Insurance Law Update:
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INSURANCE LAW UPDATE 2020
Presented by Professor Emeritus Greg Munro

University of Montana Alexander Blewett III School of Law

NOTE: This outline includes only selected insurance cases from Montana State and Federal Courts during the past year and includes only selected insurance issues from the cases reviewed.

MONTANA SUPREME COURT DECISIONS

SETTLING WITHOUT A RELEASE

High Country Paving, Inc., v. United Fire & Casualty Co., 2019 MT 297, 398 Mont. 191 (Justice Gustafson) [MTLA Amicus by Colin Gerstner]

Facts: A loaded equipment trailer belonging to High Country came unhitched during highway travel and collided with a vehicle killing its driver and catastrophically injuring its passenger. High Country carried insurance with United Fire in the form of (1) a CGL policy with aggregate limits of $2 million and per-occurrence limit of $1 million, (2) commercial auto liability coverage of $1 million, and (3) commercial umbrella coverage of $2 million. MTLA member Chris Edwards, representing the plaintiffs, demanded from United Fire a $3 million settlement without a release, and presented claimed economic damages of $1,549,881.25. United Fire defended High Country, and High Country also had its own counsel who objected to any settlement proposed without a release. United Fire tendered $3 million for settlement with a release, and Edwards refused. United Fire settled for $3 million without a release over its insured's objection, but continued as agreed to defend High Country.

High Country and Edwards negotiated an additional settlement for $1.275 million, and United Fire refused to cover the settlement, since it had paid the limits of the Business Auto and Umbrella coverage, and asserted that the CGL coverage did not apply. High Country sued for bad faith and breach of contract in Federal Court in front of Judge Molloy who certified the following question to the Montana Supreme Court.

Certified Issue: Where liability is reasonably clear, is it a breach of an insurer's duty to its insured to pay policy limits to a third party in a motor vehicle accident without a release of its insured, where claimed special damages are below policy limits but total damages (including general damages) exceed policy limits?

Held: It is not a breach of the insurer's duty to its insured to pay policy limits to a third party, if:
(1) Liability is reasonably clear,
(2) total damages caused by the accident are reasonably proven to exceed policy limits, and
(3) the insurer continues to meet defense obligations as required by the policy.

Reasoning: The insurer has two duties to settle. First, ***Ridley*** (1997) required payment of medical expenses in advance of settlement if liability is reasonably clear, while ***Shilanek*** (2003) required such payments without a release if they exceeded the policy limits. Second, the insurer has a duty to "attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear" under the UTPA, 33-18-201(6). Shilanek (2003) said, "nothing in the UTPA requires a general release of the insured or the insurer as a condition to a §33-18-201(6) or (13), MCA settlement." The Court rejected the idea that general damages could not be basis for requiring settlement without a release. The Court said:

> When it is reasonably clear that the amount required for a final settlement of all claims–including general damages reasonably shown to have been caused by the insured's conduct–exceeds policy limits, an insurer has a duty to pay policy limits to an injured third party, without conditioning such a payment on obtaining a release for it insured.

The insurer's duty to continue defending after such settlement arises from the policy language and not from the UTPA.

INSURER'S DUTY BASED ON SAFETY PROGRAM

Maryland Casualty v. Asbestos Claims Court, 399 Mont. 279 (Justice Sandefur) [MTLA members Alan McGarvey & Dustin Leftridge]

Facts: Maryland Casualty Company was the worker's compensation insurer for W.R. Grace in its vermiculate mining operations at Libby. The vermiculite was contaminated by asbestos. Maryland Casualty developed a safety program under which it provided asbestos related professional medical evaluations of employees, made recommendations for radiological monitoring of the employees and for determining whether and under what conditions an employee could continue to work for Grace. Maryland Casualty was the only entity performing the industrial hygiene, monitoring and testing. It failed to inform workers of test results indicating lung disease and then collaborated with Grace in developing a program to minimize liability when it became apparent that workers who were not moved to other jobs would become sicker.

Procedure: Judge Amy Eddy, presiding over the Asbestos Claims Court, granted the lead plaintiff summary judgment on the duty element of his negligence claim concluding that:

> Under circumstances where a workers' compensation insurer has developed a Safety Program, of which a duty to warn employees of hazards is an essential component, and through its own affirmative action of engaging in medical monitoring of workers, has actual knowledge a known hazard is injuring workers, the workers' compensation insurer has a common law duty to warn workers of the hazard.

Maryland Casualty petitioned for supervisory control which was granted, and the Supreme Court affirmed Judge Eddy and remanded for further proceedings.

Holding 1: Maryland owed a direct common law duty of care under Restatement of Torts § 324A(b) to protect the plaintiff workers from the known risk of exposure to airborne asbestos.

> ...it is beyond material dispute that MCC's performance of the employee-specific medical monitoring of workers constituted an assumption of that distinct aspect of the performance of Grace's safety duty to workers, and thus owed a direct common law duty of care to Hutt and other Grace workers under § 324A(b) to use reasonable care to protect them from the known risk of exposure to airborne asbestos.

Holding 2: "...we hold that the scope of duty owed by MCC to Hutt and other Grace workers was to use reasonable care to warn them of the known risk of exposure to airborne asbestos in the Grace workplace.

Reasoning: The Court adopted Restatement of Torts § 324A which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, of (b) he has undertaken to perform a duty owed by the other to the third persons, or (c) the harm is suffered because of reliance of the other or a third person upon the undertaking.

The Court said:

> ...we hold that our elemental formulation of 324A is a distinct prerequisite in determination of the threshold question of whether an alleged tortfeasor owed a common law duty of reasonable care to a particular claimant or class based on an affirmative undertaking to render aid or services to a 3rd party who was the direct cause of the harm.

The Court noted that generally, an insurer provides insurance and risk management for the benefit of the employer and does not by those acts alone assume part of the employer's duty of safety to the workers. Here, however, Grace was not independently engaged in the safety programs undertaken by MCC, so that MCC had assumed a duty the scope of which was to warn.

ISSUE PRECLUSION: UIM AS CONTRACT, NOT TORT

Reisbeck v. Farmers Ins. Exchange, DA 19-319 (Mont. 6/30/20) (Justice Shea) [MTLA members, Dennis Conner, Keith Marr & James Conner]

Facts: Reisbeck, who was insured for UIM by Farmers, was rear-ended by King who had $50,000 limits of BI coverage with Progressive. Reisbeck litigated his tort case against King and the jury found liability and $10,000 damages for pain and suffering with $0 for loss of earnings, earning capacity, emotional distress or loss of established course of life. Progressive then agreed to vacate the verdict and settled for the $50,000 BI limits on an agreement that Reisbeck would forego motions for new trial and appeal. Reisbeck demanded UIM benefits, and Farmers refused on the ground of "issue preclusion," arguing that a jury had already adjudicated his damages at $10,000.

Held: The underlying tort damage verdict does not preclude the issue of damages under a UIM policy.

Reasoning: For "issue preclusion," the issue in the prior adjudication must be identical to the issue in the action in question. ***Denturist Ass'n of Mont.*** (Mont. 2016). A UIM claim "presents a controversy between an insurer and an insured over the interpretation of an insurance contract," and "should be resolved by contract law" ***Braun*** (Mont. 1990). The Farmers UIM coverage requires that "any applicable bodily injury liability bonds or policies have been exhausted by payment of judgment or settlements." There was no judgment, only settlement. The Court noted that Progressive paid five times the verdict in settlement and said, "A publicly traded insurer does not stay in business long by voluntarily paying a settlement that is 5 times the verdict out of the goodness of its heart. Progressive might be progressive but it isn't stupid."

The Court noted that the issue in the underlying action was whether King was liable to Reisbeck in tort; the UIM action, whether and to what extent Farmer's is liable in contract under the UIM coverage.

Dissent: Justices Rice, Baker and McKinnon dissented on ground that Reisbeck had availed himself of litigation in the courts to adjudicate his damages and then abandoned the appeal which should preclude the issue under the UIM coverage.

PERSONAL JURISDICTION OVER FOREIGN INSURER

Gateway Hospitality Group et al v. Philadelphia Indemnity Ins., 2020 MT 125, 400 Mont. 80 (Justice Rice) [MTLA members Jory Ruggiero & Dominic Cossi]

Facts: Gateway of Ohio manages multiple hotels for Hilton in locations in Montana. When it filled out its application for insurance with Philadelphia Indemnity, it disclosed its operation of the hotels in Montana. The policy provided coverage for "any wrongful act committed anywhere in the world." When Gateway and its hotels were sued by employees for withholding tips from banquets, Philadelphia refused to defend under the policy's intentional employment practices exclusion. Gateway settled with the employees for over $4 million and then sued Philadelphia in the Fourth Judicial District in Montana. The insurer moved to dismiss on multiple grounds, and Judge Vanatta denied the motions. The Supreme Court decided to treat the appeal as one of Supervisory Control, because the case involves "a constitutional issue of statewide importance and impact" that merits such review, and limited its review to the motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2).

Held: Montana could exercise personal jurisdiction under Rule (4)(b)(1)(D) of the long arm statute language "contracting to insure any person, property, or risk located withing Montana at the time of contracting."

Reasoning: Philadelphia failed to appear and defend the claims in Montana. It was aware that Gateway would be providing management services world-wide. Montana hotels were listed in the application. It was more than mere foreseeability that a claim could arise in Montana. The insurer could have contractually excluded Montana from policy coverage. The company received authorization from the Montana Insurance Commissioner for sales, transactions and service of process in Montana. Litigating in Montana imposed no greater burden on the insurer, and Montana courts provide efficient and convenient adjudication. Montana has significant interest in declaratory actions where the underlying suit is brought in Montana and the insurer refuses to defend.

NON-TAXABLE COSTS AND THE INSURANCE EXCEPTION

King v. State Farm Mutual Auto Ins., 2019 MT 208, 397 Mont. 126 (Justice Gustafson)

Facts: Kyra King suffered injuries in an auto accident near Malta. She claimed State Farm UIM benefits under the auto in which she was a passenger. State Farm offered only $20,000, but the Malta jury awarded her $410,000. She moved for attorney fees and $12,758.35 costs under the Insurance Exception to the American Rule. The trial court awarded attorney fees, but denied her statutory costs because they were not filed within 5 days of the verdict as required by MCA § 25-10-501. The judge denied King's non-taxable costs, because she was not convinced they were allowed under the Insurance Exception to the American rule.

Held: Non-taxable costs are recoverable under the Insurance Exception to the American Rule. The statutory requirement of 25-10-501 for filing of costs within 5 days does not apply to non-taxable costs.

Reasoning: The Court in Mlekush I (Mont. 2015) and Mlekush II (Mont. 2017) implicitly recognized non-taxable costs as being recoverable under the Insurance Exception. The Court now made such recovery explicit when an insured is forced to assume the burden of legal action to obtain the full benefit of the policy. The Insurance Exception is a rule created by the Court and removes the issue of non-taxable costs from the statute. Hence, the time limit does not apply. The insured should file the request for non-taxable costs with or before the request for fees for convenience and efficiency.

MONTANA FEDERAL DECISIONS

BAD FAITH & "REASONABLE BASIS" DEFENSE

High Country Paving v. United Fire & Casualty, CV-18-163-M-DWM, 2020 WL42722, 1/3/20 (Judge Molloy)

Facts: High Country Paving was liable for the death of one claimant and catastrophic injury to another. Its insurer, United Fire & Casualty, paid out the $3 million limits of the business automobile liability and umbrella policies of its insured, High Country Paving, over High Country's objection and without securing a release for the insured. High Country sued for bad faith and breach of contract in federal court, and Judge Molloy certified the question whether paying the limits without a release in the circumstances was a breach of the insurer's duties. The Montana Supreme Court answered that it was not if (1) liability is reasonably clear, (2) total damages caused by the accident are reasonably proven to exceed policy limits, and (3) the insurer continues to meet defense obligations as required by the policy.

United Fire & Casualty moved for summary judgment on the ground that it had a "reasonable basis" for its action which is a complete defense to bad faith under MCA § 33-18-242(5) but is not a defense to breach of contract. ***Freyer*** (Mont. 2013).

Holding 1: United Fire's motion for summary judgment is denied subject to renewal later as a motion for judgment as a matter of law, since determination of whether United had a "reasonable basis" depends on the jury's finding of fact on the reasonable settlement value of the claim.

Reasons: The fact issue is the reasonable settlement value of the case to be decided by the jury. Whether a party acted reasonably is a fact issue for the jury. Whether the party reasonably interpreted the law is a coverage determination and is a question of law for the court. ***Freyer*** (Mont. 2013).

Freyer (2013) provided that, determining whether there was a reasonable basis requires surveying the legal landscape as it existed during the relevant time period, assessing the insurer's defense in light of that legal landscape, and, determining whether the law at that time provided sufficient guidance to a reasonable insurer that the grounds for its actions were not meritorious.

Judge Molloy noted that the ***Watters*** and ***Shilanek*** decisions were legal landscape that supported United's action, and the Supreme Court's answer to the certified question apparently came to the same conclusion. But, the fact issue that still remains is the reasonable value of the settlement which High Country disputed.

Holding 2: Summary Judgment for High Country on coverage under the CGL policy.

Reasons: The CGL policy's "Aircraft Auto or Watercraft " exclusion and the "Multiple Liability Coverages Limitation" endorsement unambiguously exclude coverage, but the policy's non-compliance with the Montana Property & Casualty Insurance Policy Language Simplification Act unambiguously requires that the exclusions cannot be enforced.

PERSONAL JURISDICTION OVER FOREIGN INSURER

FNB Sioux Falls as PR of Travis Carlson v. Estate of Eric Carlson and Grinnell Mutual Reinsurance, 2020 WL 1434276, 44 MFR 218, 3/24/20 (U.S. Magistrate Cavan) [MTLA members, John Amsden & Justin Stalpes)

Facts: Travis Carlson, a South Dakotan in the fencing business, had a business auto policy with Grinnell Mutual Reinsurance. While working on a ranch in Carter County, Montana, his twin brother, Eric, arrived in a vehicle and confronted Travis which resulted in a vehicle chase and the firing of shots by Eric into Travis's truck. When the vehicles collided, Eric shot Travis to death and, Travis was found dead through suicide the next day. FNB as PR sought UM or UIM benefits under Grinnell's policy, and sued in Montana Federal District Court. Grinnell moved to dismiss for lack of personal jurisdiction.

Grinnell is headquartered and incorporated in Iowa. It is accredited in Montana, and nine insurers in Montana sell Grinnell insurance. Its ads say it is "a valued member of Montana's business community," and "We live where you live" as a "local neighbor." The company's only employee in Montana was hired in 2018 and constituted .0012% of its workforce. Its Montana gross premiums were never more than 1% of its total gross premiums, and it never issued a single direct policy to anyone in Montana, only reinsurance. The company website welcomed six new Montana mutuals to the "Grinnell Mutual Family" which "marks the beginning of our entrance into the State of Montana." However, nationally Grinnell worked with more than 1600 agencies and 250 local mutual insurers.

Held: Grinnell is not "essentially at home" in Montana and not, therefore, subject to general personal jurisdiction under MRCivP 4(b)(1).

Reasoning: Even though Grinnell could be viewed as doing business in the state, Rule 4(b)(1)(A) requires that the "defendant's suit-related conduct create a substantial connection with the forum state" citing ***Milky Whey*** (Mont. 2016); ***Walden*** (US 2014). The Court noted that Grinnell's reinsuring in Montana was unrelated to the policy at issue which involved a South Dakota insured, South Dakota agent, an Iowa reinsurer and a vehicle in South Dakota at the time of contracting. The Court distinguished between cases where the insured is sued by a third party and the insurer must come and defend in a foreign state, and those where the insured brings a first party claim in a foreign state. In the case of the third party suit, the insurer has promised to appear and defend wherever the accident and resulting lawsuit occur. The Court also said this case was similar to ***Carter*** (Mont. 2005) where the accident happened in Montana, Carter was resident in Mississippi, and the car was garaged there, so there was no jurisdiction under the long arm statute.

The Court found that MCA § 33-2-1216 which provides that the reinsurer must "agree to the jurisdiction of this state" is only for purposes of the reinsurance credit which is the subject of the statute and does not subject the reinsurer to general jurisdiction of Montana.

POLLUTION EXCLUSION–LIABILITY FOR EPOXY PAINT INJURY

Swank Enterprises v. United Fire & Casualty, CV-19-00179-M-DWM, 44 MFR 219, 4/7/20 (Judge Molloy)

Facts: T&L Painting was a subcontractor to contractor Swank Enterprises which built the Butte-Silverbow Metro Wastewater Treatment Plant in 2015. T & L agreed to indemnify Swank for liability arising from T & L's work and to list Swank as an additional insured under its CGL policy with United Fire & Casualty. Cogswell Agency issued a Certificate of Liability Insurance showing Swank as the "Certificate Holder," but Swank was not listed as an additional insured.

Two T&L employees sued Swank and the paint manufacturer for bodily injury caused by the epoxy paint they applied. Swank tendered the suit to United Fire which denied coverage on the basis that Swank was not an additional insured, and coverage was barred by the pollution exclusion.

Held: The pollution exclusion bars coverage regardless of whether Swank is an additional insured which Judge Molloy called a "close question."

Reasoning: The Total Pollution Exclusion bars coverage for "'bodily injury' or 'property damage' which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time."

Pollution is defined as follows: "Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Judge Molly noted that courts have taken two approaches to interpreting the pollution exclusion and cites ***Apana*** (9th Cir. 2009, collecting cases). Courts finding the exclusion clear and unambiguous apply it literally, while courts that find it ambiguous or in violation of reasonable expectations, limit it to traditional environmental pollution. He concluded that Montana finds it clear and unambiguous so as to apply it literally citing ***Sokoloski*** (Mont. 1999). Consequently, he held injury from the epoxy paint to be barred by the Total Pollution Exclusion.

Note: ***Sokoloski*** (Mont. 2009) is an unfortunate decision for consumers that oversimplifies the complex question of what constitutes a pollutant, and makes the exclusion so broad as to violate

the insured's reasonable expectations. Are premises slip and falls on any liquid automatically barred from coverage by the Total Pollution Exclusion? Can any product liability claim for injury by a dangerous and defective vaporized or liquid product be insured?

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INSURANCE COVERAGE FOR METH DAMAGE

United States Fire Ins. v. Greater Missoula Family YMCA, CV-19-21-M-DWM, 2020 WL1809567, 4/9/20 (Judge Molloy)

Facts: The Missoula YMCA discovered that an employee had been using meth on the premises of its daycare and had constructed a meth den inside a cabinet by installing lights, shelves, baffles, and an inside lock. Testing revealed that she had likely been using meth in the kitchen, bathroom and laundry room and that the HVAC system spread contamination throughout the premises causing much damage. She plead guilty to endangering the welfare of a child, drug possession and criminal mischief.

Procedure: US Fire, as the property insurer for the YMCA, filed a declaratory action to bar coverage under its pollution and criminal acts exclusions.

Insurance: The pollution exclusion barred coverage arising out of the "discharge, dispersal, seepage, migration, release or escape of 'pollutants' unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the 'specified causes of loss'."

The policy defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

"Specified causes of loss" included "fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse, volcanic action; falling objects; weight of snow, ice or sleet; water damage."

The criminal act exclusion bars coverage for any "dishonest or criminal act..." but has an exception for "acts of destruction by [YMCA] employees." *Black's* defines "destruction as "substantially detract from the value of the property." The Court found the damage to the cabinet and use of meth in areas where the HVAC would spread the contamination constituted such acts of destruction excepting the damage from the exclusion.

Hence, vandalism and smoke are exceptions to the pollution exclusion.

Holding 1: The employee's act was "vandalism" which excepted the damage from the pollution exclusion.

Reasoning: U.S. Fire must prove that the exclusion applies, and meth is a "contaminant" within the meaning of the exclusion. The YMCA must prove the exception to the exclusion. Vandalism isn't defined in the policy, but the dictionary definition is commonly understood to require deliberate destruction or damage to property *citing Black's; Websters.* However, courts hold that requirement is met when one acts with intentional disregard for the property rights of another which is what the Court found here.

Holding 2: The particles that result from meth use are "smoke" so that the damage is excepted from the pollution exclusion.

Reasoning: "Smoke" is not defined by the policy, and case law gives little guidance. Dictionary definitions describe the "visible suspension of carbon or other particles in the air emitted from a burning substance", and also refer to the inhaling and exhaling of a gaseous product of a burning material such as a cigarette or other illicit substances, again *citing Webster's.* The Court concluded that, when the employee used meth, the heated substance resulted in particles being suspended in the air consistent with the definition of smoke. The Court noted that the policy also created ambiguity by using the term "smoke" both to define excluded pollutants, and in the list of "specified causes of loss" which removes it from the exclusion, which ambiguity must be resolved for the insured.

Holding 3; The employee's act was an "act of destruction" which excepted the damage from the "criminal act exclusion."

Reasoning: The criminal act exclusion barred coverage for any "dishonest or criminal act" but provided an exception for "acts of destruction by [YMCA] employees." *Black's* defines "destruction" as "substantially detract from the value of the property." The employee's acts of defacing, altering and damaging the cabinet "den" and using meth where the HVAC system would contaminate the premises was more than necessary to get high and meets the definition of destruction.

NINTH CIRCUIT MONTANA CASES

CLAIMS MADE-AND-REPORTED POLICY

Banjosa Hospitality v. Hiscox, 18-35905, 788 Fed. Appx. 591 (Mem) (Unpublished 9th CA, 12/19/19) Banjosa claimed realtor malpractice when its deal to buy a Montana hotel fell through. The defendant realtor had coverage under a claims-made-and-reported policy that expired in 2013. The insurer, Hiscox, Inc., refused coverage on the ground that the claim was not made and reported timely. The realtor settled by assigning his rights against Hiscox, Inc.. Banjosa filed suit against Hiscox in Federal Court in Montana, and Judge Cavan agreed with Hiscox that the claim was not timely reported. Banjosa appealed to the Ninth Circuit.

Holding 1: The claim was not timely reported. The policy defines a claim as "any notice received by the insured as a demand for damages or for non-monetary relief." If two emails threatening litigation but not demanding damages or non-monetary relief constituted a "claim," then they were not reported during the policy term. If the filing of the complaint constituted a "claim", then the claim was made after the policy had expired. Either way, there was no coverage.

Holding 2: Montana's "notice prejudice" rule from ***Gleason*** (Mont. 2015) and ***Greytak*** (2015) does not apply to a claims-made-and-reported policy. The argument has been uniformly rejected, and the Court noted that Banjosa could not cite a single jurisdiction that applied the rule to claims-made policies.

Holding 3: Reasonable expectations doctrine cannot apply where "terms of the policy clearly demonstrate an intent to exclude coverage." ***Fisher*** (Mont. 2013). One cannot have a reasonable expectation of coverage if the claim was neither made nor reported.

Note: The policy behind "notice prejudice" is that the insured should not lose the core promise of the insurance because of technical conditions of the policy as long as the insurer is not prejudiced. However, courts have held that the requirement that the claim be made and reported in the claim period is the essence of the deal made in claims-made-and-reported policies. It is not just a technicality, and courts uniformly enforce the provision.

HOMEOWNERS' INSURANCE COVERAGE FOR SEXUAL ASSAULT

American Reliable Ins. Co. ***Lockhard,*** 793 Fed. Appx. 505,18-35758 unpublished (9th Cir. 12/3/19) [MTLA members Saidee Johnston & Terry MacDonald]

Facts: Nelson sued Lockhard for sexual assault that occurred while she and Lockhard were employees of the United States Fish & Wildlife Service sharing a cabin in Glacier Park. She alleged he negligently proceeded with sex after she was asleep on her sleep medication, while he claimed the sex was consensual. Lockard was convicted of knowingly engaging in sexual contact without the other's permission. Lockhard tendered the civil claim to his homeowners insurance carrier which sought a declaratory judgment of no coverage on the ground that there was no "occurrence" under the policy and as many as five applicable exclusions blocked coverage. Judge Christensen denied the insurer summary judgment, and tried the fact issues. He found that the sexual assault was intentional so that there was no "occurrence" but concluded that Lockhard's use of work emails to tell "his side of the story," though an intentional act, was an "occurrence" under ***Fisher*** (Mont. 2016), because the damages were objectively unintended and unexpected by Lockhard. Cross appeals to the Ninth Circuit followed.

Held: Christensen erred. The harm resulting from Lockhard's conduct was objectively expected, so as to be intentionally caused so that there was no "occurrence" and no coverage.

Reasoning: ***Strecker*** (Mont. 1990) established that "if the negligent act is based upon an inherently intentional act, then coverage does not exist. However, ***Fisher*** (Mont. 2016) held that "an 'accident' may include intentional acts so long as the consequences of those acts are not objectively intended or expected from the standpoint of the insured." The two-part test from ***Fisher*** is" (1) whether the act itself was intentional; and (2) if so, whether the consequences or resulting harm stemming from the act was intended or expected from the actor's standpoint." The Court simply found that, on the record, the resulting harm was intended or expected making it intentional.

STACKING OF BODILY INJURY LIABILITY COVERAGE

Durbin v. Mountain West Farm Bureau Ins., 789 Fed. Appx. 607 (mem) unpublished (9th Cir. 1/7/20)

Facts: Mountain West Farm Bureau paid third-party claimants a $500,000 single limit of BI Liability coverage under a policy that provided "the most we will pay" as a result of "any one 'accident' is the Limit of Insurance for Liability Coverage shown in the Declarations." The Declarations showed $500,000. Durbins moved Judge Christensen to certify the stacking question to the Montana Supreme Court, and he denied the motion. Durbins had accepted a full assignment of the tortfeasor's rights against the insurer and contended that made the BI coverage personal and portable.

Holding 1: If enforceable, the language clearly prohibits stacking, and the reasonable expectations doctrine cannot apply when the policy terms clearly demonstrate an intent to exclude coverage. ***Fisher*** (Mont. 2013).

Holding 2: The terms do not violate public policy and are enforceable.

Reasoning: "Provisions that defeat coverage for which the insurer has received valuable consideration are void as against public policy" ***Hardy*** (Mont. 2003) If the insurer provides multiple first-party coverages that are "personal and portable," the insurer must stack the coverage. ***Cross*** (Mont. 2019). To be "personal and portable" the coverage must apply in all circumstances. ***Jacobson*** (Mont. 1982) BI Liability coverage is not "personal and portable", because it applies only when the insured is operating a vehicle insured under the coverage.

Holding 3: The fact that the rights under the policy were assigned does not make the policy BI coverage "personal and portable".

Reasoning: Even if assigned, the insurance still applies "only with respect to an accident arising out of the ownership, maintenance or use of an auto or trailer."

Held: Judge Christensen's decision not to certify was affirmed.

Reasoning: Certification rests in the sound discretion of the federal court, and Montana law provides ample authority regarding when coverage is "personal and portable" for purposes of stacking.

STACKING OF AUTO LIABILITY COVERAGE

Morris et al v. Estate of Bishop and Progressive Northwestern Ins. 775 Fed. Appx. 356 (mem) (9th Cir. 8/22/19)

Facts: Bishop had auto liability insurance with Progressive when he negligently killed Robinson in a motor vehicle accident. Bishop's policy had BI Liability Coverage, and the Declarations page showed bodily injury and property damage coverage for each vehicle as "$300,000 combined single limit each accident." Progressive paid the estate and siblings a $300,000 limit without a release and later stipulated to judgment of $900,000, but refused to pay the balance of the judgment.

Procedure: Judge Haddon granted summary judgment to Progressive , and plaintiffs appealed.

Held: Haddon affirmed. The BI coverage can't be stacked.

Reasoning: MCA § 33-23-203 is the stating point for determining stacking, and it "defers to the provisions of the subject policy." ***Cross*** (Mont. 2019). The policy's provisions here are identical to those in ***Cross*** which were found to "specifically and unambiguously" block stacking. Anti-stacking provisions as applied to liability coverage have not been voided for public policy considerations, so they are enforceable to prevent stacking.

CONSTRUCTION INSURANCE: INSURED'S WORK EXCLUSION

Northland Casualty v. Mulroy(Yorlum Ranch), Northwest Log Homes and Keim, 789 Fed. Appx. 60, 19-35085 (9th Cir. 12/27/2019)

Facts: Contractor Keim built a log home and failed to treat the logs for insects. A wood-boring beetle infestation severely damaged the home and guest home. Keim tendered defense to his insurer, Northland which refused coverage because the policy excluded "'property damage' to 'your work' arising out of it or any part of it." Keim settled and assigned his rights to the owner. Northland which had defended. Northland ultimately won a dec action from Judge Christensen on the ground that the damages arose from Keim's work and were subject to the exclusion.

Held: Christensen affirmed. The damages arose from failure of Keim to treat the logs.

Reasoning: The subcontractor exception does not apply, because the log supplier was merely a material supplier who did not perform work at the work site and did not manufacture materials according to the contractor's specifications. ***Mosser*** (6th Cir. 2011).