IN THE SUPREME COURT OF THE
STATE OF MONTANA
Supreme Court Cause No. DA 12-0600

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RONALD L. KOHLER and BARBARA J. KOHLER, husband and wife; THOMAS F. JONES and RITA A. JONES, husband and wife; DENNIS A. ARNOLD and GERALDINE N. ARNOLD, husband and wife; and DEBRA L. SYKES,

Plaintiffs and Appellees,

v.

KELLER TRANSPORT INC.; CONOCOPHILLIPS COMPANY; ERICKSON PETROLEUM CORPORATION; WAGNER ENTERPRISES LLC; and DOES 1-10,

Defendants.

CAROLINA CASUALTY INSURANCE COMPANY and WESTCHESTER SURPLUS LINES INSURANCE COMPANY,

Appellants.

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# AMICUS CURIAE BRIEF OF THE MONTANA TRIAL LAWYERS ASSOCIATION

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ON APPEAL FROM MONTANA TWENTIETH
JUDICIAL DISTRICT COURT LAKE COUNTY
HON. JEFFREY LANGTON

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*[counsel of record on pages ii-iii]*

John L. Amsden
BECK & AMSDEN, pllc
1946 Stadium Drive, Suite 1
Bozeman, MT 59715
Tel: (406) 586-8700
Fax: (406) 586-8960
Amsden@becklawyers.com
*Montana Trial Lawyers Association*

Allan H. Baris
MOORE, O'CONNELL & REFLING, pc
PO Box 1288
Bozeman, MT 59771
Tel: (406) 587-5511
Fax: (406) 587-9079
morlaw@qwestoffice.net
*WSLIC*

Jonathan D. Hacker
O'MELVENY & MYERS, llp
1625 Eye Street, NW
Washington, D.C. 20006
Tel: (202) 383-5300
Fax: (202) 383-5414
jhacker@omm.com
*WSLIC*

Robert J. Slavik
COZEN O'CONNOR
1201 Third Avenue #5200
Seattle, WA 98101
Tel: (206) 340-1000
Fax: (206) 621-8783
jslavik@cozen.com
*WSLIC*

Charles E. Hansberry
GARLINGTON, LOHN & ROBINSON pllp
PO Box 7909
Missoula, MT 59807
Tel: (406) 523-2500
Fax: (406) 523-2595
cehansberry@garlington.com
*Keller Transport, Inc.*

Robert Terrazas, pc
Andre Gurr
Julia D. Goodkind
TERRAZAS LAW OFFICES
PO Box 9077
Missoula, MT 59807
Tel: (406) 541-2550
Fax: (406) 541-2553
attorneys@terrazaslaw.com
*Wagner Enterprises, LLC*

Timothy M. Bechtold
BECHTOLD LAW FIRM, pllc
PO Box 7051
Missoula, MT 59807-7051
Tel: (406) 721-1435
Fax: (406) 830-3085
tim@bechtoldlaw.net
*Kohler, Jones and Arnold*

Roger M. Sullivan
McGARVEY, HEBERLING, SULLIVAN & McGARVEY, pc
745 South Main
Kalispell, MT 59901
Tel: (406) 752-5566
Fax: (406) 752-7124
rsullivan@mcgarveylaw.com
*Kohler, Jones and Arnold*

Trent N. Baker
DATSOPOULOS, MacDONALD &
LIND, pc
201 W Main, Suite 201
Missoula, MT 59802
Tel: (406) 728-0810
Fax: (406) 543-0134
tbaker@dmllaw.com
*Sykes*

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## INTRODUCTION

Westchester's appeal, from a decision in a case to which it was not a party, should be denied because it presents a question that is not ripe for appeal.

First, Westchester's rights and responsibilities depend upon a determination of what, if any, duties it has breached. Those issues will not be resolved in this action. Rather, those matters are currently pending before Judge McLean in the collateral insurance litigation and any appeal therefrom. Granting relief to Westchester *in this action* would be premature and constitute an advisory opinion on an unripe issue.

Second, Westchester does not need either the procedural or the substantive relief it seeks if, as Westchester asserts, it has not breached any of its obligations. If Westchester has already fully discharged all of its obligations under its insurance policy, then it has no further responsibility in connection with this underlying tort action. It is not Westchester's concern on what terms the parties settle. Every action it might take, if permitted to intervene, would require the trial court to engage in advisory opinions that have no bearing on anyone's legal rights.

Third, the relief Westchester seeks will only benefit Westchester if it has breached obligations to its insureds. Depending on what obligations Westchester is found to have breached, it might not be entitled to such relief. It would be unfair, burdensome and inefficient to force the parties or Judge Langton to accommodate

Westchester where it may either not need or not be entitled to the relief it seeks.

Respectfully, this Court should be wary of creating new rights and entitlements that only benefit a breaching liability insurer. The better result is to allow Judge McLean to enforce Westchester's rights and responsibilities in the pending insurance action.

## DISCUSSION

### A. Westchester's Rights and Responsibilities Cannot Be Determined Until Judge McLean Determines What, If Any, Duties It Has Breached.

Westchester seeks to intervene in the underlying action to determine the reasonableness of a settlement to which it is not a party. Westchester's concerns are non-justiciable because they are not ripe for judicial determination. *See Havre Daily News LLC v. City of Havre*, 2006 MT 215, ¶ 18, 333 Mont. 331, 142 P.3d 864. The doctrine of ripeness "requires an actual, present controversy, and therefore a court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative." *Id.* at ¶ 19. The basic rationale behind the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.*

To illustrate the prematurity of granting Westchester relief in this action, it helps to explicate the different duties of a liability insurer and the different consequences for breach of each. A Chart of Liability Insurer Contractual Breaches

is included in the Appendix.[1] As a general matter, liability insurers owe their insureds three contractual duties, two express and one implied. These are: 1) the duty to indemnify; 2) the duty to defend; and 3) the duty to treat settlement proposals with the same consideration the insurer would give if it was wholly responsible for any verdict. *Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 459 (Ariz. 1987).

A breach of these duties, actual or anticipatory, deprives the insured of security he purchased and leaves him exposed to a personal judgment. When such insurer breach occurs, the insured is generally freed, at least to some degree, from the cooperation clause of the policy and may settle over the insurer's objection without voiding coverage. *Id.* (citing A. Windt, *Ins. Claims & Disputes*, §§ 3.10 to 3.11, at 97-99, § 4.01 to § 6.37, at 100-297 (1982); 7C Appleman, *Ins. Law & Practice* § 4714 (1981)). The insured exposed "to the sharp thrust of personal liability . . . need not indulge in financial masochism." *Id*. (citing *Damron v. Sledge*, 460 P.2d 997, 999 (Ariz. 1969)).

[1] Importantly, both this brief and the Appendix chart deal exclusively with contractual duties. Breaches of statutory duties are not covered. Also not covered herein is the scenario where the insurer becomes estopped to deny coverage by virtue of having assumed control of the defense. That is because insurers are not allowed to control the defense under Montana law. *In re Rules of Professional Conduct & Insurer Imposed Billing Rules & Procedures*, 2000 MT 110, ¶ 38, ¶ 41, ¶ 47, 299 Mont. 321, 2 P.3d 806.

While the insurer's breach entitles the insured to settle without voiding coverage, however, the extent of the insurer's liability for that settlement depends on which duty was breached. These alternative scenarios are as follows:

**1. Breach of the Duty to Indemnify.**

The first scenario occurs when the insurer is defending, but has conditioned defense upon a reservation of rights (*Miller v. Shugart*, 316 N.W.2d 729, 733-34 (Minn. 1982)) and/or has anticipatorily repudiated indemnity coverage (*Helme*, 735 P.2d at 459). Although such insurer has not "abandoned" the insured, the failure to accept full responsibility for the liability exposure leaves the insured in a precarious position. *USAA v. Morris*, 741 P.2d 246, 251 (Ariz. 1987).

If the insurer has correctly determined that it has no indemnity obligation, then it has not breached any contractual obligation. The insured's settlement would simply not be covered. On the other hand, if it is later determined that the policy affords indemnity coverage, then the insurer (by defending pursuant to a reservation of rights and/or anticipatorily repudiating indemnity) erroneously created doubts about coverage. The consequence is that the insurer cannot invoke the cooperation clause of the policy to void coverage of a settlement negotiated over the insurer's objection. *Miller*, 316 N.W.2d at 733-34.

Importantly, the insurer's breach is not held to create coverage that did not otherwise exist. The insurer does not lose its defenses to coverage. It simply cannot complain that the insured settled a *covered* claim over its wishes.

The insurer's liability for that settlement, however, will be limited both by its policy limits (*Morris*, 741 P.2d at 257; *Grace v. Ins. Co. of NA*, 944 P.2d 460, 468 n. 20 (Alaska 1997)) and to a reasonable settlement value (*Morris*, 741 P.2d at 252-53; *Gates Formed Fibre Products Inc. v. Imperial Cas. & Indem. Co.*, 702 F. Supp. 343 (D. Me. 1988)).

Thus, if Judge McLean determines that Westchester fulfilled its defense duty, but improperly reserved its right to deny indemnity, or even anticipatorily repudiated indemnity, Westchester may well be entitled to a reasonableness determination. The issue for this Court is whether *this action* is the appropriate context for Westchester to litigate that issue. As addressed below, it is not.

**2. Breach of the Duty to Settle.**

A liability insurer in full compliance with its defense obligations, and even in full compliance with its indemnity obligations, may nevertheless be found to have breached a duty to effect a settlement within policy limits.

The insurer's settlement duties require it to treat settlement offers as if the insurer alone would be liable for an excess judgment. *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 274-75, 682 P.2d 725, 730 (1984); *Thompson v. State Farm*

*Mut. Auto. Ins. Co.*, 161 Mont. 207, 215, 505 P.2d 423, 427-28 (1972)[2] (citing *Jessen v. O'Daniel* (D. Mont. 1962), 210 F. Supp. 317, 326-27). The insurer cannot gamble against an excess verdict risking only the insured's money.

Breach of this duty, again, frees the insured to settle without the insurer's consent without voiding coverage. *Helme*, 735 P.2d at 460. Again, however, breach of this duty does not create indemnity coverage that would not otherwise exist. The insurer's other defenses to coverage are, generally speaking, preserved.

In addition, the insurer maintains its right to have the settlement be made fairly, with notice and without fraud or collusion. *Lozier v. Auto Owners Ins. Co.*, 951 F.2d 251, 256 (9th Cir. 1991). The insurer will be liable only for reasonable settlement sums. *Lozier*, 951 F.2d at 256 (test is whether reasonably prudent person in insured's position would have settled on those terms); *Besel v. Viking Ins. Co. of Wisc.*, 49 P.3d 887, 890-91 (Wash. 2002); *Himes v. Safeway Ins. Co.*, 66 P.3d 74, 82 (Ariz. App. 2003) ("reasonably prudent person" is one with ability to pay settlement from own funds and who makes settlement decision as though he will).

Unlike an insurer whose only breach is an erroneous reservation of rights, though, an insurer in breach of a duty to settle has waived its policy limits. *Lozier*, 951 F.2d at 256; Windt, *Ins. Claims & Disputes* (2nd ed. 1988), § 5.11 at 254-55; *Crisci v. Security Ins. Co.*, 426 P.2d 173 (Cal. 1967); *Gibson*, 210 Mont. at 274-75,

[2] Overruled on other grounds in *Watters v. Guaranty Nat. Ins. Co.*, 2000 3 P.3d 626, 632, 300 Mont. 91.

682 P.2d at 730; *St. Farm Mut. Auto Ins. Cov. v. Brewer*, 406 F.2d 610, 612 (9th Cir. 1968); *Besel*, 49 P.3d at 890.

Thus, again, if Judge McLean determines that Westchester fulfilled its defense obligations, but breached a duty to settle, it may be entitled to a reasonableness determination. Nevertheless, for reasons addressed below, the better policy is to allow Westchester to litigate that issue in the action before Judge McLean.

**3. Breach of the Duty to Defend.**

Failing to pay for a defense is considered the most egregious of breaches by a liability insurer and has the direst of consequences. This duty is triggered when there is anything less than an unequivocal demonstration of no possibility for covered liability. *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶¶ 22, 24, 321 Mont. 99, 90 P.3d 381.

An insurer in breach of its defense obligations cannot invoke the cooperation clause to void coverage. *Mora v. Phoenix Indem. Ins. Co.*, 996 P.2d 116, 120 (Ariz. App. 1999). The insured is free to settle, including confessing or stipulating to judgment in exchange for a covenant not to execute. *Nielsen v. TIG Ins. Co.*, 442 F. Supp. 2d 972, 980 (D. Mont. 2006). The insurer's liability for that settlement can

be defeated only by showing that there *unequivocally* never was any possibility of covered liability or that the settlement was fraudulent.[3] *Id.*

Also, the insurer loses its right to invoke its policy limits. *Nielsen*, 442 F. Supp. 2d at 981; *Lee v. USAA Cas. Ins. Co.*, 2004 MT 54, ¶ 22, 320 Mont. 174, 86 P.3d 562. And, the insurer's liability is not limited to a reasonable settlement value. *Parking Concepts Inc. v. Tenney*, 83 P.3d 19, 22 n. 3 (Ariz. 2004).

These consequences are imposed to protect the insured from breach of this duty. An insured erroneously told that there is not even defense coverage has only one bargaining chip to obtain a covenant not to execute against his personal assets – a confession of damages limited only by a prohibition against fraud.

Counsel representing such insured is not only entitled to, but indeed has an ***ethical obligation***, to agree to whatever settlement amount is necessary to obtain a covenant not to execute for the abandoned insured. *Himes*, 66 P.3d at 83. For this reason, Westchester cannot complain that "plaintiffs want the damages award to be as high as possible, and defendants' only continuing interest is in avoiding their own liability." WSLIC's Br. 3, 13.

An insurer that breaches a defense duty has gambled that it has correctly analyzed whether there is even a possibility of coverage. Such insurer cannot

[3] The concept of what it means for a settlement to be "fraudulent" is not well-developed in Montana law. MTLA respectfully believes it should be something akin to the Rule 60(b)(3) standard for a fraudulent judgment.

complain when the plaintiff also chooses to gamble that the insurer is wrong – by exchanging a covenant not to execute in exchange for a confession of a judgment whose only limitation is that it must be non-fraudulent.

In recognition of the necessity for this extreme remedy to protect insureds from breach of a defense obligation, courts recognize that only an insurer that has complied with its defense obligation is entitled to a reasonableness limitation on its liability for a settlement. *Parking Concepts*, 83 P.3d at 22 n. 3 (where the insurer has refused to defend, it "has no right to contest the stipulated damages on the basis of reasonableness, but rather may contest the settlement only for fraud or collusion"); *Himes*, 66 P.3d at 84 ("Safeway, by meeting its duty to defend, was entitled to a reasonableness hearing on the issue of damages in spite of the alleged failure to treat settlement offers with equal consideration").

It is important to observe that if the insurer correctly denied even defense coverage – i.e., by establishing that there was never any possibility of covered liability – then it is of no concern to the insurer that the insured has confessed an unreasonable judgment. The insurer will pay nothing – and Plaintiffs will recover nothing – pursuant to the confessed judgment.

Thus, if Judge McLean determines that Westchester has breached no duties, then it will pay nothing more. Its interest is concluded. Alternatively, if Judge McLean determines that Westchester breached its defense duty, then it has

forfeited its right to challenge the reasonableness of the settlement in this action. Westchester's implicit argument, then, must be that it should be allowed to intervene to intrude upon the settlement on the mere possibility that it will be found to have breached a duty *other than its defense obligation* and thus not forfeited its right to a reasonableness limitation. As discussed more fully below, such intrusion is not necessary because Westchester may litigate reasonableness in the insurance action if it is otherwise appropriate to do so.

### B. Westchester May Either Not Need or Not Be Entitled to the Relief It Seeks in This Action.

At this juncture, neither this Court, the parties to this action, nor Westchester itself knows what rights and responsibilities Westchester may have in connection with the settlement negotiated below. That is because the insurance action remains pending. Judge McLean has not entered judgment against Westchester. If and when he does, Westchester will presumably appeal.

One possible final outcome of that litigation is that Judge McLean will determine that Westchester did not breach *any* contractual obligations. In that event, Westchester will not be liable for any portion of the settlement from below. A reasonableness determination by Judge Langton would be irrelevant. This, in fact, is Westchester's own position: that it has not breached any duties and owes nothing further in connection with this action. Yet, it simultaneously seeks to

intervene, even though, by its own analysis, it has no further interest therein. If Westchester is right about the latter, it does not need the former.

Another possible outcome is that Judge McLean will determine that Westchester breached its defense obligations. If so, Westchester is not entitled to a reasonableness determination (*Parking Concepts*, 83 P.3d at 22 n. 3) and has forfeited any right to intervene (*Mora*, 996 P.2d at 120-21; *Manny v. Anderson's Estate*, 574 P.2d 36, 38 (Ariz. App. 1977); *Damron v. Sledge*, 460 P.2d 997, 1001 (Ariz. App. 1969). This is the position of the Plaintiffs and insured Defendants.

Intervention only becomes an issue under a third scenario – one not propounded by Westchester or Plaintiffs or the insured Defendants. In this third scenario, Westchester fully complied with its defense obligation, but breached some other duty, either by creating erroneous doubts about indemnity coverage and/or by failing to effectuate a settlement within limits. Under the former, Westchester has preserved its policy limits. Under the latter, it has not. Under either scenario, however, by fully discharging its defense obligations, Westchester has limited its liability to a reasonable settlement value.

The issue then is whether *this action* is the appropriate context for Westchester to challenge reasonableness, which may or may not ever be relevant to its liability for the settlement. For the reasons set forth in the following section, reasonableness, if otherwise appropriate, should be litigated before Judge McLean.

### C. All of Westchester's Rights and Responsibilities May Be Litigated in the Action Before Judge McLean.

If Westchester's coverage position is correct, it does not need a reasonableness hearing. If the Plaintiffs and insured Defendants are correct, then it is not entitled to one. A reasonableness determination will become appropriate only if Judge McLean rejects both positions and holds that Westchester has fully discharged its defense duties but breached some other duty. In other words, only if Westchester, Plaintiffs and insured Defendants are all wrong in their coverage analyses will any court need to make a reasonableness determination.

The issue for this Court to determine is whether that possibility warrants unwinding the parties' settlement, reversing Judge Langton and directing that Westchester be allowed to intervene to block a settlement over its own insured's wishes. Respectfully, such drastic and intrusive measures are unnecessary because all of Westchester's rights and defenses may be fully litigated in the action before Judge McLean.

There is no question that an insurer in breach of its defense obligations loses its right to intervene in the underlying action. *See, e.g., Mora*, 996 P.2d at 120-21; *Manny v. Anderson's Estate*, 574 P.2d 36, 38 (Ariz. App. 1977); *Damron*, 460 P.2d at 1001. But, it is true that, in some other jurisdictions, insurers that have not breached their defense obligations are permitted to intervene in the underlying action. *E.g., Himes*, 66 P.3d at 86 (Ariz. App. 2003).

There are numerous reasons why intervention should not be the rule in Montana:

### 1. The Right of the Parties to Settle for any Reason and on Any Terms They See Fit Must Remain Inviolate.

Montana recognizes a strong public policy of encouraging settlements upon terms negotiated by the parties alone:

> **Settlement is a process that belongs to the parties**. The declared public policy of this State is to encourage settlement and avoid unnecessary litigation. The reasons for encouraging settlement are numerous. Settlement eliminates cost, stress, and waste of judicial resources. When **the parties can control their own outcome by reaching an agreement themselves**, "the result reached is frequently a more equitable adjustment than is possible to be had in a court of law."

*Miller v. State Farm Mut. Auto. Ins. Co*, 2007 MT 85, ¶ 14, 337 Mont. 67, 155 P.3d 1278 (citations omitted, emphasis added).

Allowing an insurance company or a court to block a settlement because it is not "reasonable" would be an unprecedented departure from established Montana law. Montana courts have previously supervised settlements in this manner only when dealing with an incompetent party, such as a minor. Never before have competent adults, represented by able counsel, been prevented from settling on any terms they see fit.

This right should remain inviolate. Abrogating this right is unnecessary because the insurer's rights are not dependent upon its ability to intrude into the underlying litigation and block a settlement negotiated by the parties.

### 2. Permitting Intervention to Challenge Reasonableness of a Settlement Would Seriously Prejudice Montana's Insureds.

Under Westchester's position, an insured could be forced to continue litigating (at his own expense, where the insurer is not defending) unless or until the plaintiff agrees to accept a settlement that his breaching liability insurer and/or the Court have determined meets some undefined standard of "reasonableness."[4]

Westchester does not take into account that a plaintiff has no reason to grant a covenant-not-to-execute in such a situation. The plaintiff, like the insured, has been told that there is no insurance coverage available for a settlement. In many such cases, the plaintiff would prefer to continue litigating and take her chances with a jury verdict or a default judgment with a damages hearing, rather than exchange a covenant-not-to-execute for a limited settlement that might not be

[4] Homeowner Plaintiffs argue in the action before Judge McLean that the standard is what a reasonable and prudent person in the insureds' positions would have paid to settle the homeowner Plaintiffs' claims, given the insureds likelihood of being found liable, and given the potential jury verdicts they faced. Plaintiffs further argue that under the particular facts of this case, where there was a well-developed record in the underlying proceeding with discovery closed and extensive expert reports filed, together with the depositions of the experts, the record in this underlying proceeding may provide the basis for a reasonableness hearing. Amici take no position on this issue.

covered. Westchester's position amounts to a breaching insurer destroying the only bargaining chip that an insured has to bargain for a covenant not to execute: the possibility that the plaintiff will get extra-contractual damages from the liability insurer if the insurer has gambled incorrectly about its coverage obligations.

### 3. There Is No Need to Intrude Upon Settlements in This Manner Because a Liability Insurer's Rights Are Fully Protected in Separate Coverage Litigation.

In considering whether a case is ripe for review, courts should take into account the extent of hardship that will be suffered by the parties if the court withholds review. *Havre Daily News LLC*, ¶ 20. Here, there is no hardship because Westchester may not even need the relief it seeks. If Westchester does need the relief, it can be fully and fairly adjudicated in the already-pending insurance action before Judge McLean.

Westchester argues that it has a "direct and incontestable interest" that the "damages award" (one assumes Westchester means the confessed judgment) is reasonable "because the covenant judgment directs plaintiffs to recover *from WSLIC*, rather than defendants Keller and Wagner." WSLIC's Br. 8 (emphasis in original). Westchester is being somewhat overwrought.

In order for Plaintiffs to recover *anything* from Westchester, they must succeed in separate litigation against Westchester, in which litigation Westchester may raise all applicable defenses including: that it fully complied with its defense

obligations; that it has no further liability in connection with this action; that it is not liable for amounts in excess of its policy limits; that it should only be held liable for a reasonable settlement value; etc.

Montana does not have any procedure whereby a plaintiff in possession of a confessed judgment can automatically execute that judgment against a liability insurer's assets. The plaintiff must always litigate the insurer's liability for that confessed judgment in some forum. Thus, there is always another forum for all of the insurer's defenses to be fully litigated.

In that other forum, the insurer may prove that it breached no duties and owes nothing. The insurer may establish its right to enforce the cooperation clause of the policy to void coverage. The insurer may establish that its liability is limited to its policy limits (*Grace*, 944 P.2d at 468 n. 20) or to a reasonable settlement value (*Besel*, 49 P.3d at 890). Even if the insurer has committed the most egregious of breaches, by failing to provide a defense when one was owed, it may still defend against fraudulent settlements. *Nielsen*, 442 F. Supp. 2d at 980.

To illustrate: A plaintiff who has obtained a confessed or stipulated judgment must pursue collateral litigation to enforce the judgment against the insurer. If the insurer has preserved its right to raise a reasonableness defense (by defending its insured), then the plaintiff must establish that the judgment was reasonable. *Morris*, 741 P.2d at 253. If plaintiff cannot show that the entire amount

of the judgment was reasonable, "he may recover only the portion that he proves reasonable." *Id*. (citing A. WINDT, § 5.16, at 212–13). An unreasonable settlement does not exempt the insurer from liability. But, as long as the insurer provided a defense, it is only liable for that portion of the settlement that is reasonable.

This approach correctly places the burdens and risks on the two parties with a remaining interest in the outcome. It protects an insured wrongfully deprived of insurance coverage from the burden of having to continue litigating. The reasonableness issue is litigated between the breaching insurer and the plaintiff who has gambled that the confessed judgment is collectible against the insurer.

Here, all of these issues are already pending in the separate insurance action before Judge McLean. Westchester's real objection is that it does not believe it breached any duties or obligations. But that issue is for Judge McLean – not Judge Langton. Judge Langton did not hold that Westchester had breached any duties. Judge Langton merely took judicial notice that another court had so found.

#### 4. The Unique Facts of This Case Reveal the Unworkability of Allowing Intervention to Test Reasonableness.

In an ordinary case, there is no uncertainty as to whether the insurer has provided a defense. It is either paying for one or it is not. If it is not, then it cannot intervene for any reason. If it is, then some other jurisdictions would allow the insurer to intervene. But, in this case, there is a dispute as to whether the insurer

has breached its defense obligations. This uncertainty reveals the unworkability of allowing a liability insurer to intervene in an underlying tort action to block a settlement the parties wish to execute.

If, as Westchester itself argues, it has fully discharged all of its duties under its policy, then it has no further interest in this litigation:

> If the insurer has no interest in the litigation, it follows that no policy reason justifies allowing it to intervene and help determine the outcome of the litigation.

*Mora.*, 996 P.2d at 120-21; *see also Stephens v. St. Farm Mut. Auto. Ins. Co.*, 508 F.2d 1363, 1366 (5th Cir. 1975) ("When the denied liability does not, in fact, exist, no harm can be done the insurer by the insured's settlement with a third party.").[5]

On the other hand, if the Plaintiffs and insured Defendants are correct that Westchester has breached duties up to and including its defense obligations, then Westchester has forfeited any right to contest the settlement. *Nielsen*, 442 F. Supp. 2d at 981; *Lee*, ¶ 22.

Because that issue has not been finally resolved, no court knows whether Westchester is entitled to contest the reasonableness of the settlement. In such a situation, it would be inefficient and inequitable to force further litigation in the action before Judge Langton, for Westchester's benefit, when the issue may be moot.

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[5] *Abrogated on other grounds by Holyfield v. Members Mut. Ins. Co.*, 572 S.W.2d 672 (Tex. 1978).

### 5. Westchester's Efficiency Arguments Lack Depth.

Westchester argues that "the district court in this case is better acquainted with the underlying facts relating to actual damages, and so is far better suited to determine the proper measure of damages." WSLIC's Br. 13. While this argument may have appeal at first glance, it would not necessarily be true in all actions, as sometimes the settlement occurs early in the litigation. Under Westchester's position, parties who want to settle may be forced to develop expert opinions just to get their settlement approved. Westchester's position would require the parties to continue litigating against their wishes, and potentially at their own expense, just to protect an insurer who only has an interest in the value of the judgment if it is later determined to be in breach of its obligations.

## CONCLUSION

There is no need for Judge Langton – or this Court at this time – to get involved with insurance coverage issues. Any attempt to do so would be premature and constitute an advisory opinion on a non-justiciable issue. The extent of Westchester's coverage obligations has not yet reached final determination in the insurance coverage action. All of Westchester's concerns may be fully litigated before Judge McLean. The rights of the Plaintiffs and insured Defendants to settle this action on any terms they see fit should remain inviolate.

DATED, this 7th day of March 2013.

SUBMITTED BY:

_____

John L. Amsden
BECK & AMSDEN, pllc

*Montana Trial Lawyers Association*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Amicus Curiae Brief of the Montana Trial Lawyers Association* is proportionately spaced in 14-point roman, non-script text and contains 4,607 words excluding brief's cover, table of contents, table of citations, certificate of service, certificate of compliance and appendix.

DATED, this 7th day of March 2013.

SUBMITTED BY:

_____

John L. Amsden
BECK & AMSDEN, pllc

*Montana Trial Lawyers Association*

## CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing *Amicus Curiae Brief of the Montana Trial Lawyers Association* with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing *Amicus Curiae Brief of the Montana Trial Lawyers Association* upon each attorney of record as follows:

Allan H. Baris
MOORE, O'CONNELL & REFLING, pc
PO Box 1288
Bozeman, MT 59771
Tel: (406) 587-5511
Fax: (406) 587-9079
morlaw@qwestoffice.net
*WSLIC*

Jonathan D. Hacker
O'MELVENY & MYERS, llp
1625 Eye Street, NW
Washington, D.C. 20006
Tel: (202) 383-5300
Fax: (202) 383-5414
jhacker@omm.com
*WSLIC*

Robert J. Slavik
COZEN O'CONNOR
1201 Third Avenue #5200
Seattle, WA 98101
Tel: (206) 340-1000
Fax: (206) 621-8783
jslavik@cozen.com
*WSLIC*

Charles E. Hansberry
GARLINGTON, LOHN & ROBINSON pllp
PO Box 7909
Missoula, MT 59807
Tel: (406) 523-2500
Fax: (406) 523-2595
cehansberry@garlington.com
*Keller Transport, Inc.*

Robert Terrazas, pc
Andre Gurr
Julia D. Goodkind
TERRAZAS LAW OFFICES
PO Box 9077
Missoula, MT 59807
Tel: (406) 541-2550
Fax: (406) 541-2553
attorneys@terrazaslaw.com
*Wagner Enterprises, LLC*

Timothy M. Bechtold
BECHTOLD LAW FIRM, pllc
PO Box 7051
Missoula, MT 59807-7051
Tel: (406) 721-1435
Fax: (406) 830-3085
tim@bechtoldlaw.net
*Kohler, Jones and Arnold*

Roger M. Sullivan
McGARVEY, HEBERLING, SULLIVAN & McGARVEY, pc
745 South Main
Kalispell, MT 59901
Tel: (406) 752-5566
Fax: (406) 752-7124
rsullivan@mcgarveylaw.com
*Kohler, Jones and Arnold*

Trent N. Baker
DATSOPOULOS, MacDONALD & LIND, pc
201 W Main, Suite 201
Missoula, MT 59802
Tel: (406) 728-0810
Fax: (406) 543-0134
tbaker@dmllaw.com
*Sykes*

DATED, this 7th day of March 2013.

SUBMITTED BY:

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John L. Amsden
BECK & AMSDEN, pllc

*Montana Trial Lawyers Association*