COURT OF APPEALS, STATE OF COLORADO

Case No. 93 CA 1923 and 93 CA 1936

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE CITY OF LITTLETON BY THE COLORADO MUNICIPAL LEAGUE

CITY OF LITTLETON, COLORADO, a muncipal corporation, and CITY OF ENGLEWOOD, a municipal corporation,

Plaintiffs-Appellants,

v.

COMMERCIAL UNION ASSURANCE COMPANIES, a/k/a COMMERCIAL UNION INSURANCE COMPANY, a/k/a EMPLOYER'S FIRE INSURANCE COMPANY, a Massachusetts corporation;

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation;

FIREMAN'S FUND INSURANCE COMPANIES, a California corporation, and THE AMERICAN INSURANCE COMPANY, a New Jersey corporation;

COMPASS INSURANCE COMPANY, a New York corporation;

GRANITE STATE INSURANCE COMPANY, a New Hampshire corporation;

AMERICAN STATES INSURANCE COMPANY, an Indiana corporation;

NORTH STAR REINSURANCE CORPORATION, a Connecticut corporation;

GUARANTY NATIONAL, a Colorado corporation,

Defendants-Appellees.

City and County of Denver
District Court No. 91 CV 00723

Respectfully Submitted by
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5/18/94

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STATUTES

Colorado Municipal League, by and through its counsel, Inman Flynn and Biesterfeld, P.C., pursuant to Colorado Appellate Rule of Procedure 29, submits this brief as **Amicus Curiae** in the above referenced action.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review by the City of Littleton which are addressed in this brief by the Colorado Municipal League are:

1. Whether the PRP Notice letters issued by the United States Environmental Protection Agency pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) to Littleton, and the administrative process thereby initiated, is the functional equivalent of a "suit" triggering Littleton's insurers' duty to defend under the Comprehensive General Liability (CGL) insurance policies issued to Littleton.

2. Whether sewage sludge is a "waste material or other irritant, contaminant, or pollutant" under the Pollution Exclusion clause of the CGL policies.

STATEMENT OF THE CASE AND RELEVANT FACTS

For the sake of brevity, the Colorado Municipal League adopts the Statement of The Case and Relevant Facts set forth in the opening brief of Appellants the Cities of Littleton and Englewood.

ARGUMENT

I. Standard of review.

Summary judgment is a drastic remedy and is only warranted in exceptional cases where there is a clear showing that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as as matter of law. Churchey v. Adolph Coors, Co. 759 P.2nd 1336 (Colo. 1988); U.S. v. Jesse, 744 P.2nd 491 (Colo. 1987). In determining the propriety of a motion for summary judgment, the Court of Appeals should not deny a litigant a trial if there is the slightest doubt as to the facts. Coseal v.

Hart, 755 P.2nd 462 (Colo. App. 1988). The Court of Appeals must determine whether the movant clearly proved that there existed no issue of material fact. Gifford v. City of Colorado Springs, 815 P.2d 1008 (Colo. App. 1991).

II. Littleton's PRP Notice letter and the EPA administrative process initiated thereby is the functional equivalent of a "suit" within the context of the CGL policies issued to Littleton.

The CGL policies issued to Littleton provide that its insurers had a "duty to defend any suit against the insured". As recognized by the Iowa Supreme Court, the majority of courts find that "suit" used in the context of a CGL policy, includes more than simply a court proceeding. See, A.Y. McDonald Industries, Inc. v. Ins. Co. of North America, 475 N.W.2d 607 (Iowa 1991). [1] In A.Y.

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[1] A condensed list of cases in which courts have decided that a PRP notice letter is the equivalent of a suit under CGL policies include: U.S. Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838 (1983); Fireman's Fund Ins. Co. v. Ex-Cell-O, 662 F. Supp. 71 (E.D. Mich. 1987) (coverage doesn't hinge on form of action taken but on threatened use of legal process to coerce payment or conduct, "suit" includes any effort to impose liability on policyholder ultimately enforceable by a court); Hazen Paper Co. v. United States Fidelity & Guaranty Co., 407 Mass. 689, 555 N.E.2d 576 (1990) (litigation defense protection purchased by insured would be substantially compromised if insurer had no obligation to defend insured's interest in response to EPA letter); Higgins Indus. v. Fireman's Fund Ins. Co., 730 F. Supp. 774 (E.D. Mich. 1989); C.D. Spangler Construction Co. v. Industrial Crankshaft & Engineering Co., 326 N.C. 133, 388 S.E.2d 557 (1990); Polkow v. Citizens Ins. Co. of America, 180 Mich. App. 651, 447 N.W.2d 853 (1989); Minnesota Mining Co. v. The Travelers Indem. Co., 457 N.W.2d 175 (Minn. 1990); Township of Gloucester v. Maryland Casualty Co., 668 F. Supp. 394 (D. N.J. 1987); Compass Ins. Co. v. Cravens, Darvan & Co., 748 P.2d 724 (Wyo. 1988); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987), affirmed in part, reversed in part on other grounds, 933 F.2d 1162 (3rd Cir. 1991); Industrial Indem. Ins. Co. v. Crown Auto Dealership, Inc., 731 F.Supp. 1517 (M.D. Fla. 1990). Compare with Ryan v. Royal Ins. Co. of America, 916 F.2d 731, 738, 741 (1st Cir. 1990)(Where the Court identified four guidelines in determining

McDonald the court ruled that "suit" includes an attempt to gain an end by a legal process. Id.; See also, C.D. Spangler Constr. Co. v Industrial Crankshaft & Eng'g Co., 326 N.C. 133, 388 S.E.2d 557 (1990).

The United States First Circuit Court of Appeals in Ryan v. Royal Ins. Co. of America, 916 F.2d 731, 738 (1st Cir. 1990), carefully analyzed the issue of whether a PRP letter constitutes a "suit" for purposes of triggering an insurer's duty to defend. The Ryan court refused to adopt either the "suit-cum-judgment" rule advocated by the insurers or the "any contact with a governmental agency is enough" rule advocated by the insureds. Instead, the court formulated a subjective standard to apply on a case-by-case basis. The standard weighs both the coercive and adversarial nature of the efforts of the governmental agency towards the insured and the gravity of imminent consequences faced by the insured. Ryan, 916 F.2d at 741. In Ryan, the court stated:

> "Since the law holds PRPs to so strict a liability standard, the degree of compulsion the government wields in pursuing an insured seems an apt proxy for measuring factual expectancy according to the actual probability and immediacy of toxic waste liability." Ryan, 916 F.2d at 741.

A. The EPA's Notice letter is sufficiently adversarial to satisfy the requirements of Ryan.

Review of the PRP letters sent to Littleton by the EPA shows the adversarial posture taken by EPA. In 1985, EPA sent Littleton

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whether a PRP letter constitutes a "suit" including: "gravity of the imminent consequences faced by the PRP", seriousness of the "governmental effort to force the insured to take action", "coerciveness", and "adversariness").

a letter notifying it that EPA had information that Littleton may have disposed of hazardous materials at the Lowry Landfill. The letter is a part of the appellate record included as Exhibit 9 attached to the Reply Memorandum of City of Englewood dated March 9, 1992. With this letter, EPA sought only information pursuant to a 104(e) request. [2] At this time EPA encouraged Littleton to enter into negotiations with EPA concerning Littleton's liability.

Based upon the responses that EPA received to its 104(e) request, EPA compiled a "waste-in" list. EPA proceeded to remove all doubt that Littleton would be named a major PRP at Lowry with its issuance of a Notice letter to Littleton sent pursuant to 42 U.S.C. § 9622, in May of 1988. The Notice letter is part of the appellate record attached as Exhibit 10 to the Reply Memorandum of the City of Englewood dated March 9, 1992.

EPA's Notice letter began **URGENT LEGAL MATTER NOTICE OF POTENTIAL LIABILITY** and stated that EPA had already incurred costs in excess of $7,000,000, that EPA expected to expend additional funds, and that EPA may hold Littleton liable for these costs.

The May 1988, Notice letter to Littleton began a process of EPA enforcement with serious ramifications for Littleton. EPA used the Notice letter as a vehicle to coerce an imminent response from

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[2] A 104(e) request is a request for detailed information pursuant to 42 U.S.C. § 9604(e)(2) regarding:

(A) identification, nature and quantity of materials generated, stored, transported, treated or disposed of at a site;

(B) nature or extent of the release or threatened release of a hazardous substance at a site;

(C) ability of a person to pay for or perform the cleanup.

Littleton to undertake performance of the Remedial Investigation/Feasibility Study at the Lowry Superfund site. Failure of Littleton to undertake this work subjected Littleton to penalties and a larger share of the ultimate cleanup liability. [3]

To appreciate the liability faced by Littleton as a major PRP, it is helpful to understand the circumstances, including the projected cost for clean-up at Lowry, at the time EPA issued its May 1988 Notice letter to Littleton and the other Lowry PRPs. At that time, Lowry was listed among the top 25% most hazardous CERCLA sites in the nation with a cost for remediation estimated at between $500,000,000 and $4,500,000,000. It was also widely recognized that once EPA named a party as a PRP at a major superfund site, the best that the PRP could expect was to have some influence on the amount of its liability but could not avoid such liability altogether. These circumstances, combined with the language and tone of EPA's Notice letter, assured Littleton that if it refused to cooperate with EPA that EPA would exercise its authority to institute an action to force Littleton and other PRPs to do the cleanup under 42 U.S.C. § 9606, or would undertake the cleanup itself and sue Littleton in a cost recovery action under 42 U.S.C. § 9607(c)(3).

Littleton would also have been the target of a contribution

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[3] Recent case law has demonstrated that the failure to cooperate with the EPA can subject the PRP to a larger share of allocation liability at Superfund sites. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672-673 (5th Cir. 1989); United States v. R.W. Meyer, Inc., 932 F.2d 568, 571 (6th Cir. 1991).

action by PRPs that cooperated with EPA. As evidence of this fact, on April 29, 1994, the City and County of Denver and Waste Management, Inc. filed such an action against the PRPs that failed to settle their Lowry liability. City and County of Denver and Waste Management Inc., v. Metro Wastewater Reclamation District, et al., CV No. 94- -1025 (Colo. Fed. Dist. Ct.)

B. PRPs have no practical choice other than to respond actively to an EPA Notice letter.

Although in Notice letters, PRP's are only requested to take voluntary actions, they are nevertheless actions which the EPA could compel through court enforcement. As the Court stated in Hazen Paper Co. v. United States Fidelity & Guaranty Co., 407 Mass. 689, 697, 555 N.E.2d 576, 581-582 (1990), "[i]t would be naive to characterize the EPA letter as a request for voluntary action. [A PRP has] no practical choice other than to respond actively to the letter." This sentiment was echoed in United States Fidelity & Guaranty Co. v. Specialty Coating Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071, 1079 (1st Dist. 1989), where the court stated

> The fortuitous choice to first seek voluntary compliance instead of court action does not eliminate the specter of potential liability for cleanup costs and damages to be incurred by the defendants. Indeed, it is the very threat of available formal legal action that is expected to motivate the recipient of a PRP letter into responding acceptably to the government's suggestion.

See also, Polkow, 447 N.W.2d at 856 (Where administrative mechanisms are backed up with the power to expose the insured to a money judgment in a court of law, courts have found such measures the equivalent of a suit).

Many courts recognize that receipt of a PRP Notice letter

begins an environmental enforcement process that has immediate and long range adverse consequences on an insured and sums are spent for which the insured will be held liable, long before a courtroom ever is seen. Courts have thus concluded that the "administrative process is part of a litigious process that triggers an obligation to defend." Avondale Indus. v. Travelers Indem. Co., 697 F. Supp. 1314, 1322 (S.D.N.Y. 1988), aff'd, 887 F.2d 1200 (2nd Cir. 1990). Accord, Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991).

C. The Colorado Federal District Court is split on the "suit" issue.

The Colorado Federal District is split on whether a the same PRP notice letters issued by EPA at to Lowry PRPs are the functinal equivalent of a suit. In The City of Lakewood v. United States Fire Ins. Co., et al., 90-Z-880, Judge Zita Weinshienk ruled that if this issue were presented to the "Colorado Supreme Court", the Court would rule that "a PRP letter is equivalent to a suit". (Tr. p. 38, March 30, 1993). Judge Weinshienk, after a review of the relevant case law, stated "this letter gives rise to the special procedures which begin the process of making certain parties liable under CERCLA." Id.

In Metro Wastewater Reclamation District v. CNA, et al., 89-C-895, however, Judge Jim Carrigan found that a PRP letter was not the equivalent of a suit. Judge Carrigan based his decision on 1) the dictionary definition of the word "suit" as being "an action or a process in a court for the recovery of a right or claim: a legal application to a court for justice" and, 2) that otherwise the word

"claim" in the phrase "any claim or suit" within the CGL policies would otherwise be superfluous. Judge Carrigan's reasoning, however, fails on both points. First, as indicated below, other dictionary definitions of "suit" would encompass the PRP letters, and second, an EPA "claim" is distinguishable from a conventional "claim" as that term is used in the CGL standard form policy.

i. The dictionary definition of "suit" includes an attempt to gain an end by legal means.

As noted in C.D. Spangler Construction Co., 388 S.E.2d 557 at 570 (N.C. 1990), ""suit" may also include, by definition, an attempt to gain an end by legal means".

The Ryan court recognized this imprecision in the term "suit" in finding that use of the word "suit" brings to the language of the policy a precision that the drafter omitted and the parties were not bound to anticipate. The Ryan court held that it would not say that the "cryptic phrase, any suit" unqualified by clear and unmistakable language in the policy's text, necessarily requires that a civil case be commenced in a court of law before the duty to defend arises. Ryan, 916 F.2d at 735-736.

ii. An EPA Notice letter is distinguishable from a conventional claim of a private party.

EPA's actions under CERCLA differ significantly from claims or demands made by private parties. An insured who refuses to cooperate with a private claimant for personal injuries suffers no increased liability. A PRP who refuses to cooperate with EPA faces penalties and a trebling of damages. See, Hazen Paper Co., 407

Mass. at 696, 555 N.E.2d at 581.

Further, PRPs who resolve their liability with the EPA are immunized from contribution suits from non-settling parties. Their settlement amount is deducted from the aggregate liability of the site on a dollar for dollar, rather than a pro-rata basis. 42 U.S.C. § 9613(f)(2); United States v. Cannons Engineering Corp., 899 F.2d 79, 92 (1st Cir. 1990).

Littleton's failure to cooperate with EPA would also have precluded Littleton from participation with the larger volume generators on the Lowry Coalition. Without such participation, Littleton's exposure would have substantially increased. See, Hazen Paper Co. v. United States Fidelity & Guaranty Co., 407 Mass. 689, 696, 555 N.E.2d 576, 581 (1990) (noting the importance of the administrative record to the PRP and limited judicial review of the EPA's actions).

The Lowry Coalition consists of thirteen large volume Lowry PRPs formed to cooperate with EPA and to, among other things, conduct the Deep and Shallow Ground Water Remedial Investigation and Feasibility Study at Lowry. Over the past six years the Lowry Coalition was actively involved in issues that had a direct and substantial effect on the allocation of each members' liability. This work included identification of new PRPs, identification of areas where EPA needed better information before settling with PRPs, providing assistance and commenting on EPA's proposed settlement with de minimus PRPs, challenging an EPA bankruptcy settlement with Storage Technology Corporation and commenting on

other EPA activities at Lowry that affected the remedy selected and ultimate allocation of shares of liability.

The influence of the activities of the Lowry Coalition at Lowry was substantial. This influence, in turn, affected the amount of Littleton's liability for clean-up. It was critical to Littleton's overall defense to have a voice in Lowry Coalition activities. See The Superfund Steering Committee: A Primer, 4 Envtl. F. 13 (1986); Local Governments and Superfund: Who Will Pay the Tab?, 22 Urban Lawyer 79 (1990). Building a defense and mitigating its ultimate share of allocation liability, if any, is enhanced by early participation in the studies and other activities at the site. Id. Without a voice in the Coalition, the Coalition would have provided Littleton a larger allocation of liability. Clearly, as recognized by courts in the numerous decisions cited in footnote 1 of this brief, Littleton had no practical choice but to cooperate with EPA. [4]

D. Public policy supports a finding that Littleton's PRP notice letter constitutes a "suit".

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[4] If a Notice letter is not the equivalent of a "suit", the PRP faces a significant dilemma. If the PRP responds to the Notice letter by attempting to reach a resolution without formal court litigation, the duty to defend in its CGL policies are not triggered and its insurance coverage for defense purposes is worthless. If the PRP refuses to cooperate and forces the EPA to initiate a formal lawsuit, the duty to defend is triggered but the PRP has exposed itself, in addition to the lawsuit, to penalties of as much as $25,000/day, joint and several liability and treble damages depending upon the EPA's approach. 42 U.S.C. § 9606(b)(1), 9607(c)(3). If the PRP refused to cooperate, and later was assessed statutory penalties or fines, the insurer would most certainly claim that the penalties or fines were not covered under the policies. Under these circumstances the PRP has no practical alternative but to cooperate.

Adoption of the view that "suit" in CGL policies issued to Littleton include only a court action will delay cleanups and impede the purposes of CERCLA. If, to obtain defense coverage, an insured must refuse to cooperate with EPA to force EPA to file a formal lawsuit, cleanup delays are inevitable. This delay is contrary to the interests of all involved in environmental cleanup actions. In finding that a PRP letter consituted a suit, the Court in Avondale Industries, Inc. v. Travelers Indemnity Co., 887 F.2d 1200 (2nd Cir. 1989), recognized this logic. The Court held that "[c]ommon sense argues that for Travelers to proffer a defense now is better for it, Avondale and the public interest in a prompt cleanup of the hazardous waste." Avondale, 887 F.2d at 1206.

III. Sewage sludge is an not "irritant, contaminant, or pollutant" under the Pollution Exclusion clause of the CGL policies.

A. The Colorado Federal District Court found that it was a question of fact whether sewage sludge placed by another municipality at Lowry was a "waste material or other irritant, contaminant or pollutant".

The "pollution exclusion" clause at issue here states that the insurance does not apply:

> to ... property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land ....

A plain reading of the above exclusion indicates that the discharge of sewage sludge is excluded from coverage if 1) the sludge is one of the industrial type emissions listed, i.e. "smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases", or a "waste material", and 2) that the industrial type

emissions or waste materials are "irritants, contaminants or pollutants".

The insurers have provided no evidence that the sludge fits into one of the specific categories of industrial type emissions. This narrows the court's focus to whether, as a matter of law, Littleton's sewage sludge is a "waste material" that is an "irritant, contaminant, or pollutant".

Under the doctrine of ejusdem generis, where general words follow the enumeration of specific classes of persons or things, the general words are limited to persons or things of the same general nature as those enumerated. Noyes Supervision, Inc. v. Canadian Indem. Co., 487 F. Supp. 433, 437 (D. Colo. 1980). Thus in the above exclusion the general words "irritants, contaminants or pollutants" must be of the same general nature as the specific industrial type emissions listed before them, ie. smoke, vapors, soot, fumes, acids, alkilis, toxic chemicals. Accord, Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95, 98 (Ala. 1977); A-1 Sandblasting & Steamcleaning Co. v. Baiden, 632 P.2d 1377, 1379 (Or. App. 1981), aff'd, 643 P.2d 1260 (Or. 1982).

During the same period of time that the Cities of Englewood and Littleton were utilizing the Lowry Landfill for placement of their sewage sludge, two other Denver area municipalities were doing likewise. In addition to the Cities of Littleton and Englewood, the EPA also named the City of Lakewood (Lakewood) and the Denver Metro Wastewater Reclamation District (Metro) as PRPs

for the sewage sludge they placed at Lowry. The sewage sludge from the four municipalities all came from the Denver Metropolitan area and the chemical composition of the sludge was therefore, by in large, the same. The activities of the four municipalities differed in one respect. Metro placed its sludge on the land around the periphery of the landfill rather than into the landfill.

Lakewood and Metro have declaratory judgment actions pending against their insurers in Colorado Federal District Court. See City of Lakewood v. United States Fire Ins. Co.,et al., 90-Z-880 (Judge Zita Weinshienk) and Metro Wastewater Reclamation District v. CNA, et al., 89-C-895 (Judge Jim Carrigan).

In Metro, Judge Carrigan denied the insurers' motions for summary judgment based on the pollution exclusion clause. Judge Carrigan ruled that the issue of whether Metro's sludge placed at Lowry was a "waste material or other irritant, contaminant, or pollutant" was a question of fact. See Memorandum and Order dated September 26, 1993. In Lakewood, Judge Weinschenk denied the insurers' motions for summary judgment finding that a factual question existed as to whether Lakewood sewage sludge placed in the Lowry landfill was a "pollutant, irritant, contaminant or pollutant". Judge Weinshienk ruled that:

> the question has been raised also whether these sludges are pollutants; and the plaintiff has argued that they may be hazardous and therefore the subject of attention by EPA but not pollutants and therefore not within the pollution exclusion clause. The point is that in this area, there simply are factual issues that have to be decided...
>
> Therefore, the Court feels, as I did when we started this argument--in fact, I feel more strongly now after hearing the

argument--that there are indeed factual disputes that revolve around the pollution exclusion clause.

Lakewood v. U. S. Fire Insurance Company, et al., 90-Z-880 (June 8, 1993, transcript P.41).

More recently, on April 14, 1994, in Regional Transportation District v. American Reinsurance Company, Civ. No. 92-Z-1174, Judge Weinshienk, denied another round of insurers summary judgment motions based on the pollution exclusion clause. In that case, Judge Weinshienk ruled that it was a question of fact whether the sand trappings and sludge that RTD disposed of at Lowry were "irritants, contaminants, or pollutants".

C. Sewage sludge is a recyclable resource.

Sewage sludge contains most of the same constituents as commercial fertilizer including such nutrients as iron, potassium, nitrogen, phosphates, zinc, and copper. Sewage sludge from the Denver Metropolitan area has been known to be one of the "cleanest" sludges produced in the country. The primary reason for this is that Denver has a relatively large residential community with very light industry.

Recycling of sewage sludge through land application is practiced throughout the world and has existed for centuries. Today, land application is the most common method of sewage sludge utilization. States such as Wisconsin, apply 90 to 95 percent of its sewage sludge to agricultural land. EPA encourages recycling sewage sludge through land application as opposed to incineration or disposal in rivers, lakes or oceans. It has been EPA's preferred method of sludge utilization for at least two decades.

Similarly, land application of sludge has been Colorado's policy since at least 1980. The Colorado Department of Health ("CDH") provides that "utilization of sludge as a recyclable resource" will "help to conserve the nutrients, humus, and energy resources of the State while serving its economy."

Today Metro sells 100 percent of its sewage sludge to the state's agricultural community for soil enhancement. Due to the substantial demand, Metro keeps a waiting list of customers.

Littleton's sludge was mixed with municipal solid waste to assist in the decomposition of the solid waste. This was a widespread practice at municipal landfills. EPA recognizes that the co-disposal of municipal sewage sludge with solid waste may improve leachate quality. See, 53 Fed. Reg. at 33383-4. See also, The Effects of Municipal Wastewater Sludge on Leachates and Gas Production from Sludge-Refuse Landfills and Sludge Monofills, Water Engineering Research Laboratory, U.S.E.P.A., Cincinnati, Ohio (1987), p. 65. Like Metro's sludge, there were beneficial aspects to the use of Littleton's sludge at Lowry.

In the case of In re Hub Recycling, Inc., 106 B.R. 372, 375 (D.N.J. 1989), the court rejected the insurer's argument that under the definition of pollutant in its policy that all recyclable materials are pollutants. The policy contained a different and more explicit pollution exclusion than contained in Littleton's policies. The policy specifically defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to, smoke, vapors, soot, fumes, acids,

alkalis, chemicals and waste, including materials to be recycled, reconditioned or reclaimed". (emphasis added) The court reasoned that "waste" was an example that clarified the definition of pollutant as a contaminant or irritant. Therefore, the Court found that waste did not include things such as recycled newspapers. The Court found that "waste" was not defined in the policy and raised ambiguities in the language of the pollution exclusion clause, and resolved the ambiguity against the insurer. Id. at 374.

Similarly in Weber v. IMT Insurance Co., 462 N.W.2d 283 (Iowa 1990), the court was asked to determine whether the "pollution exclusion" clause relieved an insurer of its duty to defend and indemnify its insured when the insured was sued for damages to crops from the spillage of hog manure on a public road. The insurer argued that hog manure is not a waste material or alternatively that the phrase "waste material" is ambiguous.

In finding in favor of the insurer, the court specifically limited its holding to the facts of the case. The court stated; "[w]e should not be understood to hold that manure always falls within the definition of waste material as set forth in the pollution exclusion. We hold only that under the facts of this case, hog manure spilled on the road is waste material." Id. at 286 (emphasis added).

D. Littleton's sewage sludge is not an "irritant, contaminant or pollutant".

Even assuming that Littleton's sludge could be a "waste material" it is not a "waste material" that is an "irritant, contaminant, or pollutant". See, In re Hub Recycling, Inc., 106

B.R. 372, 375 (D.N.J. 1989) (rejecting insurer's argument that all recyclables are covered by the pollution exclusion, the insurer must prove that the waste is also an irritant or contaminant for the exclusion to apply).

The case of United States Fidelity & Guaranty Co. v. Armstrong, 479 So. 2d 1164 (Ala. 1985) dealt with the discharge of raw sewage on property adjacent to where sewer lines were being replaced. The insurer denied coverage under both the "occurrence" and "pollution exclusion" clauses. The court was required to interpret a "pollution exclusion" clause identical to the one at issue in this case. Citing the case of Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977), the court noted that the clause was intended to only cover industrial contamination and pollution and further that the clause is ambiguous and should be construed against the insurer. The Court stated:

> To deny coverage here under this clause would be to distort the plain purpose of the pollution exclusion. We should not be understood to hold that raw sewage could never be such a pollutant or that the insurance company could not write an exclusion clause which would cover the activity here involved. We hold only that this policy clause, under the facts of this case, does not eliminate coverage.

Armstrong, 479 So. 2d at 1168 (emphasis added)

The insurers in this case were aware of Littleton's activities at Lowry. Despite this knowledge the language of the exclusion in the policy sold to Littleton failed to clearly exclude potential damages from Littleton's Lowry activities. Just as the court in Armstrong noted, the insurers could have written a clause to

exclude from coverage Littleton's Lowry activities.

Other courts when interpreting the same "pollution exclusion" at issue in this case, have found that the substance must be an irritant, contaminant or pollutant for the exclusion to be applicable and that the clause is ambiguous. See also, Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95, 100 (Ala. 1977) (holding that sand and mud washed into lake as a result of insured's construction activities does not fall within the pollution exclusion clause, as an irritant, contaminant or pollutant); A-1 Sandblasting & Steamcleaning Co. v. Baiden, 632 P.2d 1377, 1379 (Or. App. 1981), aff'd, 643 P.2d 1260 (Or. 1982) (rejecting insurer's argument that paint, being an acid or alkalis, is covered under the "pollution exclusion"; court noted that such an expansive interpretation would mean that the discharge of even pure water would be covered by the clause, and that paint is generally not thought of as an irritant, contaminant or pollutant).

In addition, courts interpreting pollution exclusion clauses similar to that found in Hub Recycling, have found various substances did not fall within the definition of pollutant as irritants or contaminants. Westchester Fire Ins. Co. v. City of Pittsburg, Kan., 768 F. Supp. 1463, 1470-71 (D. Kan. 1991) (fogging spray used by city contained insecticide, malathion, court rejects insurer's broad reading of "irritant or contaminant" and stated that "pollutant" is not merely any substance that may cause harm but those which are recognized as toxic or particularly harmful and malathion is not recognized as a pollutant or hazardous substance;

court further noted that insect spraying is a common city function and was not specifically excluded under the policy, the insurer "has failed to define the limitation of its pollution exclusion clause in clear and explicit terms"); West American Ins. Co. v. Tufco Flooring E., Inc., 409 S.E.2d 692 (N.C. App. 1991) (insured was sued for damages to poultry resulting from exposure to styrene during insured operations in resurfacing floors, court holds that styrene was not a pollutant, when brought to the site it was simply a raw material and not an irritant or contaminant); but cf., Guilford Indus., Inc. v. Liberty Mutual Ins. Co., 688 F. Supp. 792, 794-795 (D. Me. 1988) (holding that fuel oil falls within the pollution exclusion, but also that the exclusion applies only if the substance is an irritant or contaminant).

E. Littleton's sewage sludge is not a toxic or hazardous waste under CERCLA or Colorado state law.

Sewage sludge is generally not considered a hazardous waste. This was confirmed by the testimony of Hartford's and FFIC's expert in the Metro case, where Dr. Albert Page testified:

> Q. - Do you know if the EPA has ever characterized sewage sludge as a hazardous waste?
> A. - The EPA does not consider sewage sludge to be a hazardous waste except under one condition.
> Q. - And that is?
> A. - If the concentration of polychlorinated biphenyls ("PCBs") exceeds 50 milligrams per kilogram.

No evidence suggests that Littleton's sludge was ever considered a "hazardous waste" by the EPA because of the presence of PCBs.

Nor is municipal sewage sludge considered either a hazardous or solid waste under Colorado state law. See, C.R.S § 25-15-101

(9)(b)(IV); § 30-20-101(6).

F. The insurers, with knowledge of Littleton's activities, sold Littleton insurance that was ambiguous as to its coverage.

"Exclusionary clauses designed to insulate particular conduct from general liability coverage provisions must be drafted in clear and specific language." American Family Mut. Ins. Co. v. Johnson, 816 P.2d 952, 953 (Colo. 1991). "The burden is on the insurer to establish that the exclusion applies and that the exclusion is not subject to any other reasonable interpretation." Omnibank Parker Rd. v. Employers Ins., 961 F.2d 1521, 1523 (10th Cir. 1992) (interpreting Colorado law, citing American Family Mut. Ins. Co. v. Johnson, 816 P.2d 952 (Colo. 1991)).

Where an insurer seeks to avoid liability upon acceptance of premiums, it must use clear and unequivocal language evidencing its intent to limit coverage, and must also call such limiting conditions to the attention of the applicant. Cf., State Compensation Ins. Fund v. Wangerin, 736 P.2d 1246, 1248 (Colo. App. 1986) (insurer failed to condition acceptance of premium on appeal of decision of referee).

During the period of time that the insurers issued their policies to Littleton, there is no indication that they ever considered Littleton's sludge to fall within the substances covered under the "pollution exclusion" clause. The insurers, knowing of Littleton's activities at Lowry, failed to specifically exclude those activities from the broad general liability coverage under their policies, and have thus failed to define the limits of their "pollution exclusion" clauses in clear and explicit terms. E.g.,

Westchester Fire Ins. Co. v. City of Pittsburg, Kan., 768 F. Supp. 1463, 1471 (D. Kan. 1991).

The policies are, at best, ambiguous as they apply to Littleton's sludge. This ambiguity in the policy must be construed against the insurer under Colorado law. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1090 (Colo. 1991) Where there is ambiguity or uncertainty as to coverage, courts should construe the policy in favor of the insured. Republic Ins. Co. v. Jernigan, 753 P.2d 229, 232 (Colo. 1988).

V. CONCLUSION

The Colorado Municipal League represents 245 Colorado municipalities which include the vast majority of Colorado ratepayers for sewage and wastewater services. The municipalities have paid substantial sums for insurance coverage for which the insurers in this case now seek to avoid.

The EPA had the power to seek court enforcement of its orders against Littleton to initiate cleanup or pay for the cleanup of the Lowry site. Littleton faced the possibility of substantial additional liability and penalties had it forced EPA to file suit to enforce its orders. In short, there was no reasonable alternative to Littleton but to comply with the EPA's Notice letter and the administrative process initiated thereby.

The PRP letter is designed to encourage and coerce voluntary participation in Superfund cleanups by its recipients. Unlike the consequences of failing to cooperate with a private party that makes a claim for an auto accident against an insured, CERCLA legislation and the superfund process substantially increases an

uncooperative PRPs legal liability.

If Littleton could not obtain a defense under its policies until the EPA filed a complaint in court, this would have discouraged Littleton from cooperating in the cleanup efforts. Such a position would have delayed the Lowry cleanup and increased the fiscal exposure of both Littleton and its insurer in a subsequent enforcement, contribution or cost recovery action.

The definition of "suit" includes an attempt to gain an end by legal means, which is precisely what the EPA is attempting to do with Littleton. Because the term is capable of two or more reasonable interpretations, or at a minimum is ambiguous, it must be construed in favor of coverage.

As was believed at the time, and as EPA research later indicated, co-disposal of sewage sludge in municipal landfills improves not degrades the quality of the leachate from the landfill and assists in the decomposition of solid waste. In addition, Denver municipalities have long practiced reclycing sewage sludge as a beneficial resource in the form of a soil conditioner. The evidence indicates that it is a question of fact whether Littleton's sludge is a "waste material" that is an "irritant, contaminant, or pollutant".

The Colorado Municipal League respectfully requests that this Court hold 1) that the PRP letter issued to Littleton by the EPA and the administrative process initiated by thereby, was the functional equivalent of a suit, and 2) that a question of fact exists as to whether Littleton's sludge is an "irritant, contaminant, or pollutant".

DATED THIS 18 DAY OF May, 1994.

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COURT OF APPEALS, STATE OF COLORADO

Case No. 93 CA 1923 and 93 CA 1936

CERTIFICATE OF MAILING

CITY OF LITTLETON, COLORADO, a muncipal corporation, and CITY OF ENGLEWOOD, a municipal corporation,

Plaintiffs-Appellants,

v.

COMMERCIAL UNION ASSURANCE COMPANIES, a/k/a COMMERCIAL UNION INSURANCE COMPANY, a/k/a EMPLOYER'S FIRE INSURANCE COMPANY, a Massachusetts corporation;

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation;

FIREMAN'S FUND INSURANCE COMPANIES, a California corporation, and THE AMERICAN INSURANCE COMPANY, a New Jersey corporation;

COMPASS INSURANCE COMPANY, a New York corporation;

GRANITE STATE INSURANCE COMPANY, a New Hampshire corporation;

AMERICAN STATES INSURANCE COMPANY, an Indiana corporation;

NORTH STAR REINSURANCE CORPORATION, a Connecticut corporation;

GUARANTY NATIONAL, a Colorado corporation,

Defendants-Appellees.

I, the undersigned, hereby certify that a true and correct copy of the within foregoing BRIEF OF AMICUS CURIAE IN SUPPORT OF THE CITY OF LITTLETON BY THE COLORADO MUNICIPAL LEAGUE was placed in the U. S. Mail, postage prepaid, addressed to:

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Dated this 18th day of May, 1994.

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