

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 04-228

TRAVELERS CASUALTY AND SURETY COMPANY, a foreign corporation,

Plaintiff/Respondent/Cross-Appellant,

v.

RIBI IMMUNOCHEM RESEARCH, INC., a Delaware corporation,

Defendant/Appellant.

MONTANA STATE AUDITOR AND COMMISSIONER OF INSURANCE
MOTION FOR LEAVE TO PARTICIPATE AS
AMICUS CURIAE ON APPEAL

FILED

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STATE OF MONTANA

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE

The Applicant, Montana State Auditor and Ex Officio Commissioner of Insurance (commissioner), pursuant to Rule 24, M.R.App.P., moves this court for leave to appear amicus curiae and to file an amicus curiae brief. When the commissioner learned of the pending matter and the important legal issues it raises, he directed his legal staff to obtain and review the prior briefing and ask counsel for both parties for permission to appear amicus curiae. Counsel for appellant has no objection. At the time this motion was filed, counsel for respondent has not received his client's decision to permit or object to the applicant appearing amicus curiae.

This case concerns interpretation of the standard form pollution exclusion clause that the insurance industry submitted for the commissioner's approval in 1970. The court's interpretation of this clause will determine the availability of tens to hundreds of millions of dollars in insurance coverage for environmental cleanup in the State of Montana. Many commercial policyholders responsible for unintended environmental damage either have limited means to respond or are insolvent. If the court adopts the insurers' present day interpretation of the 1970 pollution exclusion clause, then the State of Montana may ultimately have to pay those cleanup costs.

The commissioner is informed and believes that in 1970 the insurance industry, represented by the Mutual Insurance Rating Bureau [MIRB] and the Insurance Rating Bureau [IRB], predecessors to the Insurance Services Organization [ISO], insurance advisory organizations authorized in MCA §3-16-102, submitted an explanatory memorandum to state insurance regulators, including Montana, on behalf of member insurers supporting regulatory approval of the pollution exclusion clause. The commissioner believes that the Montana Insurance Code requires that the pollution exclusion clause be interpreted consistently with that explanatory memorandum. While the parties in this case have raised a number of arguments, they have not addressed this important issue. The commissioner requests leave to participate in this case to ensure that this Court has the benefit of a record on appeal that includes all pertinent facts and legal arguments affecting this issue.

MEMORANDUM IN SUPPORT OF MOTION

Pursuant to the requirements of Rule 24, M.R.App.P., to “identify the interest of the applicant and . . . state the reasons why a brief of an amicus curiae is desirable,” the applicant provides the following:

1. **Interest of Applicant.**

The commissioner is responsible for the regulation of the insurance industry, which is the third largest industry in Montana. Insurance companies in Montana

now do more than \$2 billion worth of business every year. One of the commissioner's essential roles is the review and approval of policy form filings and rates for licensed carriers. Montana has a strong policy requiring regulation of the insurance industry to promote the public's interest. *See* MCA §33-1-311(3).

2. Reasons Why an Amicus Curiae Brief is Desirable.

One of the important issues in this case is the interpretation of the 1970 standard form pollution exclusion clause. Commercial general liability ("CGL") insurers appear to have used this clause in policies issued to Montana businesses over a 15-year period. Although this Court has not previously interpreted the 1970 pollution exclusion in CGL policies, the standard-form clause has generated significant litigation nationally between CGL policyholders and insurers, resulting in a near-even split in authority in the highest state courts of the nation. Some courts have concluded that the phrase "sudden and accidental" in the clause should be interpreted to have a temporal component and understood to mean only "abrupt and unintended."¹ Other courts have concluded that it should mean "unexpected and unintended."²

Many courts that have addressed this issue have approached it as a question of whether the policy language is ambiguous. Indeed there is patent ambiguity

¹ *See, e.g., Aetna Casualty & Surety Co. v. General Dynamics Corp.*, 968 F.2d 707 (8th Cir. 1992); *Aluminum Company of America v. Aetna Casualty & Surety Co.*, 998 P.2d 856 (Wash. 2000).

² *See, e.g., Textron, Inc. v. Aetna Cas. & Sur. Co.*, 754 A.2d 742, 751-54 (R.I. 2000); *Ala. Plating Co. v. U.S. Fid. & Guar. Co.*, 690 So.2d 331, 335-36 (Ala. 1996); *Morton Int'l Inc. v. Gen. Acc. Ins. Co. of Am.*, 629 A.2d 821, 848-56, 868-76 (N.J. 1993).

here, since the dictionary defines each alternative meaning of the term “sudden.” The commissioner believes, however, that ambiguity is a subsidiary question in this context under Montana law. Primarily, the Code requires insurers to interpret and apply the standard form pollution exclusion clause in a manner that is consistent with the explanatory memorandum submitted to the commissioner in seeking regulatory approval of the pollution exclusion clause. At a minimum, explanatory memoranda submitted to state insurance regulators should illuminate contradictory, and therefore ambiguous, dictionary definitions of the policy term “sudden.” The commissioner believes that preserving the integrity of Montana’s insurance regulatory scheme demands that insurers be held to their representations before regulators, even when they contest policy coverage based on diametrically opposite representations before the courts.

The Code prohibits insurers from issuing insurance policies or endorsement forms without the commissioner’s approval. M.C.A. § 33-1-501(1)(a). It requires the commissioner to reject any form that fails to comply with the Code, or that contains any inconsistent or misleading clauses that deceptively affect the risk assumed in the policy’s general coverage. M.C.A. § 33-1-502. The Code prohibits insurers from withholding information from the commissioner, or giving false or misleading information to the commissioner that would affect rates, rating systems, or premiums. M.C.A. § 33-16-107. And, if an insurance policy form contains a

provision that is not in compliance with the Code, it must be interpreted and applied as though it had been in full compliance. M.C.A. § 33-15-315.

The Code therefore requires that a standard form insurance policy clause be interpreted consistently with any explanatory memorandum filed by an insurer in seeking regulatory approval of the clause. Otherwise, the insurer would be free to assert policy interpretations that render its explanatory memorandum inconsistent, deceptive, misleading, and in violation of the Code.

Other courts and numerous commentators have concluded “sudden and accidental” means “unexpected and unintended” by considering the regulatory history of the 1970 standard form pollution exclusion clause.³ Those courts observe that, in 1966, through the definition of “occurrence,” the insurance industry broadened the meaning of “accident” in its then new standard form CGL policy to include gradual exposure to conditions. *See Morton*, 629 A.2d at 849-50, 852. Insurers did this to conform to prevailing judicial interpretation of the term “accident.” The insurance industry specifically marketed its new standard CGL form as providing coverage for gradual pollution damage. *Id.*

In 1970, the insurance industry sought to clarify that it did not intend to cover pollution damage that was expected or intended from the policyholder’s standpoint. *See Ala. Plating*, 690 So.2d at 335. The insurance industry filed a

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See, e.g., Textron, Inc. v Aetna Cas & Sur Co., 754 A 2d 742, 751-54 (R.I. 2000); *Ala. Plating Co v US Fid. & Guar Co*, 690 So 2d 331, 335-36 (Ala. 1996); *Morton Int'l Inc v Gen Acc. Ins. Co. of Am.*, 629 A 2d 831, 848-56, 868-76 (N.J. 1992)

standard form pollution exclusion clause for regulatory approval by the insurance commissioners in all 50 states, with an explanatory memorandum that stated:

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident

Morton, 629 A.2d at 852.

The insurance industry's explanatory memorandum did not state that the proposed standard form pollution exclusion clause barred coverage for all pollution damage unless the pollution was "abrupt," even when the policyholder did not expect or intend the pollution damage. It also did not state that the new clause reduced existing coverage. And it did not seek a rate reduction reflecting reduced coverage. Rather, the explanatory memorandum stated that the proposed clause "clarifies" the insurance industry's intent that its standard form CGL policy excluded pollution damage that is expected or intended from the policyholder's standpoint, but "continued" coverage for pollution caused damage when the pollution results from an "accident." As noted above, at that time, the standard form CGL policy explicitly broadened the meaning of "accident" to include gradual exposure to conditions resulting in property damage or bodily injury neither expected nor intended from the policyholder's standpoint.

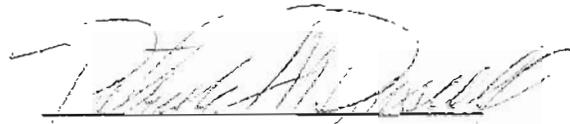
The Code requires that the 1970 standard form pollution exclusion clause be interpreted consistently with this explanatory memorandum filed by the insurance industry in seeking regulatory approval of this clause. This issue does not turn on whether the clause is ambiguous. Indeed, in *Morton*, the New Jersey Supreme Court found the clause to be unambiguous, concluding that “sudden and accidental” meant “unexpected and unintended.” *Morton*, 629 A.2d at 871-76. But the court in *Morton* nevertheless determined it to be vitally important to uphold the integrity of the state’s insurance regulation process, and refused to adopt the insurance industry’s new found interpretation of the standard form clause because it was inconsistent with the explanatory memorandum. *Id.* at 875. Montana policyholders deserve no less.

CONCLUSION

The commissioner’s participation as amicus curiae is both necessary and desirable. The commissioner does not intend to repeat arguments that the parties and other amicus curiae have already made to the court. But, from the commissioner’s perspective, the parties have not addressed the important statutory enforcement issue that is central to this case. The commissioner requests leave to address this issue to protect the integrity of the insurance regulation process, and to enforce the insurance industry’s financial responsibility for environmental cleanup

in Montana. The commissioner respectfully seeks leave to file an amicus curiae brief on a schedule convenient to the Court.

Dated this 15th day of November, 2004



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Certificate of Service

I hereby certify that I served true and accurate copies of the foregoing Motion for Leave to Participate As Amicus Curiae On Appeal by depositing said copies in the U.S. Postal Service, postage prepaid, addressed to the following:

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