

2000

# Mountain States Steel, Inc. v. Voest-Alpine Services and Technologies Corporation : Brief of Appellant

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

MOUNTAIN STATES STEEL, INC.,

Case No. 20000608-SC

Appellant/Third-Party Plaintiff,

Priority No. 15

vs.

VOEST-ALPINE SERVICES &  
TECHNOLOGIES CORPORATION,

Appellee/Third-Party  
Defendant.

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**APPELLANT'S BRIEF**

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On Appeal from Judgment  
of the Fourth Judicial District Court,  
Utah County, State of Utah  
Honorable James Taylor, Presiding

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Corporation

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UTAH

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MOUNTAIN STATES STEEL, INC.,	:	Case No. 20000608-SC
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Appellant/Third-Party Plaintiff,	:	Priority No. 15
	:	
vs.	:	
	:	
VOEST-ALPINE SERVICES & TECHNOLOGIES CORPORATION,	:	
	:	
Appellee/Third-Party Defendant.	:	

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## **JURISDICTION**

The Court has jurisdiction under Utah Code Ann. § 78-2-2(3)(j).

## **STATEMENT OF ISSUES**

1. Whether the “Waiver of Subrogation” may be enforced where there was no “notice to” or “endorsement” by the parties’ insurance carriers, as required by ¶6.4 of the Lease. This was a ruling made on summary judgment, which is reviewed for correctness with no deference afforded the trial court. *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991). This issue was raised in “Mountain States Steel’s Memorandum in Opposition to Voest-Alpine’s Second Motion for Summary Judgment” at RR. 776-75.

2. Whether the Waiver of Subrogation may be enforced where Voest-Alpine failed to provide the liability insurance required by ¶6.1 of the Lease. The same standard of review applies as in ¶1 above. This issue was also raised in Mountain States Steel’s Memorandum in Opposition at RR. 777-76.

3. Whether there is a proper basis for Voest-Alpine’s “Amended” Judgment for Attorney’s Fees and Costs, assuming it gets entered by the trial court. Calculation of a reasonable attorney’s fee is in the sound discretion of the trial court. *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 671 (Utah 1982). This issue was raised in Mountain States’ “Objections to Voest-

Alpine's 'Amended' Findings of Fact; Conclusions of Law Re: Attorney's Fees; Costs" at R. 1057.

### **STATEMENT OF CASE**

On March 4, 1994, Alfonso Ramirez and Mark Bakowski fell 40 feet from a man basket suspended over a concrete floor. (R. 338 ¶1) Both individuals suffered serious and permanently disabling injuries when they struck the floor. (R. 7 ¶14)

Both were employees of Voest-Alpine Services & Technologies Corporation ("Voest-Alpine"). (R. 338 ¶4) At the time of the accident, they were working on a wall at facilities owned by Mountain States Steel, Inc. ("Mountain States"). (R. 335 ¶9)

On January 19, 1994, Voest-Alpine entered into a "Lease" with Mountain States (R. 319) by which it rented a portion of the premises (the "North Shop of the Complex"). (R. 338 ¶2) Ramirez and Bakowski were working on the wall as part of the work necessary to prepare the North Shop for Voest-Alpine's occupancy. (R. 335 ¶9)

The "Term" of the Lease (R. 319 ¶2.1) began March 1, 1994. At the time of the accident, Voest-Alpine was working on its improvements to the North Shop. (R. 252/4-22) As permitted by the Lease, (R. 318 ¶2.3) Voest-Alpine was



withholding rent because the leased premises were not available for immediate occupancy. (R. 334 ¶16)

Mountain States was responsible for the improvements, which were known as “Lessor Improvements.” (R. 318 ¶2.3) The Lease provided that if Mountain States failed to complete the Lessor Improvements within the time required, Voest-Alpine was permitted to “perform or cause to be performed any work or service...to keep the Lessor Improvements on schedule.” (R. 318 ¶2.3)

Voest-Alpine “loaned” its two employees (Ramirez & Bakowski) to Mountain States to accelerate the pace of the Lessor Improvements. (R. 334 ¶14) At the time of the accident, Ramirez and Bakowski were working under the direction and control of Mountain States. The man basket was suspended from a crane that was owned by Mountain States and was being operated by a Mountain States employee.

Ramirez never filed action. His claim was settled for \$1,182,500 (R. 357 ¶7) following mediation. Bakowski filed this action against Mountain States, (R. 10) but his Complaint was never served. Bakowski’s claim was settled shortly after the mediation for \$503,714. (R. 357 ¶7)

The claims were settled by insurers for Mountain States. (R. 334 ¶17) Pacific Insurance, Ltd. (“Pacific”) provided Mountain States with \$1 million in

primary liability insurance. Century Indemnity Company (“Century,” successor to Insurance Co. of North America) provided Mountain States with \$2 million in excess liability insurance.

Pacific paid its \$1 million policy limit to settle Ramirez’ claim. (R. 928 ¶5)  
Century paid the remaining \$182,500 to settle Ramirez’ claim. (R. 927 ¶7)  
Century paid all of the \$503,714 to settle Bakowski’s claim. (R. 927 ¶7) Mountain States’ liability insurers also incurred \$58,017.44 in attorney’s fees and \$2,161.88 in costs defending Mountain States against the claims by Ramirez and Bakowski. (R. 476)

The Lease (R. 314 ¶6.1) required Voest-Alpine to “obtain and keep in force during the term of this lease a policy of combined single limit, bodily injury and property damage public liability insurance insuring [Mountain States] and [Voest-Alpine] against any liability arising out of the ownership, use, occupancy or maintenance of the premises and all areas appurtenant thereto.”

The insurance was to be “a combined single limit policy in an amount not less than Two Million Dollars (\$2,000,000.00).” (R 314 ¶6.1) It was to contain “cross liability endorsements.” (¶6.1) However, the limits of insurance were not to “limit the liability of [Voest-Alpine] hereunder.” (¶6.1) The insurance was also to have “a Lessor’s Protective Liability endorsement attached thereto.” (¶6.1)

The Lease provided that if “[Voest-Alpine] shall fail to procure and maintain the insurance, [Mountain States] may, but shall not be required to, procure and maintain the same, but at the expense of [Voest-Alpine], or [Mountain States] may declare a material breach of this Lease.” (R. 314 ¶6.1)

Voest-Alpine agreed in this case that the liability insurance it was supposed to acquire would have covered the incident in this case. (RR. 884-76)

Based on the foregoing, Mountain States tendered the Ramirez and Bakowski claims to Voest-Alpine and its insurers. (R. 479 ¶4) However, Voest-Alpine and its insurers rejected the tender. (RR. 479 ¶5)

Voest-Alpine contended that the Lease Term did not commence until the Lessor Improvements were completed. (RR. 333-24) Voest-Alpine’s insurers contended that liability for the accident did not arise out of Voest-Alpine’s “ownership, use, occupancy or maintenance of the premises and all areas appurtenant thereto.” (RR. 468-67)

Because of the rejection of tender, Mountain States’ insurers were required to indemnify and defend the loss. However, there was nothing in the Lease requiring Mountain States to obtain and keep in force the kind of insurance that would indemnify and defend against the loss.

Mountain States was required to “obtain and keep in force during the term of this lease, a policy or policies of insurance for full replacement value covering loss or damage to the premises (excluding [Voest-Alpine’s] fixtures, equipment and mobile office building)....” (R. 314 ¶6.2(a))

This was “Property Insurance” (R. 314 ¶6.2) rather than “Liability Insurance.” (¶6.1) As such, it was to provide “protection against all perils included within the classification of fire, extended coverage, vandalism, malicious mischief, special extended perils (all risk), and such other insurance as is required by mortgagees of the Complex.” (¶6.2(a))

Even though Voest-Alpine and its insurers rejected the tender, Mountain States continued to insist that they were liable for the accident and apprised them of all significant developments in the case. (R. 479 ¶6)

Most importantly, Mountain States notified Voest-Alpine and its insurers of the mediation and the possible settlement of the claims. (RR. 465-64) Voest-Alpine and its insurers were invited to participate in the mediation and negotiation of the claims, but they never did. (RR. 465-64) They never inquired of Mountain States regarding the status of the claims. (R. 462)

After the claims were settled, Century and Pacific (in the name of Mountain States) filed a Third-Party Complaint against Voest-Alpine for breach of the Lease

and indemnification. (R. 48) Century and Pacific filed action to recover amounts paid to settle the Ramirez & Bakowski claims, including costs and attorney's fees defending Mountain States against the claims. (R. 43)

Both Century and Pacific and Voest-Alpine filed Motions for Summary Judgment, (RR. 156 & 348) which were heard by Judge Maetani of the trial court. On June 8, 1998, Judge Maetani made his Memorandum Decision. (R. 458)

Judge Maetani granted Mountain States' Motion and denied Voest-Alpine's. (R. 487) In doing so, Judge Maetani rejected Voest-Alpine's argument about the commencement of the Lease Term. Judge Maetani concluded "that Voest-Alpine was obligated to have a liability insurance policy in force on March 1, 19[9]4." (R. 452)

Voest-Alpine did not present any evidence that it had complied with the insurance obligation under the Lease. (R. 356 ¶8) Therefore, Judge Maetani also determined that Voest-Alpine was in breach of ¶6.1: "Voest-Alpine did not procure insurance, as required by paragraph 6 of the Lease. Inasmuch as the Bakowski/Ramirez accident arose out of the ownership, use and occupancy of the premises, the required insurance would have provided coverage to Mountain States for the Bakowski/Ramirez accident." (R. 455 ¶18)

Judge Maetani noted that “[t]he remaining issues of the amount of damages are left unaffected by this decision.” (R. 452) Accordingly, both parties filed Second Motions for Summary Judgment. (RR. 461 & 491) In its Second Motion for Summary Judgment, Voest-Alpine contended that it did not breach the Lease because it provided the insurance required by ¶6.1. (RR. 733-32) Voest-Alpine also contended that the “Waiver of Subrogation” barred the third-party action. (RR. 731-24)

The Motions were heard by Judge Taylor of the trial court who ruled from the bench. (R. 948) Judge Taylor held that “the strict language of the contract compels the Court to conclude that where there is any insurance that covers the loss, the parties will not seek further damages.” (R. 948)

On June 5, 2000, Judge Taylor entered “Findings of Facts, Conclusions of Law and Order Granting Defendant Voest-Alpine Service’s Motion for Summary Judgment.” (R. 955)<sup>1</sup>

Judge Taylor did not reach the issue whether Voest-Alpine provided the insurance required by ¶6.1. (R. 952 ¶16) He concluded that Mountain States’

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<sup>1</sup> Both parties were mistaken about the date of entry. Voest-Alpine’s “Notice of Entry of Judgment” (R. 957) stated that the date was “June 6, 2000.” The undersigned confirmed this with the clerk of the trial court. Based on this, Mountain States filed its Notice of Appeal on July 6, 2000. (R. 1022) However, the time for filing the appeal was actually extended by Voest-Alpine’s Motion for Attorney’s Fees, which was not decided until after Mountain States filed its Notice of Appeal. *See ProMax Development Corp. v. Raile*, 2000 UT 4, ¶¶14,15, 998 P.2d 254.

third-party action was barred by ¶6.4 of the Lease. (R. 952 ¶18) Accordingly, he granted Voest-Alpine's Motion and dismissed the third-party action. (R. 950 ¶¶A, B & C)

On June 19, 2000, Voest-Alpine served a "Motion for Attorney's Fees." (R. 959) The Motion was supported by a "Memorandum," (R. 1015) which totaled the fees for Voest-Alpine's Salt Lake City law firm as \$30,206.45. (R. 1013) The fees for Voest-Alpine's Pittsburgh law firm were totaled as \$23,637.50. (R. 1013)

Mountain States filed a "Memorandum in Opposition" (R. 1027) objecting to the "reasonableness" of the total fees. (RR. 1025-24)

On September 11, 2000, Judge Taylor made a "Memorandum Decision re: Attorney's Fees." (R. 1052) Judge Taylor granted Voest-Alpine's Motion, but only awarded \$30,206.45 in fees, (R. 1049) the amount represented for Voest-Alpine's Salt Lake City law firm. Judge Taylor found that this amount represented a "reasonable fee." (R. 1050)

As directed by the trial court, Voest-Alpine served a "Judgment for Third-Party Defendant Voest-Alpine's Attorney's Fees." There was no objection from Mountain States, but Voest-Alpine did not file the Judgment with the trial court, and it has not been entered.

Voest-Alpine replaced it with an “Amended” Judgment for Attorney’s Fees. As it turned out, the “Affidavit” that Voest-Alpine filed in support of its Motion, (R. 1011) actually totaled the fees of the Salt Lake City law firm at \$38,380.00. (RR. 1009-969) It also totaled \$4,870.33 in “costs.”

Therefore, the Amended Judgment was for an amount \$13,043.88 higher than that awarded by Judge Taylor. It also included an award of costs or legal expenses that was no part of Voest-Alpine’s claim or Judge Taylor’s ruling.

As a result, Mountain States filed “Objections” to the Amended Judgment. (R. 1057) Voest-Alpine filed a “Memorandum in Opposition to Mountain States Steel’s Objections.” (R. 1074)

Mountain States’ Objections to the Amended Judgment are at issue but have not been decided by the trial court. Mountain States is not appealing the \$30,206.45 award of attorney’s fees. (R. 1052) However, it does intend to appeal the Amended Judgment, assuming it gets entered by the trial court.

Since neither Mountain States’ “Memorandum in Reply” nor Voest-Alpine’s Amended Judgment appears in the record of the case, Mountain States requests, pursuant to URAP 11(h), to modify the record to include both said documents (Addenda hereto).



## **SUMMARY OF ARGUMENTS**

1. Paragraph 6.4 of the Lease required “notice to” and “endorsements” from the parties’ insurance carriers recognizing the waiver of subrogation. There was no evidence of “notice” to the parties’ insurance carriers. There were certainly no “endorsements” recognizing the waiver of subrogation. Without notice and an endorsement, Mountain States’ insurance carriers are free to pursue this subrogation action.

2. The Lease provided that the parties would look exclusively to the insurance each was required to provide. The “Waiver of Subrogation” was dependent on this mutual insurance requirement. The purpose behind the Waiver of Subrogation would not be served by permitting Voest-Alpine to avoid its insurance obligation simply because Mountain States obtained liability insurance of its own.

3. The trial court awarded \$30,206.45 in attorney’s fees. In doing so, the court found that to be a “reasonable fee.” There is no basis for Voest-Alpine’s claim to an additional \$13,043.88 in the Amended Judgment. There is no basis for Voest-Alpine’s claim to costs or legal expenses.

## ARGUMENTS

### **I. MOUNTAIN STATES' INSURANCE CARRIERS HAD NO NOTICE OF AND NEVER ENDORSED THE "WAIVER OF SUBROGATION" AND ARE THEREFORE FREE TO PURSUE THIS ACTION.**

Paragraph 6.4 of the Lease ("Waiver of Subrogation") provides, in pertinent part, as follows:

[Voest-Alpine] and [Mountain States] each waive any and all rights of recovery against the other, or against the officers, employees, agents and representatives of the other, for loss of or damage to such waiving party...where such loss or damage is insured against under any insurance policy in force at the time of such loss or damage. [Voest-Alpine] and [Mountain States] shall, upon obtaining the policies of insurance required hereunder, give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in this lease, and shall obtain endorsements to the respective policies recognizing the waiver.

Voest-Alpine seized on the word "any" in the first sentence of ¶6.4 and argued that this barred the subrogation action by Mountain States' insurance carriers. However, the first sentence of ¶6.4 says nothing about "subrogation" or "insurance carriers." All it says is that Mountain States waived "any and all rights or recovery" against Voest-Alpine "where such loss or damage is insured against under any insurance policy in force at the time of such loss or damage."

That is where the second sentence of ¶6.4 comes in. It actually ensures a waiver of subrogation by requiring "notice to the insurance carrier

or carriers that the foregoing mutual waiver of subrogation is contained in this lease” and also “endorsements to the respective policies recognizing the waiver [of subrogation].” Otherwise, the insurance carrier or carriers would be free to pursue subrogation actions against the parties.

It is obvious that the two sentences must be read together. They are both in the same paragraph titled “Waiver of Subrogation.” There is language in the second sentence specifically tying the sentences together: “Lessee and Lessor shall,...give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in this lease,....”

Voest-Alpine is sure to argue that the first sentence of ¶6.4 is enough to accomplish a waiver of subrogation that would bind the insurance carriers. If that were true, there would be no need for the second sentence. Under ordinary rules of contract interpretation, the Court should read the contract “so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so.” *LDS Hospital v. Capitol Life Insurance Co.*, 765 P.2d 857, 858 (Utah 1988).

Since the right of subrogation arises for the benefit of the insurer, it is certain that the insurer may waive that right. 16 *Couch on Insurance 2d*, § 61:15, p. 89. However, waiver of subrogation is no different than waiver in other cases, which

requires a “knowing relinquishment of a known right.” *Jenkins v. Percival*, 1998 UT 16022, 962 P.2d 796, 799.

As a result, insurers have prevailed in the face of waiver of subrogation clauses where it was shown that they did not receive “notice” of the clause. *Continental Insurance Co. v. Washeon Corp.*, 524 F. Supp. 34, 36 (D. Mo. 1981); and *Alamo Chemical Transportation Co. v. M/V Overseas Valdes*, 469 F. Supp. 203, 212 (E.D. La. 1979).

More to the point, where the parties’ contract requires the written agreement of the insurers, the waiver of subrogation is ineffective without it. *Harlington Realty Corp. v. S.L.G. Discount Corp.*, 556 N.Y.S.2d 308, 309 (N.Y.A.D. 1 Dept. 1990)(“the lease provided for mutual release and waiver of the right of subrogation by either parties’ insurer only if each party’s insurance policy contained a clause providing that such a release or waiver would not invalidate the policy or increase its premiums....Accordingly, there was no valid mutual release and waiver of the right to subrogation, and plaintiff’s insurer was thus entitled to maintain this claim”).

At the very least, Mountain States would be entitled to “indemnification” for Voest-Alpine’s failure to provide the waiver of subrogation endorsement required by the Lease. *In re: Admiral Towing Barge Co.*, 767 F.2d 243, 251 (5<sup>th</sup> Cir.

1985)(“Intermodal was unable to obtain P[rotection] and I[ndemnity] insurance with a waiver of subrogation against the tug or its owner. The district court therefore properly allowed Admiral Towing indemnification against the Seatrain entities, in the event of future claims by cargo, for their failure to hold Admiral Towing harmless from liability to cargo”).

Voest-Alpine is sure to argue that the carriers are barred by the general equitable principle that because an insurer stands in the shoes of its insured, “any defenses that are valid against the insured are also valid against the insurer.” *E.g.*, *Fashion Place Inv. v. Salt Lake County*, 776 P.2d 941, 945 (Utah App. 1989). However, the general principle holds no sway (nor should it) in the face of express contractual language to the contrary.

In this case, it is undisputed that Mountain States’ liability insurance carriers did not endorse the waiver of subrogation in the Lease. (R. 776 n.6)<sup>2</sup> There is certainly no evidence in the record that they did. There is no evidence that they received notice of the waiver of subrogation. Therefore, under the plain language of the Lease, ¶6.4 does not bar the subrogation claims of Mountain States’ liability insurance carriers.

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<sup>2</sup> Voest-Alpine did not deny the contention. (RR. 887-86). In case there were any doubt, Mountain States offers, pursuant to URAP 11(h), to modify the record by producing each of the insurance policies in question.

## **II. PARAGRAPH 6.4 OF THE LEASE ONLY APPLIES TO INSURANCE “REQUIRED” BY THE LEASE.**

“Insurance” is the subject of ¶6 of the Lease. “Liability Insurance” is the subject of ¶6.1. It is clear that Voest-Alpine had the obligation to provide liability insurance under ¶6.1. There is no mention of Mountain States providing liability insurance. Therefore, it is obvious that the Lease contemplated that the parties would look exclusively to liability insurance provided by Voest-Alpine.

There is nothing in the Lease expressly contemplating the parties getting insurance not required by the Lease. Voest-Alpine argues that the word “any” in the first sentence of ¶6.4 should be so construed. However, it is easy to see why Voest-Alpine’s interpretation makes no sense.

There is nothing in ¶6.4 requiring the parties to “give notice to” or “obtain endorsements” from insurance carriers other than those providing the insurance required by ¶6. This is made plain by the language in the second sentence of ¶6.4: “Lessee and Lessor shall, upon obtaining the policies of insurance required hereunder, give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in this lease,....”

Voest-Alpine's construction of ¶6.4 avails it nothing since the party obtaining insurance not required by the Lease would not be required to obtain a waiver of subrogation endorsement from the insurance carriers.

Neither of the two principal cases relied upon by Voest-Alpine in the court below involved a true subrogation action by an insurer. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction, Inc.*, 831 P.2d 724 (Wash. 1992) involved a “loan receipt” arrangement by which the insurer did not make any payments under the policy. 831 P.2d at 727. *Town of Silverton v. Phoenix Heat Source System, Inc.*, 948 P.2d 9 (Colo. App. 1997) involved an insurer who, after paying the loss, “assigned the town all of its interests, including rights of subrogation,....” 948 P.2d at 11. That may explain why nothing was said about the insurers endorsing the waiver of subrogation.

*Richmond Steel, Inc. v. Legal and General Assurance Society, Ltd.*, 821 F. Supp. 793 (D. P.R. 1993), another case cited by Voest-Alpine in the court below, is interesting because it involved a subrogation action by an insurer in a case where the waiver of subrogation required an express insurer endorsement. However, the court did not address the issue. 821 F. Supp. at 799-802. There is no way to know if the endorsement were made or not. This is true for most of the cases dealing with waiver of subrogation.

*Richmond Steel, Inc., supra*, is useful for stating the purpose behind a waiver of subrogation: “The purpose of a waiver of subrogation...is...to require a party to the contract to provide...insurance for all the parties.” 821 F. Supp. at 800. In other words, the waiver of subrogation walks hand-in-hand with the insurance requirement in the parties’ contract.

The purpose behind the waiver is served when the parties obtain the insurance required by the contract. It is not served when the parties avoid their contractual obligation to supply insurance where one of the parties has supplied insurance that is not required by the contract.

*Richmond Steel, Inc., supra*, may well illustrate this principle. The case involved property damage that was covered by property insurance obtained by the owner. The owner’s insurer argued that the waiver of subrogation did not apply because the party seeking to enforce it (apparently) had not supplied the insurance it was required to under the contract.

The court held that this did not make any difference because the party’s obligation was to supply “liability” insurance, and the case did not involve a liability claim. 821 F. Supp. at 801. It is obvious from what the court said that the result may have been different if the case involved a claim covered by liability insurance, *id.*, which is just the case here.



It is clear from the language in ¶6.4 of the Lease that the waiver of subrogation was dependent on the mutual insurance obligation in ¶¶6.1 and 6.2. Voest-Alpine's tortured and syllogistic reading of ¶6.4 actually renders the waiver of subrogation moot and unenforceable.

As demonstrated above, waivers of subrogation serve an important purpose of requiring the parties to a contract to obtain insurance to cover their risks and then to look to that insurance in case of an accident, loss or damage. That purpose would not be served by affirming the Judgment in this case.

In order to secure the benefits of a waiver of subrogation, this Court should make it the law of this State that waivers of subrogation are ineffective unless parties to a contract obtain the insurance expressly required by the contract. In that case, the interests of justice would be served in this case, and the interests of good commerce would be served in all cases.

### **III. THERE IS NO BASIS FOR VOEST-ALPINE'S "AMENDED" JUDGMENT FOR ATTORNEY'S FEES AND COSTS.**

Paragraph 15.13 of the Lease (R. 306) provides the basis for Voest-Alpine's request for attorney's fees: "If either party brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party shall be entitled to its reasonable attorney fees."

Voest-Alpine submitted an attorney's fee request of \$30,206.45 for its Salt Lake City law firm. Judge Taylor found that only those fees of the Salt Lake City law firm were "reasonable." Accordingly, Judge Taylor awarded that amount to Voest-Alpine.

Voest-Alpine made an error in the calculation of the attorney's fees it requested. Even though it supplied Judge Taylor with evidence of attorney's fees totaling \$38,380.00, it only requested \$30,206.45. That was the amount presented to Judge Taylor, and that is the amount he found to be "reasonable."

By serving an Amended Judgment, Voest-Alpine attempted to alter Judge Taylor's award without submitting it to him. It does not follow that Judge Taylor would have "automatically" awarded the higher amount. That is why Mountain States filed Objections to the Amended Judgment. Voest-Alpine's Amended Judgment requires a new evaluation by Judge Taylor.

Mountain States also objected to the request for \$4,870.33 in "costs." It is important to note that we are not concerned with costs requested under URCP 54(d). Voest-Alpine has not filed a memorandum of costs under Rule 54(d)(1). We are concerned with costs or "legal expenses" requested under the contract of the parties.

There is no provision for an award of costs or legal expenses in the parties' contract. Fees provided by contract are only allowed in "strict" accordance with the terms of the contract. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). Therefore, Voest-Alpine's Amended Judgment should be denied.

### **CONCLUSION**

Both the Lease and common law principles of waiver and estoppel required notice to and written endorsements from the parties' insurance carriers expressly acknowledging the "Waiver of Subrogation." However, there was no evidence of such notice and certainly no such endorsements were made. Therefore, Mountain States' liability insurance carriers are free to pursue this action.


The Waiver of Subrogation was dependent on the mutual insurance requirement in the Lease. Both parties were required to obtain different kinds of insurance for their mutual benefit. The purpose behind the Waiver of Subrogation would not be served by permitting Voest-Alpine to avoid its obligation to provide the insurance that would have covered this loss. This would mean that parties in other cases could ignore their insurance obligations in cases where the other party obtains insurance not required by the parties' contract.

There is no basis for the Amended Judgment. Judge Taylor found the sum of \$30,206.45 to be a “reasonable” attorney’s fee. There is no provision in the Lease for costs or legal expenses.

For all the foregoing reasons, Mountain States respectfully requests that the Court reverse the Judgment of the trial court.

DATED this 20<sup>th</sup> day of February, 2001.

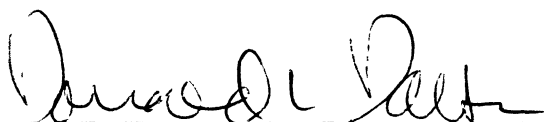
DALTON & KELLEY

By   
Donald L. Dalton  
Attorneys for Appellant

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that two true and correct copies of the within and foregoing "Appellant's Brief" were mailed, postage prepaid, this 20<sup>th</sup> day of February, 2001, to:

Terry M. Plant  
Jason M. Kerr  
Plant, Wallace, Christensen & Kanell  
136 East South Temple  
Salt Lake City UT 84111



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Donald L. Dalton (4305)  
DALTON & KELLEY  
Attorneys for Mountain States  
Post Office Box 58084  
Salt Lake City, Utah 84158  
Telephone: (801) 583-2510

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**IN THE FOURTH JUDICIAL DISTRICT COURT**  
**UTAH COUNTY, STATE OF UTAH**

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**MOUNTAIN STATES STEEL, INC.,**

**Third-Party Plaintiff,**

**Vs.**

**VOEST-ALPINE SERVICES &  
TECHNOLOGIES CORPORATION,**

**Third-Party Defendant.**

**OBJECTIONS TO VOEST-  
ALPINE'S "AMENDED"  
FINDINGS OF FACT;  
CONCLUSIONS OF LAW RE:  
ATTORNEY'S FEES; COSTS**

**Case No. 960400135 PI**

**Hon. James R. Taylor**

**Mountain States Steel, Inc., by and through its attorneys, respectfully submits the  
following Objections to Voest-Alpine's "Amended" Findings of Fact; Conclusions of Law  
Re: Attorney's Fees; Costs:**

**STATEMENT OF FACTS**

- 1. On June 19, 2000, Voest-Alpine Services & Technologies Corporation  
made a Motion for Attorney's Fees.**
- 2. There was a Memorandum in Support in which Voest-Alpine detailed its  
claim for attorney's fees as \$30,206.45 to the Salt Lake City law firm Plant,**

Wallace, Christensen & Kanell and \$23,637.50 to the Pittsburgh law firm Kirkpatrick & Lockhart.

3. The Motion was based on ¶15.13 of the Lease, which provides: "If either party brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party shall be entitled to its reasonable attorney fees."
4. There is no provision in the Lease for an award of "costs" or legal expenses.
5. The Court considered the objections of Mountain States and in a Memorandum Decision re Attorney's Fees, ruled that "\$30,206.45," the amount represented to have been billed by Plant, Wallace, Christensen & Kanell, "represents a reasonable fee incurred in the defense of the third party action maintained by [Mountain States] in this case." Pg. 3 of 5
6. Based on this finding, the Court concluded that "Voest-Alpine is entitled to attorneys fees and costs reasonably incurred in this matter of \$30,206.45." Pg. 4 of 5
7. On September 19, 2000, Voest-Alpine submitted Findings of Fact and Conclusions of Law and a proposed Judgment for Third-Party Defendant Voest-Alpine's Attorney's Fees.
8. Paragraph 10 of the Findings and Conclusions correctly stated the amount of the Court's award as "\$30,206.45."

9. Mountain States made no objection to the Findings and Conclusions or Judgment because they were consistent with the Court's Memorandum Decision.
10. Though the time has passed, Voest-Alpine has (apparently) not submitted the Findings and Conclusion or Judgment to the Court.
11. Instead, on October 9, 2000, Voest-Alpine submitted "Amended" Findings of Fact and Conclusions of Law and Judgment.
12. Paragraph 10 of the Findings and Conclusions reads as follows: "This Court finds that defendant Voest-Alpine Services and Technologies is entitled to its reasonable attorney's fees and costs incurred in this matter in the amount of \$43,250.33."
13. The difference in amounts is explained nowhere in the Findings and Conclusions or Judgment.
14. However, in a letter dated October 9, 2000, Voest-Alpine explained: "Due to an arithmetic error, our motion and first proposed judgment has incorrect amounts listed as the total fees and costs expended by Voest-Alpine in this matter. The correct total amount for Plant, Wallace, Christensen & Kanell from all the bills submitted with the affidavit was \$38,380.00 in attorney's fees and \$4,870.33 in costs."
15. \$43,250.33 represents the sum of the represented \$38,380.00 in attorney's fees and \$4,870.33 in costs.



## ARGUMENTS

The award of the Court was \$30,206.45. This was based on the representation of Voest-Alpine that its fees from Plant, Wallace, Christensen & Kanell were \$30,206.45: “The total bill from that firm, of \$30,206.45, represents a reasonable fee incurred in the defense of the third party action maintained by [Mountain States] in this case.

Memorandum Decision, pg. 3 of 5

Based on this same representation, Mountain States, in its Memorandum in Opposition to Voest-Alpine’s Motion for Attorney’s Fees, reached the same conclusion: “If there is to be a recovery it should be limited to what was billed and actually paid by Voest-Alpine to the Utah law firm.” Pg. 3


Paragraph 10 of the “Amended” Findings of Fact and Conclusions misstates the Court’s ruling on the matter. It states that Voest-Alpine is entitled to “its reasonable attorney’s fees and costs incurred in this matter in the amount of \$43,250.33.” This was not the finding or conclusion of the Court and should not have been stated as such.

If Voest-Alpine insists on the higher amount, Mountain States should be permitted to re-evaluate the request, taking a closer look at the actual time charges from Plant, Wallace, Christensen & Kanell. \$30,206.45 may have been a reasonable amount: \$38,380.00 may not.

In any event, there is no basis for an award of “costs.” What Voest-Alpine really means is “expenses,” and there is no provision for expenses in the parties’ agreement.

DATED this 12th day of October, 2000.

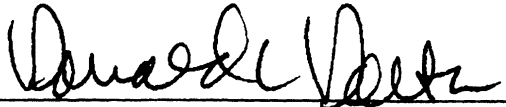
DALTON & KELLEY

By   
Donald L. Dalton  
Attorneys for Mountain States

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that I caused a true and correct copy of the within and foregoing "Objections" to be mailed, postage prepaid, this 12th day of October, 2000 to:

Terry M. Plant  
Plant, Wallace, Christensen & Kanell  
136 East South Temple  
Salt Lake City UT 84111



TERRY M. PLANT, #2610

JASON M. KERR, #8222

**PLANT, WALLACE, CHRISTENSEN & KANELL**

Attorneys for Third-Party Defendants Voest-Alpine

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Telephone: (801) 363-7611

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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, PROVO DEPARTMENT, STATE OF UTAH**

---

MARK BAKOWSKI,	)	JUDGMENT FOR THIRD-PARTY
	)	DEFENDANT VOEST-ALPINE'S
Plaintiff,	)	ATTORNEY'S FEES
	)	
v.	)	
	)	
MOUNTAIN STATES STEEL, INC.	)	
GROVE MANUFACTURING	)	
COMPANY; GROVE WORLDWIDE,	)	
INC.; NATIONAL CRANE CORP.,	)	
INC; and JOHN DOES I	)	Civil No. 960400135 PI
THROUGH IV,	)	
	)	Judge JAMES TAYLOR
Defendants.	)	
	)	
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MOUNTAIN STATES STEEL,	)	
INC.,	)	
	)	
Defendant & Third-Party	)	
Plaintiff,	)	
	)	
v.	)	
	)	
VOEST-ALPINE SERVICES &	)	
TECHNOLOGIES CORPORATION, a	)	
Delaware corporation,	)	
	)	
Third-Party Defendants.	)	

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The Court, having determined that third-party defendant Voest-Alpine Services and Technology is the prevailing party in the above entitled lawsuit and that Voest-Alpine is entitled to its attorney's fees as per the findings of fact and conclusion of law dated \_\_\_\_, which are incorporated into this order by this reference. It is ordered and adjudged that third-party defendant Voest-Alpine Services and Technologies Corporation recover from third-party plaintiff Mountain States Steel, Inc. \$43,250.33 as reasonable attorney's fees and costs.

Dated this \_\_\_\_ day of September, 2000.

By the Court:

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JAMES R. TAYLOR  
DISTRICT COURT JUDGE

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy of the foregoing document was mailed, postage prepaid, this \_\_\_\_ day of September, 2000, to the following:

**Attorneys for Mountain States**

Donald L. Dalton

**DALTON & KELLEY**

PO Box 58084

Salt Lake City, Utah 84158

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