IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

METROPOLITAN DENVER SEWAGE DISPOSAL DISTRICT NO. 1, n/k/a METRO WASTEWATER RECLAMATION DISTRICT, a political subdivision of the State of Colorado,

Plaintiff/Appellee/
Cross-Appellant

Case Nos. 99-1327 and 99-1336
01-1196 and 01-1234

v.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant/Appellant/
Cross-Appellee.

BRIEF OF *AMICUS CURIAE* FOR THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PLAINTIFF/APPELLEE/CROSS-APPELLANT METRO WASTEWATER RECLAMATION DISTRICT AND AFFIRMANCE OF THE TRIAL COURT'S DECISION

On appeal from the United States District Court
for the District of Colorado
Civil Action No. 89-D-895
The Honorable Wiley Y. Daniel, District Judge

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September 6, 2001

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COLORADO MUNICIPAL LEAGUE

COLORADO MUNICIPAL LEAGUE'S CORPORATE DISCLOSURE STATEMENT

The Colorado Municipal League ("CML") is a non-profit, voluntary association of 265 municipalities located throughout the State of Colorado. All of CML's member associates are governmental entities, which exempts them from Fed. R. App. P. Rule 26.1, however CML is registered with the Colorado Secretary of State as a non-profit Colorado corporation in good standing. CML has no parent corporations, and is not owned by any publicly held company.

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INTEREST OF AMICUS CURIAE

The Colorado Municipal League is a non-profit, voluntary association of 265 municipalities located throughout the State of Colorado (comprising 99.68 percent of the total incorporated state population), including all 82 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. CML has been appearing as amicus before the Colorado Court of Appeals, the Colorado Supreme Court and this court for decades in appeals where a significant decision affecting Colorado municipalities is possible.

CML's municipal members regularly appear in Colorado Courts seeking to enforce contracts of insurance for activities which often result in liability. These members have purchased Comprehensive General Liability ("CGL") insurance policies in reliance upon representations by insurance companies that there will be coverage for their potentially liability-producing activities, including activities of publicly owned treatment works ("POTW's") like that owned by Plaintiff/Appellee. CML as an amicus would provide the Court with a statewide municipal perspective on the issues present in this case, and would assure that the general interest of those other municipalities is represented. CGL insurance coverage is critical to the day to day operations of CML member municipalities, and especially for activities of POTW's arising in superfund liability. CML members have a great deal at stake in the proper resolution of this matter.

ARGUMENT

I. COMPLIANCE WITH NOTICE REQUIREMENTS: METRO WASTEWATER RECLAMATION DISTRICT ("METRO") COMPLIED WITH NOTICE REQUIREMENTS UNDER THE RELEVANT INSURANCE POLICY IN SUCH A MANNER THAT INSURANCE COVERAGE MUST NOT BE DENIED.

Three basic questions comprise the framework for evaluation of an insured's compliance with notice requirements in the relevant insurance policy. First, the court must consider whether, in the instance of a late notice claim, the insured was required to provide the insurer notice of an occurrence, claim or suit. If notice was due, the second question to be answered is whether the notice given was timely. Finally, if notice was not timely, the remaining question is whether failure to provide notice was justifiably excused, or whether there were extenuating circumstances to explain the delay. See Certified Indemnity Co. v. Thun, 165 Colo. 354, 439 P.2d 28 (1968).

A. Metro had no obligation to notify its insurer, Fireman's Fund Insurance Company ("FFIC"), of an occurrence or a potential claim or suit after receipt of the June, 1983 notice from Denver.

There are two events that trigger an obligation of notice on behalf of a policyholder, the happening of an "occurrence" and the receipt of a "claim" or "suit." There also remains a material question of fact with regard to what constitutes "a reasonable time" for giving notice once the obligation to give notice has been triggered. Finally, there is a well recognized exception to the notice requirement when the policyholder can articulate a "justifiable excuse or extenuating circumstances to explain the delay." Ultimately, it is a question of fact as to what constitutes "reasonable time" for

giving notice under all the facts and circumstances. See Certified Indemnity, *supra*.

In 1964, the City and County of Denver acquired the Lowry Bombing Range for solid waste disposal. Prior to 1969, Denver also began to operate a sanitary landfill that included the disposal of liquid wastes, which was operated on a segment of Section 6 of the Lowry Bombing Range ("Lowry Landfill"). In 1969, Metro began to apply sewage sludge to a portion of Section 6 that was physically separated from the Lowry Landfill by a fence. At no time did Metro place any of its sludge directly into the Lowry Landfill, although other entities disposed of sewage sludge in the landfill proper.

Metro sought environmentally friendly ways in which to recycle its sludge and performed numerous studies on the effects of sewage sludge application, including studies conducted in cooperation with the Colorado Department of Health ("CDH"), the Environmental Protection Agency ("EPA"), the Tri-County Health Department and the Soil Conservation Services. Metro engaged in tilling and seeding on Section 6, and cattle grazed on the land at the site year-round. The vegetation in areas where Metro applied its sludge showed noticeable improvements.

Many other CML member municipalities were involved in co-disposal in a sanitary landfill at Lowry, which was an environmentally sound method of sludge disposal, and was authorized by both the EPA and the CDH. Metro's activities were a more cutting-edge and advanced land application process occurring on property outside the landfill which CML member municipalities were watching and from which they were learning.

Amicus Insurance Environmental Litigation Association ("IELA") incorrectly asserts on page 3 of its Amicus Curiae brief that Metro gave notice to FFIC in 1988. Notice was appropriately given no later than July 31, 1986 after receipt of EPA's CERCLA §104(e) letter requesting information regarding Metro's Section 6 activities. Further, IELA incorrectly asserts on page 6 of its brief that Metro "dumped" into a "landfill." At no time did Metro take its sludge to the landfill for co-disposal , and Metro did not expect to hear anything further from EPA because its activities were confined to an entirely separate area in Section 6. Metro understood that EPA's focus was directed toward industrial chemical wastes deposited in the waste pits of the landfill.

1. Metro's notice to FFIC was offered even before it received a PRP letter from the EPA that would trigger the obligation to give notice of a "claim" or "suit" under the Compass decision.

The trigger requiring notice to be given under the FFIC policy is notice of a claim or suit. Until the Supreme Court's pronouncement in Compass Ins. Co. v. City of Littleton, 984 P.2d 606, 622 (Colo. 1999), that the term "suit" is ambiguous, and that "an EPA action under CERCLA is sufficiently coercive to constitute a 'suit' as that term is used in the insurance policies," the nature of the potential responsible party ("PRP") letters received by Metro remained unsettled in Colorado. In fact the trial court judge, Judge Wiley Daniel, in his Order on Post-Trial Motions in Metro Wastewater Reclamation Dist. v. Fireman's Fund Ins. Co., No 89-D-895 (D.Colo. March 10, 2000), noted specifically that the Colorado Supreme Court's interpretation of a PRP notice letter as the functional equivalent of a "suit" was not clearly foreshadowed. Slip op. at 10. He

found that prior to the Compass opinion, there was absolutely no Colorado law on point on this specific issue nor did any existing law imply the result reached by the Supreme Court. Id. Given that until 1999, the law was unsettled in Colorado as to whether a PRP notice letter constituted a suit, there is a material question of fact regarding when Metro's obligation to give notice of a suit became due.

As detailed above, the first document Metro received referencing an EPA proceeding and Notice and Claim under CERCLA was actually over the signature of an official of Denver. The document also referred to the "Lowry Bombing Range Landfill," into which Metro never deposited its sewage sludge. The first letter actually sent to Metro by the EPA in 1985 indicated that the "Lowry Landfill" had been added to the National Priorities List. Again, Metro never deposited its sewage sludge in the landfill itself, but only outside a fenced-off portion of Section 6. Upon receipt of the April 24, 1986 letter from the EPA that actually referred to Section 6 which requested information from PRPs such as Metro, Metro notified its insurance carriers of the EPA's activities regarding Section 6. Even so, it was not until 1988 that Metro received a letter from the EPA making it aware of potential liability under Superfund for Section 6 activities. FFIC had already been given notice by Metro two years earlier.

Even under the Compass decision's holding that PRP letters qualify as a "claim" or "suit" that triggers notification requirements, Metro's notice to FFIC **pre-dated** the first PRP letter that actually related to portions of Lowry property that Metro had applied its sludge deposits.

When Metro's obligation to give notice of "suit" arose is a question of fact. This court cannot rely on selective facts with hindsight as set forth by FFIC, some of which are misstated, to grant summary judgment based on late notice. Colorado law arguably still requires that the Court examine the totality of the circumstances to determine whether Metro's notice to FFIC was timely. See discussion, infra.

B. Metro's notice to FFIC, which was given no later than July 31, 1986, was timely.

1. Colorado follows the "totality of the circumstances" test in examining whether notice as required by an insurance policy provision, once due, was timely.

There are two events that trigger an obligation of notice on behalf of a policyholder, the happening of an "occurrence" and the receipt of a "claim" or "suit." In determining whether notice is timely, Colorado generally follows the "total circumstances" test. See generally, Newmont Mining Corp. v. Insurance Co. of North America, No. 98CA0414 (Colo. Ct. App. March 23, 2000) (not selected for publication). Under the totality of the circumstances test, what constitutes reasonable notice is ordinarily a question of fact to be determined by the trier of fact. See Certified Indem. Co. v. Thun, 165 Colo. 354, 360, 439 P.2d 28, 30 (1968). Only where the facts are undisputed and only one clear inference can be drawn from the undisputed facts, does reasonable notice become a question of law for the court. Id.

a) Particularly because of Metro's ongoing relationship with the EPA and other public entities regarding its application of sewage sludge, the date of its notice to FFIC was reasonable under all the facts and circumstances.

The next step in the coverage analysis is determining whether the notice was timely, once it was determined to be due. In interpreting the insurance provisions regarding the timeliness of notice, Colorado courts have found that provisions such as "as soon as practicable," "promptly," or "within a reasonable time," do not require instantaneous notice, but rather notice within a reasonable length of time under all the facts and circumstances. See Certified Indem., 165 Colo. at 359, 439 P.2d at 30. Timeliness must be determined on a case by case basis.

2. Clementi: The Colorado Supreme Court's shift away from the traditional approach to the modern notice-prejudice trend suggests that insurer prejudice is, or will soon become, a relevant inquiry in determining whether late notice excuses insurance coverage.

Colorado law pertaining to notification requirements may mandate the Court's consideration of insurer prejudice as a final component in the late notice analysis. The Colorado Supreme Court granted certiorari upon appeal from the lower court's decision in the case of Nationwide Mut. Fire Ins. Co. v. Clementi, 989 P.2d 192 (Colo. Ct. App. 1999) to decide the following issue:

> Whether the Court of Appeals erred in affirming the trial court, which held, as a matter of law, that the notice given by the Clementis to Nationwide, seven months before settlement with the tortfeasor, was not timely and that Nationwide was not required to demonstrate prejudice before it could forfeit underinsured motorist benefits.

Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223, 225 n.1 (Colo. 2001). On January 22, 2001, the Supreme Court announced its opinion in the Clementi case, a copy

of which has been attached hereto for the Court's convenience.

The Supreme Court took this opportunity to revisit the law in Colorado which for twenty-five years has followed the "traditional approach" that an "unexcused delay in giving notice relieves the insurer of its obligations under an insurance policy, regardless of whether the insurer was prejudiced by the delay." Id. at 227. This traditional approach had been applied by Colorado courts in various contexts, including liability and underinsured motorist ("UIM") cases. Conversely, the modern trend requires consideration of whether the insurer was prejudiced by lack of compliance with the notice requirements before the insurer may deny benefits in late-notice cases, **even if the delay in giving notice is untimely and unreasonable**. See id. at 229 and 231.

The Clementi opinion sets forth further guidelines for the implementation of the notice-prejudice approach in its observation that, "generally, an insurer is prejudiced by an insured's breach of a policy requirement when the purposes of the requirement are defeated." Id. at 229. The purpose of a notice requirement in an insurance policy is "to allow the insurer to adequately investigate and defend a claim." Id. at 229. Under this reasoning, delay in providing the insurer with notice cannot be used as a bright-line weapon in UIM cases to preclude coverage if the insurer is nevertheless able to promptly investigate and adequately defend the claim.

The Supreme Court found that the modern trend toward the notice-prejudice approach is justified on three bases: "(1) the adhesive nature of insurance contracts, (2) the public policy objective of compensating tort victims, and (3) the inequity of the

insurer receiving a windfall due to a technicality." Id. at 229. The Supreme Court ultimately was persuaded by the reasoning of other jurisdictions that have joined the modern trend and concluded "that insurer prejudice should now be considered when determining whether noncompliance with a UIM policy's notice requirements vitiates coverage." Id. at 230.

Although the notice issue in Clementi was raised in the underinsured motorist context, much of the analysis and underlying policies arguably apply to the liability context. The court merely declined to extend its holding to liability cases "**at this time**" because it did not have the proper case before it. Id. at 224 (emphasis added)(citing in particular to Marez v. Dairyland Ins. Co., 638 P.2d 286 (Colo. 1981)).

In light of the recent holding in Clementi, the continuing validity of the Marez holding is fragile at best. The Marez decision itself was far from unanimous; it was rendered with three dissenting justices who specifically addressed the need for consideration of insurer prejudice. See id. at 227, n.4. Twenty years later, the Supreme Court noted that Colorado was one of only two remaining states that still strictly adhered to the traditional notice approach, and rendered a decision in Clementi that moved Colorado law from the traditional notice approach to the notice-prejudice approach. See id. at 228. While finding that Marez was inapplicable to the Clementi case because it was decided in the no-notice liability context rather than the UIM context, the Court expressly eroded the authority of the Marez holding by stating, "to the extent that Marez has been applied by the court of appeals to UIM cases, we disapprove." Id. at 224. The

resurrection and reconsideration of policy issues that are applicable to both UIM and liability cases strongly implies that Colorado's highest court is poised to overturn the Marez holding when the proper facts are before it.

C. The final consideration in the late notice analysis is whether the late notice was justifiably excused, or whether there were extenuating circumstances to explain the delay.

1. Metro's reasonable belief that it was not liable for the alleged contamination of Section 6 is a justifiable excuse for any lack of timeliness in providing notice to FFIC.

If notice is determined to be untimely, there is a question as to whether the delayed notice was justifiably excused or whether there were extenuating circumstances that explained the delay. Graton v. United Sec. Ins. Co., 740 P.2d 533 (Colo. Ct. App. 1987); Certified Indem., 439 P.2d at 30. Where the insured, acting as a reasonably prudent person, believes it is not liable for damage (which belief of non-liability may be based on the advice of a broker, insurance agent, counsel or other representative), such reasonable belief of non-liability may excuse a delay or a failure to give notice. Colard v. American Family Mut. Ins. Co., 709 P.2d 11 (Colo. Ct. App. 1985); Barnes v. Waco Scaffolding and Equip., 589 P.2d 505, 507 (Colo. 1978); but see Haller v. Hawkeye Security Ins. Co., 936 P.2d 601 (Colo. Ct. App. 1997).

Other jurisdictions concur with the law of Colorado by recognizing that an insured may be relieved of the responsibility of timely notice if the insured reasonably believed

that it was not responsible or liable for a given occurrence or accident.[1]

In American Fidelity Fire Ins. v. Adams, 97 Nev. 106, 108, 625 P.2d 88 (1981), where an insured sought coverage under his homeowner's policy for liability associated with a dune buggy accident, the Court quoted the following passage in concluding clauses in policies calling for notice of a liability creating event, like "as soon as practicable", "promptly" or "within a reasonable time" all essentially mean the same thing: "[S]uch clauses do not require instantaneous notice of an accident, but rather call for notice within a reasonable length of time under all the facts and circumstances of each particular case. 8 J. Appleman, Insurance Law and Practice, section 4734 (2d ed.); 13 G. Couch, Cyclopedia of Insurance Law, section 49.39-49.48 (2d ed.)." Citing, Certified Indemnity Company v. Thun, 439 P.2d 28, 30 (Colo. 1968).

FFIC alleges that Metro had notice of the occurrence and notice of the "claim" and yet failed to give timely notice. Even if the facts ultimately establish that Metro was aware of an occurrence and had received earlier PRP notice letters, Metro's failure to give notice until July 31, 1986, was justifiably excused. Metro's past collaborative work with the EPA, CDH and other entities provided no indication that litigation would be pending,

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[1]Sparacino v. Pawtucket Mut. Ins. Co., 50 F.3d 141, 143 (2d Cir. 1995); City of Chicago v. United States Fire Ins. Co., 260 N.E.2d 276, 279-80 (Ill. App. Ct. 1970); Powell v. Fireman's Fund Ins. Cos., 529 N.E.2d 1228, 1231-32 (Mass. App. Ct. 1988), *review denied*, 532 N.E.2d 690 (Mass. 1988); Peskin v. Liberty Mut. Ins. Co., 520 A.2d 852, 856 (N.J. Super. Ct. Law Div. 1986), *aff'd in part and remanded*, 530 A.2d 822 (N.J. Super. Ct. App. Div. 1987); Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp., 293 N.E.2d 76, 78 (N.Y. 1972); West Am. Ins. Co. v. Hardin, 571 N.E.2d 449, 453 (Ohio Ct. App. 1989); Allstate Ins. Co. v. Wilson, 856 S.W.2d 706, 709 (Tenn. Ct. App. 1992), *appeal denied*, (May 3, 1993).

particularly since its activities were confined to an area that was separated from the Lowry Landfill by fencing. Furthermore, the Denver representatives who served on Metro's board of directors perceived no actual threat of being sued by Denver. The context in which the suit against Metro arose is ample justification for Metro's failure to alert FFIC of the EPA's Lowry Landfill activities until it received notice that the EPA was seeking information specific to Section 6 activities.

II. INAPPLICABILITY OF THE POLLUTION EXCLUSION: METRO'S SLUDGE IS NOT A WASTE MATERIAL OR OTHER IRRITANT, CONTAMINANT OR POLLUTANT WITHIN THE MEANING OF THE POLLUTION EXCLUSION CLAUSE.

Determining the applicability of the pollution exclusion clauses of the insurance policies at issue herein requires a concentrated analysis of two aspects of the clauses. Initially, the trier of fact must determine whether the material disposed of comes within the purview of the clause; that is, whether the domestic sewage sludge is a "waste material or orther irritant, contaminant or pollutant." In West Bend Mutual Ins. Co. v. Iowa Iron Works, 503 N.W.2d 596 (Iowa 1993), the Iowa Supreme Court ruled that a trier of fact must make a threshold inquiry as to whether the fact situation involves a "pollutant" within the meaning of the CGL policies. If not, the pollution exclusion does not and cannot effectively preclude coverage.

The second obstacle to applying the pollution exclusion clause to exclude otherwise available coverage is a determination of whether the discharge of the polluting substance was expected or intended. In this framework, there are two "discharges" to

which the expected and intended language may apply. The initial release is the discharge into the containment area; the second is the discharge from the containment area into groundwater. At trial in this case Metro was forced to concede that its discharge was intentional because of the existing precedent of Broderick Investment Co. v. Hartford Acc. Indem. Co., 954 F.2d 601 (10th Cir. 1992).

A. Metro's sewage sludge deposited is not within the purview of the pollution exclusion clause; i.e., Metro's domestic sewage sludge is not waste material or an irritant, contaminant or pollutant.

Metro disposed of municipal sewage sludge at Section 6 from 1971 through 1980. The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.* ("CERCLA") was enacted in December 1980, after Metro completed its activities in Section 6. CERCLA imposes retroactive, strict liability on parties found liable under the statute.

During the period from 1971 to 1980, while Metro was applying sludge at Section 6, sludge was clearly excluded from then existing definitions of hazardous waste under Colorado Department of Health guidelines regardless of whether it was land applied for beneficial reuse or co-disposed in a landfill.

There is no evidence in the record to suggest that Metro's sludge would have ever been considered a pollutant, contaminant or irritant, much less a "hazardous waste," under any EPA toxicity criteria, rule, regulation, guideline or statute in effect during the relevant period of disposal. In fact, the EPA's 1989 Interim Municipal Settlement Policy, which went into effect **after** Metro was notified of potential liability at Lowry, states that EPA

will no longer pursue municipalities for CERCLA liability who merely disposed of solid waste (trash) or sewage sludge. 54 Fed. Reg. 51071, Oswer Directive No. 9834.13. Unfortunately, this policy was not officially released until December, 1989, and not effective until February, 1990, more than two years after EPA implicated Metro at Lowry. Id.

Based upon its chemical constituents no one at Metro reasonably expected or intended environmental damage to occur at the time the sewage sludge was applied at Section 6. Metro's sludge is not the same material as raw sewage; likewise, a contaminant or irritant is not necessarily a pollutant and trace materials are not necessarily contaminants. The fact that sewage sludge contains minute, trace elements of heavy metals in limited concentrations does not qualify it as a contaminant. Drinking water contains the same trace heavy metals found in sewage sludge, and no one would argue for its inclusion as a pollutant within the pollution exclusion clause. Certainly, at the time that its sewage sludge was applied at Section 6, Metro did not expect or intend to discharge a pollutant, contaminant or irritant within the meaning of the pollution exclusion clause.

In the case of In re Hub Recycling, Inc., 106 B.R. 372, (D. N.J. 1989), the court rejected the insurer's argument that under the definition of "pollutant" in its policy, all recyclable materials are pollutants. The court reasoned that "waste" was a term that clarified the definition of pollutant as a contaminant or irritant. Id. at 374. Therefore, waste could not include non-hazardous items such as recycled newspapers. Like the

materials at issue in Hub Recycling, Metro's sludge was not waste material.

Recent case law firmly establishes that under almost identical facts as the case at hand, the pollution exclusion does not preclude insurance coverage for Metro. Given its innocuous nature and the beneficial use to which Metro put its sludge (e.g., tilling, seeding and grazing), Metro's sewage sludge does not constitute a "waste material" under the pollution exclusion, and the jury so found.

The term "waste material" is not defined in the pollution exclusion clauses or anywhere else in the subject insurance policies. Additionally, Newcastle County v. Hartford Acc. & Indem. Co., 778 F.Supp. 812, 819 (D. Del. 1991), holds that the fact a substance actually causes damage does not make it a contaminant. The substance must be toxic or a particularly harmful material which is recognized as such in industry or by government regulators. Id. at 819. See also Molton, Allen & Williams Inc. v. St. Paul Fire & Marine Ins. Co., 347 So.2d 95 (Ala. 1977); A-1 Sandblasting & Steamcleaning Co. v. Baaiden, 632 P.2d 1377 (Or. App. 1981), aff'd, 643 P.2d 1260 (Or. 1982); Westchester Fire Ins. Co. v. City of Pittsburgh, Kan., 768 F.Supp. 1463, (D.Kan. 1991); In re Hub Recycling, Inc., 106 B.R. 372 (D.N.J. 1989); Minerva Enter. v. Bituminous Cas. Corp., 851 S.W.2d 403 (Ark. 1993) for the general proposition that, for the pollution exclusion to bar coverage, the substance at issue must be an irritant, contaminant or pollutant as those terms are commonly understood.

Only after Metro ceased activity at Section 6 did the EPA decide to hold Metro liable as a PRP under CERCLA. EPA limited the Lowry Landfill Superfund site to

Section 6 only. Metro also applied sludge in equal amounts on four other nearby sections of the former Lowry Bombing Range. None of these sections have been designated for cleanup by EPA.

The Hub Recycling court specifically addressed the term "waste," which FFIC uses to bolster its argument to exclude coverage. However, the subject "waste" must be a pollutant, contaminant or irritant. See Hub Recycling, 106 B.R. at 374. Recyclable materials, including domestic sewage sludge, do not come within the language of the standard pollution exclusion. In fact, a New York Supreme Court ruled that sewage or waste is not a "pollutant" within the ordinary usage of the term. Incorporated Village of Cedarhurst v. Hanover Ins. Co., 1994 WL 145750 (N.Y.Sup.Ct., Nassau Co., 1994), aff'd as modified, 89 N.Y. 2d 293, 675 N.E. 2d 822 (N.Y. Dec. 1996). The Court further ruled that the pollution exclusion clause was designed only to eliminate coverage for industrial or commercial polluting activities, not for municipalities. Id.

1. The doctrine of *ejusdem generis* leads to the similar conclusion that, by definition, Metro's sludge was not a waste material.

The doctrine of *ejusdem generis* is a rule of construction which provides that when 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). This rule, . . . applied to insurance policies, is based on the principle that if the drafter had intended the general words to be used in an unrestricted sense, he would not have

mentioned the particular things or classes of things, which would in that event become mere surplusage. Id. (citing Martinez v. People, 111 Colo. 52, 137 P.2d 690 (1943)).

In applying this doctrine to the insurance policies at issue, the phrase "waste materials or other irritant, contaminant or pollutant" must be limited by the words preceding them and must apply only to industrial-type emissions including "smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases . . . ."

2. The pollution exclusion clause in the FFIC insurance policy is ambiguous under Colorado law.

Just as significant as the doctrine of ejusdem generis is the argument that the pollution exclusion clause in the instant case is ambiguous under Colorado law and should therefore be construed against the insurer. FFIC has asserted in the trial court below that sewage sludge is a "waste material" and as such, the pollution exclusion clause applies even if sewage sludge is not found to be a pollutant, contaminant or irritant. Various courts, when interpreting the same pollution exclusion at issue herein, have found that the substance must be an irritant, contaminant or pollutant for the exclusion to be applicable, and/or that the clause is ambiguous on this issue. Molton, Allen and Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So.2d 95 (Ala. 1977) (holding that sand and mud washed into a 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 & Steam Cleaning 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 a liquid,

acid or alkali, is covered under the pollution exclusion; the 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); Westchester Fire Ins. Co. v. City of Pittsburgh, Kan., 768 F.Supp. 1463 (D. Kan. 1991) (where fogging spray used by city contained insecticide and malathion, the court rejected insurer's broad reasoning of "irritant or contaminant" stating that a pollutant is not merely any substance that may cause harm, but those which are recognized as toxic or particularly harmful).

The case of United States Fid. & Guar. 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 issue before the Armstrong court was the interpretation of a pollution exclusion clause identical to the one at issue in the present case. The court noted that the clause was intended to cover only industrial contamination and pollution, and further that the clause is ambiguous and should be construed against the insurer. Armstrong, 479 So.2d at 1168. A similar conclusion can be drawn in the case now pending before this Court. Metro's domestic sludge is not encompassed by a pollution exclusion intended to exempt the insurer from coverage of industrial contamination, particularly when the clause is ambiguous.

In Minerva Enter. v. Bituminous Cas. Corp., 851 S.W.2d 403 (Ark. 1993), the Supreme Court of Arkansas held that the definition of "pollutants" in a commercial

liability insurance policy was intended to exclude industrial wastes, not common household wastes. At best, the court found the definition to be ambiguous. Id. at 404. The court further stated that it was not clear under the policy language that a septic tank backup was the type of damage the pollution exclusion clause was intended to exclude. Id. at 406. The court relied heavily on United States Fid. & Guar. Co. v. Armstrong, supra, for the proposition that the pollution exclusion clause was intended to cover only industrial pollution and contamination and not contaminants derived from raw sewage. Clearly, raw sewage in Armstrong and Minerva contained greater "pollutant, contaminant, or irritant" properties than that contained in the Metro sewage sludge.

The same rationale employed in the Molton Allen, Minerva and Armstrong cases was adopted by the Supreme Judicial Court of Massachusetts in Atlantic Mutual Ins. v. McFadden, 595 N.E.2d 762 (Mass. 1992). The Massachusetts court found that lead in paint was not a "pollutant" for the purpose of the pollution exclusion clause in CGL policies, despite the contention that lead would be included in the exclusion as "a contaminant" or "irritant." Id. at 763-64. The court held that it could not be inferred from the language of the exclusion that the exclusion was drafted with a view toward limiting liability for lead-paint related injuries. Id. The court also relied upon the reasonable expectation of coverage doctrine in finding that the insured reasonably expected to be covered for paint-related injuries. Id.

3. In light of the innocuous character of its sewage sludge, and under the reasonable expectation of coverage doctrine, Metro was entitled to assume its land application activities at Section 6

IELA evidently has cited the wrong policy.

More importantly, the jury found that Metro's sewage sludge was not a waste material, irritant, contaminant, or pollutant. IELA also argues on page 8 of its brief that "sewage sludge could **theoretically** be put to a beneficial use." (Emphasis added.) However there was nothing theoretical about Metro's land application at Section 6. Indeed Metro's land application process was precisely a beneficial reuse of sewage sludge as the record supports. The sludge was not co-disposed in the landfill, but land applied to the face of Section 6 to achieve the goal of beneficial reuse.

Moreover FFIC, in performing due diligence and issuing loss control reports, indicated its awareness of Metro's sewage sludge operation. However there was never any attempt to craft a specific exclusion from coverage for this activity.

The reasonable expectation of coverage doctrine has been followed in Colorado. See Sanchez v. Connecticut Gen., 681 P.2d 974 (Colo. Ct. App. 1984) (An insurer who wishes to avoid liability must not only use clear and unequivocal language evidencing its intent to limit coverage, but it must also call such limiting conditions to the attention of the applicant. Absent proof of such disclosure, coverage will be deemed to be that which would be expected by the ordinary layperson.) Whether Metro contemplated that its sludge would be covered by its policy with FFIC and not excluded by the pollution exclusion clause is a question of fact.

It is well settled that insurance companies must establish that an exclusion applies to the particular facts at hand, and is not subject to any other reasonable interpretation.

Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (CO 1991). In this case, the application of the pollution exclusion is at the very least ambiguous, and must be construed in favor of the policyholder. Id, at 1090-92. "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). Where an insurer seeks to avoid liability upon acceptance of premiums, it must use clear and unequivocal language evidencing its intent to limit coverage. During the period of time that FFIC issued its policy to Metro, there is no indication that it ever considered Metro's biosolids to fall within the substances covered under the pollution exclusion. FFIC, knowing of Metro's activities at Lowry, failed to specifically exclude those activities from coverage, and thus failed to define the limits of the pollution exclusion in clear and explicit terms. Consequently Metro reasonably expected coverage for its activities at Lowry.

CONCLUSION

CML represents Colorado municipalities and the vast majority of Colorado ratepayers for sewage and wastewater services. These municipalities have paid substantial sums for insurance coverage. FFIC, one of those insurers, now seeks to avoid its coverage obligations by advancing untenable positions, completely contrary to Colorado law. Should FFIC succeed in reversing the decision of the Trial Court, Metro and similarity situated Colorado municipalities will be forced to pay a triple penalty. First, they will have paid premiums reasonably expecting coverage not afforded.

Secondly, they will have expended substantial sums in payment of Superfund liability for which carriers should have been liable. Thirdly, they will have expended substantial sums for legal fees and costs in seeking to enforce their rights and insurer obligations otherwise not recoverable.

For the foregoing reasons, *amicus curiae* Colorado Municipal League requests that the Court uphold the ruling of the district court in favor of Metro Wastewater Reclamation District, formerly known as Metropolitan Denver Sewage Disposal District No. 1.

Respectfully Submitted,

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Date: September 6, 2001

CERTIFICATE OF COMPLIANCE
Pursuant to FED.R.App.P.32(a)(7)(C)

Counsel for *Amicus Curiae* Colorado Municipal League ("CML") certifies the following:

Pursuant to Fed R.App. P.32 and 10th Cir. R. 32.1, the attached brief for *Amicus Curiae* CML is printed using a proportionally spaced, 13 point Times New Roman typeface, and contains fewer than 7,000 words.

Dated this 6th day of September, 2001.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* FOR THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF AND AFFIRMANCE OF PLAINTIFF-APPELLEE/CROSS- APPELLANT METRO WASTEWATER RECLAMATION DISTRICT was deposited in the U.S. mail this 6th day of September, 2001, postage pre-paid, addressed to the following:

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