

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.

**CROSS-APPELLANT STATE OF MONTANA'S
REPLY 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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In responding to the State's Opening Brief, NIC continues its nearly two decades-long quest to avoid its defense and indemnity obligations to the State. As required by M. R. App. P. 12(3), the State's reply is limited to the State's following three cross-appeal issues:

1. Whether the State's 2002 tender triggered NIC's duty to defend.
2. Whether NIC's conditional offers to defend were unlawful.
3. Whether indemnity coverage exists for Claimants whose inhalation of asbestos only before the policy period resulted in ongoing injury during the policy period.

I. NIC's duty to defend was triggered by the State's tender of Claims in 2002. NIC's failure to mount and fund the State's defense beginning in 2002, including NIC's failure to defend the *Orr* appeal, breached NIC's duty to defend.

NIC asserts its duty to defend was not triggered on the grounds that the State chose to control its own defense and did not request a defense until March 2005. This assertion ignores undisputed facts, admissions of NIC's own witnesses, and settled Montana law.

NIC admitted: (1) the State's June 27, 2002 tender of the Claims was a request for NIC to respond according to its contractual duties, which include the duty to defend (StAppxSld.293;StAppx.010); and (2) when an insured tenders claims to NIC, NIC understands the insured is asking NIC "to not only defend but indemnify them" (StAppxSld.280-81). If there were any question about the tender,

the State confirmed with NIC in July 2002 that the tender was a request for defense and indemnity. (Tab428-p.143:9-21.)¹

NIC's reliance on cases like *Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.*, 902 F. Supp. 1235 (D. Mont. 1995), is misplaced. *Casualty* relied on a Seventh Circuit decision in *Hartford Accident & Indemnity Co. v. Gulf Ins. Co.*, 776 F.2d 1380 (1985). *Hartford* states: "Mere knowledge that an insured is sued does not constitute tender of a claim. What is required is knowledge that the suit is potentially within the policy's coverage coupled with knowledge that the insurer's assistance is desired." *Id.* at 1383. The State's 2002 tender clearly put NIC on notice its assistance was desired. The letter provided the State was "tendering these claims [to NIC] . . . pursuant to the . . . policy . . . issued by National Indemnity to the State." (StAppx.021.)

The Policy requires only notice to NIC of an occurrence, claim or suit; there is no provision requiring the State to make any particular requests or expressly tender anything to be entitled to coverage. (StAppx.013,cond.4.) Montana law has never required an insured to use any particular magic words in making a request

¹ The fact that at the time of tender the State had already briefed and argued a motion to dismiss is irrelevant, because NIC waived a "late notice" defense by failing to include it in the policy defenses NIC attempted to belatedly assert in 2005. (StAppx.026-033.) See *Newman v. Scottsdale Ins. Co.*, 2013 MT 125, ¶¶ 48, 67-69, 370 Mont. 133, 301 P.3d 348 (late notice is waived when an insurer asserts policy defenses but does not include an assertion of late notice).

for defense. Nor has Montana law ever required an insured to do any of the things NIC insists are required, such as requesting payment of defense bills or appointing new counsel.² Under Montana law, the duty to defend is triggered when an insurer receives notice of claims that “potentially implicate” its policy. *Tidyman’s Mgmt. Servs. v. Davis*, 2014 MT 205, ¶¶ 27, 30, 376 Mont. 80, 330 P.3d 1139; *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶¶ 20-21, 321 Mont. 99, 90 P.3d 381. There is potential coverage “[u]nless there exists an unequivocal demonstration that the claim against an insured does not fall within the insurance policy’s coverage.” *Staples*, ¶ 22. When the duty to defend is triggered by notice of a potentially-covered claim, an insurer’s assertion the insured “never demanded a defense” is “sheer sophistry.” *Samson v. Transamerica, Ins., Co.*, 636 P.2d 32, 44 (Cal. 1981).³

² NIC’s assertion the State conceded it did not want NIC to hire additional counsel misrepresents the record. When asked whether the State requested NIC to retain defense counsel, the State’s representative said: “No, *other than the tender of defense*, the tender that I sent in and if National wanted to retain someone separate from my office or Agency for Legal Services’ office they were certainly free to do it.” (CR148, Tab22-p.136(emphasis added).)

³ Even if the phrase “tender for defense” as opposed to “tender pursuant to the policy” were required, the undisputed testimony is that the State made such a specific request in July 2002, and NIC admitted the State’s tender was a request to defend.

Here, NIC recognized its “obligation to provide a defense” arose when it received “copies of suits” alleging negligence by the State resulting in injury during the policy period. (StAppxSld.236.) NIC also recognized the Claims are potentially covered by admitting it could not make an unequivocal demonstration the Policy did not apply. (*Id.*-228.) See *Tidyman’s*, ¶ 30.

By the time of the State’s tender in 2002, courts had recognized that coverage-triggering injury from asbestos begins “immediately upon exposure” to asbestos and “continue[s] to occur even after exposure ends.” *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993). The complaint in *Orr v. State*, which was included with the 2002 tender, alleges this type of injury. Specifically, it alleged that Herbert Orr worked at Grace from 1965-67 and later developed asbestosis that was diagnosed in 1998 “due to asbestos exposure at the Grace/Zonolite mine and mill.” (NICOApp.160,166.)

All of the Claims allege negligent failure to warn by the State from the mid-1950s throughout the NIC policy period, and NIC admits the Claimants allege injury throughout the NIC policy period. (StAppxSld.267.) NIC knew in 2002 the Claimants alleged they “were continuously injured by the State’s claimed failure to warn,” including throughout the policy period, when it received the first set of complaints with the State’s 2002 tender. NIC admitted this when it finally conditionally offered to defend in 2005. (StAppx.029,031.)

NIC knew its duty to defend was triggered when it established a \$25,000 reserve for defense costs in November 2002 and raised the defense reserve to \$200,000 in December 2002, eight days after learning the Claimants filed the *Orr* appeal. (StAppx.023;StAppxSlid.184,217.) Despite this knowledge, NIC failed to defend the *Orr* appeal, which breached NIC's duty to defend.

NIC is wrong that its establishment of defense reserves is irrelevant. *See* § 33-2-518(2)(a), MCA (reserve information “must include . . . the estimated liability” of “loss expenses”). In a recent order, Judge Christensen held that “reserve information reflects, at least in part, upon the insurer’s estimation of potential liability.” (Tab453-p.9 (citing § 33-2-518(2)(a), MCA).) *See also Miller v. Elite Ins. Co.*, 100 Cal. App. 3d 739, 749, 753 (Cal. App. 1980) (establishment of a defense reserve shows insurer recognizes its duty to defend).

When the duty to defend is triggered, as it was here in 2002, the insurer is required to mount and fund the insured’s defense. *State Farm Fire & Cas. Co. v. Schwan*, 2013 MT 216, ¶ 16, n.2, 317 Mont. 192, 308 P.3d 48 (quoting “the seminal” decision in *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997)). NIC is wrong that its duty to defend was “unquestionably satisfied” by “monitoring developments,” “requesting updates,” appointing “an experienced claims handler,” and ensuring that the State was represented by counsel paid solely by the State. These asserted activities have nothing to do with mounting and funding the State’s

defense. Tellingly, NIC admits it made no offer to defend the *Orr* appeal, provided no assistance to the State for the appeal, and paid nothing to defend the appeal. (StAppxSld.210,217,241.)

NIC's failure to "act immediately" to mount and fund defense of the *Orr* appeal establishes NIC's breach of its duty to defend, as a matter of law. *See State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 37, 372 Mont. 191, 312 P.3d 403. Once triggered, the duty to defend is discharged only if the insured states it does not want the insurer's assistance or is unresponsive or uncooperative. *Cincinnati Cos. v. W. Am. Ins. Co.*, 701 N.E.2d 499, 503-04 (Ill. 1998). NIC admits the State was cooperative and never told NIC the State did not want NIC to defend or assist in defending the Claims. (Tab 431-p.248;StAppxSld.292.)

The fact the State defended the *Orr* appeal does not excuse NIC's failure to defend, as this Court has made clear. *See Tidyman's*, ¶ 31 (insured's defense by its own counsel does not excuse an insurer's breach of its duty to defend). On this point, NIC misplaces reliance on *Schwan*, which involved co-insurers who both had a potential duty to defend. A tender had been accepted by State Farm Auto, which hired Cal Stacey to defend the insureds. The other insurer, State Farm Fire, was notified of the claim by State Farm Auto but did not receive a tender. State Farm Fire consulted with State Farm Auto and Stacey, who confirmed additional defense counsel was not needed. *Schwan*, ¶¶ 4-7, 19. State Farm Fire wrote to the

insureds confirming they were defended and were not tendering the claims for defense. *Id.*, ¶ 19. State Farm Fire committed it would undertake defense if State Farm Auto discontinued the defense. *Id.* Under these facts, the Court held State Farm Fire did not breach its duty to defend. *Id.*, ¶ 24.

In contrast, NIC took none of the actions taken by State Farm Fire to comply with its duty to defend, including acknowledging its potential duty to defend, confirming in writing that the insured did not desire additional defense assistance, stating it would defend if it became necessary, and promptly filing a declaratory judgment action. *See Schwan*, ¶¶ 7-9, 19, 24.

Westchester Surplus Lines Ins. Co. v. Keller Transp., Inc., 2016 MT 6, 382 Mont. 72, 365 P.3d 465, likewise does not support NIC. In *Westchester*, the insurer provided and paid for the defense, except for a 4-month delay in the payment of defense costs, and at the time of the loss – a stipulated judgment – the insurer was paying all defense costs and providing a defense. *Id.*, ¶¶ 7, 29, 31-33.

In contrast to *Westchester*, NIC did nothing until after the State lost the *Orr* appeal. NIC admits the loss in *Orr* has significant adverse consequences for all Claims that have been or ever will be filed. (StAppxSld.254 (NIC’s president admits the loss in *Orr* dramatically increased the State’s exposure); CR145-p.3 (NIC admits the loss in *Orr* subjected the State to “potential liability” and resulted in the State’s decisions to pay tens of millions of dollars to settle Claims).) Under

Montana law, where, as here, an insurer “neglects to defend,” the harm attributable to a loss by the insured “is conclusive” against the insurer. Section 28-11-316, MCA; *Staples*, ¶ 27. It matters not that at the time of the loss the insured was represented by its own counsel.

NIC’s duty to defend was triggered by the State’s 2002 tender. NIC breached its duty to defend by failing to immediately mount and fund the State’s defense, including defense of the *Orr* appeal. NIC’s breach makes it responsible for the loss in *Orr* and resulting settlements, judgments, and defense of all past and future Claims. (*See* St.Op.Br. pp.23,26,36.)

II. NIC breached its duty to defend because its offers to defend imposed three unlawful conditions: pro-rata defense costs, recoupment of defense costs, and assertion of an untimely reservation of rights.

NIC’s offers to defend have at all times been unlawfully conditioned on the State’s acceptance of a pro-rata defense, NIC’s ability to recoup defense costs for potentially-covered Claims, and NIC’s asserted reservation of previously waived coverage defenses. After failing to defend the *Orr* appeal, NIC continued to breach its duty to defend because it never made a valid offer to defend the State. An offer of only incomplete performance or of performance subject to improper conditions is a breach. *See* §§ 28-1-1203, 1211(1), MCA.

The Pro-Rata Condition Is Unlawful

NIC claims it offered “a full defense,” not “a pro-rata defense.” That simply is not so and has never been the case. NIC’s offer to defend states that “all defense costs . . . must be allocated pro-rata.” (StAppx.031.) Even after NIC revised its initial offer to allow for *advance* of 100% of defense costs, NIC admits this advance was subject to a condition that NIC would later be allowed to “seek pro-rata reimbursement.” (NICAns/ReplyBr.-p.23.) NIC’s pro-rata offers are improper because NIC is responsible for the entire defense, not a pro-rata defense. *Schwan*, ¶ 16, n. 2. Montana law is unequivocal: the insurer “must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not.” *Id.* (quoting *Buss*).

NIC’s pro-rata offers are also prohibited by the Policy. Under the Policy, NIC’s admitted duty to defend applies to “any suit,” not parts thereof, and requires NIC to “pay . . . all expenses incurred by [NIC]” for that defense. (StAppx.010,013.)

NIC incorrectly asserts the State’s defense costs are subject to pro-rata allocation for the 44 years of the State’s self-insurance program for its tort liabilities. (NICAns/ReplyBr.-pp.2,35); *see* § 2-9-202(3), MCA. Pro-rata allocation of defense costs must be rejected for several reasons. First and

foremost, any allocation of defense costs is contrary to the Policy provisions quoted and law cited above. NIC sold “all sums” coverage, not pro-rata coverage.

Even under a pro-rata approach, however, NIC’s position is untenable. The State did not begin to self-insure any tort liabilities until *after* the NIC policy period ended in 1975.⁴ The failures to warn alleged against the State occurred during the time period 1956-1975. (*See* St.Op.Br.-pp.7-8.) The Policy provides coverage for events and exposures both before and during the NIC policy period where, as here, injury results during the policy period from asbestos that remains in the Claimants’ bodies indefinitely. NIC admitted this interpretation is correct. (StAppxSld.230.) It is also the interpretation accepted by pro-rata courts: “These are ‘occurrence’ policies which, by their nature, provide coverage for pre-policy occurrences (acts) which cause injury or damage during the policy period.” *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 993 (N.J. 1994) (internal quotations omitted).

Second, pro-rata cases relied on by NIC and its *Amici* decline proration to self-insureds when insurance coverage is unavailable. *See e.g. Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 114-15 & n.13 (Conn.

⁴ NIC asserts the State began to self-insure its tort liabilities on July 1, 1976. (NICOp.Br.-p.9.) However, the correct date is July 1, 1977. *See* Michael P. Heringer, *White v. State: Raising the Stakes of State Tort Claims*, 45 Mont. L. Rev. 151, 163 (1984).

2003). When the State began to self-insure on July 1, 1977, it did so because it was “unable to find an insurance company that would write a policy providing adequate coverage for the state.” Heringer, 45 Mont. L. Rev. at 163; (*see also* Depo. Brett Dahl (NICOApp.261-62)). Applying the rule of unavailability bars the pro-rata allocation of defense costs sought by NIC.

Under the Policy and the undisputed facts, there is no basis for pro-rata allocation of defense costs, either prospectively or retrospectively through reimbursement.⁵ The Policy and Montana law require NIC to pay the entirety of the State’s defense.

The Recoupment Condition Is Unlawful

NIC admits its various offers to defend have always been offers to temporarily advance defense costs with the proviso it could later seek recoupment of those costs if it should be successful in challenging coverage. This is not a “full defense,” as NIC asserts. It is an illusory offer of a “trap-door” defense that deprived the State of the unconditional defense NIC promised to provide in its Policy and that Montana law requires.

As the State demonstrated in its Opening Brief, Montana law prohibits an insurer from recouping defense costs for potentially-covered claims. In *Schwan*,

⁵ The same law and undisputed facts apply as well to NIC’s claim for pro-rata allocation of indemnity.

the Court quoted the “seminal” *Buss* case and held that an insurer may obtain reimbursement only for defense costs for claims that are not even potentially covered. *Schwan*, ¶ 16 n. 2. As *Buss* explains, as to 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.” ... The creation of a right of reimbursement would amount to a pro tanto supersession of the policy—which would require a separate contract supported by separate consideration.

Buss, 939 P.2d at 776.

NIC admits the Claims against the State are potentially covered. (StAppxSld.228,236,267 (NIC’s 30(b)(6) witness admits potential coverage based on allegations of negligence causing bodily injury during the policy period); (StAppxSld.149 (NIC notifies reinsurers of NIC’s “potential obligation under the Policy to participate in the defense and indemnity of the State”). In fact, what makes NIC’s recoupment condition particularly egregious is that NIC admits not just potential coverage, but *actual coverage*. (StAppxSld.265 (NIC’s 30(b)(6) witness informs reinsurers: “the Policy applies” to the State’s alleged “failure to disclose”). NIC’s statements to its reinsurers estop NIC from denying its duty to provide the State an unqualified and unconditional defense of the State. *See*

Regence Group v. TIG Specialty Ins. Co., 903 F. Supp. 2d 1152, 1167-69 (D. Or. 2012).⁶

For three separate and independent reasons, there is no merit to NIC's assertion that its recoupment condition is authorized by *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research*, 2005 MT 50, 326 Mont. 174, 108 P.3d 469, and *Horace Mann Ins. Co. v. Hanke*, 2013 MT 320, 372 Mont. 350, 312 P.3d 429. First of all, neither case involved potentially-covered claims. In fact, the allegations in the complaints in those cases unequivocally were not covered. In *Ribi*, the allegation was that the insured intentionally poured hazardous waste onto a dirt landfill resulting in groundwater pollution, and the policy contained a pollution exclusion. *Ribi*, ¶ 1. In *Hanke*, the claim was that the insured intentionally took possession of and asserted ownership over the claimant's property, and the policy excluded losses intentionally caused by the insured. *Hanke*, ¶¶ 5, 20. These cases are distinguishable because here, as NIC admits, the Claims are potentially covered.

⁶ As *Regence Group* demonstrates, NIC is wrong that admissions of coverage by an insurer to its reinsurers are inadmissible. The District Court correctly held they are "relevant and are admissible as admissions of a party-opponent." (StAppx.007.) See also *National Union Fire Ins. Co. v. Continental Illinois Corp.*, 116 F.R.D. 78, 83 (N.D. Ill. 1987) (discussions of insurer's position with reinsurers "would obviously be relevant").

Second, even in cases in which recoupment is possible, *Ribi* requires that the insurer must timely assert its right to recoup. *Ribi*, ¶¶ 49-50. Here, NIC waited more than three years after its duty to defend was triggered to offer to defend and claim a right of recoupment. During this time, the State suffered the loss in *Orr* which NIC failed to defend.

Third, as *Ribi* made clear, the insured must accept the insurer's offer with its purported right to seek recoupment. In *Ribi*, the insured accepted the benefit of the insurer's offer to defend, and this acceptance was the reason the Court enforced the insurer's claim for recoupment. *Ribi*, ¶¶ 48, 50. In contrast, it is undisputed the State never accepted NIC's defense offer conditioned on recoupment.

Moreover, NIC is wrong that the State's acceptance of NIC's defense would not be a waiver of any rights. On the contrary, acceptance would have waived the right to contest NIC's claim for recoupment, just as it did for the insured in *Ribi*. As the Court held in *Ribi*, ¶ 49, a reservation of rights "proves enforceable" where the insured accepts an insurer's defense subject to a condition of later recoupment.⁷

⁷ The Court quoted the Restatement (Second) of Contracts, § 69 stating "[a] party cannot accept tendered performance while unilaterally altering the material terms on which it is offered," and held that "*Ribi* implicitly accepted Traveler's defense under a reservation of rights when it posed no objections." *Id.*, ¶ 50.

The State properly rejected NIC's offers to defend. They were all unlawfully conditioned on an untimely and unlawful purported right to reserve a claim for recoupment that NIC was not entitled to reserve.

The Condition Allowing for Assertion of Waived Policy Defenses Is Unlawful

NIC does not dispute that an insurer's reservation of a right to dispute coverage must be timely asserted to be valid. *See e.g. Tynes v. Bankers Life Co.*, 224 Mont. 350, 364, 730 P.2d 1115, 1124 (1986) (nine-month delay in responding to a request for coverage is untimely). NIC admits that when it received the State's tender letter of June 27, 2002, NIC understood the State wanted NIC to assess the State's "rights and obligations" under the Policy.⁸ (StAppxSld.293.) NIC also admits that "it is incumbent upon an insurance company to advise its insureds promptly when it is being asked to provide a defense and thinks that the policy may not apply." (*Id.*-p.243.) Promptly, according to NIC, means "a few days, a week, perhaps a month." (*Id.*-p.297.)

Before the end of 2002, NIC knew there were coverage issues involving the Claims against the State. (*Id.*-p.214.) When NIC finally offered to defend on July 18, 2005, it did so subject to an asserted right to resurrect policy defenses it knew

⁸ If somehow the State's "tender" for NIC to assess the State's "rights and obligations" under a Policy requiring NIC to defend Claims NIC admits are potentially-covered is not a tender for defense, then nothing could be.

about in 2002, yet failed to assert until *2.5 years later*, in 2005. (*Id.*-pp.214-15; StAppx.028;StAppx.029-32.) NIC's belated attempt to reserve its rights and force the State to accept a defense subject to policy defenses NIC had waived was a breach of NIC's duty to defend.

In conclusion, each of the three conditions described above was a breach by NIC of its duty to defend. Each breach forfeited NIC's right to rely on coverage defenses and policy limits and obligates NIC to pay settlements and defense costs. *See J&C Moodie Props., LLC v. Deck*, 2016 MT 301, ¶ 38, 385 Mont. 382, 384 P.3d 466.

III. The Policy provides indemnity coverage for settlements with Claimants whose only exposure to asbestos was before July 1, 1973, because these Claimants experienced ongoing bodily injury during the policy period.

The Policy's "all sums" coverage for the State's entire liability for settlement of covered Claims is triggered by injury during the policy period; it does not require manifestation of injury, as NIC asserts. The word "manifest" does not appear in the Policy, and there is no manifestation requirement in NIC's CGL coverage. Moreover, as this Court held in *Swank Enters. v. All Purpose Servs., Ltd.*, 2007 MT 57, ¶ 20, 336 Mont. 197, 154 P.3d 52, there is no requirement that injury be "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.”⁹

NIC’s reliance on the State’s briefs and the decision in *Murphy v. State*, 248 Mont. 82, 809 P.2d 16 (1991), is misplaced and taken out of context. Not only did *Murphy* deal with a much different fact situation, it dealt with a different type of coverage than this case. The claimant in *Murphy* (L.C.) alleged she was wrongfully committed to the state mental hospital in 1963, which resulted in mental illness that was manifest before the policy period began. *Id.* at 84-86, 809 P.2d at 18-19. Her claim was made under Coverage E, the personal injury coverage, which has different triggering language, i.e., that the alleged “offense [be] committed during the policy period.” *Id.* at 85, 809 P.2d at 18; (StAppx.012). Thus, in addition to arguing L.C.’s claim was barred by sovereign immunity, the State argued her claim was not covered under the Policy because her injuries were manifest before and the alleged offense was committed prior to July 1, 1973, when the Policy began. *Murphy*, 248 Mont. at 84, 809 P.2d at 18. The Court agreed and dismissed L.C.’s claim arising from pre-1973 conduct. *Id.* at 86, 809 P.2d at 19.

⁹ NIC erroneously claims *Swank* is limited to property damage. *Swank* cited and quoted a bodily injury case in support of its holding: *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 415 (Minn. 2003) (holding cellular-level injury caused by breast implants is “bodily injury” triggering all policies in effect from implantation through manifestation).

In contrast, the injuries in this case did not become manifest until the late 1990s. Further, unlike the personal injury coverage at issue in *Murphy*, which requires the offense be committed during the policy period, the Policy's CGL coverage is triggered by any *bodily injury* during the policy period – even if not yet manifest, and even if the alleged negligence causing the injury occurred before the policy period.

The other cases cited by NIC are likewise unavailing. For example, *Continental Cas. Co. v. Employers Ins. of Wausau*, 60 A.D.3d 128, 147-48 (N.Y. App. Div. 2008), was decided under a requirement of New York law that “onset of disease” is required to trigger coverage. The NIC Policy has no such requirement; it can be triggered either by bodily injury or disease. (StAppx.012.)

Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. App. 1987), is not an insurance case. The court held that undiagnosed asbestos-related injuries are not yet compensable under general Arizona tort law. *Id.* at 30-31. Under Montana law, compensability is not required to trigger coverage, because any bodily injury during the policy period triggers coverage. *Swank*, ¶ 20. The *Jaquays* court distinguished situations involving the triggering of insurance coverage, stating that “the existence of [subclinical asbestos-related injury] may be of vital concern

to . . . insureds who have bargained for liability coverage triggered by ‘bodily injury.’” *Jaquays*, 752 P.2d at 30 (quoting *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985)).

In this case, the undisputed medical evidence shows that all Claimants with whom the State settled have an asbestos-related diagnosis made from the late-1990s to the present. (See flash drive that is Tab384 and flash drive filed with CR407-Exs.A-O.) The undisputed medical evidence also shows that those Claimants for whom the State seeks indemnity coverage were exposed to asbestos from the operations of Grace before or during the NIC policy period, and in most cases both before and during the policy period. (See *id.*) The State submitted undisputed 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.159-66; flash drive submitted with CR407,Ex.X-Decl.,pp.2-4.)¹⁰ Accordingly, the “all sums” coverage of the Policy was triggered and provided full coverage for all Claimants exposed to asbestos at any time before or during the NIC policy period because of their continuing injury during the policy period.

¹⁰ NIC’s Chicago attorney is not a doctor and presented no evidence of medical training to support her opinions about the Claimants’ injuries. Moreover, neither of NIC’s medical experts disputed the testimony of the State’s medical expert. (See St.Op.Br. p.49.)

There is no merit to NIC's assertions the State's evidence is insufficient because its medical expert for post-2011 settlements reviewed a random sample of records. Her undisputed report states she "calculated the number of persons that would represent an accurate sample of the total population, using a standard formula for determining an appropriate sample size for 95% confidence," that the sample was selected using "a random number generator," and that the accuracy of the sampled records confirmed her undisputed opinions concerning the Claimants' exposures to asbestos and bodily injury therefrom during the policy period. (Flash drive submitted with CR407, Ex. X-Report, p.1.) As to NIC's assertions of deficiencies, inaccuracies, and ambiguity in the State's documentation, all of these were addressed, rebutted, and resolved in submissions to the District Court before entry of Judgment. (*See* CRs414-pp.1-7;415;422;423;424;425;429.)

Based on the undisputed evidence referenced above, the District Court correctly held that Claimants exposed to asbestos during the policy period are covered Claims. The District Court erred, however, in holding that Claimants who inhaled asbestos only prior to the policy period are excluded from coverage. The undisputed medical evidence demonstrated those Claimants suffered ongoing injury during the policy period, the Policy states it applies to an "event" or "exposure" that "results in bodily injury . . . during the policy period," and NIC admitted that causal events or exposures do not need to happen during the policy

period for coverage to attach. (StAppx.013;StAppxSld.230.) There is no need for a remand concerning Claimants with only pre-policy exposure, because their ongoing injury during the policy period is included in the undisputed Declaration of the State's medical expert. (See flash drive submitted with CR407,Ex.X-Decl.,¶4(b).)

CONCLUSION

For the reasons stated above and in the State's Opening Brief, the State respectfully requests that the Court grant the relief requested on pages 69 to 71 of the State's Opening Brief and further order NIC to fulfill its duties to defend and indemnify the State in accordance with the State's cross-appeal.

DATED September 10, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure 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 4883, excluding the table of contents, table of authorities, signatures, and this certificate of compliance.

DATED September 10, 2020.

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