IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0533

NATIONAL INDEMNITY COMPANY,

Plaintiff/Appellant/Cross-Appellee,

v.

STATE OF MONTANA,

Defendant/Appellee/Cross-Appellant,

and

TERRY JELLESED, *et al*.,

Intervenors.

UNITED POLICYHOLDERS' *AMICUS CURIAE* BRIEF IN SUPPORT OF THE STATE OF MONTANA

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UNITED POLICYHOLDERS' *AMICUS CURIAE* BRIEF IN SUPPORT OF THE STATE OF MONTANA

I. INTRODUCTION

In representing the interests of insurance consumers across the country, United Policyholders ("UP") strives to ensure that policyholders get the benefit of their insurance bargain. Insurance policies use standard-form, boilerplate language, not negotiated by policyholders, and courts in Montana apply the "plain meaning" and construe ambiguities against the insurance-company drafter. *Farmers All. Mut. Ins. Co. v. Holeman*, 1998 MT 155, ¶25, 289 Mont. 312, 961 P.2d 114. Ambiguities are considered from the perspective of a reasonable person "not trained in the law or insurance business." *Leibrand v. Nat'l Farmers Union Prop. & Cas. Co.*, 272 Mont. 1, 10, 898 P.2d 1220, 1225 (1995). Montana courts construe grants of coverage broadly and exclusions narrowly. *Leibrand*, 272 Mont. at 10, 898 P.2d at 1224; *Swank Enters., Inc. v. All Purpose Servs., Ltd.*, 2007 MT 57, ¶27, 336 Mont. 197, 154 P.3d 52 (exclusions are "contrary to the fundamental protective purpose of an insurance policy"); *Farmers Union Mut. Ins. Co. v. Oakland*, 251 Mont. 352, 356, 825 P.2d 554, 556 (1992).

This Court has explicitly adopted the reasonable-expectations doctrine. *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 180, 656 P.2d 820, 824 (1983) (citation omitted). This doctrine "protect[s] consumers from confusing or unclear contract language" because insurance policies, "rather than being the result of anything resembling equal bargaining between the parties, are truly contracts of adhesion." *Winter v. State Farm Mut. Auto. Ins. Co.*, 2014 MT 168, ¶19, 375 Mont. 351, 328 P.3d 665 (quotation omitted); *see also Meadow Brook, LLP v. First Am. Title Ins. Co*., 2014 MT 190, ¶15, 375 Mont. 509, 329 P.3d 608. These rules help effect the "fundamental protective purpose of an insurance policy." *Swank,* ¶27.

The positions taken by National Indemnity Company ("NIC") and its *amici*, Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association (together, "Insurance *Amici*"), eviscerate the policy's "dominant purpose of indemnity," *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981), and ignore the intent of the standard-form provisions drafted by the insurance industry and incorporated, without substantive change, into NIC's policy. In drafting the Comprehensive General Liability insurance policy (the "CGL Policy"), the industry sought to

satisfy the demands of the insurance-buying public for broader coverages and made representations to insurance regulators that undercut the positions now taken by NIC and the insurance industry, as represented by Insurance *Amici*.

The Court should reject insurer arguments to rewrite the insurance contract and, instead, should apply the policy language itself. In so doing, the Court should adopt as the governing law in Montana the insurance industry's express intent favoring the continuous trigger of coverage and plain meaning of "all sums," and reject the expansive reading of the pollution exclusion that could negate the fundamental protective purpose of insurance for Montana insureds.

II. STATEMENT OF ISSUES, STATEMENT OF THE CASE, AND STATEMENT OF FACTS

UP adopts the Statement of Issues, Statement of the Case, and Statement of Facts set forth in the State of Montana's Brief.

III. ARGUMENT

The District Court correctly held that NIC owes the State a complete defense and indemnity for long-tail asbestos claims under the "all sums" language in its insurance policy. That holding is consistent not only with the insurance policy language; it also accords with the insurance industry's stated intent when it drafted the CGL

Policy and marketed it to policyholders. Detailed memoranda, publications, and public statements by the insurance industry, called "drafting history," reflect this intent. As explained in the drafting history, the standard-form language supports a continuous-injury trigger of coverage, requires enforcement of the CGL Policy's plain "all sums" language, and limits the application of the pollution exclusion to active polluters.

Contrary to NIC's and Insurance *Amici's* purported "plain meaning" arguments, which mash together policy provisions applicable to trigger on the one hand and scope of coverage on the other, the "during the policy period" trigger-of-coverage language found in policy definitions "does not define the extent of coverage." *State of California v. Cont'l Ins. Co*., 55 Cal.4th 186, 199 (2012) ("[T]he 'during the policy period' language that the insurers rely on to limit coverage, does not appear in the 'Insuring Agreement' section of the policy and therefore is neither 'logically [n]or grammatically related to the 'all sums' language in the insuring agreement.'").[1] The insuring agree-

[1] The similarities between *State of California* and the facts here are notable. Both cases involve State policyholders with long-tail coverage under standard-form CGL insurance policies. Under "principles of equity and sound insurance policy interpretation considerations,"

Footnote continued…

ment, which Montana construes broadly to favor coverage, promises "all sums" up to the limits of any triggered policy. *Id.* at 200. Similarly, the pollution exclusion was intended to apply to active polluters, not governmental regulators. *Niagara Cnty. v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 418 (N.Y. App. Div. 1981).

A. The Court Should Not Allow Insurers to Rewrite History.

As past is prologue, a brief history of the CGL Policy helps set the stage. Insurers have jointly drafted policy forms and language since the nineteenth century and promulgated the first standard CGL Policy in 1941 to protect policyholders against expanding concepts of tort liability and concomitant weakening of privity in contract.[2] Prior liability insurance forms covered only certain, enumerated "hazards." U.S. insurers promoted their new "*Comprehensive* General Liability"[3] policy form as covering all risks not specifically excluded, in part to compete with broader, highly successful liability insurance developed

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the California Supreme Court concluded "that the all sums approach to insurance indemnity allocation applies to the State's liability for successive or long-tail property damage." 55 Cal.4th at 202.

[2] Eugene R. Anderson, et al., *Insurance Coverage Litigation* §1.04[B] (2d ed. 1999 & Supp. 2020).

[3] The insurance industry renamed it the "*Commercial* General Liability" Policy in 1986 to side-step the true comprehensive intent of the CGL Policy. *Id.*

by Lloyd's of London and to continue to develop policy standardization, which allows for the mass marketing of insurance.[4]

Most jurisdictions, since at least the 1940s, have required insurers to obtain regulators' approval of substantive changes to standard-form CGL policy language. *In re Ins. Antitrust Litig.*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part*, 506 U.S. 814 (1992), *on remand*, 5 F.3d 1556 (9th Cir. 1993). In drafting these policy forms and clauses and obtaining the requisite regulatory approval, the industry created a wealth of analyses and regulatory filings that explain the intent of the adhesion-contract language included in CGL insurance policies, a "legislative history" of the CGL Policy. This brief recounts that history. *See Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 10 Cal.4th 645 (1995).

[4] *See, e.g.*, *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F.Supp. 1485 (S.D.N.Y. 1983), *modified,* 748 F.2d 760 (2d Cir. 1984); *see also Insurance Coverage Litigation* §1.04[B] and insurance-industry authorities cited therein.

B. The Policy Language and Drafting History Compel Adoption of a "Continuous Trigger" for Progressive Bodily Injury Claims.

Both the NIC policy language and CGL drafting history demonstrate that "gradual" or "continuous" injury that takes place over years triggers coverage.

1. The CGL Policy Supports a Continuous Trigger.

In the standard-form language at issue, NIC agreed to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damage because of bodily injury . . . caused by an occurrence." NICOApp.097. The policy also uses standard-form definitions, defining "occurrence" as "an event, or a continuous or repeated exposure to conditions, which results in bodily injury . . ." NICOApp.105. It defines "bodily injury" as "bodily injury, sickness or disease sustained by any person which occurs during the policy period . . . ." NICOApp.104.

Thus, as an initial matter, NIC's policy covers liabilities for bodily injuries resulting during the policy period, regardless of when the injury-causing act took place. As this Court has said, the occurrence definition "contains no temporal component and focuses instead on the insured's expectations regarding damages. Thus, acts that take

place over a significant period of time, but cause unexpected damage fall within the definition of an 'occurrence' and are entitled to coverage." *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc*., 2005 MT 50, ¶21, 326 Mont. 174, 108 P.3d 469. When injury is progressive and ongoing, as with asbestosis, the vast majority of courts have adopted the continuous injury trigger.[5] The Court should adopt the continuous trigger as the one supported by the plain policy language, relevant drafting history, and the CGL Policy's dominant purpose of indemnity.

2. The Drafters of the Standard-Form CGL Policy Contemplated and Selected a Continuous Trigger, While Rejecting Other Triggers of Coverage.

Most courts considering the CGL Policy's drafting history have found it relevant and relied on it to determine coverage. *Pac. Hide &*

[5] *See, e.g., Keene,* 667 F.2d at 1041(adopting continuous trigger, "interpreting these contracts in a manner that is equitable and administratively feasible and that is consistent with insurance principles, insurance law, and the terms of the contracts"). Courts choosing other triggers early on adopted the trigger position that maximized coverage for the policyholder. *E.g., Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co*., 682 F.2d 12 (1st Cir. 1982) (adopting policyholder's manifestation trigger to promote coverage); *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.,* 451 F.Supp. 1230, 1233 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980) (adopting exposure trigger sought by policyholder).

Fur Depot v. Great Am. Ins. Co., No. CV-12-36-BU-DLC, 2013 WL 11029340, at *3 (D. Mont. July 31, 2013). "[T]he presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues." *Montrose,* 10 Cal.4th at 670.

Early on, and again to compete with the broader coverage available from Lloyd's, the insurance-industry drafters recognized in drafting the 1966 Form that the CGL Policy "needed to have injury as the trigger, so it would not matter whether the injury was all at once or took place over a period of time." Stewart Aff., Tab 418, p.17; StAppx.103. They understood that long-term injury would trigger multiple policy periods (where multiple policies apply), using waste-disposal as an example:

> This brings into focus one important change in our [1966] policy—the fact that coverage no longer attaches when the accident occurs but rather when the injury or damage takes place. This means that the policy in force when a particular injury or damage takes place is the one that applies, regardless of when the causing accident took place. So if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a re-

> newal date, *and in fact over a period of years, with a separate policy applying each year*.[6]

In a 1965 speech, another key drafter explained that ongoing bodily injury also triggers all policies on the risk during the period of injury:

> Although it is most common that the injury takes place simultaneously with the exposure, there are many instances of injuries taking place over an extended period of time before they become evident.
>
> In some exposure type of cases involving cumulative injuries, it is possible that more than one policy will afford coverage.[7]

To be sure, the drafters sought to avoid this result, considering other options and returning repeatedly to consider a manifestation trigger. Time and again, through the 1950s and 1960s until adoption of the 1966 CGL Form, however, they rejected manifestation, in part to compete with the London Insurance Market, which already was offering such broad coverage. Stewart Aff., Tab 418, p.4; StAppx.090.

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[6] Gilbert L. Bean, Assistant Sec'y, Liberty Mut. Ins. Co., *New Comprehensive General and Automobile Program: The Effect on Manufacturing Risks*, Mutual Insurance Technical Conference 6 (Nov. 15-16, 1965) (emphasis added) (quoted in *Insurance Coverage Litigation* §4.01[B][3]).

[7] Address by Lyman J. Baldwin, Jr., to American Society of Insurance Management, New Orleans, La. (Oct. 20, 1965) (quoted in *Insurance Coverage Litigation* §4.01[B][3]).

After adopting the 1973 CGL Policy, the industry drafters confirmed the concept that later would be termed "continuous trigger," specifically in facing the prospect of long-tail asbestos claims:

> [T]he majority view [at a meeting of industry drafters] was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, *i.e.*, from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period *could be fully responsible for the cost of defense and loss*.[8]

The drafters of the CGL Policy continued to use, in the 1966 and 1973 Forms whose terms form the basis of NIC's policy, terms adopting a continuous trigger and marketed their CGL policies accordingly. Decades later, NIC and Insurance *Amici* should not be permitted to ignore or deny this history to the detriment of its insured. *Keene*, 667 F.2d at 1046.

C. The Court Should Enforce NIC's Policy's Promise of "All Sums."

Contrary to NIC's and Insurance *Amici's* arguments, under Montana law, the contract terms—not a court's after-the-fact notions of equity or "fairness"—govern. NIC's coverage grant, which the

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[8] Memorandum of Meeting of Asbestosis Discussion Group 1 (Apr. 21, 1977) (quoted in *Insurance Coverage Litigation* §4.01[B][3]) (emphasis added).

Court should construe broadly in favor of coverage, promises to pay "all sums." Nothing is unfair about enforcing the "all sums" language to which the parties agreed. NIC's promise to pay "all sums" is not qualified in any way, and NIC did not include, as it could have, a pro-rata clause in its policy. *E.g., State of California,* 55 Cal.4th at 202 ("insurer may avoid stacking by specifically including an 'antistacking' provision in its policy.").

1. The Policy's Insuring Agreement Requires "All Sums" Coverage.

NIC's policy, once triggered by bodily injury during the policy period, promised to pay *all sums* of the insured's resulting liability for settlements or judgments. *See* NICOApp.097. The Court should hold NIC to its word.

Montana's rules of policy interpretation require courts to enforce the "plain meaning" of relevant policy terms. What could be plainer than "all sums"? At the least, the Court should construe ambiguities arising from the parties' differing interpretations in favor of coverage. It should reject insurer arguments for proration, which promote what other high courts have called a "legal fiction" and "judicial intervention." *See In re Viking Pump, Inc.*, 27 N.Y.3d 244, 261

(2017); *State of California,* 55 Cal.4th at 199 (*overruling* pro-rata ruling in *FMC Corp. v. Plaisted & Cos.,* 61 Cal.App.4th 1132 (1998)).

2. The Court Should Not Add a Pro-Rata Clause into NIC's Policy.

The policy language applies "all sums" to both a CGL insurer's duty to defend and its duty to indemnify. The CGL Policy does not contemplate or even use the phrase "pro rata" for either duty, despite NIC's attempts to rewrite the insuring agreement to include a "during the policy period" limitation on the scope of coverage.

Moreover, if NIC (or the insurance industry more generally) had meant the CGL Policy to require proration, it (and they) could have written it to do so. "If the insurer wished to limit its liability through a pro-rata allocation of damages once a policy is triggered, the insurer could have included that language in the policy." *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co*., 134 Wash.2d 413, 429 (1998). Because the insurance industry decided not to include an explicit proration formula in the CGL Policy, as other kinds of insurance do (*see, e.g., Insurance Coverage Litigation* §4.07[F][1][d]), the insurer should bear the result of that decision. This Court should reject NIC's and the Insurance *Amici's post-hoc* attempt to rewrite the policy language.

3. The Drafters Endorsed "All Sums," Rejecting Proration as Unworkable Many Times.

The insurance-industry drafters for decades wrestled with the fact that their standard insuring agreements allowed for "cumulation" of limits, but rejected, not once but several times, pro-rata clauses as unworkable. The tension between a continuous trigger of coverage and the resulting "cumulation" of limits of triggered policies presented "the biggest challenge for the policy drafters . . . ." Stewart Aff., Tab 418, p.18; StAppx.104.

> For nearly two decades, the drafters and others involved in the [standard-form policy] revision project tried to write policy language that would give the broadening of coverage they wanted [for marketing purposes] without giving the cumulation of limits they did not want. They *tried at least four different restrictive wordings, including a proposal to prorate* the damages over the years of injury. *They rejected all of them.* When the standard "occurrence" form was finally put on the market – and to this day – it did contain language making clear that it would be triggered by injury over time, but it did not contain any restriction on how many limits would apply.

Id., p.5; StAppx.091 (emphases added). The drafters concluded, "pro-rating cannot be effectuated between the insurer and the [policyholder] claimant. Between two insurers, of course, they would prorate. We cannot ask our Claims Departments to adjust parts of claims; also, *we cannot defend our pro rata share of claims, but must defend the*

entire claim." *Id.*, p.28; StAppx.114 (citing Meeting Minutes at 11, Joint Forms Committee (Sept. 21-23, 1964) (emphasis added)).

After working almost two decades to "get it right," the drafters "seem to have given up trying to reconcile the conflicting goals of an occurrence policy which would respond to injury over time and yet would not cause the triggered coverages to add up or cumulate. *The most likely reason was that the merchandising considerations could wait only so long*." Stewart Aff., Tab 418, pp.32-33 (emphasis added); StAppx.118-19. Policyholders should not bear the burden of the insurance-industry's drafting decisions, made in light of its preference for market-share and competition advantage.

4. "Fairness" Calls for Applying the Contract Language as Written.

NIC's and Insurance *Amici's* arguments about "fairness" and purported decisions to "self-insure" fail for two reasons. First, fairness dictates that a court enforce a contract as written:

> Northern contends ["all sums"] violates principles of fairness and public policy because it provides a policyholder who purchases just one year of insurance the same protection as those who purchase insurance annually. This argument is without merit. Northern drafted the policy language; it cannot now argue its own drafting is unfair. Further, *because insurance policies are considered contracts, the policy language, and not public policy, controls*. We will not add language to the policy that

> the insurer did not include. Instead, Northern agreed to pay "all sums" arising out of an "occurrence" which, by its own policy definition, may take place over a period of time.

B & L Trucking, 134 Wash.2d at 429-30 (emphasis added). As the California Supreme Court concluded, "We shall assume for argument's sake that Aerojet has enjoyed great good luck over [] the insurers. But the pertinent policies provide what they provide. Aerojet and the insurers were generally free to contract as they pleased [and] [t]hey evidently did so. They thereby established what was 'fair' and 'just' *inter se*." *Aerojet–Gen. Corp. v. Transport Indem. Co.,* 17 Cal.4th 38, 75 (1997).

Second, under Montana law, contracts are not interpreted in hindsight by "fairness." Rather, Montana courts interpret contracts according to their terms. *Wray v. State Comp. Ins. Fund for Harp Line Constr. Co*., 266 Mont. 219, 225, 879 P.2d 725, 728 (1994) (the party bearing the risk of a purported mistake "is not justified in seeking to modify [an] agreement[] to obtain a result that it now finds more equitable than the terms of the agreement[] into which it entered"); a*ccord Aerojet,* 17 Cal.4th at 75 ("We may not rewrite what they [the parties] themselves wrote.").

The gutting of CGL coverage advocated by NIC and Insurance *Amici* hurts not just Montana's fisc and large corporate policyholders who can more easily fight the insurance industry's litigation machine, but also ordinary homeowners, consumers, and small businesses who cannot. Homeowners have been found liable for damage to neighbors from years of subsidence,[9] and dry-cleaners for long-tail damage from dry-cleaning chemicals.[10] The unfettered proration rule would leave such policyholders, and others like them, virtually uninsured and require them to pay for decades of uninsurable liabilities.

5. Pro-Rata Allocation Invites Additional Litigation and Is Less Efficient than "All Sums" Allocation.

While touting the "efficiency" of proration over "all sums," Insurance *Amici* never explain why those purported (and unsupported) concerns should override the State's (or any policyholder's) contractual rights to the "all sums" coverage it purchased. The simple fact is

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[9] *E.g.*, *Snapp v. State Farm Fire & Cas. Co.,* 206 Cal.App.2d 827 (1962)*; Harman v. Am. Cas. Co.,* 155 F.Supp. 612 (S.D. Cal. 1957); *Gruol v. Ins. Co. of N. Am.,* 11 Wash.App. 632 (1974) (all relied on by D.C. Circuit to adopt continuous trigger and all-sums allocation in *Keene*).

[10] *E.g.*, *Voggenthaler v. Md. Square LLC*, 724 F.3d 1050 (9th Cir. 2013).

that, in Montana, policy language controls, and NIC chose not to include a pro-rata provision.

In addition, it is proration that is less efficient than "all sums." Even courts adopting proration have recognized the significant burdens it imposes on parties and courts. *See Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 994-95 (N.J. 1994) (stating, in adopting proration, that "[w]e realize that many complexities encumber" proration; and that, "[i]f, after experience, we are convinced that our solution is inefficient or unrealistic, we will not hesitate to revisit the issue"); *State of California,* 55 Cal.4th at 201 (addressing the "numerous advantages" of "all sums" with "stacking"). Indeed, experience has borne these predictions out.

Because proration is judicially created and includes a variety of pro-rata "schemes" or "methods" (*State of California,* 55 Cal.4th at 199), insurers' jockeying for a preferred pro-rata formula can lead to years of additional litigation, with policyholders paying the price. *See Boston Gas Co. v. Century Indem. Co*., 910 N.E.2d 290, 314 (Mass. 2009) (recognizing pro-rata methods require courts "to indulge in a 'probable fiction'"); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589, 600 (S.C. 2011) ("Pro rata theorists

have developed several different methods for calculating each insurer's pro rata portion of the loss, each supported by its own notions of fairness."). The Second Circuit has addressed proration in three appeals of one case, spanning more than a decade. *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307 (2d Cir. 2000); *Olin Corp. v. Certain Underwriters at Lloyd's, London*, 468 F.3d 120 (2d Cir. 2006); *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89 (2d Cir. 2012).

Efficiency is much better served by applying the "all sums" coverage the policy promises, rather than constructing the legal fictions needed to support proration. At best for the insurers here, the multiplicity of pro-rata schemes establishes that NIC's policy is ambiguous (and should be construed in favor of coverage); and that there is no "majority" of courts adopting a single proration rule. Most importantly, the divergent methods of proration show that courts adopting proration do not apply the policy language, but merely impose their judge-made views of what, in hindsight, appears to them to be "fair." The results of such efforts deprive policyholders of coverage they purchased under their insurers' promises to pay all sums, undermining the "fundamental protective purpose" of CGL insurance.

D. The Pollution Exclusion Applies Only to Active Polluters.

No one contends that the State polluted anything. NIC nevertheless argues that its standard-form "pollution exclusion" bars coverage. That position is contradicted by representations the insurance industry made when it persuaded state regulators to allow insurers to exclude coverage for active polluters.

1. Insurance-Industry Representations Limit the Exclusion's Reach.

Before the early 1970s, standard-form CGL policies did not exclude pollution. Freeman Aff., Tab 414, ¶¶5-6; StAppx.065. In 1970, CGL insurers and insurance-industry organizations began asking state insurance regulators to approve a pollution exclusion. *See Joy Techs., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 498 (W. Va. 1992) (recognizing approval of state Insurance Commissioner required). The Insurance Rating Board ("IRB") "was the trade organization that provided representation to stock insurance companies like NIC. The Mutual Insurance Rating Bureau ('MIRB') provided the same representation for mutual insurance companies." Freeman Aff., Tab 414, ¶8; StAppx.065.

Seeking approval of a pollution exclusion materially the same as NIC's pollution exclusion, Freeman Aff., Tab 414 ¶8 & Exs. B, D; StAppx.065, 069, 075; *see* NICOApp.097, those organizations assured regulators that the exclusion "is *actually a clarification of original intent*, in that the definition of occurrence excludes damages that can be said to be expected or intended" and that "present general liability policies do not provide coverage for contamination or pollution in most cases because the damage can be said to be expected or intended and thus are excluded by the definition of occurrence." Freeman Aff., Tab 414, ¶10 & Exs. E-F; StAppx.066, 076, 078 (emphasis added). Critically, because the insurance industry presented the pollution exclusion as a mere "clarification" of standard-form CGL Policy terms, and not a reduction in coverage, they resisted giving policyholders any reduction in premiums.[11] Accepting these representations, insurance commissioners found "no objection" and approved the exclusion

[11] *Morton Int'l v. Gen. Accident Ins. Co. of Am.*, 629 A.2d 831, 872 (N.J. 1993). If the exclusion were as broad as NIC argues, "the conclusion is inescapable that a significant [premium] rate reduction would have been required." *Id.* The lack of such a reduction demonstrates that the industry obtained approval of the exclusion based on the intent that the exclusion simply clarified existing coverage and did not narrow it.

with no premium reduction. Freeman Aff., Tab 414, Ex. G; StAppx.080.

What's more, in the course of making those representations, the insurance industry repeatedly explained that the exclusion bars coverage only for "actual polluters." Insurance-industry organizations argued:

- It "is in the public interest that *willful pollution* of any type be stopped";
- If "the insurance industry were to support continued pollution *by providing coverage for those who pollute*, it would be considered as aiding and abetting these polluters . . ."; and
- It "should be remembered that *the decision of whether or not to contaminate or pollute* is a management decision as in most cases contamination or pollution *can be prevented if management is willing to take the necessary steps*."

Freeman Aff., Tab 414 ¶9 & Exs. E-F; StAppx.066, 076, 078 (emphases added). These representations show the insurance industry's intent: the pollution exclusion was meant to bar coverage for those policyholders engaged in pollution and not for others, like the State, who were not.

INA, one of the nation's largest CGL insurers at the time, stated in the *Wall Street Journal* in 1970 that policyholders "won't be covered for any damage *they may cause by deliberately polluting* the en-

vironment . . . ." Freeman Aff., Tab 414, Ex. A; StAppx.068 (emphasis added). INA's President declared, "[w]e will no longer insure the company which *knowingly* dumps its wastes." *Id.*; *see also Morton,* 629 A.2d at 850 (same).

New York's legislature also recognized the exclusion's purpose. In the 1970s, its legislature enacted a statute requiring that liability policies include the pollution exclusion, explaining, "a *polluting corporation* might continue to pollute the environment if it could buy protection from potential liability . . . ." *Niagara Cnty.*, 80 A.D.2d at 418 (emphasis added). Based on that explanation, the *Niagara* court found the exclusion "was intended to apply only to actual polluters." *Id.*

Indeed, other pollution exclusions expressly bar coverage for non-polluters by, for instance, stating that no coverage exists for pollutants "whether or not such discharge of pollutants results from the policyholder's activities or the activities of any person or entity." *See HDI Global v. Phillips 66*, No. 20 Civ. 631, 2020 WL 2415588 (S.D.N.Y. May 12, 2020). Such exclusions are consistent with the insurance industry's representations that standard-form pollution exclu-

sions (as in the policy here) do not bar coverage for non-polluters and show how an insurer can rewrite the exclusion to do so.

In sum, this history shows that the State's position is the one consistent with insurance industry representations and stated intent in seeking approval of the pollution exclusion.

2. Because the State Did Not Pollute, the Pollution Exclusion Is Inapplicable.

The underlying claims allege that the State failed to warn about the dangers of asbestos. Neither they nor NIC says anything about "pollution" by the State. The Court should reject NIC's attempt to apply the exclusion more broadly than the insurance industry represented it would be applied when the industry convinced state regulators to approve it. *See Morton*, 629 A.2d at 872-73 (refusing to adopt broad insurer interpretation, which would have "ignor[ed] the industry's [] presentation to state regulators over twenty years ago"); *United Pac. Ins. v. Van's Westlake Union*, 664 P.2d 1262, 1266 (Wash. Ct. App. 1983) (after quoting commentary from 1970s, finding that pollution exclusion did not apply where policyholder "was not an active polluter"); *U.S. Fid. & Guar. Co. v. Specialty Coatings, Inc.*, 535 N.E.2d 1071, 1076 (Ill. Ct. App. 1989) (citing "underwriting history" to construe ambiguity of whether "the parties intended the exclusion-

ary clause to apply whether the insured was an active polluter or not" against insurer).

The representations, by drafters, a prominent insurer, and a state legislature, all show that the pollution exclusion was meant to prohibit coverage for actual polluters, while preserving coverage for those, like the State, not engaged in polluting activities. As a Connecticut appellate court recently observed, the "drafting history makes abundantly clear that . . . the exclusion was intended to bar coverage only for liabilities arising out of traditional environmental pollution such as the intentional dumping of hazardous waste and other toxic materials into the natural environment." *R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 171 Conn.App. 61, 251 (2017).

CONCLUSION

This Court should adhere to the Montana rule that insurance policies are enforced as written and follow those courts that apply the plain language and intent of standard-form CGL policies, as expressed

by insurance-industry drafters, on trigger, scope of coverage, and the pollution exclusion.

May 22, 2020 By: /s/ Curt Drake

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Brief is in Times New Roman, 14-point font; is double-spaced; and the word court, as calculated by Microsoft Word, is not more than 5,000 words, excluding the tables of contents and authorities, signature blocks, certificate of service, and this certificate of compliance.

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