the Claims

allege that each failure to adequately disseminate the results of each inspection report is a failure to warn by the State. (StAppxSld.234-35.)[16]

Two cases cited in *Heggem* show why NIC's asserted underlying reason for the alleged failures to warn is not the occurrence. In *Am. Indem. Co. v. McQuaig*, 435 So. 2d 414, 415-16 (Fla. App. 1983) (cited in *Heggem*, ¶ 37), insanity was the reason the insured fired three shots, but insanity was not the occurrence because liability was based on the injury caused by each shot. In *Michigan Chemical Corp v. Am. Home Assur. Co.*, 728 F.2d 374, 376, 382-83 (6th Cir. 1984) (cited in *Heggem*, ¶ 31), the occurrences were the insured's multiple shipments of mislabeled, injurious livestock feed, not the underlying reason, i.e., the mislabeling.

The cases NIC cites are also distinguishable. In *Mead Reinsurance v. Granite State Ins. Co.*, 873 F.2d 1185, 1188 (9th Cir. 1988), the policy of condoning police brutality was one occurrence because § 1983 liability is based on the offending policy, not individual acts of brutality. A single occurrence was found in *Washoe County v. Transcontinental Ins. Co.*, 878 P.2d 306, 308, 310 n.6, (Nev. 1994), because the County's alleged inadequate licensing process could not be "separated out into discrete acts or omissions." NIC's product liability cases are

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[16] Moreover, 14 of the alleged failures to warn involve reports by the State after a 1967 statutory amendment mooted the AG Opinion, or they were issued by the federal government, to which the AG Opinion never applied. *Orr*, ¶ 30.

also inapposite because the State is not a product manufacturer and did not directly expose Claimants to asbestos. The asbestos came from Grace, not the State.

NIC alternatively argues there is only one occurrence under subsection (c) of the Policy's Endorsement 1, which states that "all bodily injury … arising out of continuous or repeated exposure to substantially the same general conditions shall be treated as one occurrence." However, assuming the occurrences are the alleged failures to warn, they are "event" occurrences, not "exposure" occurrences to which subsection (c) applies. (StAppx.013(occurrences under the Policy are either events "or" exposures)); *see Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 900 (Conn. 2001) (application of continuous exposure clause to an alleged failure to warn is inconsistent with the purpose of the clause); *cf. Pablo v. Moore*, 2000 MT 48, ¶¶ 23-25, 298 Mont. 393, 995 P.2d 460 ("arising out of" is ambiguous and does not bar coverage for an alleged failure to warn, although the factual cause of injury was excluded).

If the occurrence is Claimants' exposures to asbestos, subsection (c) does not apply because Claimants' exposures are not "to substantially the same general conditions." As the District Court concluded, the undisputed evidence shows that each Claimant's exposure is unique in locations, routes, circumstances, times, durations, and levels. (CR377-pp.28,30,31,33;Tab384 flash drive;flash drive filed with CR407-Exs.A-J.)

A substantial body of authority supports the District Court's interpretation of the undefined phrase "substantially the same general conditions." *See e.g. Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 886 N.E.2d 876, 887 (Ohio App. 2007) (multiple occurrences where insured's "failure to protect led to a multitude of physically and temporally distinct injuries under a multitude of differing factual scenarios"); *Metro. Life,* 765 A.2d at 908 (multiple occurrences under "cause test" because claimants were "exposed to asbestos in several different places, in varying amounts, over the course of many years"); *Plastics,* 759 N.W.2d at 622 (provision like subsection (c) only precludes each claimant "from asserting that each time he or she was exposed to an asbestos containing product a new occurrence arose"); *LuK Clutch Sys., LLC v. Century Indem. Co.*, 805 F. Supp. 2d 370, 379-81 (N.D. Ohio 2011) (under nearly identical policy language a manufacturer's decision to use asbestos was not one occurrence, because hundreds of different customers were exposed to asbestos in different situations); *CSX,* 680 A.2d at 1094, 1097-98 (harmful exposures under different conditions at different times, locations, and intensities are not "substantially the same general conditions").

E. The District Court correctly held that no exclusions or limitations bar coverage for the Claims.

NIC told its reinsurers there is coverage. (StAppxSld.259;StAppxSld.265.) This admission estops NIC from denying coverage. *Regence Group*, 903 F. Supp. 2d at 1168-69 (admission of coverage to reinsurers estops insurer from denying

coverage); *cf. Story v. Bozeman,* 242 Mont. 436, 450, 791 P.2d 767, 775 (1990) (dishonesty is a breach of the covenant of good faith implied in every contract). In any event, the District Court correctly rejected all three of NIC's attempts to defeat coverage.

1. "Known loss" does not apply.

"Known loss" is not a Policy exclusion. It is a construct of insurance law some courts use to bar coverage for losses known to exist when a policy is issued. As applied to liability policies, "loss" means "the insured's *legal liability.*" *Anderson, Stanzler, Masters,* INSURANCE COVERAGE LITIGATION, § 15.10 (2020-2 Supp.); *Montrose,* 913 P.2d at 904-906 (known loss for a liability policy requires insured's knowledge of all elements of a claim: liability, causation, and damages).

Neither of the Montana cases NIC cites involved known loss for a liability policy. *State v. Allendale Mut. Ins. Co.*, 2002 Mont. Dist. LEXIS 1820, was a first-party damage claim, not a third-party liability claim. *Allendale* allowed discovery so an insurer could argue known loss "may come into play." *Id.* at *4. *Profitt v. J.G.Watts Constr. Co.,* 143 Mont. 210, 215-16, 387 P.2d 703, 706 (1963), was a workers' compensation case holding an "extraordinary occurrence" for "injury" required more than normal job duties.

NIC also misstates the holding in *Aetna Cas. & Sur. Co. v. Dow Chem. Co.,* 10 F. Supp. 2d 771 (E.D. Mich. 1998). *Aetna* required proof of the insured's

actual, subjective knowledge of a threat of loss so immediate that the insured knew the loss was occurring when the policy was issued. *Id.* at 788-89. The State's knowledge of a potential risk of harm, which is what NIC relies on, is not enough. *Id.* at 788.

On July 1, 1973, when the Policy was issued and sovereign immunity ended, no allegation of wrongdoing had been made against the State, and the Claimants' injuries were unknown to both the Claimants and the State. (StAppxSld.166.) No Claimant was diagnosed with asbestos-related injury until more than 25 years after the Policy was issued. (CR346-Ex.B,¶6;Tab384;CR407-Exs.A-J.) Even as of 2004, when *Orr* was decided, no Claimant had established "the State breached its duty to them and in so doing, caused their damages and injuries." *Orr*, ¶ 81. A *possible* claim for alleged multiple failures to warn cannot retroactively be imputed to have been a "known liability" decades before the Claims were made against the State and *Orr* was even decided.

Admissions NIC made in addressing Claimants' settlement demands also estop NIC from asserting its known loss defense. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground." *Newell v. Meyendorff*, 9 Mont. 254, 262-63, 23 P. 333, 335 (1890) (quoting *Ohio Ry. Co. v. McCarthy*, 96 U.S. 258 (1878)). As late as 2008, NIC told the State its liability was "highly questionable";

that the State owed no duty to the "general public" in "the Libby area"; and "[t]he State's failure to provide information . . . was not a cause of injury" to Mine workers. (StAppx.048-49.) NIC also admitted the State "*could not have foreseen*, and therefore cannot be legally liable for, any injury to any person who was not a full-time employee at the Libby Mine." (StAppx.057(emphasis added).)

The District Court correctly held that when the Policy was issued "there would have been no reason for the State to anticipate that it would be liable for any acts or omissions it committed prior to July 1, 1973." (CR377-pp.18-19.) When sovereign immunity was eliminated in Article II of the 1972 Constitution, effective on the same day the Policy was issued, the Transition Schedule stated "[a]ny rights, procedural or substantive, created for the first time by Article II shall be prospective and not retroactive," and the Convention Notes confirmed Article II "does not create any right for past events." 1972 Mont. Const. Trans. Schedule, § 3, and Convention Notes thereto. Also, NIC's failure to request information from the State before the Policy was issued resulted in a waiver of any claim of non-coverage based on matters "existing at the time of the issuance of the policy." *Curtis v. Zurich Gen. Accident & Liab. Ins. Co.,* 108 Mont. 275, 281, 89 P.2d 1038, 1041 (1939).

Finally, the State's ongoing regulatory efforts to reduce the risks from asbestos at Grace's operations do not present a known liability. Instead, they show the State's good faith efforts to address a risk to Grace workers.

2. The knowing/intentional limitation does not apply.

An "occurrence" cannot arise from injury knowingly or intentionally caused by the insured. (StAppx.013.) The above known-loss discussion also applies to this attempted defense.

The knowing/intentional limitation bars coverage only when the insured commits "intentional or reckless acts to *consciously* control risks covered by [a] policy." *Am. States Ins. Co. v. Willoughby*, 254 Mont. 218, 222, 836 P.2d 37, 40 (1992). At a minimum, there must be "a high degree of certainty" that injuries will result and the injuries must be expected "to flow[] directly" from the insured's conduct and actions. *Northwestern Nat'l Casualty Co. v. Phalen*, 182 Mont. 448, 458, 597 P.2d 720, 725 (1979); *Daly Ditches Irrigation Dist. v. National Sur. Corp.*, 234 Mont. 537, 539, 764 P.2d 1276, 1277 (1988); *see also Employers Mut. Cas. Co. v. Fisher Builders, Inc.*, 2016 MT 91, ¶ 20, 383 Mont. 187, 371 P.3d 375 ("accident" policies also cover intentional acts if injury is not intended or expected).

In the District Court, NIC argued that knowledge of "highly certain" injury is "the applicable legal standard." (CR349-pp.16-17.) However, in addition to

highly certain knowledge of injury, there must also be highly certain knowledge that the insured's actions are the direct cause of the injury. *See* § 45-2-101(35), MCA ("A person acts knowingly with respect to the result of conduct … when the person is aware that it is highly probable that the result will be caused by the person's conduct"). In addition to the fact the State had no knowledge of highly certain injury, Grace, not the State, was the direct cause of injury to Claimants.

NIC admitted the State's alleged failures to warn were "not a cause of injury" to Grace workers, because they "already had sufficient information concerning both the presence of asbestos and the dangers of asbestos exposure." (StAppx.048-49.) Grace provided the State reports to the Grace workers' Union, the federal government sent its reports directly to the Union, and NIC agreed "the State reasonably could have concluded the Union advised its members" of those reports. (StAppxSld.277-78.) The federal government likewise concluded that respirators protected the workers while Grace worked to achieve TLV compliance. (StAppxSld.034.) For Claimants who did not work at Grace, NIC admitted the State "could not have foreseen, and therefore cannot be legally liable for, any injury to any person who was not a full-time employee at the Libby Mine." (StAppx.057.)

NIC told the State the Claimants' allegation of negligence "is highly questionable," and that NIC "does not believe the State was negligent."

(StAppx.048.) If, by NIC's own admission, the State was not even negligent, the State certainly did not act knowingly or intentionally to cause Claimants' injuries.

NIC misrepresents the undisputed historical record in asserting there was an "extremely high likelihood that exposed individuals would contract asbestos-related diseases." (NICAppellantBr.-p.30.) The record shows the State and federal inspectors believed the risk to workers was manageable by avoiding inhalation of excessively high levels of asbestos for extended periods of time. This risk was mitigated by mandatory respirator use beginning in 1957 and reduction of asbestos levels, over time, to those believed at the time to be safe. Federal officials concluded that by using respirators "employees were protected even though environmental levels in the plant exceeded the [federal] standard." (StAppx.034); *see Tatera v. FMC Corp.*, 786 N.W.2d 810, ¶ 36 (Wis. 2010) (risk of workplace asbestos exposure can be limited by protective equipment), *cited with approval in BNSF Ry. Co. v. Asbestos Claims Court,* 2020 MT 59, ¶ 30, 399 Mont. 180, 459 P.3d 857.

The TLV standards used by the inspectors are based on a work-life of exposure during which "workers may be repeatedly exposed, day after day, without their health being adversely affected." (Tab208A-Report-p.1;Tab360-p.5;Tab376-p.657.) The State had no knowledge of work-life exposure above a TLV for any Claimant. (StAppx.061.) The repeated inspections and

recommendations by State and federal authorities demonstrate their intent to protect workers, not to cause them harm.

As discussed above, *Orr* made no "factual determinations" and neither did the District Court. The District Court reviewed the undisputed historical record and properly concluded the State's knowledge of a potentially foreseeable risk is not harm knowingly or intentionally caused. If reasonable foreseeability of a risk of harm were all that is needed to preclude coverage under a liability policy, "there would be no point to purchasing a policy of liability insurance." *Armstrong*, 45 Cal. App. 4th at 72-73.

3. The pollution exclusion does not apply.

The Policy's pollution exclusion bars coverage for injury "arising out of the discharge, dispersal, release or escape of . . . pollutants." (StAppx.010.) This exclusion does not apply because it is ambiguous and Grace, not the State, discharged the asbestos.

The District Court correctly held this exclusion does not bar coverage due, in part, to the ambiguity of the phrase "arising out of" and this Court's decision in *Pablo.* (See CR377-p.24.) In *Pablo*, the policyholder was sued for a supervisor's failure to warn an employee about unsafe driving conditions, leading to an auto accident. The policy excluded injury "arising out of" vehicle use. This Court held

the undefined term "arising out of" is ambiguous and held that "negligent failure to warn [is] not unambiguously excluded from coverage." *Id.*, ¶¶ 16, 24.

Like *Pablo*, the exclusion for injuries "arising out of" the discharge of pollutants is ambiguous because it is not clear whether the exclusion applies to the entity discharging the pollution or a governmental inspecting entity like the State. Further, negligent failure to warn is not unambiguously excluded from coverage. Exclusions "must be clear and unequivocal; otherwise, the policy will be strictly construed in favor of the insured." *Winter*, ¶ 13. Furthermore, "exclusions from coverage will be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy." *Marie Deonier*, ¶ 45. According to NIC, the exclusion applies to any bodily injury caused by a pollutant. This interpretation, however, is neither clear, unequivocal, nor consistent with the language of the exclusion.

The pollution exclusion's history confirms the applicability of *Pablo* to this case. In seeking approval for the industry-drafted exclusion used by NIC, the insurance industry told the public the exclusion applied only to those "deliberately polluting the environment," (StAppx.065-66), and represented to the insurance commissioners who approved the exclusion that it applied only to "those who pollute," (StAppx.066,076-77). Grace, not the State, is the polluter.

Courts have relied on this drafting history to hold the pollution exclusion in the Policy bars coverage only for those who engage in intentional pollution. *See e.g. Morton Int'l v. General Accident Ins. Co*., 629 A.2d 831, 875 (N.J. 1993); *Claussen v. Aetna Casualty & Sur. Co*., 380 S.E.2d 686, 689 (Ga. 1989). Montana law allows extrinsic evidence to resolve ambiguities, § 28-2-905, MCA, and the undisputed evidence establishes the insurance industry intended this exclusion to apply only to polluters. This history also supports the District Court's conclusion that an average consumer of insurance would expect NIC's pollution exclusion to apply only if the insured was "directly responsible for the pollution." (CR377-p.25.)

Cases that address the exclusion's applicability to claims involving a government's regulatory failure to warn about pollution follow an approach like *Pablo* and confirm the exclusion does not apply here. *See WTC Captive Ins. Co., Inc. v. Liberty Mut. Fire Ins. Co.*, 549 F. Supp. 2d 555, 563 (S.D.N.Y. 2008) (exclusion does not bar coverage for claims against New York City for failing to share information about asbestos test results); *Covington Township v. Pacific Employers Ins. Co.*, 639 F. Supp. 793, 799-800 (M.D. Pa. 1986) (exclusion does not bar coverage for failure-to-warn claims based on town's "public entity duties"); *Niagara County v. Utica Mut. Ins. Co.*, 439 N.Y.S.2d 538, 541-42 (N.Y. App. Div. 1981) (exclusion does not bar coverage for County's failure to warn about

industrial toxic waste). In *Northern Ins. Co. v. Aardvark Assocs.*, 942 F.2d 189, 194 (3d Cir. 1991), a case relied on by NIC, Judge Alito recognized the distinction between claims "based squarely on the discharge of pollutants" and "public entity duties."

The Montana cases NIC cites are distinguishable. As the District Court correctly stated, the phrase "arising out of" was not at issue in *Mont. Petrol. Tank Release Comp. Bd. v. Crumleys*, 2008 MT 2, ¶¶ 9-13, 31, 294 Mont. 210, 980 P.2d 1043 (whether diesel fuel was "pollutant"); *Sokoloski v. Am. W. Ins. Co.*, 1999 MT 93, ¶¶ 3, 16, 341 Mont. 33, 174 P.3d 948 (whether release was "sudden and accidental"); or *Ribi*, ¶ 16 (whether repeated waste disposal was "sudden and accidental"). (CR337-p.23.) These cases are also distinguishable because the insureds owned or operated the polluting facility or generated the pollution. *Crumleys*, ¶¶ 9-13 (insured owned leaking tank); *Sokoloski*, ¶ 3 (insured burned candles); *Ribi*, ¶ 8 (insured discharged hazardous waste).

Some cases cited by NIC contain erroneous dicta that the exclusion applies to non-polluters. These and all of the cases cited by NIC are distinguishable because, in all of them, the insured generated, hauled, or disposed of the pollution or owned the property or facilities that discharged the pollution. *See e.g. Scottsdale Indemn. Co. v. Vill. of Crestwood*, 673 F.3d 715, 716 (7th Cir. 2012) (insured owned contaminated wells and sold contaminated water); *Aardvark*, 942 F.2d at

190 (insured deposited industrial waste in trash sites); *Larsen Oil Co. v. Federated Serv. Ins. Co.*, 859 F. Supp. 434 (D. Or. 1994) (insured severed pipe that leaked oil).

NIC's argument that *contra proferentem* does not apply is misplaced. The State did not participate in writing the industry-drafted exclusion NIC used, without change, but simply accepted the "usual policy exclusion." (NICOApp.091.) As discussed above, this exclusion was intended to apply only to polluters.

In Montana, *contra proferentem* (interpretation of ambiguous contract language against the drafter) is a statutory rule applied without regard to the promisee's sophistication. Section 28-3-206, MCA; *In re Marriage of Weiss*, 2010 MT 188, ¶ 27, 357 Mont. 320, 239 P.3d 123; § 28-3-101, MCA (all contracts are interpreted by the same rules). This is particularly the case when dealing with exclusions in insurer-drafted policies, which are construed narrowly and strictly. *Marie Deonier*, ¶ 45.

III. The relief awarded to the State does not violate NIC's constitutional rights.

There is no merit to NIC's assertions of constitutional violations. For the Contract Clause to apply, the State must have "through its *legislative* authority, enacted [a statute] to impair its contract with Plaintiffs." *Univ. Hawaii Prof. Assembly v. Cayetano*, 183 F.3d 1096, 1101 (9th Cir. 1999) (emphasis added);

Seven Up Pete Venture v. State, 2005 MT 146, ¶¶ 40-41, 327 Mont. 306, 114 P.3d 1009 (limited to whether a "state law" impairs a contract). Because that is not the case here, NIC's Contract Clause claim fails.

Regarding due process and takings, the awarded relief violates neither. The due process clause prohibits "grossly excessive or arbitrary punishments." *Seltzer v. Morton*, 2007 MT 62, ¶ 149, 336 Mont. 225, 154 P.3d 561 (quotation omitted). Coverage by estoppel for breach of the duty to defend is not a punishment. It has been part of Montana law since 1895. *See* § 28-11-316, MCA; *Staples,* ¶ 27. It does not depend on whether a claim is ultimately determined to be covered, because the duty to defend requires the insurer to respond to allegations of potentially-covered claims. *Tidyman's I,* ¶¶ 27, 41 n.2; *Staples,* ¶¶ 20-21.

NIC's attempt to recast its coverage arguments as due process and takings claims is without merit. NIC agreed to defend and indemnify the State under a Policy NIC proposed. When the State paid the premium, it became entitled to the coverage it purchased.

As to procedural due process, it "requires that parties be given reasonable notice and a reasonable opportunity to be heard." *Anaconda Pub. Schs. v. Whealon*, 2012 MT 13, ¶ 15, 363 Mont. 344, 268 P.3d 1258 (citation omitted). Here, NIC was given notice and an opportunity to be heard in spades. In the District Court, NIC asserted its constitutional claims in support of its request to be

heard on coverage. (CR299-p.8.) The Court granted that request and ruled against NIC. The Court denied NIC's request to brief objections to the State's final interest computations because the Court found the computations accurate. The Court denied NIC's request to respond to 27 Claimant Declarations because they unambiguously confirmed these Claimants lived or worked in Libby during the policy period. (CR427-pp.2-3;CR429-p.2.) The Court also correctly denied NIC's untimely and unmeritorious request to amend the 10% interest rate. (CR438-pp.8-9;CR440-pp.4-6.) At some point, a case must end.

IV. The District Court properly awarded the State its declaratory action costs.

When an insured establishes its insurer breached either the duty to defend or the duty to indemnify, the insured is entitled to declaratory action fees and expenses. *Mt. W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 36, 315 Mont. 231, 69 P.3d 652. Because the State established NIC's breaches, it is entitled to its declaratory action costs.

CONCLUSION

The State respectfully requests the Court hold that NIC breached its duty to defend by failing to begin defending in 2002 and by each of the three unlawful conditions NIC asserted in 2005 and thereafter. Based on any of these breaches, the State is entitled to the following relief:

- A judgment for settlements and prejudgment interest on those settlements, in the amount of $97,089,476.92, plus interest of $16,817.20 per day for each day after March 29, 2019 until paid.[17]
- Affirm the District Court's Judgment for the State's defense costs and prejudgment interest on those costs, in the amount of $11,775,039.11.[18]
- Require NIC to defend and indemnify the State for all pending and future Claims because of the ongoing, significant harm caused by the loss in *Orr* and by NIC making its offers to defend subject to unlawful conditions.
- If the Court holds that NIC's breach of the duty to defend began in 2002, remand for a judgement for defense costs and prejudgment interest thereon, from July 1, 2002 to July 18, 2005.

If the Court does not hold that NIC breached its duty to defend beginning in 2002 or by any of its three unlawful conditions, the State is entitled to the

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[17] These amounts are the total of the amount the State paid for the 9/8/11 Global Settlement ($26,800,00), the amount of all settlements approved after February 23, 2012 ($44,013,721.61), and prejudgment interest on those settlement amounts calculated to March 29, 2019 ($26,275,755.31), plus the daily interest amount after March 29, 2019. (CR382-pp.2-3.)

[18] (CR424-p.4.)

following relief because the Policy covers most of the Claims and because NIC breached its duties to defend and indemnify:

- Affirm the District Court's Judgment that the State is entitled to $48,085,900.00 for NIC's breach of its duty to defend by delaying the filing of its declaratory judgment action until after the $43 million settlement.[19]
- Affirm the District Court's Judgment that NIC is responsible for the post-2/23/2012 settlements and prejudgment interest for Claimants exposed to asbestos resulting in bodily injury during the policy period, in the amount of $34,451,843.84.[20]
- Direct entry of a supplemental judgment in the amount of $5,861,912.04[21] for settlements attributable to Claimants who inhaled asbestos only before the policy period resulting in bodily injury during the policy period, and remand for a determination of prejudgment interest on the supplemental judgment.

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[19] This amount includes the $26.8 million the State paid for the $43 million settlement (9/8/11 Global Settlement), plus prejudgment interest on this amount. (CR424-p.3.)

[20] (CR424-p.3.)

[21] (*See* CR407-Decl.,¶¶7-11.) The supplemental judgment amount of $5,861,912.04 is the sum of the settlement amounts detailed in Exhibits F-J on the flash drive filed with CR407.

- Affirm the District Court's Judgment awarding the State all defense costs and prejudgment interest on those costs, in the amount of $11,775,039.11.[22]
- Require NIC to defend and indemnify the State for all pending and future Claims for persons exposed to asbestos prior to the end of the policy period.

For the State's declaratory action costs, the Court should:

- Affirm the District Court's Judgment in the amount of $3,570,410.44,[23] and remand for an award of the State's appeal fees and expenses.

The State respectfully requests the Court enforce the Policy and hold NIC responsible for not providing the defense and indemnity the State is entitled to under the Policy and Montana law.

DATED May 7, 2020.

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[22] (CR424-p.4.)

[23] (CR424-p.4.)

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure and in accordance with this Court's February 25, 2020, Order granting an extension of the word limit to 16,000 words, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Office Word is 15973, excluding the table of authorities, table of appendices, signatures, and this certificate of compliance.

DATED May 07, 2020.

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