SC96107

IN THE SUPREME COURT OF MISSOURI

THE DOE RUN RESOURCES CORPORATION,

Plaintiff-Respondent,

vs.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY AND LEXINGTON INSURANCE COMPANY

AND

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant-Appellant.

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This lawsuit was brought by Respondent The Doe Run Resources Corporation ("Doe Run") against Appellant St. Paul Fire and Marine Insurance Company ("St. Paul") for reimbursement of Doe Run's defense costs in lawsuits filed on behalf of Peruvian citizens allegedly injured by toxic pollution from a metal refining and smelting facility in La Oroya, Peru (the "Smelter Suits").

Doe Run contends that St. Paul owes a defense obligation for those Suits under a global liability policy it issued to Doe Run. St. Paul counters that it has no defense obligation because (1) coverage is barred by the policy's absolute pollution exclusion and/or (2) its policy applies as excess insurance having no duty to defend because another insurer has that duty.

On July 2, 2014, the circuit court entered a judgment on the parties' cross-motions for summary judgment, declaring that: (1) St. Paul's absolute pollution exclusion does not bar coverage because it is ambiguous; (2) St. Paul's policy provides primary, not excess, coverage to Doe Run; and (3) St. Paul is obligated to reimburse Doe Run for that portion of the defense costs incurred in the Smelter Suits not paid by Doe Run's other insurers. A3-7, LR003411-003415.

A bench trial was held on December 8 and 9, 2014 to determine the amount of past defense costs owed by St. Paul. On February 18, 2015, the circuit court entered a judgment ruling that St. Paul is obligated to pay Doe Run $1,758,252.72 in past defense costs plus prejudgment interest in an amount to be determined by the court. A18-19, LR003577-003578.

On April 23, 2015, the circuit court entered a final judgment: (1) declaring that St. Paul is obligated to participate in Doe Run's defense of the Smelter Suits; (2) ruling that St. Paul breached its defense obligations and awarding Doe Run $2,108,535.44 in damages, including prejudgment interest; (3) dismissing with prejudice Doe Run's Mo. Rev. Stat. §375.420 claim; (4) awarding Doe Run $12,903.08 in costs; and (5) ruling that post-judgment interest shall accrue from April 22, 2015. A20-25, LR003618-003623. On May 28, 2015, St. Paul filed a timely notice of appeal from the judgments entered against it.

The Court of Appeals, Eastern District, heard argument on March 1, 2016. In an opinion dated September 27, 2016, the court of appeals affirmed the ruling on Point I (finding that St. Paul's pollution exclusion does not bar coverage) and Point II (St. Paul's policy is primary, not excess, having an obligation to reimburse defense costs), but granted Point III (ruling that St. Paul has no obligation to reimburse defense costs incurred prior to the March 16, 2012 tender of the Smelter Suits), and granted in part and denied in part Point IV (overruling the trial court's calculation of prejudgment interest and instead holding that interest accrues (1) on the initial defense bills from December 6, 2012, when St. Paul first received them, and (2) on the subsequent bills from the date St. Paul received each bill). The court of appeals remanded the case for further proceedings consistent with its opinion.

St. Paul filed a motion for rehearing and application for transfer to this Court. On December 1, 2016, the court of appeals denied the motion and application. St. Paul then filed an application to transfer with this Court.

On February 28, 2017, this Court sustained the application to transfer and ordered the case transferred. The Court has jurisdiction pursuant to Missouri Constitution, Article V, Section 10 and Rule 83.04 of the Missouri Rules of Civil Procedure.

INTRODUCTION

This appeal presents an issue of first impression in this Court – whether an insured's claim for defense coverage of toxic tort claims arising from alleged industrial pollution is barred by an insurance policy's absolute pollution exclusion.

This Court has articulated the principles to be applied in interpreting insurance contracts. These include that a court must interpret a policy as written, with the language given its plain meaning. *Allen v. Cont'l Western Ins. Co.*, 436 S.W.3d 548, 554 (Mo. banc 2014). Courts are not to "'distort'" policy language or "'exercise inventive powers for the purpose of creating an ambiguity where none exists.'" *Id*. (*quoting Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. banc 2007)). Courts also are "not permitted to create an ambiguity . . . in order to enforce a particular construction which [they] might feel is more appropriate." *Rodriguez v. Gen. Acc. Ins. Co.*, 808 S.W.2d 379, 382 (Mo. banc 1991).

In faithfully applying these principles, the Missouri Courts of Appeals as well as the United States Court of Appeals for the Eighth Circuit have concluded that absolute pollution exclusions like the one in the St. Paul policy unambiguously bar coverage for pollution claims. *See, e.g, Cas. Indem. Exch. v. City of Sparta*, 997 S.W.2d 545 (Mo. App. S.D. 1999); *Boulevard Inv. Co. v. Capitol Indem. Corp.*, 27 S.W.3d 856, 858 (Mo. App. E.D. 2000); *Doe Run Res. Corp. v. Lexington Ins. Co.*, 719 F.3d 876, 879-80 (8th

Cir. 2013); and *Doe Run Res. Corp. v. Lexington Ins. Co.*, 719 F.3d 868, 874-77 (8th Cir. 2013).

Had the circuit court in this case applied these principles, it should have concluded that St. Paul's pollution exclusion precludes coverage for the Smelter Suits. Instead, the court failed to apply the exclusion as written and give the language its plain meaning. It strained to find coverage, concluding that the exclusion was ambiguous because it did not expressly list in the definition of "pollution" each of the toxic substances that allegedly caused injuries to the Smelter Suit plaintiffs – lead, arsenic, cadmium and sulfur dioxide. Contrary to the principles articulated by this Court, the circuit court's ruling improperly distorts the policy language to create an ambiguity that does not exist, and denies enforcement of an exclusion that other courts repeatedly have found valid under Missouri law.

Because pollution exclusions have been routinely included in general liability policies since the 1980's, this appeal is of utmost interest to Missouri policyholders and insurers alike. If such exclusions are not enforced as written, the cost and availability of liability insurance in this State could be dramatically affected.

STATEMENT OF FACTS

A. The Voluntary Dismissal of the 2007 Suit.

In October 2007, Doe Run and others were sued in a class action lawsuit filed on behalf of Peruvian citizens living in the vicinity of the Doe Run metal refining and smelting facility in La Oroya, Peru ("Smelting Facility"), captioned *Reid, et al. v. Doe Run Resources, et al.*, Cause No. 0722-CC08582 (City of St. Louis Circuit Court,

Missouri) ("2007 Suit"). LR000647. The 2007 Suit alleged that the plaintiffs had suffered injuries caused by toxic emissions emanating from the Smelting Facility. In August 2008, the 2007 Suit was voluntarily dismissed. *Id.*

B. The Subsequent Filing of the Smelter Suits.

After the 2007 Suit was dismissed, Doe Run and others were sued in more than 25 individual Smelter Suits filed on behalf of minor plaintiffs living in the vicinity of the Smelting Facility. LR000270-000271, 000275-000277, 003567-003568. Those Suits are currently in ongoing litigation.

Each Smelter Suit alleges that the plaintiffs suffered injuries from exposure to harmful and toxic substances, including lead, arsenic, cadmium and sulfur dioxide, released from the Smelting Facility. The complaints allege that such releases were "into the air and water and onto the properties on which the minor plaintiffs have in the past and/or continue to reside, use and visit, which has resulted in toxic and harmful exposures to minor plaintiffs." LR000646, 000662. They further allege that the particulate matter within the air is dispersed from the Smelting Facility "in a dust form that enters and settles inside the minor plaintiffs' houses and is deposited on the ground and on all surfaces, including furniture, clothing, water, and crops." *Id.*

C. Doe Run's Suit Against Other Insurers and the Subsequent Addition of St. Paul as a Defendant.

In April 2010, Doe Run filed this suit against four insurance companies, not including St. Paul, seeking reimbursement for defense costs that Doe Run is incurring in the Smelter Suits. Those sued included National Union Fire Insurance Company of

Pittsburgh, Pa. ("National Union"), which issued an "Executive and Organization Liability Insurance Policy," and American Guarantee & Liability Insurance Company ("AGLIC"), which issued a global liability policy covering a period earlier than that of the St. Paul policy. LR000055-000065.

On November 7, 2011, Circuit Judge Sandra Hemphill ruled that National Union was obligated to defend the Smelter Suits. Subsequently, Doe Run settled with National Union, which made a lump sum payment for past defense costs and agreed to pay a significant percentage of future defense costs. LR003608. Doe Run also settled with AGLIC, which made a lump-sum payment for a portion of past defense costs. *Id.* The claims against the other two insurers were dismissed. LR000092-000094.

D. Doe Run's Tender to St. Paul of the 2007 Suit and, After the Voluntary Dismissal of the 2007 Suit, Tender in March 2012 of the Subsequently Filed Smelter Suits.

On October 15, 2007, Doe Run's insurance broker notified The Travelers Indemnity Company, St. Paul's affiliate, of the 2007 Suit. LR000649-000650. Ten days later, a St. Paul representative responded, stating that St. Paul would investigate the coverage claim and requesting that Doe Run supply several categories of "information and documentation." LR002962-002963. St. Paul never received a response to its request, or any subsequent communications from Doe Run regarding the 2007 Suit. LR000432-000433, 003463. As the circuit court found, "it appears that – whether intentional or not – Doe Run forgot about or ignored St. Paul as it pursued claims against

its other insurers." LR003463. The 2007 Suit was voluntarily dismissed in 2008. LR000647. Thereafter, the initial Smelter Suits were filed.

Almost five years later, on March 16, 2012, Doe Run's counsel sent a letter to St. Paul advising St. Paul that: (1) the 2007 Suit had been voluntarily dismissed; (2) thereafter, the Smelter Suits were filed; (3) Doe Run filed coverage litigation against its other insurers and had obtained a declaratory judgment rejecting the application of National Union's pollution exclusion; and (4) National Union settled Doe Run's coverage claims by agreeing to pay a portion of Doe Run's defense costs. LR000652-000654. The letter also, for the first time, requested St. Paul to fund the unreimbursed defense costs. *Id*. In April 2012, St. Paul acknowledged receipt of that letter, reserving all rights. LR002965-002967.

E. The St. Paul Policy.

The St. Paul policy at issue in this case is a "Global Companion Policy," number GB09400566, issued to Doe Run with initial effective dates of December 31, 2005 to November 1, 2006, and subsequently renewed for the period from November 1, 2006 to November 1, 2007 ("Policy"). LR000286, 000389. Subject to its terms, conditions and exclusions, the Policy covers "bodily injury" and "property damage" that happens during the policy period caused by an "event" that arises outside of the United States. LR000314, 000319, 000451, 000456. The Policy has an "Each Event" limit of $1,000,000 and a "General Total Limit" of $1,000,000. LR000309, 000423. Defense costs, however, are not subject to those limits. LR000318, 000455.

The Policy lists "Doe Run Peru S.R. Ltda." ("Doe Run Peru"), then a subsidiary of Doe Run, as an additional named insured. LR000387, 000422. Doe Run Peru is the Peruvian company that owned and operated the Smelting Facility at issue. LR000644, 000659-000660, 003498.

A Peruvian insurer, Rimac Seguros ("Rimac"), issued primary policies with limits of $1,000,000 per occurrence covering Doe Run liabilities arising in Peru during St. Paul's coverage period. LR000603-000606. The binder issued for the St. Paul Policy confirms Doe Run's agreement that it had obtained coverage in Peru from Rimac and that the St. Paul Policy provides excess coverage to Rimac's policy: "It is agreed that the insured has a primary General Liability policy in place for US $1,000,000 per occurrence, and that the Global Companion policy will be excess to this primary policy issued by Rimac Seguros." LR003302.

The St. Paul Policy contains several types of coverage, including commercial general liability coverage, business travel accidental death and dismemberment protection, auto liability and auto medical payments protection, kidnap and ransom protection, and workers compensation and employers liability protection. LR000288, 000392. The Policy includes a provision entitled "Estimated Premium Summary" that states the premium for the Policy's Commercial General Liability portion could be increased or decreased based on tonnage of "ore," but that "[a]ll other terms of your policy" – including the pollution exclusion – "remain the same." LR000311, 000397.

1. The Pollution Exclusion.

The Policy contains a three page absolute pollution exclusion ("Pollution Exclusion") that provides in relevant part as follows:

> **Pollution injury or damage.**
>
> We won't cover injury or damage or medical expenses that result from pollution at, on, in, or from any:
>
> • protected person's premises
>
> * * *
>
> *Pollution* means any actual, alleged, or threatened discharge, dispersal, escape, migration, release, or seepage of any pollutant.
>
> *Pollutant* means any solid, liquid, gaseous, or thermal irritant or contaminant, including:
>
> • smoke, vapor, soot, fumes;
>
> • acids, alkalis, chemicals; and
>
> • waste.
>
> *Waste* includes materials to be recycled, reconditioned, or reclaimed.
>
> *Protected person's premises* means any premises, site, or location that is or was at any time owned, rented, leased, borrowed, or occupied by any protected person. For example …
>
> *You own an apartment building … Two of your renters sue you for bodily injury to their children allegedly caused by the lead in that paint ... We won't cover such injury.*

* * *

Pollution work loss, cost, or expense.

We won't cover any loss, cost, or expense that results from:

- any request, demand, order, or statutory or regulatory requirement that any protected person or others perform pollution work[.]

* * *

Pollution work means:

- the testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing of any pollutant; or
- the responding to, or assessing, in any way the effects of any pollutant.

For example:

A chemical spill at your manufacturing facility releases a vapor cloud. Several hundred people are exposed to the vapor cloud before it disappears … several of them demand that you arrange and pay for medical checkups now, and yearly for the next ten years, to assess the effect of the vapor cloud on their health. We won't cover the cost of such pollution work, regardless of who orders or performs it.

LR000336, 000338, 000473, 000475 (italics in original).

2. The Policy's Defense and Other Insurance Provisions.

The Policy contains the following provision with respect to defense coverage:

> **Right and duty to defend a protected person.**
>
> We'll have the right and duty to defend any protected person against a claim or suit for injury or damage covered by this agreement.
>
> We'll have such right and duty even if all of the allegations of the claim or suit are groundless, false, or fraudulent. But we won't have a duty to perform any other act or service.

LR000317, 000454.

However, the Policy additionally contains the following "Other Insurance" provision that provides, as applied to the facts here, that the Policy is excess over any other similar coverage issued in Peru, and that, when the Policy is excess, St. Paul does not have a duty to defend a suit for which any other insurer has the duty to defend ("Other Insurance Provision"):

> **Other Insurance**
>
> This agreement is primary insurance. However, if there's any valid and collectible other insurance for injury or damage covered by this agreement, we'll apply this agreement in connection with that other insurance in accordance with the rest of this section.
>
> * * *

Primary or excess other insurance.

* * *

We'll also apply this agreement as excess insurance over any similar coverage that is issued in a country within the coverage territory.

* * *

When this agreement is excess insurance.

When this agreement is excess insurance, we won't have a duty to defend the protected person against the part or parts of any claim or suit for which any provider of other insurance has the duty to defend that protected person.

LR000340-000341, 000477-000478

The Policy also incorporates the following endorsement (the "DIC Endorsement") regarding underlying coverage that provides, as applied to the facts here, that a reduced premium has been charged based on Doe Run's representation that it has purchased underlying insurance issued in Peru:

Difference in Conditions/Difference in Limits Warranty.

A reduced premium has been charged for this policy in consideration of your representation that certain other insurance is issued in countries within the coverage territory, that will remain in full force and effect, and that will include certain coverages. You must maintain these policies in full force and effect, and any renewals of these policies cannot be more restrictive.

> You are responsible for maintaining this other insurance in countries within the coverage territory with a minimum required Limit of Liability of $1,000,000 applying to any claims resulting from Bodily Injury or Property Damage.
>
> If, in the event of a loss, this other insurance issued in countries within the coverage territory that you represented to be in full force and effect at the inception date of this policy are not in full force and effect, have lapsed, or have been replaced by policies more restrictive than what you represented without notifying us, we will only be liable to the extent we would have been if the representations had been correct and current.

LR000350, 000487.

Further, the Policy imposes the following conditions with respect to notice and unauthorized payments:

> **If Your Policy Provides Liability Protection**
>
> If your policy provides liability protection and there's an accident, act, error, event, incident, offense, or omission that may result in damages or other amounts which may be covered under that protection, you or any other person or organization protected under your policy must do all of the following in connection with that accident, act, error, event, incident, offense, or omission:
>
> * * *

> 3. As soon as possible after receiving them, mail, deliver, or otherwise give to us a copy of:
>
> - all written demands made; and
> - all legal documents relating to any suit brought;
>
> against you or any other person or organization protected under your policy.
>
> * * *
>
> 5. Not assume any financial obligation or pay out any money, other than for first aid given to others at the time of an accident, without our consent.

LR000298-000299, 000435-000436.

3. Rimac Seguros' Denial of Coverage.

As discussed *supra* at 8, Rimac issued primary policies to Doe Run. Doe Run tendered the Smelter Suits to Rimac for coverage, but Rimac denied coverage based on the pollution exclusion contained in its policy. LR002541-002543. Doe Run has chosen not to sue Rimac for coverage. LR002581, 002587.

F. The Litigation Between Doe Run and St. Paul.

1. The Pleadings.

On May 17, 2012, Doe Run added St. Paul to this case through the filing of its "First Amended Complaint." LR000026, 000106-000118. St. Paul answered, denying

coverage based upon, among other things, the application of the Pollution Exclusion and the Other Insurance Provision. LR000119-000144.

On May 21, 2013, Doe Run filed a "Second Amended Complaint" in which it added an additional claim for "Unreasonable Refusal to Pay Pursuant to Mo. Rev. Stat. § 375.420" against St. Paul ("Extra-Contractual Claim"). LR000172-000182. St. Paul answered denying the allegations supporting the Extra-Contractual Claim and again denying coverage. LR000200-000222.

2. The Circuit Court's Rulings on the Summary Judgment Motions.

St. Paul and Doe Run cross-moved for summary judgment. St. Paul contended that it is not obligated to reimburse Smelter Suit defense costs because (1) coverage is barred by the Pollution Exclusion and (2) its Policy is excess to the Rimac policies and, therefore, it does not have a duty to defend because National Union has that duty. LR002380-002427, 002456-002460. In response, Doe Run argued that St. Paul is obligated to participate in the defense because (1) the Pollution Exclusion is ambiguous and (2) St. Paul's policy provides primary coverage. LR001466-001517.

On July 2, 2014, Circuit Judge Thomas J. Prebil, who had replaced Judge Hemphill on this case, denied St. Paul's motion and granted Doe Run's motion. A6-7, LR003414-003415. As to the Pollution Exclusion, the circuit court decided to "uphold" Judge Hemphill's ruling that the pollution exclusion in the National Union policy was ambiguous because it did not specifically list each of the individual contaminants at issue in the Smelter Suits – lead, arsenic, cadmium and sulfur dioxide. A3-4, LR003411-003412. The circuit court also noted that Judge Hemphill relied on the ruling in *Hocker*

Oil Co. v. Barker-Phillips-Jackson, Inc., 997 S.W.2d 510 (Mo. App. S.D. 1999), where the court held that a pollution exclusion in a policy issued to gasoline service stations was ambiguous as applied to a gasoline spill. A3, LR003411. The circuit court stated that it found "enticing" St. Paul's argument that *Hocker Oil* should be limited to its unique factual situation and that contrary Missouri and Eighth Circuit decisions enforcing pollution exclusions are directly on point. A3-4, LR003411-003412. Nonetheless, the circuit court chose to follow the *Hocker Oil* reasoning "[u]ntil our higher courts resolve the issue." A4, LR003412.

As to the Other Insurance Provision, the circuit court ruled that, as a matter of law, the St. Paul Policy provides primary insurance and that St. Paul has a duty to defend the Smelter Suits. A6, LR003414.

St. Paul also subsequently moved for summary judgment on Doe Run's Extra-Contractual Claim. LR002616-002639. On November 18, 2014, the circuit court entered summary judgment on the Extra-Contractual Claim in favor of St. Paul and against Doe Run. A18, LR003460-003464.

3. The February 18, 2015 Judgment.

On February 18, 2015, after a two day trial on damages, the circuit court entered a judgment finding that St. Paul is obligated to pay $1,758,252.73 in past defense costs, plus prejudgment interest to be subsequently determined and any other unreimbursed defense costs incurred before the entry of a final judgment. A18, LR003577. Included in that amount were $481,520.89 incurred before March 16, 2012, when Doe Run tendered the Smelter Suits to St. Paul ("Pre-Tender Costs"). In awarding Pre-Tender Costs, the

circuit court found that Doe Run had provided notice of the Smelter Suits prior to March 2012 by: (1) advising St. Paul of the 2007 Suit that was subsequently dismissed; and (2) providing St. Paul with copy of a November 2010 letter to Zurich Insurance Company ("Zurich") discussing the status of certain pending cases, including the Smelter Suits.[1] LR003575. The circuit court found that this notice was sufficient to justify an award of Pre-Tender Costs, but that even if it was not, St. Paul must prove actual and substantial prejudice to avoid Pre-Tender Costs, which the evidence did not support. A13-14, LR003572-003573.

4. The April 23, 2015 Final Judgment.

On April 23, 2015, the circuit court entered a final judgment that: (a) declared that St. Paul is obligated to participate in defense of the Smelter Suits; (b) ruled that St. Paul breached its defense obligations and awarded Doe Run $2,108,535.44 in damages and prejudgment interest (comprised of $1,805,771.35 in past defense costs and $302,764.09

[1] Zurich was Doe Run's domestic primary insurer. The letter was copied to "Various Excess Insurers," and accompanied by a transmittal letter addressed to "St. Paul Travelers Company" in St. Paul, Minnesota. LR003484-003499. As to why the excess insurers were copied, the letter stated: "[U]nderstanding that it is Zurich's obligation as Doe Run's primary insurer to keep relevant overlying insurers apprised for their files, to help facilitate that process, we have copied excess and umbrella insurers on this letter." LR003485. Neither the letter to Zurich nor the transmittal letter referred to the St. Paul Policy or stated that Doe Run was tendering to St. Paul the defense of Smelter Suits.

in prejudgment interest); (c) dismissed with prejudice Doe Run's Extra-Contractual Claim; (d) awarded Doe Run $12,093.08 in costs; and (e) ruled that post-judgment interest shall accrue as of April 22, 2015. A20-25, LR003580-003585.

5. The Court of Appeals' Opinion.

St. Paul filed its Notice of Appeal on May 28, 2015. LR003587-003623. On September 27, 2016, the court of appeals issued its opinion ("Opinion") affirming in part, reversing in part, and remanding the case to the circuit court.

As to Point I (the Pollution Exclusion), the court of appeals affirmed the circuit court's ruling that the Pollution Exclusion was unenforceable, but it did so based on its *sua sponte* interpretation of the Policy, one not advocated by Doe Run in the trial court or on appeal. The court of appeals did not find the Pollution Exclusion itself ambiguous. Instead, the court of appeals found a "conflict" between the Pollution Exclusion and the manner in which the Policy's premium is calculated. The court reasoned that since the premium varies based on "the amount of ore [Doe Run] mines, smelts, recycles, and fabricates," one could expect that, as ore production increases, more "toxic byproducts" would be generated. Opinion at 9-10. It cited the increased risk of "covered bodily injury liability *specifically because* such increases in output heighten the risk of *harmful exposures to the toxins resulting from the process*." *Id*. at 10 (emphasis in original). The court of appeals concluded that "the ordinary person of average understanding purchasing [the Policy] might reasonably perceive a conflict between the terms of the policy's pollution exclusion and its premium summary," thereby rendering the Policy ambiguous and the Exclusion unenforceable. *Id*.

The court of appeals also affirmed the circuit court's ruling as to the Other Insurance Provision (Point II), but again based on a theory not advocated by Doe Run. The court concluded that, "because the National Union policy is a D&O policy," the policy did not provide coverage to Doe Run "for its *own* wrongful acts resulting in bodily injury, but for its indemnification obligations to its *officers and directors* who have caused harm." Opinion at 12 (emphasis in original). Because the court concluded that National Union did not cover Doe Run for its own acts, and since the St. Paul Policy "*only* excuses St. Paul from providing coverage for the *specific 'part or parts* of any claim or suit for which any provider of other insurance has the duty to defend,'" the court of appeals ruled that St. Paul had a duty to defend Doe Run. Opinion at 12 (emphasis in original).

With regard to Point III (Pre-Tender Costs), the court of appeals reversed, ruling "that the trial court erred in determining that St. Paul had notice of a claim for coverage in the underlying lawsuits prior to March 16, 2012." Opinion at 16. The court of appeals found that Doe Run did not demand coverage until that date. As a result, the court of appeals held that St. Paul is not liable for any defense costs incurred before March 16, 2012. *Id*.

Finally, on Point IV (Prejudgment Interest), the court of appeals held that the circuit court erred in awarding prejudgment interest from the date Doe Run incurred each of its defense costs. The court of appeals ruled that interest runs from when Doe Run advised St. Paul of the specific amounts for which it was seeking reimbursement. St. Paul contended that Doe Run did not advise it of those amounts until a week before trial,

when Doe Run provided a final accounting listing the specific defense invoices for which it was seeking reimbursement and the portion of those invoices that had been paid by other insurers. The court of appeals disagreed, instead ruling that St. Paul was placed "on notice of the 'readily determinable' or 'ascertainable' defense costs for which it was potentially liable" when Doe Run produced its first group of invoices on December 6, 2012 and when it produced subsequent invoices. Opinion at 19. The court ruled that St. Paul owed interest on each invoice from the date of its production to St. Paul. *Id*. at 19-20.

St. Paul filed a motion for rehearing and application to transfer. Both were denied on December 1, 2016. St. Paul thereafter filed an Application to Transfer with this Court, which was granted on February 28, 2017.

POINTS RELIED ON

I. The circuit court erred in denying St. Paul's motion for summary judgment premised on the St. Paul Policy's Pollution Exclusion, and in granting Doe Run's cross-motion for partial summary judgment, because the circuit court incorrectly determined that St. Paul owes a defense obligation to Doe Run for the Smelter Suits, in that:

a. the Pollution Exclusion unambiguously bars coverage for the injuries alleged in the Smelter Suits caused by the pollution released from the Smelting Facility in Peru, a conclusion supported by Missouri appellate and Eighth Circuit authority

holding that similar pollution exclusions are unambiguous and bar coverage for pollution; and

b. in finding the Pollution Exclusion ambiguous, the circuit court ignored the plain meaning of the Pollution Exclusion and "created" an ambiguity by finding the clause must list the specific contaminants at issue, a requirement that is impractical and that has been consistently rejected by state and federal courts applying Missouri law.

Cas. Indem. Exch. v. City of Sparta, 997 S.W.2d 545 (Mo. App. S.D. 1999).

Boulevard Inv. Co. v. Capitol Indem. Corp., 27 S.W.3d 856 (Mo. App. E.D. 2000).

Doe Run Res. Corp. v. Lexington Ins. Co., 719 F.3d 868 (8th Cir. 2013).

Doe Run Res. Corp. v. Lexington Ins. Co., 719 F.3d 876 (8th Cir. 2013).

II. The circuit court erred in denying St. Paul's motion for summary judgment premised on the St. Paul Policy's Other Insurance Provision, and in granting Doe Run's cross-motion for partial summary judgment, because the circuit court incorrectly determined that St. Paul owes a defense obligation to Doe Run for the Smelter Suits, in that:

a. the circuit court ruling failed to apply this Court's enunciated principles of insurance policy interpretation in that it failed to consider all of the provisions of the Other Insurance Provision;

b. the Other Insurance Provision provides that the St. Paul Policy applies as excess insurance over local coverage issued in Peru;

c. such local coverage was issued by Rimac Seguros;

d. the Other Insurance Provision provides that, if the St. Paul Policy is excess insurance, St. Paul will not have a duty to defend if any other insurer has such a duty; and

e. National Union has a duty to defend the Smelter Suits.

Floyd-Tunnell v. Shelter Mut. Ins. Co., 439 S.W.3d 215 (Mo. banc 2014).

Britt v. Gen. Star Indem. Co., 775 F. Supp. 2d 454 (N.D.N.Y. 2011), *rev'd on other grounds*, 494 Fed. Appx. 151 (2d Cir. 2012).

Northbrook Prop. & Cas. Ins. Co. v. U.S. Fid. & Guar. Co., 501 N.E.2d 817 (Ill. Ct. App. 1986).

III. The circuit court erred in denying St. Paul's motion for judgment regarding those defense costs incurred in the Smelter Suits prior to Doe Run's March 2012 tender of the Smelter Suits, and in awarding Doe Run damages for such pre-tender defense costs, because the circuit court incorrectly found that St. Paul is obligated to reimburse such costs, in that:

a. defense costs incurred before an insured's tender of a defense are not recoverable under the St. Paul Policy and Missouri law;

b. contrary to the circuit court's finding, the evidence established that Doe Run did not tender the Smelter Suits to St. Paul until March 2012; and

c. the circuit court erroneously concluded that St. Paul was required to prove that it was prejudiced by the delayed tender of the Smelter Suits in order not to be obligated to reimburse Doe Run for pre-tender costs.

Monsanto Co. v. Gould Elecs., Inc., 965 S.W.2d 314 (Mo. App. E.D. 1998).

Cincinnati Ins. Co. v. Mo. Highways and Transp. Comm., No. 12-CV-1484, 2014 WL 7330980 (W.D. Mo. Dec. 19, 2014).

Wright v. Hartford Acc. & Indem. Co., 442 F. Supp. 155 (N.D. Ga. 1977).

Travelers Indem. Co. v. Northrop Grumman Corp., 3 F. Supp. 3d 117 (S.D.N.Y. 2014), *aff'd*, No. 15-3117-CV, 2017 WL 391926 (2d Cir. Jan. 27, 2017) (Summary Order).

IV. The circuit court erred in entering a judgment under Mo. Rev. Stat. §408.020 awarding Doe Run prejudgment interest on the damages awarded because the circuit court incorrectly concluded that the damages are liquidated, in that:

a. the damages awarded were not liquidated because the amount of defense costs allegedly owed by St. Paul could not be determined until Doe Run provided an accounting setting forth on which invoices St. Paul allegedly owed defense costs and showing for each invoice the amount St. Paul purportedly owed after crediting amounts Doe Run had received from other insurers;

b. Doe Run did not provide St. Paul with such an accounting until shortly before trial; and

c. prejudgment interest may be awarded under Missouri law only if the damages are liquidated.

Fohn v. Title Ins. Corp. of St. Louis, 529 S.W.2d 1 (Mo. banc 1975).

Transamerica Ins. Co. v. Penn Nat'l Ins. Cos., 908 S.W.2d 173 (Mo. App. E.D. 1995).

Nangle v. Brockman, 972 S.W.2d 545 (Mo. App. E.D. 1998).

Doe Run Resources Corp. v. Certain Underwriters at Lloyd's London, 400 S.W.3d 463 (Mo. App. 2013).

ARGUMENT

I. The circuit court erred in denying St. Paul's motion for summary judgment premised on the St. Paul Policy's Pollution Exclusion, and in granting Doe Run's cross-motion for partial summary judgment, because the circuit court incorrectly determined that St. Paul owes a defense obligation to Doe Run for the Smelter Suits, in that:

a. the Pollution Exclusion unambiguously bars coverage for the injuries alleged in the Smelter Suits caused by the pollution released from the Smelting Facility in Peru, a conclusion supported by Missouri appellate and Eighth Circuit authority holding that similar pollution exclusions are unambiguous and bar coverage for pollution; and

b. in finding the Pollution Exclusion ambiguous, the circuit court ignored the plain meaning of the Pollution Exclusion and "created" an ambiguity by finding the clause must list the specific contaminants at issue, a requirement that is impractical and that has been consistently rejected by state and federal courts applying Missouri law.

A. Standard of Review.

In its motion for summary judgment, St. Paul contended that the Pollution Exclusion is unambiguous as applied to the allegations in the Smelter Suits and bars Doe Run's coverage claim. In denying St. Paul's motion and granting Doe Run's cross-

motion for partial summary judgment, the circuit court ruled that the Pollution Exclusion is ambiguous as applied to the Smelter Suit allegations, and entered a judgment declaring that St. Paul is obligated to pay Doe Run for any unreimbursed reasonable and necessary defense fees and costs incurred by Doe Run in the Smelter Suits.

Review of the circuit court's ruling on the cross-motions for summary judgment is *de novo*. *See Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 826 (Mo. banc 2014). The criteria on appeal for evaluating the propriety of summary judgment are no different from those that should be employed by the circuit court in determining whether summary judgment is warranted. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate if no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Id.*

The interpretation of an insurance policy is a question of law. *Dutton v. Am. Fam. Mut. Ins. Co.*, 454 S.W.3d 319, 322 (Mo. banc 2015). On appeal, questions of law receive *de novo* review, giving no deference to the trial court's decision. *Pearson v. Koster*, 367 S.W.3d 36, 43-44 (Mo. banc 2012).

B. Insurance Policy Interpretation.

The duty to defend arises only when "'there is a potential or possible liability to pay based on the facts at the outset of the case.'" *Allen v. Cont'l Western Ins. Co.*, 436 S.W.3d 548, 552 (Mo. banc 2014) (*quoting McCormack Baron Mgmt. Servs., Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 170 (Mo. banc 1999)). In determining whether there is a duty to defend, the court must first compare the policy's language with the

allegations in the pleading alleging claims against the insured, here the complaints in the Smelter Suits. If the complaint "alleges facts that give rise to a claim potentially covered by the policy, the insurer has a duty to defend." *Id*. The insurer also has a duty to defend "if facts that are known to the insurer, or that are reasonably apparent to the insurer, at the commencement of the suit establish a potential for coverage." *Id*.

This Court has held that, as contracts, insurance policies are subject to the settled rules of contract interpretation. *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301-03 (Mo. banc 1993). "The general rule in interpreting insurance contracts is to give the language of the policy its plain meaning." *Allen*, 436 S.W.3d at 554. In construing the terms of an insurance policy, Missouri courts apply "the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009).

"Absent an ambiguity . . . Missouri appellate courts do not resort to canons of construction. If the policy's language is unambiguous, it must be enforced as written." *Allen*, 436 S.W.3d at 554 (citation omitted). If an insurance policy is found to be ambiguous, the ambiguity is construed against the insurer. *Id*. However, "[a]n ambiguity exists only when a phrase is 'reasonably open to different constructions.'" *Id*. (*quoting Mendenhall v. Property and Cas. Ins. Co. of Hartford*, 375 S.W.3d 90, 92 (Mo. banc 2012)).

Courts are "not permitted to create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which [they] might feel is more appropriate." *Rodriguez v. Gen. Acc. Ins. Co.*, 808 S.W.2d 379, 382

(Mo. banc 1991). "'[C]ourts may not unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating an ambiguity where none exists.'" *Allen*, 436 S.W.3d at 554 (*quoting Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. banc 2007)). "Definitions, exclusions, conditions, and endorsements are necessary provisions in insurance policies. If they are clear and unambiguous within the context of the policy as a whole, they are enforceable." *Todd*, 723 S.W.3d at 163.

C. The Pollution Exclusion in the St. Paul Policy is Unambiguous and Clearly Includes the Allegations of the Smelter Suits.

The Absolute Pollution Exclusion in the St. Paul Policy is three pages in length, the pertinent portions of which are quoted *supra*, at 9 - 10. Among other things, the Exclusion provides that coverage is excluded for "injury or damage . . . that result from pollution at, on, in or from any: protected person's premises." LR000336, 000473. The Policy defines "pollution" as "any actual, alleged, or threatened discharge, dispersal, escape, migration, release or seepage of any pollutant." *Id*. "*Pollutant* means any solid, liquid, gaseous, or thermal irritant or contaminant, including: smoke, vapor, soot, fumes; acids, alkalis, chemicals; and waste." *Id*. (emphasis in original).

The allegations of the Smelter Suits fall ***directly*** within this plain and unambiguous language. First, there is no dispute that the Smelting Facility is a "protected person's premises," as it is a "site . . . that is or was at any time owned . . . or occupied by" any "protected person," *i.e.*, Doe Run and/or Doe Run Peru. LR000336, 000473, 000603, 000644.

Second, the Smelter Suits expressly allege injuries or damage from "pollution" – *i.e.*, "actual, alleged, or threatened discharge, dispersal, escape, migration, release or seepage" of fugitive emissions "from" the Smelting Facility. LR000336, 000473. Indeed, the plaintiffs specifically allege:

- they have been "exposed to and injured by the harmful and toxic substances released from [the Smelting Facility]";
- the "release of metals and other toxic and harmful substances [including but not limited to] lead, arsenic, cadmium, and sulfur dioxide"; and
- such releases were "into the air and water and onto the properties on which the minor plaintiffs have in the past and/or continue to reside, use and visit, which has resulted in toxic and harmful exposure to the minor plaintiffs."

LR000646, 000661-000663. Moreover, the complaints expressly allege that the releases of toxic substances caused "***polluted*** air" that "is dispersed in a dust form that enters and settles inside the minor plaintiffs' houses and is deposited on the ground and on all surfaces, including furniture, clothing, water, and crops." LR000662 (emphasis added). Indeed, the complaints themselves refer to the toxic substances as "***pollutant[s]***." LR000663 (emphasis added).

Finally, the Smelter Suits unequivocally allege injuries from exposure to "pollutants." The complaints state that "[t]he minor plaintiffs lived in or around La Oroya, Peru and were exposed to and injured by the harmful and toxic substances released from [the Smelting Facility]." LR000661. Additionally, the complaints allege how each of lead, arsenic, cadmium and sulfur dioxide causes bodily injuries.

LR000662-000663. There are no allegations in the complaints of injuries caused by anything other than the emissions from the Smelting Facility.

The sort of smelter emissions alleged in the Smelter Suits are clearly what an "ordinary person of average understanding if purchasing insurance would understand" to be "pollution" under the terms of the Pollution Exclusion. *Ritchie*, 307 S.W.3d at 135. If the language in the Pollution Exclusion is to be given its plain and ordinary meaning, it must be read to apply to the type of toxic emissions alleged in the Smelter Suit complaints. *See Boulevard Investment*, 27 S.W.3d at 858 (applying the "ordinary meaning" of the word "waste" in enforcing a pollution exclusion and denying coverage).

D. The Missouri Courts of Appeals and the Eighth Circuit Have Found Virtually Identical Pollution Exclusions Unambiguous.

Appellate courts applying Missouri law have found similar pollution exclusions unambiguous and barred coverage. For example, in *Casualty Indemnity Exchange v. City of Sparta*, 997 S.W.2d 545 (Mo. App. S.D. 1999), a policyholder claimed that the insurer was obligated to defend a complaint alleging that toxic sludge had migrated from the insured's property onto neighboring property and to indemnify the insured for any judgment that might be returned against it in the suit. The Court of Appeals for the Southern District held that an absolute pollution exclusion barred the coverage for the alleged contamination, and therefore the insurer had no duty to defend the city for the underlying lawsuits. The exclusion provided that the insurer would have "no obligation" under the policy to defend "any claim or suit against any insured alleging any actual or

threatened injury or damage . . . which arises out of or would not have occurred but for the pollution hazard." *Id*. at 547. "Pollution hazard" was defined as:

> an actual exposure or threat of exposure to the corrosive toxic or other harmful properties of any solid, liquid, gaseous or thermal pollutants, contaminants, irritants or toxic substances, including smoke, vapors, soot, fumes, acid or alkalis, and waste materials consisting of or containing any of the foregoing.

Id.

The *City of Sparta* court ruled:

> Inasmuch as (1) the substance at issue in the instant case is sludge, (2) [the plaintiffs] pled the sludge contained substances toxic to humans and animals, which caused [the plaintiffs'] damage, and (3) the Absolute Pollution Exclusion bars coverage for damage arising from exposure to the toxic substances, this court holds that ***the Absolute Pollution Exclusion is not ambiguous*** regarding whether [the plaintiffs'] damage is barred from coverage . . . . The Absolute Pollution Exclusion clearly bars coverage.

Id. at 551 (emphasis added).

Citing this Court's opinion in *Brugioni v. Maryland Casualty Co*., 382 S.W.2d 707, 710 (Mo. 1964), the *City of Sparta* court observed that it "must enforce the Absolute Pollution Exclusion as written, not rewrite it" (*id*. at 550), aptly concluding:

> To hold the Absolute Pollution Exclusion does not bar coverage for damage caused by toxic substances from sludge removed from sewage by Sparta's wastewater treatment facility would leave one wondering what kind of activity would be excluded by the Absolute Pollution Exclusion.

Id. at 552.

In *Cincinnati Insurance Co. v. German St. Vincent Orphan Ass'n, Inc.*, 54 S.W.3d 661, 665-66 (Mo. App. E.D. 2001), the Court of Appeals for the Eastern District addressed an insured's argument that an absolute pollution exclusion was vague, ambiguous and overbroad as applied to a property damage claim arising from the spread of asbestos-containing dust. The exclusion stated that the insurer would "not pay for loss or damage caused by or arising from . . . [d]ischarge, dispersal, seepage, migration, release or escape of 'pollutants.'" *Id*. at 664. "Pollutants" was defined to include "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id*. The insured argued that "there is virtually no substance or chemical in existence that would not irritate or damage some person or property." *Id*. at 665. In heeding this Court's admonition that a "policy must be enforced as written," the court of appeals concluded "that friable asbestos unquestionably falls into the category of an 'irritant' or 'contaminant' as those words appear" in the absolute pollution exclusion. *Id*. at 665-66. The asbestos had been "released or discharged by the removal of the old vinyl flooring which constitutes a release or discharge of a pollutant as set forth in the exclusion." *Id*.

Similarly, in *Boulevard Investment Co. v. Capitol Indemnity Corp.*, 27 S.W.3d 856 (Mo. App. E.D. 2000), the court of appeals considered whether an absolute pollution exclusion barred coverage for a property damage claim arising from blockage in a plumbing system caused by kitchen grease and other waste. The exclusion provided that the policy does not apply to "bodily injury" or "property damage" caused by "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." *Id*. at 858. "Pollutants" was defined as:

> any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.

Id. Citing this Court's statement in *Peters v. Employers Mutual Casualty Co*., 853 S.W.2d 300, 303 (Mo. banc 1993), that courts are to give terms in a policy their ordinary meaning, the court of appeals applied the ordinary meaning of the word "waste" within the policy's definition of "pollutant" in applying the exclusion to bar coverage. *Id*. at 858.

In *Trans World Airlines, Inc. v. Associated Aviation Underwriters*, 58 S.W.3d 609, 621-23 (Mo. App. E.D. 2001), the Eastern District considered the application of the "sudden and accidental" pollution exclusion. That exclusion is similar to absolute pollution exclusions, but provides that it does not apply if the discharge, dispersal, release or escape of the pollution was "sudden and accidental." *Id*. at 621. The insured argued that the exclusion was ambiguous and therefore did not bar its claim that the insurer had to defend and indemnify it in connection with enforcement actions filed by environmental

agencies related to its hazardous waste. Noting the principle that, in interpreting the language of insurance contracts, appellate courts give the language its plain meaning, the court of appeals disagreed, ruling that the exclusion was unambiguous and barred the insured's claims for coverage. *Id*. at 622-23 (*citing Shahan v. Shahan*, 988 S.W.2d 529, 533 (Mo. banc 1999)).

The circuit court's finding of ambiguity in this case is not only at odds with Missouri appellate authority, it also conflicts with opinions of the United States Court of Appeals for the Eighth Circuit holding that absolute pollution exclusions barred coverage for injuries and damage allegedly caused at other Doe Run facilities. In finding pollution exclusions unambiguous, the Eighth Circuit has applied Missouri law and expressly adhered to the principles of insurance contract interpretation enunciated by this Court.

In *Doe Run Resources Corp. v. Lexington Insurance Co.*, 719 F.3d 868, 871 (8th Cir. 2013) (Missouri law) ("*Doe Run I*"), Doe Run sought defense coverage for a neighboring landowner's lawsuit "alleging environmental property damage resulting from" a Doe Run facility near Viburnum, Missouri. Just as in the Smelter Suits, the complaint in *Doe Run I* alleged that "Doe Run has caused hazardous and toxic substances, primarily lead . . . but also other substances including arsenic [and] cadmium . . . to contaminate the soil, air, and water." *Id.* at 871. And as in the Smelter Suits, the *Doe Run I* plaintiff alleged that releases from Doe Run's facility caused it damage. *Id.* at 871-72. Several of the policies at issue excluded:

> bodily injury or property damage . . . caused by, contributed to or arising out of the actual or threatened discharge, dispersal, release, or

> escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, pollutants or contaminants into or upon the land, the atmosphere or any course or body of water.

Id. at 872-73. Other policies excluded bodily injury or property damage caused by "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants," with "pollutants" defined as:

> any solid, liquid, gaseous, or thermal irritant or contaminate including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.

Id. at 873. Concluding that the allegations "all fit squarely within the language of the pollution exclusions," the Eighth Circuit held that the insurer had no duty to defend Doe Run. *Id.* The Court observed, "It is hard to imagine a more perfect overlap between the allegations in a third party's underlying complaint and the operative language of a pollution exclusion." *Id.* at 874 (emphasis in original) (*citing City of Sparta*, 997 S.W.2d at 552).

On the same day it decided *Doe Run I*, the Eighth Circuit issued a nearly identical decision in *Doe Run Resources Corp. v. Lexington Insurance Co.*, 719 F.3d 876, 879 (8th Cir. 2013) (Missouri law) ("*Doe Run II*"), where Doe Run sought defense coverage for a lawsuit brought "on behalf of a class of minors seeking damages for Doe Run's tortious release of lead and other toxic chemicals" from a facility near Leadwood, Missouri. The

applicable pollution exclusions were the same as those at issue in *Doe Run I*. Just as in the Smelter Suits, the *Doe Run II* complaint described the case as one "for injuries, damages and losses . . . as a result of the release of metals and other toxic chemicals" from Doe Run's facility. *Id.* The complaint further alleged releases of "metals and other substances, including but not limited to lead and cadmium" to "the property on which [the named] Plaintiff resided." *Id.* at 879-80.

As in *Doe Run I*, the Eighth Circuit compared those allegations with the pollution exclusions and again concluded that the exclusions "unambiguously apply and therefore bar a duty to defend":

> [E]very tort cause of action asserted in the [underlying] Lawsuit was *entirely* premised on allegations that Doe Run is liable for causing the "release" of "hazardous wastes" and "metals and other toxic substances" from the [facility], thus mirroring the language of [the insurer's] absolute pollution exclusions.

Id. at 880-81 (emphasis in original).

E. The Circuit Court's Finding that the Pollution Exclusion Is Ambiguous Ignored the Plain Meaning of the Exclusion and Misapplied Prior Caselaw.

In finding the Pollution Exclusion in the St. Paul Policy ambiguous, the circuit court failed to give the language of the Pollution Exclusion its plain meaning and to interpret the language ***as written***. *Allen*, 436 S.W.3d at 553-54. Rather, it held that "[u]ntil our higher courts resolve the issue," it would defer to Judge Hemphill's ruling

earlier in the case that a pollution exclusion is ambiguous if it does not expressly list the specific contaminants at issue in the underlying litigation. A3-4, LR003411-003412. Judge Hemphill concluded the pollution exclusion in the National Union policy was ambiguous simply because that insurer "could have excluded lead, arsenic, cadmium and sulfur dioxide as part of its pollution exclusion by either including these substances in the definition of Pollutants or in separate exclusions, but did not." LR000087-000088. This conclusion is squarely at odds with the Missouri appellate decisions from the Eastern and Southern Districts discussed above as well as the Eighth Circuit *Doe Run* cases. It would impose an unrealistic requirement for pollution exclusions, since there are hundreds or thousands of substances that can be an "irritant or contaminant" within the meaning of a pollution exclusion.

The circuit court, following Judge Hemphill, relied on the Southern District opinion in *Hocker Oil Co. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510 (Mo. App. S.D. 1999). In *Hocker Oil*, the court held that a pollution exclusion in a policy issued to gasoline service stations was ambiguous as applied to a gasoline spill at one of the stations because the insured could have considered the gasoline as its product and not a pollutant. *Id*. at 518. Here, on the other hand, the alleged pollution is ***not*** Doe Run's product, but toxic waste generated by the Smelting Facility that escaped into the environment. Indeed, the court in *Hocker Oil* expressly limited its holding to gasoline stored at the insured's gasoline station. There, the court observed that substances involved in other pollution cases were "not particularly helpful" to its analysis. *Id*. at 516.

Missouri appellate courts, including the Southern District, have found the logic of *Hocker Oil* inapposite to environmental coverage claims like those in this case. Less than two months after *Hocker Oil* was handed down, two of the three Southern District judges who decided *Hocker Oil* (Judges Parrish and Crow) joined in the *City of Sparta* decision in finding a pollution exclusion unambiguous as applied to toxic sludge. *City of Sparta*, 997 S.W.2d at 551. Even though *City of Sparta*, *Cincinnati Insurance*, *Boulevard Investment* and *Trans World Airlines* were all decided after *Hocker Oil*, ***none of them cited that prior decision***. None of those cases found that the pollutants at issue – be it lead, arsenic and cadmium in *City of Sparta*, asbestos in *Cincinnati Insurance*, the kitchen waste in *Boulevard Investment*, or the toxic substances in *Trans World Airlines* – had to be specifically listed in order for the exclusions to apply.

In *Doe Run I* and *Doe Run II*, as here, Doe Run argued that *Hocker Oil* compels a finding that the absolute pollution exclusion is ambiguous. But the Eighth Circuit found that *Hocker Oil* is not controlling for several reasons. First, the court noted that *Hocker Oil* "expressly limited its holding to gasoline," finding that cases involving other substances were "'not particularly helpful'" to its analysis because "'[c]lauses can, of course, be ambiguous in one context and not another.'" *Doe Run I*, 719 F.3d at 874 (*quoting Hocker Oil*, 992 S.W.2d at 516). Second, the court observed that the judges in *City of Sparta* did not even cite their prior opinion in *Hocker Oil* in applying a pollution exclusion to bar coverage. *Id.* at 875. And third, the court stated that *Hocker Oil*'s focus on whether the gasoline was the insured's product was misplaced. *Hocker Oil* instead should have focused on the gasoline's "toxic characteristics when accidentally released

into the environment." *Id*. The Eighth Circuit observed that the *Hocker Oil* court's "focus was a minority view when adopted, has been almost uniformly rejected by appellate courts in other jurisdictions, and has not since been cited or referred to favorably by the Supreme Court of Missouri." *Id*. (*citing Mont. Pet. Tank Release Comp. Bd. v. Crumleys, Inc.*, 341 Mont. 33, 174 P.3d 948, 956-59 (2008) (collecting cases and declining to follow *Hocker Oil*)). Indeed, the Eighth Circuit predicted that this Court would reject Doe Run's reliance on *Hocker Oil*:

> The Supreme Court of Missouri has noted that courts may not "create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which it might feel is more appropriate." *Rodriguez v. Gen. Accident Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. 1991). Applying that principle, we conclude the Supreme Court of Missouri would not interpret *Hocker Oil* in the manner urged by Doe Run in this case, which involves a sophisticated insured and the kind of underlying environmental liability claims that the exclusion was primarily intended to exclude.

Id. at 876-77 (citation omitted).

In a subsequent case involving a different insured, the Eighth Circuit expressed further reservations about *Hocker Oil* by observing that "not even Missouri's intermediate courts have relied on . . . *Hocker Oil* in the fifteen years since the case was decided," which "should come as no surprise, since *Hocker Oil* seems out of step with

Missouri's deeply-entrenched rule" that courts may not create ambiguities to distort unambiguous language or enforce their preferred result. *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 885 (8th Cir. 2014) (Missouri law).

The circuit court in this case recognized that *Hocker Oil* was tenuous support for its finding of ambiguity. The court described as "enticing" St. Paul's argument that *Hocker Oil* is an outlier and should not be followed. Nevertheless, the court elected to rely on Judge Hemphill's interpretation of *Hocker Oil* "[u]ntil our higher courts resolve the issue." A3-4, LR003411-003412. The plain meaning of the Pollution Exclusion in this case clearly includes the Smelter Suits. *See Progressive Northwestern Ins. Co. v. Talbert*, 407 S.W.3d 1, 12 (Mo. App. S.D. 2013) ("Where language in an insurance [policy] is unequivocal, it is to be given its plain meaning notwithstanding the fact it appears in a restrictive provision.") (*citing Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137, 142 (Mo. banc 1980)). This Court should afford the guidance requested by the circuit court in this case by holding that the Pollution Exclusion is unambiguous and bars coverage for the Smelter Suit claims.

F. The Court of Appeals Wrongly Concluded that the Policy Is Ambiguous Because of the Manner In Which Its Premium Was Calculated.

It is telling that in affirming the circuit court's conclusion that the Pollution Exclusion was unenforceable, the court of appeals did not adopt the circuit court's logic. Rather, the court of appeals found an ambiguity because it thought an ordinary purchaser

of insurance might perceive a conflict between the clear terms of the Pollution Exclusion and a premium that was calculated on the basis of ore production. Opinion at 9.

The court of appeals' ruling is illogical and unprecedented. Doe Run itself did ***not*** perceive such a conflict. Instead, Doe Run argued only that the Pollution Exclusion should not be applied because it did not list the specific substances allegedly injuring the Smelter Suits plaintiffs. It is extraordinary that the court of appeals would rely on a purported conflict that even the insured never claimed to exist.

No reported Missouri decision, and no decision nationally, adopts the court of appeals' rationale. There simply is no plausible connection between the interpretation of a policy's exclusions and how its premium is calculated. An "ordinary" person would understand that a large company with more operations pays a larger premium than a smaller company. A larger operation pays more because there are more chances, for instance, of a slip and fall, more chances that a person might be burned during smelting operations when the smelter is running for longer periods of time, more chances that an end user might get injured because the larger operation sells more product, and so forth. Therefore, an increase in Doe Run's premium was rationally tied to the size of its operations, regardless of the exclusion for pollution claims.

One of the few opinions that even considers such an argument makes exactly this point. In *West American Insurance Co. v. Johns Bros., Inc.*, 435 F. Supp. 2d 511, 519 (E.D. Va. 2006), a heating oil supplier sought coverage under a general liability policy for a claim arising from an oil leak. A portion of the policy's premium was based on the amount of oil delivered to the supplier's customers. The insured contended that it was

not bound by the policy's pollution exclusion because the basis for "the premium calculation creates an ambiguity that must be resolved in its favor." *Id*. at 518. The court disagreed, for two reasons:

> [F]irst . . . the court should begin its analysis with the language of *the policy itself*, and if such language is unambiguous the inquiry ends there; and second, even if the court considered the fact that the amount of fuel oil delivered impacted the policy rate, such factor falls far short of overriding the express pollution exclusion, and merely reflects the fact that [the insurer] utilizes an underwriting system that considers all the activities of a company seeking insurance.

Id. (emphasis in original). The court concluded that even if it "considers the fact that the policy premium was based in part on the nature of defendant's business, such fact does not override the express language of the pollution exclusion." *Id*. at 519.

In short, the court of appeals' opinion provides no support for the circuit court's finding of ambiguity. The court of appeals essentially rejected the circuit court's reasoning and then affirmed its result by "distort[ing] the language of an unambiguous policy" and resorting to a "conflict" that even Doe Run did not perceive and no case law supports. *Rodriguez*, 808 S.W.2d at 382.

* * *

"Although the duty to defend is broad, it is not limitless." *Prime Tanning Co., Inc. v. Liberty Mut. Ins. Co.*, 750 F. Supp. 2d 198, 208 (D. Maine 2010) (finding under

Missouri and Maine law that claim for defense coverage was barred by pollution exclusion). For all of the foregoing reasons, this Court should reverse the circuit court's judgment on the Pollution Exclusion, find that St. Paul has no duty to defend the Smelter Suits, and direct the circuit court to enter a final judgment in favor of St. Paul and against Doe Run.

II. The circuit court erred in denying St. Paul's motion for summary judgment premised on the St. Paul Policy's Other Insurance Provision, and in granting Doe Run's cross-motion for partial summary judgment, because the circuit court incorrectly determined that St. Paul owes a defense obligation to Doe Run for the Smelter Suits, in that:

a. the circuit court ruling failed to apply this Court's enunciated principles of insurance policy interpretation in that it failed to consider all of the provisions of the Other Insurance Provision;

b. the Other Insurance Provision provides that the St. Paul Policy applies as excess insurance over local coverage issued in Peru;

c. such local coverage was issued by Rimac Seguros;

d. the Other Insurance Provision provides that, if the St. Paul Policy is excess insurance, St. Paul will not have a duty to defend if any other insurer has such a duty; and

e. National Union has a duty to defend the Smelter Suits.

A. Standard of Review.

The circuit court ruled that the Policy provides primary insurance "as a matter of law." The court therefore denied St. Paul's motion for summary judgment, which contended that its Policy provides excess insurance and, as an excess insurer, St. Paul has no duty to defend because National Union has that duty. The court also granted Doe Run's cross-motion for partial summary judgment on this issue.

As noted *supra*, at 26 - 28, the Court determines the interpretation of an insurance policy as a question of law. This Court's review of the circuit court's ruling is *de novo* because it is a question of policy interpretation and the "application of undisputed facts." *Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co., Inc.*, 358 S.W.3d 528, 531 (Mo. App. E.D. 2012).

B. The St. Paul Policy Is Excess Insurance Over Similar Coverage Issued in Peru.

While the Other Insurance Provision provides that the St. Paul Policy can be primary insurance, it states that it applies "as excess insurance over any other similar coverage that is issued in a country within the coverage territory." LR000340-000341, 000477-000478. Here, the Policy applies as excess insurance over primary policies issued by Rimac in Peru, the "coverage territory."

The Other Insurance Provision also states that when the Policy applies as excess insurance, St. Paul does ***not*** have a duty to defend if another insurer has that duty. LR000341, 000478. National Union has a duty to defend the Smelter Suits, as Judge

Hemphill ruled in granting summary judgment to Doe Run as to the National Union policy. LR000087-000088, 000091. Therefore, St. Paul does not have that duty.

Despite these straightforward provisions, the circuit court held, "as a matter of law," that the Policy is primary insurance. A6, LR003414. That holding, however, is based ***solely*** on one sentence that the court read in isolation and out of context, in contravention of this Court's principle requiring consideration of "[t]he entire policy and not just isolated provisions." *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 217 (Mo. banc 2014). While the sentence cited by the circuit court says "[t]his agreement is primary insurance," ***the very next sentence expressly limits the prior sentence to situations, unlike here, where there is no other valid and collectible other insurance***. That sentence states that if there is other "valid and collectible insurance," the Policy will apply in accordance with the rest of the Other Insurance Provision. LR000340, 000477.

The remainder of the Other Insurance Provision states that the Policy provides ***excess insurance*** in a foreign coverage territory if there is similar coverage issued there: "We'll also apply this agreement as excess insurance over any other similar coverage that is issued in a country within the coverage territory." *Id.* Here, the applicable "coverage territory" is Peru and the "other similar coverage" was issued by Rimac. Therefore, the Policy affords excess insurance for the Smelter Suits.

C. Rimac Issued Other Insurance In Peru Underlying the St. Paul Policy.

Both the Policy and Doe Run's admissions establish that Rimac policies were issued during the St. Paul Policy period. Indeed, the St. Paul Policy was issued based on

Doe Run's ***express representation and agreement*** that Doe Run had obtained such coverage from Rimac. The DIC Endorsement reflects Doe Run's representation that it had in fact obtained local coverage in Peru:

> **Difference in Conditions/Difference in Limits Warranty**
>
> A reduced premium has been charged for this policy in consideration of ***your representation that certain other insurance is issued in countries within the coverage territory, that will remain in full force and effect***, and that will include certain coverages. ***You must maintain these policies in full force and effect***, and any renewals of these policies cannot be more restrictive.
>
> ***You are responsible for maintaining this other insurance in countries within the coverage territory*** with a minimum required Limit of Liability of $1,000,000 applying to any claim resulting from Bodily Injury and Property Damage.

LR000350, 000487 (emphasis added).

In conformance with the DIC Endorsement, the binder issued by St. Paul reflected Doe Run's agreement that it had purchased coverage from Rimac in Peru, and that ***the St. Paul Policy was excess to the Rimac policy***:

- International DIC/DIL Endorsement will apply. It is agreed that the insured has a primary General Liability policy in place for US $1,000,000 per occurrence, and that ***the [St.***

> ***Paul Policy] will be excess to this primary policy issued by Rimac Seguros***.

LR003302 (emphasis added).

Consistent with these Policy and binder provisions, Doe Run admitted during its corporate designee deposition that Rimac had, in fact, issued policies covering it during St. Paul's coverage period. LR000603-000604. Doe Run also admitted that Rimac is obligated to provide it with first-dollar defense coverage for suits arising from the operations in Peru, and that "to the extent that there's coverage under the underlying local [Rimac policy], then [the St. Paul Policy] serve[s] as ***excess***." LR000604 (emphasis added). Moreover, Doe Run actually tendered the Smelter Suits to Rimac for defense. LR002541-002543. However, like St. Paul, Rimac asserted that the pollution exclusions in its policies barred coverage, and therefore it denied that it had a duty to defend. LR002581, 002587.

The circuit court found that "[w]hether or not the Rimac policies are valid and collectible is a dispute of a very material fact." LR003413. However, even though Doe Run has not recovered any amounts on the Rimac policies, that does not render them uncollectible. As explained in *Britt v. General Star Indemnity Co.*, 775 F. Supp. 2d 454 (N.D.N.Y. 2011), *rev'd on other grounds*, 494 Fed. Appx. 151 (2d Cir. 2012), the term "collectible" does not mean that payment has been made on a policy:

> A "collectible" policy does not necessarily mean a policy which provides coverage, nor does it mean a policy on which an insurer makes payment on a claim. Likewise, a "non-collectible" policy

> does not necessarily mean a policy which excludes coverage or one which an insurer refuses to make payment under. Instead, generally the term "collectible" relates to the solvency or insolvency of an insurer. . . . St. Paul's refusal to contribute does not alone render the St. Paul CGL policy non-collectible.

Id. at 464 (citation omitted).

The meaning of "valid and collectible" is likewise explained in *Northbrook Property & Casualty Insurance Co. v. U.S. Fidelity & Guaranty Co.*, 501 N.E.2d 817 (Ill. Ct. App. 1986), as follows:

> The phrase "excess over any other valid and collectible insurance" is standard excess insurance clause language. The terms "valid and collectible" are directed to an insurance policy which is legal and valid, as distinguished from one which was procured by fraud, or cannot be collected due to insolvency of the company.

Id. at 819 (citations omitted).

While it is undisputed that Doe Run procured coverage from Rimac, even if it had not done so St. Paul still would be an excess insurer because the Warranty Endorsement provides that the St. Paul Policy is liable only to the extent such coverage was in force:

> If, in the event of a loss, this other insurance issued in countries within the coverage territory that you represented to be in full force and effect at the inception date of this policy are not in full force and effect, have lapsed, or have been replaced by policies more

> restrictive than what you represented without notifying us, ***we will only be liable to the extent we would have been if the representations had been correct and current.***

LR000350, 000487 (emphasis added).

D. Under the Terms of the Other Insurance Provision, St. Paul Has No Duty to Defend the Smelter Suits Because National Union Has That Duty.

Under the terms of the Other Insurance Provision, St. Paul, as an excess insurer, "won't have a duty to defend" against "any claim or suit for which any provider of other insurance has the duty to defend." LR000341, 000478. Because National Union has a duty to defend Doe Run, St. Paul does ***not*** have that duty.

Despite the language of the Other Insurance Provision, the court of appeals found that St. Paul has a duty to defend Doe Run in the Smelter Suits because "National Union certainly does not have the duty to defend with respect to the counts naming Doe Run alone." Opinion at 12. The court of appeals' conclusion is based on its assumption that "the National Union policy is a D&O policy" and, as such, does not provide coverage to Doe Run "for its *own* wrongful acts," but only for Doe Run's "indemnification obligations to its *officers and directors* who have caused harm." *Id.* (emphasis in original). However, the court's assumption is incorrect. The National Union policy is actually an "Executive and Organization Liability Insurance Policy" that, in Coverage B, provides "Organization Insurance" ***which directly covers wrongful acts engaged in by Doe Run itself as a corporate entity***. LR002064, 002068. Indeed, that fact was

recognized by the circuit court in its ruling that National Union insures Doe Run as to Doe Run's own corporate wrongful acts and, thus, has a duty to defend Doe Run itself for the allegations against it. LR000086-000087.

Under the express terms of the St. Paul Policy, since National Union has a duty to defend the Smelter Suits, St. Paul did not. This Court should reverse the circuit court's judgment on the "Other Insurance" issue, find that St. Paul has no duty to defend the Smelter Suits, and direct the circuit court to enter a final judgment against Doe Run and in favor of St. Paul.

III. The circuit court erred in denying St. Paul's motion for judgment regarding those defense costs incurred in the Smelter Suits prior to Doe Run's March 2012 tender of the Smelter Suits, and in awarding Doe Run damages for such pre-tender defense costs, because the circuit court incorrectly found that St. Paul is obligated to reimburse such costs, in that:

a. defense costs incurred before an insured's tender of a defense are not recoverable under the St. Paul Policy and Missouri law;

b. contrary to the circuit court's finding, the evidence established that Doe Run did not tender the Smelter Suits to St. Paul until March 2012; and

c. the circuit court erroneously concluded that St. Paul was required to prove that it was prejudiced by the delayed tender of the Smelter Suits in order not to be obligated to reimburse Doe Run for pre-tender costs.

A. Standard of Review.

St. Paul contended in motions *in limine* and for judgment at the close of Doe Run's case-in-chief that, even if St. Paul had a defense obligation, it is not liable for defense costs incurred before March 16, 2012, when Doe Run's counsel first tendered the Smelter Suits to St. Paul. The circuit court denied those motions and instead concluded that Doe Run's tender of the 2007 Suit, voluntarily dismissed in 2008, acted as notice of the Smelter Suits filed after that dismissal. The court also ruled that Doe Run notified St. Paul of the Smelter Suits in November 2010, when it copied the "St. Paul Travelers Companies" on a letter to Zurich, Doe Run's domestic primary insurer, setting forth the status of a number of suits, including the Smelter Suits. Alternatively, the circuit court held that, even if Doe Run did not tender the Smelter Suits until March 16, 2012, St. Paul failed to prove it suffered prejudice by the late tender, as purportedly required under Missouri law. A13-16, LR003572-003575.

While the court's ruling on the pre-tender issue is based on a mixture of facts and law, the facts are not in dispute. Therefore, this Court reviews the circuit court's ruling *de novo*, with no deference being paid to the circuit court's decision. *See Pearson v. Koster*, 367 S.W.3d 36, 43-44 (Mo. banc 2012); *see also Jennings v. Atkinson*, 456 S.W.3d 461, 464 (Mo. App. W.D. 2014).

B. An Insured is Not Entitled to Reimbursement of Defense Costs Incurred in a Suit Before it Tenders the Defense of the Suit to Its Insurer.

A "duty to defend exists only when an insured has invoked coverage and tendered a defense to an insurer." 30 MISSOURI PRACTICE: INSURANCE LAW & PRACTICE, § 7.42 at n.10 (2016) (*citing State Farm Fire & Cas. Co. v. Alberici*, 852 S.W.2d 388, 389 (Mo. App. E.D. 1993) (an insured must claim there was coverage or tender the defense of an underlying action for there to be a actionable controversy)). In other words, "the insured must actually ask to have the insurer defend [it] in order for the insurer to have the duty to defend." II MISSOURI INSURANCE PRACTICE, § 10.3 at 10-8 (Mo. Bar 5th ed. 2004) (*citing Alberici*, 682 S.W.2d at 389). A formal tender of the defense is required because, absent tender, an insurer has no opportunity to exercise its contractual right and duty to defend. Therefore, without a tender, the pre-condition for a defense is not satisfied. *Hartford Ins. Co. v. Federal Ins. Co.*, 682 S.W.2d 871, 872 (Mo. App. E.D. 1984) (a court cannot determine an insurer's rights and liabilities "until such tender of defense may occur").

Similarly, an insured is not entitled to reimbursement of defense costs incurred prior to a tender. This Court addressed the pre-tender issue in *Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 108 (Mo. banc 2003), albeit in the context of an indemnification agreement, not an insurance policy. The Court ruled that an indemnitor is ***not*** obligated to pay defense costs that an indemnitee incurs before the "indemnitor had notice of the lawsuit and an opportunity to defend." *Id.* at 108. The Court cited in support the court of appeals' opinion in *Monsanto Co. v. Gould Electrics, Inc.*, 965 S.W.2d 314, 318 (Mo. App. E.D. 1998). In *Monsanto*, the court held that an indemnitor has no obligation to pay indemnitee's defense costs prior to a demand for indemnification:

> [T]he [underlying] litigation was initiated in March 1988. . . . Nevertheless, [the indemnitee] did not claim indemnification from [the indemnitor] until November 1990. [The indemnitee] had a duty to act reasonably to refrain from compromising [the indemnitor's] rights by giving notice of the need to defend the lawsuit. [The indemnitee] failed to do so. Thus, the court erred in awarding attorney's fees incurred prior to the demand for indemnification.

965 S.W.2d at 318.

The rule against recovery of pre-tender costs is even more compelling here, because the Policy contains an unauthorized payments provision; it states that Doe Run "must" "not assume any financial obligation or pay out any money . . . without [St. Paul's] consent." LR000298-000299, 00435-000436.

The prohibition against recovery of pre-tender costs was applied in the insurance coverage context in *Cincinnati Insurance Co. v. Missouri Highways and Transportation Commission*, No. 12-CV-1484, 2014 WL 7330980 (W.D. Mo. Dec. 19, 2014) (Missouri law). There, the court denied recovery of defense costs incurred by the insured prior to tender, holding that an "insurer has no duty to pay for fees incurred prior to the insured's demand for coverage." *Id.* at *1. In support of its holding, the court cited *Monsanto*, *supra*, and *Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192, 198 n.9 (8th Cir. 1974) (an indemnitor is only liable for defense costs incurred after it is given "notice of the lawsuit and an opportunity to defend"). *Id.* The court also relied on the policy's unauthorized payments provision: "Parties' insurance contract also mandated

that [the insured] notify [the insurer] of any pending suit prior to assuming costs for which [the insurer] would be liable." *Id.*; s*ee also*, *Louisiana Farm Supply Co. v. Federated Mut. Ins. Co.*, 409 S.W.2d 239, 240 (Mo. App. 1966) (ruling that an unauthorized payments provision bars coverage for payments on a claim incurred prior to first notice).[2]

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[2] Both leading insurance treatises and cases from other jurisdictions similarly conclude that an insured may not recover pre-tender defense costs. *See, e.g.*, Barry R. Ostrager & Thomas R. Newman, HANDBOOK ON INSURANCE COVERAGE DISPUTES, § 5.01[c] (18th ed. 2016) ("Pre-tender defense costs consistently have been held not recoverable under an insurance policy that contains a clause prohibiting voluntary payments made without the consent of the insurer. If the insured makes no demand for a defense, there is no duty to defend and pre-tender defense costs are lawfully precluded . . . ."); *see also, Faust v. Travelers*, 55 F.3d 471, 472-73 (9th Cir. 1995) ("The voluntary payment provision . . . provides only that an insurer will not be held liable for expenses voluntarily incurred by an insured before tendering defense of a suit to the insurer. . . . The policy provision at issue in the instant case precludes recovery of pre-tender costs 'voluntarily incurred' by the insured."); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1273 (Ind. 2009) (an insurer is not responsible for pre-tender defense costs; "St. Paul's duty to defend did not arise until [the insured] complied with the policy's notice requirement."); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997) ("[A]n insured does not invoke its insurer's duty to defend until it

In its opinion, the court of appeals cited both *Monsanto* and *Bagby* in support of its conclusion that "St. Paul has no duty to pay for Doe Run's fees incurred prior to its demand for coverage in the particular lawsuits underlying this litigation." Opinion at 13-14. The court also correctly concluded that Doe Run did not demand coverage until March 16, 2012. *Id*. at 16; LR000652-000654.

C. Notice of the 2007 Suit Was Not a Tender of the Subsequently Filed Smelter Suits.

The 2007 Suit was voluntarily dismissed before the Smelter Suits were filed. LR000647, 003572-003573, 003575. Doe Run is not seeking reimbursement from St. Paul for defense costs it incurred in the 2007 Suit. Nonetheless, the circuit court concluded that tender of the 2007 Suit constituted a notice of the subsequently filed Smelter Suits, thereby rejecting St. Paul's argument that it should not have to pay for defense costs incurred prior to Doe Run's tender of the Smelter Suits in March 2012. A13-15, LR003572-003574.

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properly tenders a defense request . . . Logically, then, an insurer cannot be held responsible for defense costs incurred prior to the tender of the defense request . . . ." (citation omitted)); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp*., 790 F. Supp. 1318, 1330 (E.D. Mich. 1992) ("The moment of tendering the defense is the critical point in such a calculation. Because defense costs are more reasonably subject to allocation, an insured can waive part of its right to a defense without waiving it all.").

The circuit court's ruling is unsound. The 2007 Suit had been voluntarily dismissed by the time the subsequent Smelter Suits were filed. Under the terms of the Policy, Doe Run was obligated to tender those subsequently filed Suits to St. Paul if it was seeking coverage:

> As soon as possible after receiving them, mail, deliver or otherwise give to us [St. Paul] a copy of . . . all legal documents relating to ***any*** suit brought . . . against you and any other person or organization protected under your policy.

LR000299, 000436 (emphasis added).

This provision requires notice of ***each*** suit as it is served. Therefore, tender of the 2007 Suit, which was dismissed before the filing of the Smelter Suits, did not relieve Doe Run of its obligation to tender the subsequent suits. In its opinion, the court of appeals agreed. Opinion at 15.

The same factual situation was addressed in *Wright v. Hartford Accident & Indemnity Co.*, 442 F. Supp. 155 (N.D. Ga. 1977). There, the insured tendered a suit to the insurer, but the suit was subsequently dismissed. A second, similar suit was thereafter filed, but the insured failed to tender it to the insurer. The court concluded that the insured's notice of the first suit did ***not*** satisfy its obligation to give notice of the second suit. *Id*. at 157-58.

D. The November 2010 Letter to Zurich Did Not Serve As a Tender to St. Paul Under the Policy.

The circuit court also concluded that St. Paul received "notice" of the Smelter Suits in a November 2010 letter sent to Zurich on which several insurers excess to the Zurich policies were copied. A16, LR003575. The letter reported on the status of numerous cases pending against Doe Run, including the Smelter Suits. The letter made clear, however, that it was being provided to Zurich's excess insurers not as a tender of cases, but merely to keep them apprised of the status of the cases discussed:

> [U]nderstanding that it is Zurich's obligation as Doe Run's primary insurer to keep relevant overlying insurers apprised for their files, to help facilitate that process, we have copied excess and umbrella insurers on this letter.

LR003485.

The November 2010 letter to Zurich does ***not*** identify the St. Paul Global Companion Policy at issue here, nor does it state that its purpose is to place St. Paul on notice of the Smelter Suits under that Policy, let alone to tender the defense of those Suits. LR003484-003499. Instead, the letter was clearly intended to provide an update about ongoing cases to Zurich's excess carriers, including other Travelers companies, that had issued wholly unrelated domestic excess policies to Doe Run and/or its affiliates. TR000439-000444; LR003474, 003499. This fact is apparent not only from the above-quoted passage, but also because Doe Run addressed the letter forwarding its letter to Zurich to "St. Paul Travelers Companies" in St. Paul, Minnesota. LR003474. The actual

tender of the 2007 Suit was sent to Travelers in Hartford, Connecticut and the tender in March 2012 of the subsequently filed Smelter Suits was sent to St. Paul in Hartford, Connecticut and Troy, Michigan. LR000652-000654, 002938-002940, 002962-002963, 003474. So, Doe Run knew how to tender a case -- as it had expressly done so in 2007 (the 2007 Suit) and in March 2012 (the Smelter Suits).

The circuit court's suggestion that the letter to Zurich somehow served as an adequate substitute for a tender of the Smelter Suits is unsupportable. In *Travelers Indemnity Co. v. Northrop Grumman Corp.*, 3 F. Supp. 3d 117, 125-26 (S.D.N.Y. 2014), *aff'd*, No. 15-3117-CV, 2017 WL 391926 (2d Cir. Jan. 27, 2017) (Summary Order), the insured sent a letter to Travelers giving it notice that it had received an EPA letter stating that it was a Potentially Responsible Party for a polluted site. The letter was copied to Century Indemnity Co., but it only requested coverage from Travelers. *Id*. at 126. Century argued that the letter was inadequate notice of a coverage claim under its policy. Similar to the letter to Zurich here, the letter in *Northrop Grumman* gave "no indication that it is in fact a notice of a claim; instead, it stated that the cover letter attached 'additional information on the above captioned for your files.'" *Id*. Not only did the letter not specify that it was notice to Century of a claim for coverage, but it also failed to reference the policies Century had issued. Under these facts, the district court held that the letter did not provide notice to Century of a claim for coverage. *Id*. at 126-27.

The circuit court should have reached the same conclusion with regard to the letter to Zurich. The letter clearly did not tender the Smelter Suits to St. Paul for a defense.

Indeed, both the circuit court and Doe Run acknowledged that very point during argument on St. Paul's motion *in limine* on the pre-tender issue:

> THE COURT: Is [the November 2010 letter] a tender letter?
>
> MR. HALPERN: Your Honor, it's a notice letter. We're not in this letter asking for them to start providing a defense.
>
> THE COURT: A tender letter is something very specific, isn't it? And doesn't it trigger some rights and obligations of the parties?
>
> MR. HALPERN: Correct. So, Your Honor, the issue of tender is that when we asked for defense then they start providing a defense on that date. That's different from the issue of notice….

TR000078-000079.

In its opinion, the court of appeals found "it inconceivable that [the November 2010 letter] constituted a *demand for coverage* in the underlying lawsuits under the [St. Paul Policy]." Opinion at 15 (emphasis in original). The Court observed:

> The letter did not identify the [St. Paul Policy] or state that its purpose was to demand coverage under that policy for the underlying lawsuits here. Further, counsel for Doe Run admitted on the record that Doe Run was "not in this letter asking for [St. Paul] to start providing a defense," and that statement is borne out by the

> evidence in the record of how Doe Run took different actions and used critically different language when it actually demanded coverage in 2007 for the dismissed lawsuit, and on March 16, 2012, for the underlying lawsuits here.

Id.

E. Prejudice Is Irrelevant.

The circuit court ruled that "[e]ven had Doe Run failed to comply with purported tender obligations prior to March 16, 2012 . . . St. Paul can disallow defense costs only if it proves actual and substantial prejudice," and that St. Paul did not do so. A14, LR003573. However, the conclusion that an insurer must prove prejudice to avoid pre-tender costs is not supported by ***any*** Missouri case. None of the Missouri cases discussed *supra* on the pre-tender issue required proof of prejudice in ruling that pre-tender costs are not covered.

Instead of relying on cases addressing the pre-tender issue, the circuit court cited only cases relating to the denial of coverage for late notice and breach of cooperation clauses: *Weaver v. State Farm Mutual Automobile Insurance Co.*, 936 S.W.2d 818, 821 (Mo. banc 1997) (insurer must establish prejudice to avoid coverage on late notice grounds); *Tresner v. State Farm Insurance Co.*, 913 S.W.2d 7, 11 (Mo. banc 1995) (insurer must show prejudice to avoid coverage on late notice grounds because "the denial of coverage for failing to comply with the notification requirement amounts to a forfeiture"); *Hendrix v. Jones*, 580 S.W.2d 740, 744 (Mo. banc 1979) (an insurer seeking to avoid coverage must show prejudice caused by breach of cooperation clause). None of

these cases involves the pre-tender issue. Moreover, they are inapposite because findings of late notice or lack of cooperation result in a total forfeiture of coverage. The rule against recovery of pre-tender costs, on the other hand, simply limits the amount of covered costs that an insured can recover.

The rationale for distinguishing between the pre-tender defense and "complete forfeiture" defense was explained in *Century Indemnity Co. v. Marine Group, LLC*, No. 08-CV-1375, 2015 WL 810987 (D. Or. Feb. 25, 2015):

> The prejudice requirement was adapted to prevent complete forfeiture based upon technical failure of the insured to provide timely notice. In contrast, enforcement of the rule that pretender defense costs are not recoverable does not result in complete forfeiture of an insured's right to recover fees. Rather, the rule gives the insured the choice of defending some or all of the claim on its own . . . Because the policies justifying the prejudice requirement do not apply to the tender requirement, courts have concluded (at least between sophisticated parties) the "no pre-tender defense costs" rule remains viable even in jurisdictions that have adopted the "notice-prejudice" rule.

Id. at *6 (*citing* 4 BRUNER & O'CONNOR CONSTRUCTION LAW § 11:47 (2013)); *see also Am. Mut. Liab. Ins. Co. v. Beatrice Cos., Inc.*, 924 F. Supp. 861, 873 (N.D. Ill. 1996), *as amended* (Apr. 25, 1996) ("Moreover, the policies that prompted

courts to graft the prejudice requirement onto the notice requirement have little bearing on the question of pretender defense costs . . . .").

In its opinion, the court of appeals correctly held that a showing of prejudice is not required, citing *Weaver*, *Tresner* and *Hendrix* and adopting St. Paul's foregoing arguments. Opinion at 16.

* * *

In sum, if this Court concludes that St. Paul has a duty to defend, it should reverse the circuit court's ruling on the pre-tender issue and remand this case with instructions to amend the amount of the judgment to exclude all defense fees and expenses incurred before March 16, 2012.

IV. The circuit court erred in entering a judgment under Mo. Rev. Stat. §408.020 awarding Doe Run prejudgment interest on the damages awarded because the circuit court incorrectly concluded that the damages awarded to Doe Run are liquidated, in that:

a. the damages awarded were not liquidated because the amount of defense costs allegedly owed by St. Paul could not be determined until Doe Run provided an accounting setting forth on which invoices St. Paul allegedly owed defense costs and showing for each invoice the amount St. Paul purportedly owed after crediting amounts Doe Run had received from other insurers;

b. Doe Run did not provide St. Paul with such an accounting until shortly before trial; and

c. prejudgment interest may be awarded under Missouri law only if the damages are liquidated.

A. Standard of Review.

The circuit court ruled that "Doe Run is also entitled to receive pre-judgment interest." A17, LR003576. Pursuant to that ruling, the court awarded prejudgment interest in the amount of $302,764.09. A24, LR003584. This Court's review of that ruling is *de novo* "because it is primarily a question of statutory interpretation and its application to undisputed facts." *Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co., Inc.*, 358 S.W.3d 528, 531 (Mo. App. E.D. 2012); *Children Intern. v. Ammon Painting Co.*, 215 S.W.3d 194, 202 (Mo. App. W.D. 2006).

B. Prejudgment Interest Should Not Have Been Awarded.

This Court has explained that prejudgment interest may be awarded only on claims that are liquidated, *i.e.*, those that are fixed and determined or readily determinable or ascertainable by computation or by a recognized standard. *Monsanto*, 965 S.W.3d at 318 (stating that "[g]enerally, prejudgment interest is not warranted when the debtor is unaware of the amount owed"); *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1, 5 (Mo. banc 1975) ("[W]here the person liable does not know the amount he owes he should not be considered in default because of failure to pay.").

Here, Doe Run's reimbursement claim against St. Paul was ***not*** liquidated. Doe Run has settled with two other insurers. Under those settlements, National Union and AGLIC paid set amounts for past costs, and National Union is continuing to pay a significant portion of Doe Run's ongoing defense costs. St. Paul could not determine its

alleged share of defense costs until Doe Run disclosed how it applied those past and ongoing settlement payments to the defense bills. Doe Run did not do that until it served the Final Accounting one week before trial. LR003533-003536, 003569.

These facts are like those in *Transamerica Insurance Co. v. Penn National Insurance Cos.*, 908 S.W.2d 173 (Mo. App. E.D. 1995), which involved multiple insurers' respective obligations to a common insured. In denying prejudgment interest, the court of appeals observed that "there was no evidence that defendant was aware of the amount owed until just prior to trial":

> The first mention in the record of a more specific amount owed is in plaintiff's proposed findings of fact and conclusions of law. These proposed findings were mailed to defendant on November 22, 1993, more than four years after the suit was filed and just one week before the trial commenced.

Id. at 177 n.6; *see also Nangle v. Brockman*, 972 S.W.2d 545, 551 (Mo. App. E.D. 1998) ("[t]he pleadings were not definite as to amount and the time of the hourly bill and there was no evidence that [the defendant] was aware of the amount owed until just prior to trial").

In ruling that Doe Run is entitled to prejudgment interest calculated "from 30 days after the date of each invoice through April 22, 2015," the day before final judgment was entered, the circuit court relied on *Doe Run Resources Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463 (Mo. App. 2013). A24, LR003584. In that case, Doe Run tendered an environmental cleanup claim to a single insurer (LMI), and then sued

LMI after it failed to respond to that demand. *Id*. at 468. Doe Run ultimately prevailed on coverage, and prejudgment interest was awarded from: (a) the date the lawsuit was filed, for costs incurred prior to filing, or (b) the dates on which costs were submitted to LMI, for costs incurred after filing. The court ruled:

> At trial, Doe Run presented evidence that it sent LMI purchase orders, invoices, and pay stubs that reflected the costs incurred. . . . Doe Run also provided LMI spreadsheets that detailed all of the individual remediation invoices and costs. . . . Because Doe Run's damages were ascertainable by computing the invoices and spreadsheets that detailed remediation costs, damages were liquidated, and prejudgment interest is compelled pursuant to Section 408.020.

Id. at 477.

Unlike in that case, St. Paul could not calculate its share of costs simply by "computing the invoices and spreadsheets that detailed" "all of the individual [defense] invoices and costs." *Id*. Again, other insurers were paying defense costs, and St. Paul could not determine what was owed until Doe Run served it with a Final Accounting crediting payments received from other insurers a week before trial.

In its opinion, the court of appeals found that the circuit court had erred in its ruling on prejudgment interest:

> [T]he court failed to adhere to – or find applicable any exception to – the general rule in Missouri case law that prejudgment interest is not

> allowable upon an unliquidated claim because where the person liable does not know the amount he owes, he should not be considered in default because of failure to pay.

Opinion at 18. The court held that the earliest St. Paul learned of specific damage amounts was on December 6, 2012, when St. Paul "first began receiving from Doe Run copies of defense invoices and other records of defense costs." *Id.* at 19. The court of appeals rejected St. Paul's argument that it owed no interest at all, instead finding that the defense invoices sent to St. Paul before the final accounting "put St. Paul on notice of the 'readily determinable' or 'ascertainable' defense costs for which it was potentially liable." *Id.*

In so ruling, the court of appeals erred because St. Paul could ***not*** ascertain or calculate the amount of costs it owed simply by reviewing the forwarded invoices. These invoices showed only the amount billed by each law firm, not the amount, if any, that St. Paul was required to reimburse on each invoice. Because other insurers had reimbursed all, or a portion of, of the defense invoices, St. Paul could ***not*** determine what it actually owed until Doe Run served it, just before trial, with a Final Accounting fully crediting the payments received from other insurers.

Accordingly, should this Court rule that St. Paul has a duty to defend, it should vacate the award of prejudgment interest, or, in the alternative, remand this case with instructions as to how prejudgment interest should be recalculated.

CONCLUSION

For the foregoing reasons, St. Paul requests that this Court reverse the circuit court's judgments in favor of Doe Run and against St. Paul as to the application of the Pollution Exclusion and/or Other Insurance Provision, and remand with directions to enter judgment against Doe Run and in favor of St. Paul and to dismiss this case with prejudice.

In the alternative, if this Court finds that St. Paul has a duty to defend the Smelter Suits, St. Paul requests that this Court:

A. Reverse that portion of the circuit court's final judgment awarding Doe Run Pre-Tender Costs, and remand with instructions to enter judgment reducing the damages awarded accordingly; and

B. Reverse that portion of the circuit court's final judgment awarding prejudgment interest and remand with instructions to enter judgment reducing the damages awarded accordingly.

Dated: April 4, 2017

Respectfully submitted,

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RULE 84.06 CERTIFICATION

The undersigned hereby certifies that:

1. Substitute Brief of the Appellants contains the information required by Rule 55.03;
2. Substitute Brief of the Appellants complies with the limitations contained in Rule 84.06(b); and
3. Substitute Brief of the Appellants, excluding the cover page, certificate of service and this certificate, contains 18,270 words per Microsoft Word for Windows.

Dated: April 4, 2017

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CERTIFICATE OF SERVICE

It is hereby certified that on this 4th day of April, 2017, a copy of the foregoing **Appellant's Substitute Brief** was filed electronically with the Clerk of the Court to be served by operation of the Court's Electronic Filing System on all counsel of record. In addition, a copy was also served on the following via electronic mail:

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