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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:)	Case No: 93 B 4313 (TLB)
)	(Bankr. S.D.N.Y.)
ST. JOHNSBURY TRUCKING)	(Chapter 11)
COMPANY, INC.,)	
)	
Debtor.)	
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ST. JOHNSBURY TRUCKING)	Adv. Pro. No. 96-1023
COMPANY, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	**MEMORANDUM OF DECISION**
LIBERTY MUTUAL INSURANCE)	**DENYING IN PART AND GRANTING**
COMPANY,)	**IN PART MOTION FOR**
)	**PARTIAL SUMMARY JUDGMENT**
Defendant.)	
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#390-1

APPEARANCES:

M. E. Miller, Esq. of Greenberg Traurig, Washington, D.C. and C. O'C Reis, Esq., of Hull Webber & Reis, Rutland, Vermont, for St. Johnsbury Trucking Company, Inc. ("Debtor").

S.J. Flynn, Esq., Affolter Sannon & Flynn, Ltd, Burlington, Vermont, for Liberty Mutual Ins. Co. ("Liberty").

Debtor commenced this adversary proceeding seeking: (1) a declaratory judgment that environmental claims (the "Government Claims") asserted against Debtor by the United States Environmental Protection Agency ("EPA") and United States Department of Interior ("DOI"; and, together with the EPA, the "Government") are covered under insurance policies issued by Liberty (collectively, the "Policy"); and (2) an order requiring Liberty to pay the face amount of a settlement of the Government Claims approved in Debtor's main case.[1] Liberty moved for partial summary judgment and Debtor opposed.

At a hearing before this Court on, and by Memorandum of Decision dated, November 17, 1997, we determined that Liberty, if liable at all for the Government Claims, is liable only for the amount that Debtor actually paid to the Government in settlement of the Government Claims (i.e., the pro rata distribution amount under Debtor's Chapter 11 plan, not the face amount of such claims). In addition, we instructed the parties to brief four issues: (1) Did Liberty have a duty to defend Debtor under Vermont insurance law? (2) Did Liberty breach that duty? (3) Is Liberty bound by the settlement to repay Debtor the amounts actually paid by Debtor to the Government? and (4) Is Liberty liable for Debtor's attorney's fees incurred in litigation with the Government?

The parties submitted multiple briefs and memoranda and exhibits in respect of these four issues. After a careful review of the record and the pleadings submitted in this matter, the motion for partial summary judgment is granted in part and denied in part.

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[1] Our subject matter jurisdiction over this controversy arises under 28 U.S.C. §1334(b) and the General Reference to this Court by the District Court for the District of Vermont. This is a core proceeding under 28 U.S.C. §§ 157 (b) (2) (B) and (O). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable by Fed.R.Bankr.P. 7052.

FACTUAL HISTORY

Debtor was a regional freight carrier. As part of its operations, it owned a trucking terminal located on 645 Pine Street, Burlington, Vermont. Debtor purchased Comprehensive General Liability ("CGL") insurance from Liberty from 1944 through 1976. The 1963 through 1976 policies had per occurrence/accident and aggregate limits of liability in the amount of $2,000,000 per year.

The Policy included a standard clause providing that Liberty was obligated "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages...." [2] The Policy also contained a clause that required Liberty to defend any claim "even if the allegations of the suit are groundless, false or fraudulent." [3] In addition, the Policy contained a standard insolvency clause providing that the " bankruptcy or insolvency of the insured... shall not relieve the [insurance] company of any of its obligations [under the policy]."[4]

Debtor's potential liability under CERCLA[5] arose when, at some point either

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[2] **See, e.g.,** Comprehensive General Liability Coverage Policy (Debtor's Exhibit 15 at LM JOH 0000030 (hereinafter, "CGL Policy at LM JOH _____")).

[3] **Id.**

[4] **Id.** at LM JOH 0000034.

[5] The Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601-75 ("CERCLA"). CERCLA establishes strict liability for present and former owners of hazardous waste disposal sites, transporters of wastes, and generators of waste who arrange for transport and disposal of wastes. Under CERCLA, the EPA identifies sites contaminated with hazardous materials, and it identifies the parties "potentially responsible" for the contamination. 42 U.S.C. §§ 9601-9625. The EPA may obtain an injunction to compel the potentially responsible parties to clean-up the contamination and then sue the polluters for reimbursement. 42 U.S.C. §§ 9606-9607. Liability for clean-up costs may be imposed on one, two, or all of the responsible parties, regardless of each entity's relative degree of fault or

before or during Debtor's ownership of the property in question, toxic contaminants were deposited at the Pine Street terminal or on surrounding properties. In 1987, the EPA and DOI designated Debtor's terminal as part of the "Pine Street Barge Superfund Site" (the "Site") under CERCLA. EPA was concerned that pollutants might migrate and pollute surrounding swampland, groundwater, and ultimately Lake Champlain.

On November 30, 1987, EPA notified Debtor (the "PRP Notice") that it was a potentially responsible party ("PRP") for the costs of cleaning up the Site under CERCLA.[6] On December 30, 1987, Debtor notified its insurance carrier, Liberty, that it had received a PRP Notice from EPA and made demand for coverage. By letter dated January 18, 1988, Liberty acknowledged receipt of the notice from Debtor and stated that it would investigate the claims.[7] By letter dated September 27, 1988, Liberty agreed to pay 25% of Debtor's reasonable and necessary defense costs arising after December 30, 1987.[8] A Liberty internal memorandum dated May 24, 1989 makes clear that coverage may be available and concludes that Liberty should continue to contribute defense costs while it proceeds with its investigation.[9] Iin a Liberty internal memorandum dated July 6, 1990, however, the memorandum's author refers to a draft denial of coverage and directs the memorandum's addressee to "[p]lease destroy all drafts &

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responsibility for creating the polluted site. 42 U.S.C. § 9607(c). **See also Village of Morrisville Water & Light Dept. v. United States Fidelity & Guaranty Co.,** 775 F.Supp. 718, 721-722 (D.Vt. 1991).

[6] November 30, 1987 Letter from the EPA to Debtor (hereinafter, "PRP Notice at ___").

[7] January 18, 1988 Letter from Liberty to Debtor.

[8] **See** note 11 at 2, **infra**.

[9] May 24, 1989 Liberty Internal Memorandum from Susan Bourne to Gerry Murphy.

memos related to drafts, including this [memorandum]."[10] By letter of the same date, Liberty denied coverage.[11] In response to additional requests for coverage from Debtor, Liberty again denied coverage by letter dated August 28, 1995.[12]

On June 15, 1993, Debtor filed a voluntary petition for relief under Chapter 11, title 11, United States Code, in the United States Bankruptcy Court for the Southern District of New York. On January 5, 1994, the Government filed a $5.4 million proof of claim for clean-up costs and damages at the Site. In addition, the Government claimed an unliquidated amount of between $10 and $50 million as compensation for estimated future clean-up costs. On July 31, 1995, the Government supplemented its proof of claim and sought additional, post-petition costs incurred at the Site in the amount of $52,970.97. Under CERCLA, Debtor could be liable for damage to the entire Site because it was a former owner and operator of a portion of the Site. **See generally** 42 U.S.C. § 9607(a).

On August 10, 1995, Debtor objected to the Government's proof of claim. Debtor argued, among other things, that the Government's proof of claim failed to state a claim upon which relief could be granted because any contamination of its property was caused by acts of a third party.

On November 24, 1995, after extensive negotiations, Debtor and the Government reached a settlement of the Government Claims. In full satisfaction of the EPA and DOI's approximately $55 million aggregate claim, the Government accepted on behalf of EPA an

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[10] July 6, 1990 Liberty Internal Memorandum from D. Bogan (sp?) to A. Gavrilles.

[11] August 10, 1990 Letter from Liberty to Debtor.

[12] August 28, 1995 Letter from Liberty to Debtor.

unsecured claim in the amount of $3 million and on behalf of DOI an unsecured claim in the amount of $150,000. The EPA further accepted $35,000 in full satisfaction of its administrative expense claim. Finally, the Government agreed not to file any further civil or administrative CERCLA actions against Debtor relating to the Site.

Thereafter, Debtor commenced this action against Liberty (and certain other insurers who have since settled with Debtor), asserting that Liberty breached its contracts of insurance with Debtor by refusing to defend Debtor and provide coverage with respect to the Government's claims. Debtor contends that under Vermont law an insurer's duty to defend is triggered by the "potentiality" that coverage exists under the given policy. According to the Debtor, a review of the PRP Notice and the Policy establishes clearly the "potentiality" of coverage. Debtor also asserts that the PRP Notice constitutes a "suit" for purposes of triggering Liberty's duty to defend under the Policy. Debtor further argues that Vermont law allows an insurer to refuse to defend only when comparison of the policy with the underlying complaint shows on its face that there is no potential for coverage, and that any doubt as to the existence of a duty to defend must be resolved in the insured's favor. Finally, according to Debtor, the insurer bears the burden on this point.

Liberty contends that the PRP Notice does not indicate that any potential for coverage exists under the Policy because, according to Liberty, the statements contained in the PRP Notice establish that there is no "suit" for it to defend. Liberty also argues that there is no coverage under the Policy because it contains an exclusion for "property damage to property owned or occupied or rented to the insured."

STANDARD OF REVIEW

Summary judgment is appropriate where the moving party can show there is no genuine issue of material fact. We have set forth the well-established standards for summary judgment in, among other decisions, **In re U.S. Lines,** 169 B.R. 804, 811-12 (Bankr. S.D.N.Y. 1994). We do not recite them here. Except where stated below, this matter presents no disputes of material fact. Addressing these issues on a summary judgment basis therefore is appropriate.

DISCUSSION

I. LIBERTY HAD A DUTY TO DEFEND DEBTOR UNDER VERMONT LAW

Under Vermont law, the "duty of an insurance company to defend...is determined by comparing the allegations made against the insured to the terms of the coverage in the policy." **Vermont Gas Systems, Inc. v. United States Fidelity & Guaranty Co.,** 805 F.Supp. 227, 231 (D.Vt. 1992). Furthermore, an "insurer's duty to defend is independent of and broader than its duty to indemnify." **Id.; see also State v. Glen Falls Ins. Co.,** 132 Vt. 97, 99, 315 A.2d 257, 258 (1974) ("[t]he duty of an insurer to enter and defend a case on behalf of its insured is broader than its obligations to respond in damages"). Simply, an insurer has a duty to defend an insured whenever there is a possibility that a claim falls within the coverage of an insurance policy. **Vermont Gas,** 805 F.Supp. at 231; **Garneau v. Curtis & Bedell, Inc.,** 158 Vt. 363, 365, 610 A.2d 132, 134 (1992) ("the insurer has a duty to defend whenever it is clear that the claim with the insured might be of the type covered by the policy"). To escape the duty to defend, the burden is on the insurer to "demonstrate at the outset that the claims against an insured are entirely excluded from coverage." **Vermont Gas,** 805 F. Supp. at 231 (citing **Village of**

Morrisville Water & Light Dep't v. United States Fidelity & Guaranty Co., 775 F. Supp. 718, 733 (D.Vt. 1991)). Thus, Liberty cannot avoid its duty to defend unless it demonstrates that there is no possibility that Debtor is entitled to coverage under the Policy.

A. The "Potentiality" For Coverage Exists Under The Policies.

As a preliminary matter, we find that the "potentiality" for coverage exists under the Policy. Subject to the potential defenses raised by Liberty, which are discussed below, a comparison of the plain language in the Policy with the PRP Notice supports this finding. Indeed, the Policy, under the heading "Coverage B--Property Damage Liability", states that Liberty will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages ... because of injury to or destruction of property, including the loss of use thereof, caused by accident."[13]

B. A PRP Notice Is A "Suit" For Purposes Of Triggering Liberty's Duty To Defend.

Liberty contends, however, that it has no duty to defend absent a "suit", and that no "suit" exists absent commencement of an actual lawsuit. Liberty relies on case law holding that "suit" means a court action, not an administrative action, and that EPA demand letters, such as the PRP Notice, do not trigger the duty to defend. **See, e.g., Technicon Electronics Corp. v. American Home Assurance Co.**, 141 A.D.2d 124, 146, 533 N.Y.S.2d 91, 105 (2d Dept. 1988); **Aetna Cas. & Sur. Co. v. General Dynamics Corp.**, 968 F.2d 707, 713 (8th Cir. 1992).

The term "suit" is not defined in the Policy and nothing in the Policy indicates

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[13] CGL Policy at LM JOH 0000030.

that Liberty's duty to defend is triggered solely by commencement of a court proceeding. Furthermore, there is substantial authority finding that the term "suit" has a broader meaning than that suggested in the cases cited by Liberty. **See, e.g., Avondale Indus., Inc. v. Travelers Indem. Co.**, 887 F.2d 1200, 1206 (2d Cir. 1989) (finding that administrative proceedings and demand letters can be sufficiently adversarial to satisfy the "suit" requirement of an insurance clause); **Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.**, 948 F.2d 1507, 1517 (9th Cir. 1991) ("an 'ordinary person' would believe that the receipt of a PRP notice is the effective commencement of a 'suit'").

The PRP Notice advised Debtor that it was a potentially responsible party that may be obligated to implement any response action determined by the EPA.[14] The EPA further informed Debtor that it may be held liable for all costs incurred by the Government in responding to any release of hazardous substance, pollutants and contaminants at the Site.[15]

The PRP Notice provided an "Enforcement Activities Schedule," to "encourage future good faith negotiations between Debtor and the Agency and among Debtor and other PRPs for the conditions at the Site."[16] The schedule provided that February 28 or March 28, 1988 would be the "Termination of Negotiations and Initiation of Remedial Investigation and Feasibility Study."[17] Further, April 15, 1988 would be the "Commencement of Litigation" if

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[14] PRP Notice at 1.

[15] **Id.**

[16] **Id.** at 2.

[17] **Id.**

settlement was not reached.[18] The PRP Notice concluded with the admonition that "[d]ue to the seriousness of the environmental and legal problems posed by conditions at the Site, EPA urges that immediate attention and a prompt response be given to this letter."[19]

Whether an official action constitutes a "suit" within the meaning of a CGL policy, such as the Policy, depends on whether the official action is "sufficiently coercive and adversarial in nature." **Morrisville Water & Light**, 775 F. Supp. at 733. In **Morrisville**, the District Court of Vermont held that a letter from the EPA notifying the insured of its status as a potentially responsible party under CERCLA was a "suit" within the meaning of the CGL policy at issue. **Id.** at 732-33. There, the insured received a letter from the EPA which was substantially identical to the PRP Notice. After Debtor was identified as a PRP, it was presented with no "practical choice other than to voluntarily comply with the [Government's] demands", **Id.**, given the strong penalties that may be imposed under CERCLA.

Given such potential consequences, the PRP Notice was tantamount to the commencement of a lawsuit. If Debtor had not responded to the EPA's demands, then the EPA could have proceeded with administrative remedies or litigation.[20] The potential consequences of a CERCLA action are intended to encourage and facilitate voluntary settlements. **See Interim Guidance of Notice Letters, Negotiations, and Information Exchange, EPA Memorandum**, 53 Fed. Reg. 5298 (1988).

While we recognize that some courts have held that a letter from the EPA

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[18] **Id.**

[19] **Id.** at 3.

[20] **Id.** at 2.

notifying the insured of its status as a PRP is not a "suit" within the meaning of the policy at issue, we decline to adopt this approach for two reasons. First, the fact that another reasonable interpretation of the term "suit" exists creates an ambiguity. Under Vermont law, any ambiguity in an insurance policy must be strictly construed in favor of the holder, not the issuer. **Peerless Ins. Co. v. Wells**, 154 Vt. 491, 494, 580 A.2d 485, 487 (1990).

Second, we believe that the cases cited by Liberty fail to consider the unique aspects of CERCLA. **Morrisville Water & Light**, 775 F.Supp. at 733. To wit, Debtor had little prospect of avoiding financial responsibility under CERCLA, because liability is not based on fault and the available defenses are limited. **See id.;** 42 U.S.C. §§ 9607(a), (b). We agree with the reasoning in the **Pintlar** case:

> The extent of CERCLA liability is far-reaching. The ability to choose the response action greatly empowers the government. In order to influence the nature and costs of the environmental studies and cleanup measures, the PRP must be involved from the outset. In many instances, it is more prudent for the PRP to undertake the environmental studies and cleanup measures itself than to await the EPA's subsequent suit in a cost recovery action.

Aetna v. Pintlar, 948 F.2d at 1517.

Furthermore, Debtor's potential liability was substantial, because it could be held jointly and severally liable for the entire cost of cleaning up the Site. As stated in the PRP Notice, "demand is hereby made for payment of [$900,000] plus any and all interest authorized to be recovered...."[21] Thus, it was critical for Debtor to become involved in settlement discussions with the EPA. This is evident because after Debtor filed a voluntary petition for relief under Chapter 11, the Government filed a $5.4 million proof of claim for clean-up costs

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[21] PRP Notice at 3.

and damages at the Site.

It is not reasonable to find that a duty to defend, in the absence of clear unambiguous policy language to the contrary, will arise only when the EPA has selected a judicial forum and has commenced a civil proceeding. It is also unreasonable to find that no duty to defend will arise if the EPA, an entity not within the control of the insured, elects to pursue its administrative options instead. We therefore find that the Government's communications with Debtor were sufficiently coercive and adversarial to constitute a "suit" within the meaning of the Policy.

B. The "Owned Property" Exclusion In The Policy Does Not Preclude Coverage.

Liberty's second contention is that even if the PRP Notice satisfies the Policy's "suit" requirement, the factual assertions underlying the Government's claim against Debtor establish that the Government Claims arise out of damage to Debtor's own property, and, thus, fall squarely within the "owned property" exclusion of the Policy. This exclusion states that the Policy does not apply to "injury to or destruction of (1) property owned or occupied by or rented to the insured...."[22]

Liberty's interpretation of this portion of the Policy results in its conclusion that costs to clean up Debtor's land are excluded under the Policy. Debtor contends, however, that the owned property exclusion does not apply to suits, such as the PRP Notice, alleging "abatement remedies", as such remedies seek to prevent further damage, not only to the insured's property, but to migrating damage to other property.

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[22] CGL Policy at LM JOH 0000031.

The owned property exclusion of comprehensive general liability policies has been addressed by the Second Circuit's decision in **Gerrish v. Universal Underwriters Ins. Co.**, 947 F.2d 1023 (2d Cir.1991). In that case, the Second Circuit affirmed the district court's holding that the insurer could not avoid coverage by relying upon the owned property exclusion for cleanup costs relating to the insured's property. **Gerrish**, 947 F.2d at 1024. The court explained that for coverage, the insured need only demonstrate "damage to property *not* owned, controlled or possessed" by the insured. **Id.** at 1030 (emphasis added).

In another, earlier, decision, **Boyce Thompson Instit. For Plant Research v. Insurance Co. of North America**, 751 F.Supp. 1137 (S.D.N.Y. 1990), the court held that "[s]o long as the ... complaint contains allegations that encompass the possibility that off-site contamination exists or that the clean-up was performed to prevent damage to the property of third parties, the owned property exclusion would not be applicable to work done *on the property*." **Id.** at 1141 (emphasis added).

The PRP Notice alleges that contaminants, hazardous substances and pollutants were released from and found in the ground beneath Debtor's facility.[23] The PRP Notice also demands that Debtor implement a Remedial Investigation/Feasibility Study ("RI/FS") to identify the extent and nature and the horizontal and vertical extent of the contamination at and migrating from Debtor's facility.[24] One of the EPA's primary concerns at the Pine Street Barge Canal Superfund Site was the potential danger of migration of contamination from Debtor and other PRP's property onto surrounding swampland, groundwater, and ultimately Lake Champlain.

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[23] PRP Notice at 1.

[24] **Id.** at 3.

Other disclosed EPA objectives include an evaluation of feasible alternatives for the permanent remediation of the contamination at, and migrating from, Debtor's facility. We believe that the statements in the PRP Notice, and other Government communication,[25] are sufficient to defeat Liberty's argument that it is entitled to rely upon the owned property exclusion.

We find that Liberty had a duty to provide a defense for Debtor in matters related to the Site because there was a possibility that Debtor was entitled to coverage under the Policy.

II. LIBERTY BREACHED ITS DUTY TO DEFEND DEBTOR.

As discussed above, Liberty had a duty to defend Debtor in matters related to the Site. Liberty improperly refused to do so; therefore, Liberty breached its duty to defend Debtor.

III. DEBTOR IS NOT ENTITLED TO COLLECT GOVERNMENT SETTLEMENT AMOUNTS FROM LIBERTY.

Debtor argues that Liberty is bound to the amount of the Government settlement and must reimburse Debtor the amount actually paid by Debtor to the Government. Liberty argues that Debtor has been fully compensated for its damages through settlements with other defendants and, therefore, Liberty is not obligated to reimburse Debtor. We agree.

For Debtor to recover on the Policy would constitute an impermissible double recovery, because Debtor has already collected the full amount from other insurers. A plaintiff may not receive double recovery for his injuries. **Brunet v American Ins. Co.**, 660 F.Supp. 843, 849 (D.Vt. 1987). "If [an insured] were to collect [from multiple policies] without

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[25] **See, e.g.,** Letter from the U.S. Department of Justice to Greenberg, Traurig, Hoffman, Lipoff Rosen & Quentel, P.A. (Debtor's attorney) dated September 21, 1995.

comparing their total to [insured's] total damages, [the insured] might receive compensation for the same injury twice. Together [multiply policy] payments may not add up to more than [the insured's] total damages." **Id.**

Having settled with the Government for the Site clean-up costs, Debtor settled or reached settlement in principle with Reliance Insurance Company, Travelers Indemnity Company, Royal Insurance Company, National Union Insurance Company of Pittsburgh, Pennsylvania, and Transport Insurance Company, in amounts sufficient to reimburse Debtor for the amount paid to the Government in respect of the Government Claims. Accordingly, Debtor may not recover from Liberty under the Policy the amount of the settlement payments to the Government.

IV. LIBERTY MUST PAY DEBTOR'S ATTORNEYS' FEES.

As discussed above, the Policy provides coverage for the claims brought against Debtor concerning the clean-up of the Site. Debtor properly submitted these claims to Liberty on December 30, 1987 and Liberty, after initially cooperating with the Debtor, denied coverage. Debtor seeks to recover attorneys' fees incurred in litigation with the Government. Debtor is entitled to attorneys' fees if Liberty's denial of coverage was in bad faith and with disregard for the terms of the Policy and the claims against Debtor. **Burlington Drug Co., Inc. v. Royal Globe Ins. Co.**, 616 F.Supp. 481, 483 (D.Vt. 1985).[26]

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[26] An award of attorneys' fees "should be permitted, but only where there is a showing that the insurer's denial was made in bad faith or with vexatious disregard for the terms of the policy or the claims against the insured. **See also Time Oil Co. v. Cigna Property & Casualty Ins. Co.**, 743 F.Supp. 1400, 1421 (W.D.Wash. 1990) ("courts and commentators agree that the damages for a refusal to defend include costs and reasonable attorneys' fees incurred by the insured in defending itself, plus consequential damages stemming from the [insurer's] breach.").

An insurer's legal duty is equivalent to that of a "fiduciary". **Morrisville Water & Light**, 775 F.Supp. at 734 (citing **Myers v. Ambassador Ins. Co., Inc.**, 146 Vt. 552, 555-56, 508 A.2d 689, 691 (1986)). When determining if a third-party's claim against an insured is covered under a policy, the insurer must act in good faith, and it must "take the insured's interests into account." **Id.** The insurer must also "diligently investigate the facts and the risks involved in the claim, and should rely only upon persons reasonably qualified to make such an assessment." **Id.**

The facts show that Liberty did not meet its duties under the Policy and law. We believe its failures to be commensurate with bad faith. First, Debtor sought defense and indemnification in 1987. Liberty at first responded in a reasonable and constructive manner. However, the differing preliminary and final conclusions alluded to in the Liberty internal memoranda discussed **supra**, as well as the direction to destroy prior related internal memoranda, when combined with our conclusions with respect to the applicability of coverage, lead us to believe that Liberty acted in bad faith. Furthermore, Liberty's actions hampered Debtor's ability to reach closure regarding the Government Claims, and may have prevented earlier distributions to creditors.

Another factor supporting a bad faith finding is that Liberty asserted as one of its defenses that the Policy did not provide coverage to the insured because of the "owned property" exclusion. As discussed earlier, the owned property exclusion is inapplicable. Any doubt regarding the applicability of the owned property exclusion under circumstances such as those faced by the Debtor was resolved in 1991 by the Second Circuit's decision in **Gerrish**.

Furthermore, and surprisingly, given **Gerrish**, it was not until four years after **Gerrish**, that Liberty even raised the owned property exclusion defense.

The question of whether an insurer acts in bad faith in refusing to defend its insured is generally one for the trier of fact. **Id.** This issue only becomes a question of law if a reasonable person could draw but one conclusion from the uncontroverted evidence in the record. **Id.** We believe that to be the case. Accordingly, a hearing is required to determine the appropriate amount of attorneys' fees to be awarded to Debtor.

CONCLUSION

The PRP Notice to Debtor is a "suit" within the meaning of the Policy. The "owned property exclusion" in the Policy is inapplicable. Therefore, Liberty had a duty to defend Debtor in the claims brought against it by the Government concerning the clean-up of the Site. Liberty, however, is not required to repay Debtor the amounts actually paid by the Debtor to the Government given its prior full recovery. Nevertheless, the Court determines that Liberty's denial of coverage was made in bad faith; therefore, a hearing must be held to determine damages in accordance with the terms of this decision.

Debtor's counsel to settle an order within five (5) days.

Dated: Rutland, Vermont
April 16, 1999

FRANCIS G. CONRAD
U.S. BANKRUPTCY JUDGE

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