IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-895

METRO WASTEWATER RECLAMATION DISTRICT, formerly known as METROPOLITAN DENVER SEWAGE DISPOSAL DISTRICT NO. 1, a political subdivision of the STATE OF COLORADO,

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, UNITED STATES FIRE INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY and HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Defendants.

AMICUS BRIEF OF COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PLAINTIFF'S CONSOLIDATED BRIEF IN RESPONSE TO DEFENDANTS' FIREMAN'S FUND INS. CO., HARTFORD ACCIDENT & INDEMNITY CO. AND CONTINENTAL CASUALTY AND NATIONAL FIRE INSURANCE CO. OF HARTFORD, CROSS MOTIONS FOR SUMMARY JUDGMENT AND REPLY TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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COMES NOW the Colorado Municipal League as amicus and submits the within Brief in Support of Plaintiff's Consolidated Brief in Response to Defendants' Fireman's Fund Ins. Co., Hartford Accident & Indemnity Co. and Continental Casualty and National Fire Insurance Co. of Hartford, Cross Motions for Summary Judgment and Reply to Plaintiff's Motion for Partial Summary Judgment.

STATEMENT OF THE LEAGUE'S INTEREST

The League is a non-profit voluntary association of 245 Colorado municipalities. The League includes all home rule municipalities, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

One of the purposes of The League is to represent its members on matters of significance to Colorado municipalities. Municipalities are being held legally responsible in environmental damage cases because of the broad scope of both state and federal environmental statutes. As a result, municipalities are both potential and active litigants in complex, expensive, lengthy, multi-party environmental damage cases.

Municipalities have paid large sums in insurance premiums over the years. Municipalities have an interest in ensuring that the insurance coverage that taxpayers bought and paid for

is available in environmental damage cases. A narrow reading of standard form comprehensive general liability policy language would significantly limit the ability of municipalities to recover environmental cleanup costs from their insurance companies.

If insurance coverage becomes unavailable for municipalities involved in environmental damage cases because of this potentially damaging precedent, **taxpayers would be forced to pay a Triple Penalty:**

a) Municipalities will have paid premiums for insurance coverage they did not receive;

b) Municipalities will pay for the costs of defending the underlying environmental damage claim; and,

c) Municipalities will pay potentially staggering response costs for the cleanup of landfills and other Superfund sites.

As a brief supplementation, the Court should be advised that perhaps the most widely contested insurance issue being litigated in the United States is the question of comprehensive general liability (CGL) coverage for environmental damage claims. To date, no Colorado appellate decisions address the issues of:

1. Whether or not a Potentially Responsible Person ("PRP") notice letter constitutes a "suit" within

the meaning of a comprehensive general liability insurance policy?

2. Whether or not "cleanup costs" to remediate environmental damages constitute "damages" within the meaning of a comprehensive general liability insurance policy?

The plight of insureds in this state who are similarly situated to Plaintiff await this Court's determination. Amicus is currently aware of actions pending in Colorado state and federal courts whereby insureds are seeking a determination as to whether standard form comprehensive general liability insurance policies (issued on an "occurrence" basis, with identical insuring agreements, definitions, exclusion clauses, and legal issues to be resolved herein) provide coverage when federal and state agencies seek to impose liability for activities resulting in environmental damage. Insureds include not only mining companies and industrial concerns, but political subdivisions, municipalities, generators and transporters of hazardous substances, private parties, as well as their insurers.[1]

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[1] At the Lowry Landfill Superfund site alone, more than 600 entities received notice from the United States Environmental Protection Agency of their status as potentially responsible persons/parties with joint and several liability for the remediation of environmental damage occurring from landfill activities from 1965 through 1980, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 USC §§6902 et seq. EPA has issued various response costs estimates ranging from $500 million to $4 billion for the total cleanup of the Lowry Landfill over the next 20 years.

ARGUMENT

I. IS A "PRP" NOTICE LETTER A SUIT WHICH TRIGGERS A DUTY TO DEFEND?

Standard form CGL policy language typically states that an insurer shall have the right and duty to defend any suit against the insured. A defense obligation is normally triggered by a "suit" against the insured in the traditional sense, i.e., a judicial proceeding to which the insured is a party and in which a claim or contention is asserted that the insured has a legal liability for damage or injury to a third-party. Simon v. Maryland Casualty Co., 353 F.2d 608 (5th Cir. 1965); accord, Clarke v. Fidelity and Casualty Co. of New York, 285 N.Y. S.2d 503, 527 (Sup. Ct. NY Co. 1957).

In many cases, the first notice that a municipality/policyholder receives from EPA is a letter notifying it of its potentially responsible party status ("PRP"), otherwise known as a CERCLA Section 104 notice letter. Several courts have held that the threat of governmental action to force cleanup of a hazardous waste site contained in a PRP letter triggers the carrier's duty to defend. Fireman's Fund Insurance Company v. Ex-Cell-O, 662 F. Supp. 71, 75 (E.D. Mich. 1987) (the duty to defend is not restricted to a traditional lawsuit for money damages but extends to actual or threatened use of legal process to coerce payment, and to claims for cleanup of environmental contamination. The term "suit"

includes any effort to impose on the policyholder a liability ultimately enforceable by a court).

When faced with the alternative of potentially enormous liability for money damages by the initiation of a civil suit under Superfund, it is little wonder that operators of businesses, municipalities, and other potentially responsible persons contacted by EPA attempt to resolve allegations of contamination of the environment without resorting to the courts for an ultimate determination of their responsibility. The consequences for a recalcitrant, nonsettlor who has previously been identified as a PRP with liability for the release of hazardous substances at a Superfund site can be potentially catastrophic. An enforcement action brought by EPA against recalcitrant, nonsettlors could result in the imposition of a penalty equal to three times the amount of its allocable share of response costs (incurred by EPA and/or other PRPs contributing toward the payment of the nonsettling parties allocable share), as well as the award of EPA's attorney's fees. Given the potentially limited defenses afforded to PRPs under the Superfund law, and the strict liability nature of Superfund, the incentive to settle with EPA is overwhelming. One court has even held that it would be absurd to limit the duty to defend to the time period after a lawsuit was filed when a failure to become involved in negotiations prior to the filing of suit could have resulted in joint and several liability and treble damages under CERCLA. American Motorist Insurance Co. v. Levelor Lorentzen, Inc., No. 88-1994, Slip Op. at N.2, 57

U.S.L.W. 2270 (D.N.J. October 14, 1988), appeal dismissed, 879 F.2d 1165 (3d Cir. 1989).

A Wyoming case, Compass Insurance Co. v. Cravens, Durgan & Co., 748 P.2d 724 (Wyo. 1988) has observed that the lack of a formal claim or suit filed against an insured did not preclude coverage since the insurer's obligation of good faith and reasonableness requires them to acquiese to the cleanup effort. Further, the fact that no formal claims were filed was a credit to the cleanup effort and should not be an excuse for the denial of coverage.

Colorado law also imposes a covenant of good faith and fair dealing on its insured when faced with the prospect of liability to a third-party. See, C.R.S. Section 10-3-1101, et seq., especially Section 10-3-1113 (1)(a) and (c). How can it be reasonably argued that an insurer complied with its duty of good faith and fair dealing by alleging that a traditional lawsuit for money damages had not been filed against its insured, and therefore the duty to defend under the CGL policy had not arisen, when the insured would be exposed to sanctions under CERCLA/SARA that were potentially more severe then failing to answer a formally served complaint. The troublesome alternative facing the insured would be to ask EPA to file suit against it in order to trigger the duty to defend.

United States F & G v. Speciality Coatings and Speciality Chemical Co., 180 Ill. App. 3d 378, 535 N.E. 2d 1071 (No. D. Ill.) review denied, 127 Ill. 2d 643 (S.Ct. 1989) has held that

the fortuitous choice to first seek voluntary compliance instead of court action does not eliminate the spector of potential liability for cleanup costs and damages to be incurred by the defendant insurer. See also, United States Aviex Co. v. Travellers Insurance Co., 125 Mich. App. 579, 336 N.W.2d 838 (1983).

A recent decision of the Supreme Court of Iowa, A.Y. McDonald Industries, Inc. v. Insurance Company of North America, et al., No. 70/89-1722 (September 18, 1991) contains a thorough discussion of the issue before this court. Id., Slip Op. at 45-51. In answering questions certified to it by the United States District Court for the Northern District of Iowa, the Iowa Supreme Court held that an administrative action brought against the insured by EPA in seeking substantial response costs for environmental damage arises to the level of a "suit" within the meaning of the insured's standard form comprehensive general liability insurance policy. The Iowa Supreme Court focused on the adversarial nature of the administrative proceedings set forth in a PRP notice letter, and analogized to a conventional demand letter based upon a personal injury suit. While the identification of an insured as a potential defendant in a demand letter carries no untoward consequences if the insured fails to respond, a PRP notice letter has much more serious consequences. Id., Slip Op. at 49.

In the case at hand, Metro was served with a "special notice" letter on June 24, 1988, requesting that it participate in discussions reserved for the top 25 PRPs in terms of volume of waste hauled to the Lowry Landfill, as set forth in the

Jacobs Engineering protocols initiated by EPA. The selected recipients were requested to enter into negotiations with an eye towards conducting the remedial investigation/feasibility study for the first operable unit at the Lowry Landfill. The first operable unit was the study of the shallow groundwater. By failing to affirmatively respond, Metro would have subjected its ratepayers to fines and penalties. As a matter of public policy and social responsibility, Metro's actions in participating in discussions and eventually signing an administrative order on consent to perform the remedial investigation and feasibility study were the appropriate course of action in defending itself against potentially enormous liability, fines and penalties. Accord, Higgins Indus, Inc. v. Fireman's Fund Insurance Co., 730 F. Sup. 774, 775-76 (Ed. Mich. 1989); Ray Indus., Inc. v. Liberty Mot. Ins. Co., 728, F. Sup. 1310, 1313-14 (E.D. Mich. 1989); Avondale Indus. Inc. v. Travellers Indemnity Co., 887 F.2d 1200, 1206 (2d Cir. 1989); Compare, Detrex Chem. Indus., Inc. v. Employers Insurance of Wausaw; 681 F. Supp. 438, 452-55 (N.D. Ohio 1987).

II. CLEANUP COSTS AS PROPERTY DAMAGES

CGL policy language imposes liability for property damage caused by an occurrence. The traditional view is that damages mean monetary damages, and there is no coverage for claims of equitable relief, since equitable relief is not damages. Insofar as coverage is concerned, the traditional view states that the obligation is to pay, not to undertake remediation.

In the context of hazardous waste litigation, several courts have held that CERCLA response costs are not damage and therefore equitable monetary relief such as cleanup costs are not covered. This rationale has been followed largely in the Fourth and Eighth Circuits with some success in state courts in Washington, Florida, Ohio, and Virginia. Among the leading cases that have adopted the insurer's rationale are Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) and Continental Insurance Cos. v. North Eastern Pharmaceutical and Chemical Co. ("NEPACCO"), 842 F.2d 977 (8th Cir. 1988). Both cases hold that because CERCLA response costs claims are equitable, they are not included within the standard form CGL policy's coverage for "damages". NEPACCO further held that the term "damages" to a lay person was ambiguous and might be interpreted to include such costs, but that the term has a technical, special meaning in the insurance context which precludes coverage for equitable claims.

However, several courts have held that CERCLA response costs may be covered damages on the rationale that the reasonable expectation of an insured is that he would be covered for all sums for which he becomes liable by reason of an occurrence, whether they be as costs of compliance with the law or as damages in the technical sense. In Commercial Union Insurance Company v. Harold Taxel, et al., No. 87-0336-S-CM (S.D. Ca. August 18, 1988), the California court held that if an insurer desires a more restrictive limitation of damages or of the term "property damage" he can so provide to specifically exclude

cleanup costs. In the absence of such a restrictive exclusion, cleanup costs are covered property damage. This rationale has been followed by courts in New Jersey, Michigan, Delaware, Pennsylvania, New York, Illinois, the 9th Circuit, North Carolina, Massachusetts, Washington, Minnesota, California, Idaho, and Utah. Several cases have strongly criticized the holding in NEPACCO and have further rejected the notion that CGL policies distinguish between equitable and legal claims for coverage purposes. Shell Oil v. Accident and Casualty Insurance Co., No. 279853 (San Mateo Cty., Ca. Superior Ct., July 13, 1988); Intell Corp. v. Hartford Accident and Indemnity Co., 692 F. Supp. 1171 (N.D. Cal. 1988).

Recently, the D.C. Circuit U.S. Court of Appeals held that under Missouri law and based on the common understanding of the word, cleanup costs are "damages" within the meaning of a comprehensive general liability insurance policy. Independent Petro Chemical Corp, et. al v. Aetna Casualty and Surety Co., et al., No. 89-5367 and 89-5368 (D.C. Cir. September 13, 1991). The court was especially critical of the holding in NEPACCO for relying upon the construction of the word "damages" as used by "astute insurance specialists or perspicacious counsel". Instead the D.C. Circuit said that liability for environmental cleanup costs "quite naturally" fits the common and ordinary understanding of "damages", and that with the exception of NEPACCO, in every case in which the operative state's rules of insurance contract interpretation required resort to the common and ordinary understanding of language, "damages" have been construed to cover reimbursement for environmental expense costs

incurred by the government. See also, Fireman's Fund Insurance Co. v. Ex-Cell-O Corp., cited supra. (Damages include money spent to cleanup environmental contamination.); Centennial Insurance Co. v. Lumberman's Mutual Casualty Co., 667 F. Supp. 342 (E.D. Pa. 1987). (Most of the courts considering the issue have held that "damages" include the cost of cleaning up environmental contamination.)

It is well settled that under principles of insurance coverage for property damage, an acceptable measure of damage is the cost of repair or replacement. For instance, automobile policies routinely permit the insurer to repair an automobile damaged in a collision or to "total" the damaged vehicle if the cost of repairs is in excess of the reasonable value of the vehicle. In the environmental context, the measure of damages which have occurred to the land, substrata and groundwater is the cost of remediation. Unfortunately for the insurer under Superfund, it does not have the choice of ultimate remedy. Congress has left the discretionary remediation selection to EPA, subject, of course, to judicial review. Cleanup costs are as acceptable a measure of damages for harm to the environment as automobile repairs are for damage to a vehicle. Remediation of the land achieves the same goal: the return of the damaged property as nearly as practicable to its undamaged condition prior to the event of harm occurring.

WHEREFORE, Amicus Curiae Colorado Municipal League requests that this Court hold that a PRP notice letter constitutes a "suit" and further, that "cleanup" costs be construed as "damages", within the meaning of standard form comprehensive general liability insurance polices.

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CERTIFICATE OF MAILING

I, hereby certify that on the 9th day of October, 1991, a true and correct copy of the foregoing AMICUS BRIEF OF COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PLAINTIFF'S CONSOLIDATED BRIEF IN RESPONSE TO DEFENDANTS' FIREMAN'S FUND INS. CO., HARTFORD ACCIDENT & INDEMNITY CO. AND CONTINENTAL CASUALTY AND NATIONAL FIRE INSURANCE CO. OF HARTFORD, CROSS MOTIONS FOR SUMMARY JUDGMENT AND REPLY TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT was placed in the U.S. Mail, postage prepaid addressed to:

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