(Cite as: 1995 WL 447341 (Bankr.D.Vt.))

In re ABERDEEN 100, INC., Debtor.

ABERDEEN 100, INC., d/b/a Gamco/GAMHP, Blue-44, Inc., The Stebbe Co., Inc., d/b/a Chittenden Mobile Home Sales, and Roger Gromet, Plaintiffs,

v.

CONTINENTAL INSURANCE CO., Defendant.

Nos. 94-10599, 94-1060.

United States Bankruptcy Court, D. Vermont.

July 21, 1995.

L. Chalidze, of Hull, Webber & Reis, Rutland, VT, for plaintiffs.

J.E. Preston, of Pierson Wadhams Quinn & Yates, Burlington, VT, for Continental Ins. Co. (Continental).

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** The parties' cross-motions for summary judgment require us to determine [FN1] whether Continental was obliged by a contract of insurance to defend and indemnify Plaintiffs [FN2] in connection with three legal actions arising out of chronic problems with water and septic systems at the Green Acres Mobile Home Park (GAMHP) in Richmond, Vermont. We must also determine, as a preliminary matter, whether Continental has waived the grounds it now asserts to disclaim coverage. For the reasons which follow, we hold for Continental. The insurer did not waive the grounds it now relies upon, and those grounds justify its decision to disclaim coverage.

SUMMARY JUDGMENT

To prevail on a motion for summary judgment, the movant must satisfy the criteria set forth

in F.R.Civ.P. 56 as made applicable by F.R.Bkrtcy.P. 7056. F.R.Civ.P. 56(c) provides in part:

(T)he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

See, Celotex Corp. v. Catrett, 477 US 317, 322, 91 L.Ed.2d 265 (1986), 106 S.Ct. 2548, 2552; Eastman Machine Company, Inc. v. United States, 841 F.2d 469 (2d Cir.1988); Hossman v. Spradlin, 812 F.2d 1019, 1020 (7th Cir.1987); Clark v. Union Mutual Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir.1982); United States Steel Corp. v. Darby, 516 F.2d 961, 963 (5th Cir.1975). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials where no genuine issue of material fact is in dispute. Farries v. Stanadyne/ Chicago Div., 832 F.2d 374, 378 (7th Cir.1987).

When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

F.R.Civ.P. 56(e). Celotex Corp. v. Catrett, supra, 477 U.S. at 324, 91 L.Ed.2d at 274, 91 S.Ct. at 2553. There are no material facts in dispute, hence summary judgment is appropriate.

FACTUAL BACKGROUND

The Green Acres Tenants' Association (Tenants), residents of GAMHP, started the legal process that brings us to today's decision by bringing a state court action against, inter alia, Debtor and Gromet in May 1992. The Complaint alleged that "the water is unusable and the sewers are overflowing on the lawns and streets." The Tenants sought a temporary restraining order to enjoin GAMHP

from renting lots to any more tenants until they provide safe water and sewer service to the present tenants, who are threatened with the loss of their homes. [Tenants] also seek[ ] an injunction mandating repairs, and appointment of a receiver to run the Park until the repairs have been made.

***2** Complaint, Green Acres Tenants Association, Inc. v. Gromet, et al., Chittenden Superior Court Docket No. S678-92CnC ¶ 1 (May 4, 1992). The Tenants' Complaint alleged:

7. There are presently approximately 145 homes in the Park, the great majority of which are

owned by the occupants, who lease from defendants a lot, with associated water and sewer hookups and access to electrical service.

....

9. The lots in the Park are served by some 80 different septic systems, many of which are in bad repair, with several presently leaking sewage on the surface of the ground.

10. The water distribution system is also in poor repair.

11. In many places the underground water lines and septic systems and leach fields intersect each other.

12. Since November, 1991, the Park residents have been on notice from the defendants that they must boil the water from the Park's water system, to avoid ingestion of bacteria that could cause diseases with symptoms including diarrhea, cramps, nausea, jaundice, headache and fatigue.

13. Defendants have failed to give notice by publication and mail or delivery, as required by state law, of subsequent state findings of contaminated water in the Park's water system.

14. Since 1988 one septic system in the Park, known as the "lower mound," has failed on an intermittent basis. Although this mound system was permitted in 1980 to serve 12 homes, since at least 1988 it has been and is presently connected to the sewer pipes from 18 or 19 homes.

15. Many other septic systems in the Park have failed on an unpredictable basis during the past six years.

16. When septic systems have failed, Park residents have been subjected to the appearance and smell of sewage under their homes, on their lawns, and in the ditches and streets of the Park. Runoff eventually ends up in the nearby Winooski River.

17. In 1989, 1990, and 1991, the defendants made promises both to residents and to state and local enforcement personnel of systematic improvement to both the water and sewer systems in the Park.

18. Systematic improvements or repairs have not been made. Maintenance continues to be performed on both sewer and water systems on a crisis management basis, always several steps behind the latest failures. The "lower mound" has been leaking raw sewage for most of the past winter, and continues to leak.

19. Although defendants secured permits as long ago as 1988 to construct a sewage system to be used to disconnect six homes from the lower mound and dispose of their sewage elsewhere, that system has never been completed.

20. Defendants are presently in violation of the conditions of several construction and land use permits that have been issued over a period of years in connection with defendants' plans to build new septic fields and pumping facilities to serve residents whose homes in the Park are connected to failed or failing sewage systems.

21. Defendants have acted in wanton and reckless disregard of the health, safety, and rights of Park residents by failing to rectify the Park's water and sewer problems, after years of promises, deferrals and delays.

***3** ....

23. Many Park residents have been and are being subjected to or threatened with unsanitary, unsightly, smelly sewage spills on or near their lawns, roads, and driveways, and unsafe drinking water that is even unusable for washing for significant periods of time.

24. Children in the Park are at risk of serious illness from fecally contaminated surface water flowing and standing in the Park.

25. Many Park residents have been and are being threatened with constructively being evicted from their homes because of the sewer and water failures, which would render their homes essentially worthless due to the chronic unavailability of alternative sites in the area.

Id. The Tenants' legal claims were that the defendants' failure to maintain safe and adequate water and sewer systems breached the common law warranty of habitability and express promises to correct the problems; violated State of Vermont health and consumer fraud laws; and created a common law nuisance. In addition to the equitable relief noted above, the Complaint sought compensatory and punitive damages, and a writ of attachment in an amount sufficient to secure the claim for damages.

By letter of May 12, 1992, Continental agreed to "investigate this matter under a Reservation of Rights by providing a defense in this suit and, by conducting an investigation, there shall be no waiver of our rights to assert defenses to coverage, disclaim for some or all damages; or to withdraw from the defense of this action." In a letter of June 10, 1992, Continental disclaimed all coverage for specified reasons, and also stated:

In view of the fact that Continental is not ... privy to all of the facts and circumstances surrounding Green Acres' involvement in this matter, Continental must also reserve its rights to disclaim coverage under any other policy provisions, conditions, or exclusions which may

prove to be pertinent to this claim as additional facts presently unknown to us may warrant.

After intervention of the Vermont Department of Banking and Insurance, Continental and the defendants in the Tenants' action entered a "Non-Waiver Agreement," dated January 29, 1993. Under the Agreement, Continental resumed defense of the Tenants' action in January 1993, and paid defense costs incurred prior to its resumption of the defense. Continental continues to defend the action, while denying that the contract obligates it to do so, for a variety of reasons. Although the parties raise a number of issues, our holdings on the following issues are dispositive, and we do not reach the remainder:

(1) Did Plaintiffs' knowledge that damages were already being incurred at the time the policy was issued, preclude coverage under the "loss-in-progress" doctrine?

(2) Did Plaintiffs breach their duty under the policy to give timely notice of an "occurrence," and thereby forfeit coverage?

(3) Were the damages incurred either "expected" or "intended" from Plaintiffs' standpoint, thus falling outside the policy's coverage?

***4** (4) Does the "Products-Completed Operations Hazard" coverage extend to the claims made by Plaintiffs.

We consider these arguments in the order we have set them out, addressing related issues along the way. First, however, we address Plaintiffs' claim that Continental has waived any defenses not set out in its June 10, 1992 letter disclaiming coverage.

WAIVER

Plaintiffs argue that "when certain policy defenses are enumerated in such a letter, the carrier forfeits all policy defenses not enumerated therein." Plaintiffs' Motion for Summary Judgment and Memorandum in Support, 20. The seminal Vermont case on an insurer's waiver of defenses is Cummings v. Connecticut General Life Insurance Co., 102 Vt. 351, 360-62 (1930), wherein the Court held:

[W]hen one defense is specified by an insurer as its reason for refusing to pay a loss, all others are waived.

....

The rule works no hardship on the insurer. Considerations of public policy require that he shall deal with his individual customer with entire frankness. He may refuse to pay and say nothing as to the basis of his refusal. In that case, all defenses to an action on the policy are

available to him. He may refuse to pay on a particular ground reserving the right to defend on other grounds, with the same result. But when he deliberately puts his refusal to pay on a specified ground, and says no more, he should not be allowed to "mend his hole" by asserting other defenses after the insured has taken him at his word and is attempting to enforce his liability.

Emphasis added. The Court reiterated the Cummings rule in Hamlin v. The Mutual Insurance Co., 145 Vt. 264, 268-69 (1984). The cases cited by Plaintiffs in support of their waiver argument are not relevant because they describe situations in which the insurer neglected to reserve its rights to defend on grounds other than those specifically stated. Here, as previously noted, Continental's June 10, 1992 letter specifically "reserve[d] its rights to disclaim coverage under any other policy provisions, conditions, or exclusions which may prove to be pertinent to this claim as additional facts presently unknown to us may warrant." Accordingly, we hold that Continental waived nothing.

LOSS-IN-PROGRESS DOCTRINE

The parties stipulated in the "Non-Waiver Agreement" of January 29, 1993 that the insurance policy at issue in this case was issued effective June 30, 1989. Continental Exh. BB. Our review of the exhibits on file with the Court disclose the following relevant information about the status of GAMHP's water and septic systems prior to the effective date of the policy:

--The Vermont Department of Health reported coliform bacteria contamination in water samples taken from GAMHP on June 10, 1985, September 3 and 27, 1985, November 25, 1985, and December 11, 1985. Continental Exh. A.

--On at least two separate occasions, by letters of October 16 and December 18, 1985, Gromet was required by the Department of Health to issue public notice "that your water system has exceed the maximum contaminant level (MCL) for coliform bacteria as specified by the Vermont Public Water System Regulations." Id.

***5** --The December 1985 issue of The Richmond Times, in a story about steps being taken by GAMHP residents to organize, quoted Gromet as stating that since October 1984 80 septic tanks had been pumped and two water pumps replaced. Continental Exh. B.

--A January 19, 1986 story in The Burlington Free Press reported tenants' complaints that GAMHP "had no water pressure." Id.

--An August 31, 1987 letter from the Department of Health to Gromet discussed "conditions in the water system which do not meet current design standards, and what actions would be taken by [Gromet] to ... bring the water system into compliance with today's standards." Continental Exh. C.

--The "Lower Mound" septic system failed in the Spring of 1988. Continental Exh. F. Upon inspection it was found that 18 mobile homes had been hooked up to it, although it was only approved for 12. Continental Exh. E.

--An April 15, 1988 complaint from tenants stated, "We are tired of smelling sewer in the trailer park. We're sure the state would like to know about the sewer running in the brook by the mail boxes and other places in the park.... If the sewer problem isn't resloved (sic) by April 20, 1988 we will contact the state health board." Continental Exh. G.

--A June 11, 1988 letter from tenant Shirley A. Croll complained, "In my section of the park we have had contaminated water.... I have had to buy water for drinking at the store because I have had medical problems for over three months which may be related to the water supply." "I don't mind paying $154.00 per month rent, but just what in hell are we getting for it--not much when you can't even drink the water. If I find that your water is what has caused my medical problems, you can be sure I will consult my attorney about legal action." Id. In a letter dated June 29, 1988, Croll complained again "about the dirty water I have had to tolerate for the past four months," and noted "other people on my street have had the same dirty water problem way back to March." Id. Again, in a letter dated August 22, 1988, Croll complained, "The water has been so dirty at times during the past month that I couldn't take a shower or wash my hair." All three letters raised the issue of compensation for costs incurred or threatened to complain to the State. Id.

--Tenant Norma A. McKenzie, in a letter dated June 13, 1988, complained, "For the past 10 years the sewer has backed up under my Mobile Home every year--and the ... men have had to come and dig up the yard--one running the backhoe while the other shovels by hand and then one flushing the toilet while the other snakes out the sewer lines and of course pumping out the septic tank." "Water here in the park has been a real problem--very poor water pressure or none at all; pumps breaking down and then once we get water again it isn't even fit to bathe in much less fit for consumption. The pressure has been so bad at times that I have been unable to take showers because all I could get was a thin trickle of water; at times it has taken 45 minutes or longer to fill my washing machine which a repairman told me is why the pump in my washer is just about worn out from straining and overheating so much of the time. I'm having to fill it with a bucket now from the bathtub faucet in order to take the strain off the pump so it won't burn out entirely." Id.

***6** --Tenant Bruce Paquette complained in an August 16, 1988 letter of dirty water since March: "the problem was never solved. As of one week ago it has gotten worst (sic) than ever." Id.

--By letter of November 28, 1988 Tenant Rita Kobera complained of low water pressure that had been going on for over two months, and threatened to withhold rent until the problem was fixed. By letter of April 3, 1989, she submitted a partial rent check after deducting the

cost of septic system work she had paid for, explaining, "We were unable to use our bathrooms. The septic system was backing up into the tubs and in the sink and overflowed on the floors out of the toilets." Id.

--At a March 24, 1989 meeting with state regulatory officials, Gromet discussed plans for a new septic system to address "repeated sewage system failures." Continental Exh. E.

Continental argues that coverage is barred under the "loss-in-progress" doctrine, "a fundamental principle of insurance law." Prudential-LMI Commercial Insurance v. Superior Court, 51 Cal.3d 674, 695 n. 7, 274 Cal.Rptr. 387, 401 n. 7, 798 P.2d 1230, 1244 n. 7. (1990). See also, Inland Waters Pollution Control, Inc., 997 F.2d 172, 177 (6th Cir.1993). The doctrine "has its roots in the prevention of fraud. Because insurance policies ... are designed to insure against fortuities, a fraud is worked when they are misused to insure a certainty." Id., 997 F.2d at 179 (citations omitted).

[T]he doctrine operates only where the insured is aware of a threat of loss so immediate that it might fairly be said that the loss was in progress and that the insured knew it at the time the policy was issued or applied for.

Id., 997 F.2d at 178. The doctrine "has been applied by various courts across the country, ... 'by virtue of its recognition in standard insurance law....' " Id., quoting Mason Drug Co., Inc. v. Harris, 597 F.2d 886, 887 (5th Cir.1979). Although the Vermont Supreme Court has not addressed the issue, we believe that the Court would recognize the doctrine as the law of this state. See, id., 997 F.2d at 179.

Applying the doctrine to the circumstances of this case, we find that coverage is barred. The uncontradicted evidence is overwhelming that GAMHP's water and sewer systems were woefully inadequate prior to to the effective date of the policy, that tenants had already suffered compensable loss, and that Plaintiffs were "aware of a threat of loss so immediate that it might fairly be said that the loss was in progress." Id., 997 F.2d at 178. Accordingly, we hold that no coverage exists under the policy based on the doctrine of "loss in progress."

TIMELY NOTICE

Continental also argues that it is not liable on the policy because Plaintiffs failed to give timely notice of either the Tenants' lawsuit or the Vermont Agency of Natural Resources administrative proceeding. The insurer relies on Houran v. Preferred Accident Insurance Co., 109 Vt. 258 (1937), and its progeny, "which held that an insured's failure to comply with a notice provision in an insurance policy results in forfeiture of coverage." Vermont Gas Systems, Inc. v. United States Fidelity & Guaranty Co., 805 F.Supp. 227, 230 (D.Vt.1992).

***7** As to the Tenants' lawsuit, Continental's "argument of untimely notice, even if not waived,

borders on the ridiculous," Plaintiffs assert, "in that the carrier has conceded that it received the ... Summons and Complaint (which bear the date of May 4, 1992) on May 8, 1992, a mere 4 days later." Plaintiffs' Supplemental Memorandum, 30. An examination of the language of the policy and the circumstances of the case, however, establish the merits of Continental's defense.

Section IV(2) of the policy, "Duties in the Event of Occurrence, Claim or Suit," provides, in pertinent part:

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

Plaintiffs did comply with Section IV(2)(b) of the notice requirement by providing prompt notice of the Tenants' suit. The basis for Continental's claim of untimely notice, however, is Section IV(2)(a), which requires the insured to give notice of an "occurrence" or offense that may give rise to a claim "as soon as practicable." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Plaintiffs' Exh. 1, § V(9). "Offense" is not defined. The evidence in the record clearly establishes a series of "occurrences" that gave rise to claims for damages, and Plaintiff's knowledge of those occurrences. We pick up our recitation of the Park's water and sewer system problems where we left off in our discussion of the "loss-in-progress" doctrine, beginning from the inception of the policy period on June 30, 1989.

--A tenant's group notified Gromet, by letter dated July 10, 1989, that as of August 1, 1989 they would deposit rent payments into an escrow account "until the water pressure problem is remedied." Continental, Exh. G.

--A July 1989 article in the Burlington Free Press reported that the rent strike included at least 44 residents, who complained of "intermittent water problems for as long as five years, and frequent instances of low water pressure problems for the past year and a half." Continental, Exh. H.

--By letter dated August 1, 1989, tenant Laurie Fields, noted that low water pressure had been a problem over the course of the entire three-and-a-half years she had resided at the Park. "It takes me over 2 hours to do a load of laundry and sometimes as long as an hour for the toilet to fill up after it has been flushed. Taking a shower is out of the question. Having drinking water is close to impossible at many times." Continental, Exh. G.

***8** --A November 25, 1989 letter from Gromet noted that many of the Park's septic systems were old, and that he hoped plans for a new system would end "repeated pumping of tanks in old systems." Continental, Exh. I.

--Tests by the Vermont Department of Health found coliform bacteria in water samples taken November 6, 8, 21, and 22, 1989. Continental, Exh. J.

--A September 10, 1990 letter from Gromet to the Richmond Selectboard reported that two septic systems had failed since 1988, and reported plans to handle systems which might fail in the future. Continental, Exh. K.

--By letter of January 23, 1991, Gromet sent a partial payment to the company that provided "repetitive septic pumping" to the Park, asking for patience in bringing down the bill. "We ... know that Green Acres septic system is a time bomb waiting to fail," he said, expressing hope that a "new system will be onstream before failures are so severe that homes must move out." Continental, Exh. L.

--The Richmond Health Officer wrote Gromet on May 20, 1991 that, responding to a "complaint about raw sewage running on the ground," he had discovered a "large mound type disposal area with a flow of effluent water surfacing on the back side.... The mound has failed and a new site will be required to fix this problem." Continental, Exh. M.

--Gromet acknowledged "the failure of the lower mound system ... in early May" in a June 26, 1991 letter to Health Department officials requesting delay in the deadline for completing a new system. Continental, Exh. N.

--A November 3, 1991 letter to Gromet from tenants Steven and Susan Levesque threatened legal action over "very dirty" tap water and sewage problems. Continental Exh. O.

--As a result of water testing in November of 1991, the Department of Health required public notice that the Park's water system "may be contaminated with organisms that can cause

disease," including "diarrhea, cramps, nausea, and possibly jaundice, and any associated headaches and fatigue." Residents were advised to "[b]oil all water used for drinking ... for at least 5 minutes before consumption." Continental Exh. R.

--Vermont's Agency of Natural Resources issued an Administrative Order on December 30, 1991, citing the Park for failing to comply with permits requiring improvements to the septic systems. Continental Exh. S.

--A state environmental official reported contacting Gromet by phone on February 3, 1992, and advising him the lower mound had failed again, this time in a new location, and that children were apparently using the frozen sewage as a slide down the slope of the mound. Gromet was advised to fence off the area and post it with signs. Continental Exh. T. Gromet received similar written notice from the Richmond Health Officer by letter dated February 4, 1992. Continental Exh. U.

--On April 20, 1992, the Richmond Selectboard declared a water emergency at the Park, "because the sewage disposal system for park has failed and the low water pressure creates a potential for back siphonage of contaminated surface water into the drinking water system." Continental Exh. Y.

***9** Vermont's Supreme Court has declared that prompt notice is necessary to fix the insurer's liability, but allows insureds to present evidence that explains or excuses any delay.

Notice is an essential requirement in order to fix liability on an insurance carrier where there has been such an occurrence or accident as will lead the ordinary prudent and reasonable man to believe that it might give rise to a claim for damages.

United States Fidelity & Guaranty Co. v. Gable, 125 Vt. 519, 522 (1966). The phrase "as soon as practicable"

has uniformly been construed to mean notice with reasonable dispatch, in view of all the circumstances of each particular case. The weight of authority holds that circumstances may exist which will explain or excuse a delay in giving notice.... The question of whether the delay is explained or excused is one for the trier to decide and the burden of proof is upon the party who had the duty of giving notice.

United States Fidelity & Guaranty Co. v. Giroux, 129 Vt. 155, 159 (1971).

Continental has shown a string of "occurrences" long preceding notice by Plaintiffs, who have made no showing of circumstances explaining or excusing their delay. Fed.R.Civ.P. 56(c) "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which

that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 US 317, 322, 91 L.Ed.2d 265, 273, 106 S.Ct. 2548, 2552 (1986). Accordingly, we grant summary judgment to Continental, holding that Plaintiffs' unexplained failure to provide timely notice to Continental of any of a long string of occurrences results in no coverage under the policy for either the Tenants' lawsuit or the state administrative proceeding.

Additional grounds for holding notice untimely exist with respect to the state administrative proceeding. The parties dispute the facts with regard to what was provided Continental in connection with the administrative proceeding. Both sides agree that Gromet faxed one page, page 20, of a proposed administrative order to a Continental adjuster on April 22, 1992. Gromet subsequently provided Continental with a copy of an April 30, 1992 letter from the state relating to the proposed order. Gromet claims he contemporaneously mailed a complete copy of the proposed order to Continental. Continental can find no record that it was ever received, though the record is clear that Continental requested a complete copy. This dispute, however, is not relevant.

What is relevant is that by letter of January 7, 1992, the Agency of Natural Resources served an administrative order dated December 30, 1991, on Gromet that commenced administrative proceedings. Although the policy required timely notice of that proceeding to Continental, notice was never provided. A Vermont Environmental Law Judge dismissed the proceeding without prejudice on February 21, 1992.

***10** Page 20 from the proposed order that was provided to Continental indicates that Gromet was the only named insured involved in the proposed proceeding. The April 30 letter from the Agency of Natural Resources indicated that the state was not intending to name him as a respondent after all. Continental would have been justified in concluding that nothing was required of it.

On July 20, 1992, the Agency of Natural Resources issued a new Administrative Order that named both Plaintiffs as respondents, cited numerous violations of permits and regulations, assessed penalties totalling $38,500, and mandated replacement of the GAMHP water and sewer systems. No notice of the commencement of this administrative proceeding was provided to Continental. Plaintiffs failed to provide notice of two actual administrative proceedings, but, strangely, gave notice only that a proposed proceeding didn't involve any insureds. Accordingly, we find that notice was not proper or timely and that coverage was forfeited.

DAMAGES "EXPECTED" OR "INTENDED"

Continental also disclaims coverage on the ground that Plaintiffs expected the damages or intended to cause them. Continental argues:

Looking at the surrounding circumstances, this court can come to no other conclusion than that Gromet expected and intended to cause property damage. Gromet clearly knew that his aged sewage system was creating an intolerable situation for the residents of Green Acre Trailer Park; the documents and his own admissions show that he knew it, or at the least, expected it. He was told repeatedly for a period of years, either by state environmental inspectors or by tenant action of leakage, water contamination, loss of water pressure, and other allegations of damage.

Continental's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, 5. Continental claims Gromet "made an intentional, economic decision to violate the terms of agreements with both the trailer park tenants and his own business partners to adequately maintain and repair the trailer park facilities, including the sewage disposal and water systems." Id., 5-6. That description is basically true. Extensive and expensive repairs and improvements were necessary to remedy the problems with the water and sewer systems. Although the record indicates that Gromet identified what needed to be done and obtained the permits necessary to accomplish it, he was unable to finance the improvements on terms satisfactory to him. See, Continental Exh. N. Were we to find coverage here, Continental would be forced to foot the bill for the capital expenses that Plaintiffs were unable or unwilling to make.

Section I(2) of the policy provides,

This insurance does not apply to:

a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.

The Vermont Supreme Court has indicated that this provision "is designed to exclude only highly probable or intentionally caused damage." State v. Glens Falls Insurance Co., 137 Vt. 313, 317 (1979). "[W]here the circumstances indicate the insured knew his act would damage the injured party he must be taken to have intended it despite subjective testimony to the contrary." Id., at 317.

***11** Here, there can be no doubt that Plaintiffs knew their continued failure to make necessary repairs to the water and septic systems had caused damage in the past and would continue to cause damage in the future on an ongoing basis. Accordingly, we find that the damage was expected and intended from Plaintiffs' standpoint.

Plaintiffs' arguments to the contrary are unavailing. They assert first that the depositions of Continental employees establish that coverage is available under the policy because the damage was not expected or intended. Plaintiffs' argument requires that we accept the testimony of Continental's employees as dispositive of the meaning of the language of the

insurance policy. The law is to the contrary. "[T]he construction of an insurance policy is a question of law, not fact." Morrisville Water & Light Dept. v. United States Fidelity & Guaranty Co., 775 F.Supp. 718, 722 (D.Vt.1991). The California Supreme Court had "a brief reply" to a similar argument "that there was coverage ... because the [insurer's] employees themselves admitted the existence of such liability."

It is well settled that the interpretation of an insurance policy is a legal rather than a factual determination. Consistent therewith, it has been held that opinion evidence is completely irrelevant to interpret an insurance contract.

Chatton v. National Union Fire Insurance Co., 10 Cal.App.4th 846, 856, 13 Cal.Rptr.2d 318, 331 (1992) (citations omitted).

Plaintiffs also argue that we are bound by the Second Circuit's holding in City of Johnston v. Bankers Standard Insurance Co., 877 F.2d 1146 (2d Cir.1989). We disagree. The Second Circuit was construing New York law. Id., at 1149. Vermont law is at issue here. Moreover, our holding today is not in conflict with the holding of Johnston. There, the insurer was required to defend the City against a suit by the State of New York for the costs of studying and cleaning up wastes allegedly seeping from a City landfill into surrounding groundwaters. Id., at 1147. The Second Circuit held,

The evidence demonstrated that the City was warned that the landfill apparently was contaminating the local groundwaters. As we have noted, however, proof of warnings of possible physical damages is not enough to show that as a matter of law the damages ultimately incurred were expected or intended.

Id., at 1152. Here, by contrast, we have not just warnings of possible damage, but repeated instances of actual damage actually occurring and being alleged. Plaintiffs' prolonged failure to provide residents with safe drinking water and septic systems was an ongoing violation of residential leases and state law that gave rise to claims for damages all along the way.

Plaintiffs also argue that even if the damages were intended or expected, coverage for intentional acts is included under the part of the policy denominated as "Coverage B. Personal and Advertising Injury Liability." Coverage B insures against " 'Personal injury' " caused by an offense arising out of your business...." Plaintiffs Exh. 1, Coverage B(1)(b)(1). "Personal injury" is defined in pertinent part as:

***12** injury, other than "bodily injury," arising out of one or more of the following offenses:

....

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private

occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;

....

Plaintiffs contend that this provision covers the Tenants' claim that the inadequate water and septic systems constituted a breach of the warrant of habitability. We disagree. No allegations have been made to suggest a "wrongful eviction" of the Tenants or a "wrongful entry" into their residences. The only arguable coverage here would be that the failure to maintain adequate water and sewer systems was an "invasion of the right of private occupancy." We believe that such a holding would stretch the language of the policy beyond its plain and unambiguous meaning. Assuming for the moment that the inadequate water and sewer systems constituted a breach of the warranty of habitability, that fact would not trigger coverage. Although the premises may have been rendered uninhabitable, there has been no interference with the "right of private occupancy." It may be unpleasant, unhealthy, unsafe, and undesirable to continue to occupy the premises, but there has been no interference with the right to do so.

Senior Bankruptcy Judge Charles J. Marro, serving as Master on a claim by American Finish & Chemical Co., in the Ambassador Insurance Company liquidation pending in Washington County Superior Court, had occasion recently to reflect on a similar dispute involving substantially identical policy language. "[C]overage for 'personal injury' depends not primarily on the type of injury sustained but whether the injury arose from the commission of certain offenses," Judge Marro wrote in his May 25, 1995 Master's Report on Claim No. 076540, American Finish and Chemical Co., at 5, in Matter of Ambassador Insurance Co., Inc., Washington Superior Court Docket No. S-444-83-WnC. The fact that water and sewer problems may have made the residences uninhabitable is the result not the offense. The policy language covers damages from specified offenses, not specific results from unspecified offenses. Moreover, Judge Marro notes that the doctrine of ejusdem generis "requires that the phrase ... 'invasion of the right of private occupancy' must be construed to require an actual physical dispossession." Id.

The principle of ejusdem generis ... provides that where a general term follows a series of specific terms, the former should not be given its broadest possible meaning, but rather extends only to matters of the same general class or nature as the terms specifically enumerated. Accordingly, we must interpret the catch-all phrase "other invasion of the right to private occupancy" as encompassing only conduct of the same general type as eviction and wrongful entry. It follows then that if an intent to dispossess the injured party of the right to occupy a given premises is part and parcel of both eviction and wrongful entry, then the same holds for conduct falling within the 'other invasion' catchall.

***13** Pipefitters Welfare Education--Al Fund v. Westchester Fire Insurance Co., 976 F.2d

1037, 1041 (7th Cir.1992). Accordingly, we hold that no "invasion of the right of private occupancy" occurred.

PRODUCTS-COMPLETED OPERATIONS

Plaintiffs also claim coverage under the "products-completed operations hazard," which includes "all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work.' " Plaintiffs Exh. 1, Section V(11.a). This provision is not applicable, because all the damage alleged occurred at the Park, which the insured owned.

MISCELLANEOUS ISSUES

Two issues remain. First, Gromet asks for summary judgment requiring Continental to pay him for earnings lost while he assisted in the defense to the Tenants' action. Continental concedes that Gromet spent time assisting in the defense, but denies that Gromet has proven he lost earnings. The policy covers:

All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to $100 a day because of time off from work.

Plaintiffs Exh. 1, Supplementary Payments--Coverage A and B(4). We are unable to find from the evidence before us that Gromet lost earnings, and accordingly deny summary judgment.

Continental also asks us to grant summary judgment holding that no coverage is available for a second suit brought by the Tenants. The day after Gromet was served with the first complaint brought by the Tenants, which asked for an attachment, he transferred various parcels of real property he owned in the town of Stowe to a Vermont corporation, Equine 32, Inc. The Tenants then brought a fraudulent conveyance action seeking to attach the transferred assets. Plaintiffs contend Continental is obligated to defend under the following policy provision:

We will pay, with respect to any claim or "suit" we defend:

....

3. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

Plaintiffs Exh. 1, Supplementary Payments--Coverages A and B. We grant summary judgment to Continental. The policy language clearly indicates that its obligation to fund release of

attachments applies only to claims or suits it defends. Continental is not defending the second suit, and, for the reasons set forth herein, has no obligation to do so.

Counsel for Continental shall submit an order consistent with the holdings of this Memorandum of Decision upon five days' notice to Plaintiffs.

FN1. Our subject matter jurisdiction over this controversy arises under 28 USC § 1334 (b) and the General Reference to this Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 USC §§ 157(b)(2)(A), (E), and (O). This Memorandum of Decision constitutes findings of fact and conclusions of law under F.R.Civ.P. 52, as made applicable by F.R.Bkrtcy.P. 7052.

FN2. Gromet and Aberdeen are the only two plaintiffs that survived prior motions to dismiss by Continental.

1995 WL 447341 (Bankr.D.Vt.)

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