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NO. 69341-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EXPEDIA, INC., a Washington Corporation; EXPEDIA, INC., a Delaware Corporation; HOTELS.COM, L.P., a Texas Limited Liability Partnership; HOTELS.COM, GP, LLC, a Texas Limited Liability Company; HOTWIRE, INC., a Delaware Corporation; TRAVELSCAPE, a Nevada Limited Liability Company,

Plaintiffs/Appellants,

v.

STEADFAST INSURANCE COMPANY, a Delaware Corporation;
ZURICH AMERICAN INSURANCE COMPANY, a New York Corporation; ROYAL & SUN ALLIANCE, a Foreign Corporation;
ARROWPOINT CAPITAL CORP., a Delaware Corporation;
ARROWOOD SURPLUS LINES INSURANCE COMPANY, a Delaware Corporation; ARROWOOD INDEMNITY COMPANY, a Delaware Corporation,

Defendants/Respondents.

PLAINTIFFS/APPELLANTS' REPLY TO ANSWER TO
MOTION FOR DISCRETIONARY REVIEW

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2012 OCT 18 PM 3:38

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. INTRODUCTION

The trial court's order disregards fundamental Washington law concerning when the duty to defend arises, when it must be adjudicated, and whether its adjudication may be delayed by discovery. The duty to defend arises *immediately* upon the filing of a potentially covered claim, yet the trial court's order excuses Zurich from complying with that duty while the underlying lawsuits—the very matters in which Zurich must defend Expedia—are ongoing. The duty to defend must be adjudicated immediately, based on the eight corners of the relevant policy and complaint, yet the trial court refused to do so until Zurich completes far-reaching discovery exclusively related to facts *beyond* the policies and the complaints. And while adjudication of the duty to defend may not be delayed by discovery—particularly discovery that potentially prejudices the insured in the underlying lawsuits—the trial court delayed ruling on Expedia's motion not once, but twice, and will delay adjudication indefinitely unless and until potentially prejudicial discovery is completed.

The trial court's decision breaks new ground on all of these points. The Washington courts have never held that the duty to defend arises only after an insured conclusively defeats all of its insurer's defenses. Nor have they ever held that the adjudication of the duty to defend may be

delayed while an insurer conducts potentially prejudicial discovery. They repeatedly have held the opposite, because the duty to defend is different from the duty to indemnify. It is designed to be made early, so that defense coverage can be in place while the underlying lawsuit is ongoing. Court after court has held that an insurer may not do what the trial court permitted Zurich to do here. The trial court's order is probable error.

The order also substantially limits Expedia's freedom to act by effectively precluding Expedia from prosecuting a duty to defend action until the underlying lawsuits are complete. Expedia is entitled to a defense of the underlying cases while they are ongoing, not merely reimbursement after the fact. Expedia is also entitled to protection against actions by Zurich that could prejudice Expedia in the underlying cases. The trial court forced Expedia to give up one of these rights to obtain the other, a result Washington law forbids.

The only way to remedy the trial court's error is to order the trial court (1) to adjudicate Expedia's duty to defend motion immediately and (2) to also stay potentially prejudicial discovery. This Court should grant discretionary review and provide that remedy.

II. ARGUMENT

A. The Trial Court's Refusal to Hear Expedia's Duty to Defend Motion Is Probable Error.

Zurich is wrong to characterize the trial court's ruling as a mere

“discovery order” committed to the trial court’s discretion.¹ The trial court instead committed fundamental legal errors on issues that go to the heart of the protections provided by the duty to defend. These legal errors are reviewed de novo, not for abuse of discretion. See Tomlinson v. Puget Sound Freight Lines, Inc., 166 Wn.2d 105, 109, 206 P.3d 657 (2009).² The right to a prompt defense determination, based solely on the eight corners of the policy and the complaint, is not simply a procedural nicety. It is an acknowledgment that the entitlement to a defense while the underlying lawsuits are ongoing is often the “greater benefit” of a liability policy, Am. Best Foods, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 405, 229 P.3d 693 (2010), and that an “immediate imposition” of the duty to defend is “*necessary* to provide to an insured the full benefits due under the policy,” Haskel, 33 Cal. App. 4th at 968 (emphasis added).

Thus, at the duty to defend stage, the policyholder and the insurer face different burdens. To obtain summary judgment in its favor on the

¹ This exact characterization was rejected in Haskel, Inc. v. Superior Court, 33 Cal. App. 4th 963, 39 Cal. Rptr. 2d 520 (1995). When the insurers there argued that the same issues that Expedia presents for review “really only involve[] a discovery dispute,” the court found the argument “confuses the principles surrounding the creation of a defense obligation” and held instead that the issues were legal issues concerning when the duty to defend arises and when it must be adjudicated. Id. at 977.

² Even if the “untenable grounds” standard used in connection with discretionary rulings and relied on by Zurich applied, Expedia satisfies it because “[a]n errant interpretation of the law is an untenable reason for a ruling.” Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 463, 232 P.3d 591 (2010) (citing State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007) (“[A]pplication of an incorrect legal analysis or other error of law can constitute abuse of discretion.”)).

duty to defend, the policyholder need only show that the “insurance policy *conceivably covers* allegations in the complaint.” Am. Best, 168 Wn.2d at 404. The insurer, on the other hand, must show that there is no possibility for coverage. Id. at 405. Because the duty arises at the moment a covered complaint is filed, the determination is made solely from the relevant policy and relevant underlying complaint. Woo v. Fireman’s Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007); Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

This is not, as Zurich contends, mere “boilerplate.” Ans. at 13 n.6. These are bedrock substantive principles designed to ensure that insureds receive the full benefits they are promised under their insurance policies—promptly. Ruling on an insured’s duty to defend motion “on the merits” does not, as Zurich suggests (Ans. at 12), involve consideration of the evidence Zurich seeks. Instead, a decision on the merits determines only whether the underlying complaint potentially asserts a covered claim based on the language of the policies. The only relevant evidence—the policies and the complaints—were before the trial court and thus the duty to defend was ripe for determination on the merits.

By refusing to permit Expedia to proceed with its duty to defend motion, the trial court necessarily has held that it will not consider the existence of the duty to defend until it considers extrinsic evidence sought

by Zurich. Delaying adjudication of the duty to defend to allow an insurer to take discovery into disputed issues of fact beyond the policies and the complaints necessarily denies Expedia its substantive rights under the policies and alters the legal standard applicable to the determination of the duty to defend. This is obvious legal error.

Zurich does not cite a single Washington decision permitting the deferral of adjudication of the duty to defend pending discovery into matters extrinsic to the policies and the complaints, particularly when that discovery is potentially prejudicial.³ No such cases exist. This is because permitting insurers to “delay an adjudication of their defense obligation until they develop sufficient evidence to retroactively justify their refusal to provide that defense” is “directly contrary” to duty to defend principles. Haskel, 33 Cal. App. 4th at 977; see also Am. Best, 168 Wn.2d at 405.

Zurich’s reliance on the bad faith aspect of Expedia’s motion to justify the trial court’s order is misplaced. None of the discovery that the trial court ordered must be completed before Expedia’s motion may be heard is relevant to Expedia’s bad faith and CPA claims because those claims relate exclusively to *Zurich’s* conduct, not Expedia’s, as Zurich’s Answer concedes. See Ans. at 14 (arguing that bad faith is “dependent

³ The cases cited in footnote 6 of Zurich’s Answer involve rulings in insurers’ favor on *insurers’* motions for summary judgment and say nothing about whether a policyholder’s right to obtain adjudication of whether the duty to defend has arisen must await completion of discovery into all of the insurer’s defenses.

upon the reasonableness of the *insurer's* conduct” (emphasis added)). The trial court’s ruling focused exclusively on the interaction between the evidence Zurich sought and the duty to defend, not on Expedia’s additional claims. (A.12-13.) In any event, even if the trial court felt that the bad faith and CPA aspects of Expedia’s motion could not be resolved without further discovery, that would not justify the refusal to adjudicate the duty to defend. The trial court should have proceeded to an immediate resolution of the duty to defend, as Washington law requires.

B. The Trial Court Limited Expedia’s Freedom to Act by Forcing It to Complete Overlapping and Potentially Prejudicial Discovery to Obtain Adjudication of the Duty to Defend.

Zurich cannot reasonably dispute that as a result of the trial court’s order Expedia may not prosecute its duty to defend action until it completes the overlapping and potentially prejudicial discovery that Zurich seeks. Zurich nonetheless argues that this does not prejudice Expedia or limit its freedom to act because Expedia can simply stay the entire coverage action until the underlying lawsuits have concluded. Ans. at 16-18. The “freedom” to stay the case is illusory because it deprives Expedia of substantive rights; namely, the right to defense coverage while the underlying lawsuits are ongoing.

As shown above, Washington law entitles Expedia to defense coverage for so long as there is any possibility that coverage is available.

The trial court has already concluded that, with respect to the policies at issue, Zurich has not met its burden of proving that there is no possibility for coverage. (A.112.) Expedia is thus entitled to have Zurich's defense obligation enforced immediately. Yet the trial court has refused to enforce Zurich's defense obligation until the parties complete the discovery sought by Zurich. As the trial court found—and Zurich concedes—Zurich's pursuit of this discovery could prejudice Expedia in the underlying lawsuits, which Washington law forbids. See Mut. of Enumclaw v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 918, 169 P.3d 1 (2007).

Expedia has a right to defense coverage based on the policies and the complaints alone *and* the right to protection from discovery that overlaps with or potentially prejudices the underlying actions. Indeed, this is exactly what Haskel holds. The court ruled both that the trial court was “required to consider Haskel's motion for summary adjudication” on the duty to defend *and* that Haskel was “entitled to a stay of discovery on issues which prejudice its defense of the underlying action.” 33 Cal. App. 4th at 975, 978. The trial court's order here, however, forever forecloses Expedia from obtaining one of those rights. To obtain the benefit of the defense coverage Zurich promised, Expedia must proceed with potentially prejudicial discovery now and forgo the protection against such discovery Washington law provides. To obtain protection against overlapping

discovery, Expedia must relinquish the prompt defense to which it is entitled under the policies. An order that forces a party to sacrifice a substantive right clearly limits its freedom to act. The fact that Expedia must choose which right to sacrifice does not change the outcome.

Zurich is wrong to suggest (Ans. at 19) that Montrose Chemical Corp. of California v. Superior Court, 6 Cal. 4th 287, 861 P.2d 1153 (1993), endorses staying the *entire* coverage determination and forcing the insured to proceed without defense coverage until the underlying cases conclude. Montrose and Haskel endorse precisely the result Expedia requests here: prompt adjudication of the duty to defend with a stay of potentially prejudicial discovery. They do so because, as under Washington law, the duty to defend is paramount and must be resolved immediately to give the insured the benefits to which it is entitled. See Am. Best, 168 Wn.2d at 405; VanPort, 147 Wn.2d at 760. Montrose affirmed a ruling that the insurer was obligated to provide its insured with a defense for so long as there was the possibility of coverage. 6 Cal. 4th at 300. When the trial court entered a stay of the coverage action in that case, that stay did not interfere with the determination that the duty to defend had arisen. At the time of the stay, the insurers were (under court order) “paying millions of dollars in defense costs.” Montrose Chem. Corp. of Cal. v. Can. Universal Ins. Co., No. C 594148, slip op. at 2-3

(Cal. Super. Ct. Feb. 10, 1995) (R.A.2-3). Similarly, in Haskel, the court ordered the trial court to “issue a new order setting Haskel’s summary adjudication motion [on the duty to defend] for hearing” and “issue an order staying all discovery” that would prejudice Haskel in the underlying case. 33 Cal. App. 4th at 980-81.

Zurich’s contention that this is a problem of Expedia’s own making because Expedia had the audacity to sue Zurich to enforce Zurich’s obligation to defend Expedia in the underlying lawsuits while those underlying lawsuits remain ongoing (Ans. at 16) reflects Zurich’s misunderstanding of its duties—and Expedia’s rights—under the policies it issues. Zurich’s duty is not merely to reimburse Expedia’s defense costs after the fact. Nor is it to defend Expedia only after Expedia has defeated all of the factual defenses to coverage Zurich chooses to assert. Zurich’s duty is to provide a defense in the underlying cases *while they are ongoing*. See Montrose, 6 Cal.4th at 295 (“Imposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf.”); Am. Best, 168 Wn.2d at 405 (the insurer “must defend until it is clear that the claim is not covered”).⁴

⁴ Zurich’s assertion that the trial court’s order is appropriate because of the manner in which the cases were tendered (Ans. at 19) is unfounded. Expedia’s tenders are all timely under the policies and Washington law. Indeed, many of the cases were tendered within months of being filed. Zurich’s response to *all* the tenders has been identical—outright denial of coverage. It thus cannot meet its burden of showing that it would have

To enforce that obligation, Expedia has “an unrestricted right to prosecute a concurrent declaratory-judgment action” and is “not required to await the resolution of the [underlying] claim.” Thomas V. Harris, Wash. Ins. Law § 14.02 (3d ed. 2010). Zurich’s right to litigate, by contrast, is not unrestricted, because the insurer may not litigate a coverage action while the underlying case is pending if it “might prejudice its insured’s [underlying] defense.” Id. Expedia has a substantive right to pursue defense coverage and obtain an adjudication of Zurich’s defense obligation at any time. It also has a substantive right to protection against discovery in the coverage action that might prejudice it in the underlying lawsuits. The trial court’s order irrevocably denies Expedia one of these two substantive rights, thus limiting Expedia’s freedom to act.

III. CONCLUSION

Refusing to consider Expedia’s duty to defend motion until the completion of discovery that overlaps with, and potentially prejudices Expedia in, the underlying lawsuits for which Expedia seeks coverage is probable error that substantially limits Expedia’s freedom to act.

Discretionary review should be granted so that this Court may uphold the legal standards governing the duty to defend under Washington law.

acted differently if certain cases had been tendered earlier, as it must to prevail on a late notice defense. See Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 427 191 P.3d 866 (2008). In any event, late notice is irrelevant to the question of whether the underlying complaints trigger defense coverage under the policies.

DATED this 18th day of October, 2012.

Respectfully submitted,

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ARROWPOINT CAPITAL CORP., a Delaware Corporation;
ARROWOOD SURPLUS LINES INSURANCE COMPANY, a Delaware Corporation; ARROWOOD INDEMNITY COMPANY, a Delaware Corporation,

Defendants/Respondents.

APPENDIX TO PLAINTIFFS/APPELLANTS' REPLY TO ANSWER
TO MOTION FOR DISCRETIONARY REVIEW

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REPLY APPENDIX - Index

Montrose Chem. Corp. of Cal. v. Can. Universal Ins. Co.,
No. C 594148, slip op. (Cal. Super. Ct. Feb. 10, 1995).....1

"ORIGINAL FILED"

FEB 10 1995

BY F. BECERRA JR., DEPUTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

**MONTROSE CHEMICAL CORP.
OF CALIFORNIA,**

**Plaintiff,
vs.**

**CANADIAN UNIVERSAL INSURANCE
CO. INC., et al.**

Defendants.

CASE NO. C 594148

**COURT'S RULING ON SUBMITTED
MATTER AND ORDER**

RULING ON SUBMITTED MATTER - IN RESPONSE TO THE DIRECTIVE OF THE APPELLATE COURT IN MONTROSE II (25 Cal.App.4th 902); PLAINTIFF'S REQUEST FOR CONTINUED STAY OF ALL INDEMNITY-RELATED PROCEEDINGS; MOTION OF DEFENDANT AYLIFFE AND COMPANIES AND OTHER DEFENDANT INSURERS TO SET THE CASE FOR TRIAL; AND MOTION OF DEFENDANT TRAVELERS TO SET TRIAL IN THE IRON MOUNTAIN, PARR-RICHMOND AND STRINGFELLOW MATTERS

Introduction

This court has reviewed the pleadings and supplemental pleadings filed with respect to this submitted matter. (See e.g. Transcript of hearing of December 9, 1994 where the court lists the

pleadings received and considered, page 3, line 3 - page 6, line 3. The supplemental pleadings were filed in response to a suggestion made by the court at the hearing on January 6, 1995.) The evidence presented and the authorities cited were also reviewed. The court also read the transcripts of the lengthy hearings relating to this matter which were held on August 12, 1994, December 9, 1994, January 5, 1995 and January 6, 1995.

The aforementioned transcripts reflect the considerations and analysis of the court. They also show that the parties were given fair notice of the nature and purpose of the briefing and the hearings (in response to Montrose II) as well as a full and unrestricted opportunity to present their positions about how this action should proceed. The record of the hearings as contained in the transcripts are referred to and incorporated in this ruling.

Certain counsel referred to this court's case management order in another coverage case, World Oil Company v. Zurich American Insurance Company, et al (BC 017852). That case, however, is not relevant. First, it is not a published appellate decision. Moreover, World Oil is a separate, unrelated case, involving different facts. Additionally, a review of the pleadings in the World Oil case confirm that the parties there took different positions as to a stay/case management order than the parties have in this case. In sum, the World Oil case cannot be compared to this case.

As noted at the recent hearings, the written and oral presentations by all parties were commendable. The issues before the court and counsel as to stay and case management are novel and complex. Obviously, the burden on primary carriers who are paying

millions of dollars in defense costs is tremendous, especially in light of the highly protracted nature of the underlying proceedings, Iron Mountain in particular. As set forth in their papers, the interests of the insureds are likewise considerable. Important rights of the policyholders and the carriers are involved in the case management issues addressed herein.

The court would note preliminarily that this ruling is not immutable. It will be subject to review on noticed motions for relief from stay and at periodic status conferences set by the court. Additionally, motions for reconsideration and modification of this order can be brought where justified by new facts or law. CCP 1008.

General Ruling

The following ruling is based primarily on the pleadings and evidence submitted and on the factors set forth in Montrose II. With certain exceptions and modifications set forth in this order, the court grants plaintiffs' request for a stay of all indemnity-related proceedings.

This court made a separate analysis as to each of the three groups of underlying lawsuits, the Stringfellow, Parr-Richmond (Levin Metals) and Iron Mountain actions. Trial(s) for declaratory relief will not be set at this time as to any of these actions. Pursuant to the grounds set forth in plaintiffs' papers, the coverage trial as to each of the three sites will be stayed until resolution of the underlying action. Trial(s) in the coverage action would potentially prejudice plaintiffs in the underlying proceedings. Plaintiffs made a strong showing that the coverage questions turn on facts to be litigated in the underlying actions,

that coverage questions are logically related to issues of consequence in the underlying cases, and that they would face a risk of prejudicial, inconsistent factual determinations in the absence of a stay of the declaratory relief trial(s). Additionally, as plaintiffs assert, an anticipatory indemnity trial would not be in the interests of justice or judicial economy.

As to dispositive motions, the court makes a distinction between summary judgment motions to terminate the duty to defend and summary judgment motions which seek a determination of the duty to indemnify. Motions which seek a determination of the duty to indemnify will be stayed, pursuant to grounds set forth in the plaintiffs' papers.

As to each of the coverage defenses outlined in the defendants' pleadings, the plaintiffs made a sufficient showing of a significant overlap of issues of consequence and proved that they would be prejudiced unless adjudication of those defenses was stayed. This showing applies to motions seeking a termination of the duty to defend as well as motions seeking a determination of the duty to indemnify. Pursuant to this showing by the plaintiffs, the court will also stay motions to terminate the duty to defend, but will, out of an abundance of caution, expressly permit the individual primary carriers to seek relief from this stay in order to bring these motions.

The carriers have not shown that motions to terminate the defense duty could be made without prejudicing the insured in the underlying actions. The plaintiffs presented convincing arguments to the contrary. Nevertheless, the court will permit the carriers to, in effect, brief this issue further and seek relief from the

stay in this area for several reasons. First, as indicated at the hearing, the court recognizes that complex, novel issues confront the court and counsel on how to proceed in this kind of case. Second, the underlying litigation is protracted and the burden on carriers paying defense costs is substantial. Additionally, carriers should be allowed to attempt to terminate the defense duty if they can show that grounds exist for termination without potentially prejudicing the insured in the underlying case.

The court also notes defense counsel's oral argument, emphasizing that these motions would be based on "claims" and could be decided on the basis of allegations. (See e.g. Transcript of the January 5, 1995 hearing, pages 61 - 62 , 65 - 67 and 70 - 72, but see also pages 106 - 108 and 127 - 128.) The defense did not actually convince the court that such motions could be decided without necessitating a consideration of significant overlapping factual issues. However, the court finds that the defendants should, in effect, be given an opportunity to brief this issue further through motions for relief from stay.

This exception to the stay is also based on the statements of plaintiffs' counsel that "we have no quarrel with the carrier's right, in theory, to file termination motions of the defense." (Transcript of Proceedings on December 9, 1994, page 23, lines 15-17 and page 130, lines 26 - 28. See also Transcript of Proceedings on January 5, 1995, page 152. But see also Transcript of Proceedings on December 9, 1994, page 95, line 23 - page 97, line 1 and page 133, line 6 - page 135, line 22.)

Obviously, a primary carrier cannot ask this court to reconsider a duty to defend motion already presented to and decided

by Judge Wisot, unless the carrier has grounds to support reconsideration (CCP 1008) or has additional evidence to support termination of the duty to defend.

As discussed at the hearing, in order to avoid potential prejudice to the policyholder, it is expected that these motions will be based on allegations in the underlying actions or on facts which were admitted by or already adjudicated against the policyholder in the underlying actions ("undisputed" facts).

In these circumstances, the carriers can file under seal a motion for relief from stay, requesting that the court set a briefing schedule and hearing date on the proposed summary judgment motion. The proposed motion should be included in the sealed papers. The policyholder then can file under seal, its response to the motion for relief.

In its initial response, the policyholder does not have to address the merits of the actual motion for summary judgment/adjudication. The court will first make a determination as to whether relief from the stay can be granted. If it determines that further briefing and rulings on the substantive motion will not potentially prejudice the insured in the underlying proceedings, the court will set a date for plaintiff to file its opposition to the substantive motion, a date for the reply papers and a date for the hearing.

All papers filed and served with respect to this and other motions for relief from the stay shall be confidential and filed under seal. The hearings on said matters will also be confidential and the record sealed. Plaintiffs are invited to draft and circulate a proposed confidentiality order in this area.

Additionally, it is ordered that all indemnity-related discovery will be stayed, pursuant to plaintiffs' papers, with the following exceptions:

(a) There is no stay with respect to discovery responses provided in the underlying actions.

(b) There is no stay of discovery inquiring about the nature and status of the underlying actions. This exception to the discovery stay is limited to interrogatories or requests for production of documents which inquire about "what" is happening, but not "why."

(c) There is, of course, no stay as to records which are public.

Additionally, the parties can and should seek relief from the stay if there is a danger that certain evidence will be lost, destroyed or otherwise compromised. (See e.g. Transcript of the Proceedings of December 9, 1994 at page 100 - 101 and Mr. Gregory's reference to important elderly witnesses.)

As noted above, this order is malleable. This entire order is made without prejudice to the parties' right to seek modifications or revocation. Parties, for example, can seek relief from the stay to conduct certain discovery either by stipulation or motion.

With the exception of motions by primary carriers for relief from stay to file motions to terminate the duty to defend (discussed above), motions for relief from stay must assert new facts or law which was not presented to and considered by the court in connection with the recent hearings.

Before motions for relief from stay or motions to compel are brought, counsel are ordered to meet and confer in person to

ascertain if the dispute can be resolved informally. If a motion is brought, the motion and response must include declarations setting forth the circumstances and the result of the "meet and confer."

At the "meet and confer", counsel may conclude that the discovery, motion or other adjudication is permissible, i.e. because it is related to undisputed facts or issues that are not of consequence in underlying actions. In such cases, a motion for relief or a motion to compel becomes unnecessary. In cases of agreement between the parties, counsel can prepare a stipulation and proposed order, i.e. modifying the stay or providing relief from the stay order.

The court will set a further status conference at 10:30 am on Friday, August 11, 1995. At this conference, plaintiffs shall report on the status of the underlying proceedings. The court will also reconsider and reassess the orders herein.

On or before June 30, 1995, counsel shall file and serve status conference memoranda for the August status conference, addressing the status of this case and the underlying actions and the propriety of this stay order. Such memoranda should also address the other factors set forth in Montrose II. All requests for a modification of this stay order should be accompanied by a notice, memorandum of points and authorities and supporting evidence. Response briefs shall be filed and served by July 28, 1995.

In the meantime, if any claims are resolved in the underlying actions, plaintiffs' counsel shall file with the court a short status report and serve said report on the other parties.

In the remainder of this minute order, the court will indicate in more detail the grounds for its decision. This is not a complete statement, however. Time does not permit the court to present an exhaustive analysis of all the issues.

As to the status of the underlying actions, this court finds that they are still pending and refers to plaintiffs' briefs on this issue. After looking at the carriers' defenses and the issues in the underlying actions, this court finds that defendants failed to show that the defenses could be adjudicated without prejudice to the plaintiffs. The plaintiffs showed the contrary. As to each defense, the plaintiffs showed that adjudication of that defense turned on issues of consequence in the underlying actions and that there would be a risk of inconsistent factual determinations. As grounds for this ruling, the court refers to and incorporates plaintiffs' memoranda and evidence. The court also refers to the oral arguments of plaintiffs' counsel at the lengthy hearings and incorporates the record of those arguments in support of its ruling herein.

Finally, although the burdens on the primary carriers are great, the interests and rights of the plaintiffs are entitled to even greater weight under the circumstances. This stay order, therefore, is necessitated pursuant to the direction of the appellate court's opinion in Montrose II.

Findings Re: Iron Mountain

Finality Issue

There is insufficient factual and legal support for the carriers' position that the EPA 106 orders are final. On the contrary, this court finds a lack of finality, pursuant to grounds set forth in

plaintiffs' papers. First, the orders appear to be a part of a phased approach. See e.g. Kelley Supplemental Declaration, filed on December 7, 1994; Kelley Declaration, filed November 14, 1994, particularly paragraphs 8 & 11.

Moreover, the EPA 106 orders are not a final adjudication of liability. See e.g. Exhibit 8 to the Kelley Declaration, filed November 14, 1994. As Travelers states in its Memorandum of Points and Authorities in Support of the Motion for Summary Adjudication of Issues Re" Excess Insurers' Duty to Defend Iron Mountain Claims, filed December 9, 1994, "once a party complies with the Order, the responding party has the right to petition the government for reimbursement from the Superfund for its costs of compliance. Id. Section 9606(b)(2)(A). If the government denies the party's request for compensation, the party may then file suit against the government in federal court seeking reimbursement. Id. Section 9606(b)(2)(B)." (Memorandum, page 10.)

As plaintiffs assert, the 106 and 107 proceedings are related. See 42 USC Sections 9606(b)(2)(C), 9606(b)(2)(D), 9607(b) and 9613(f)(1). Treating the 106 orders as final could jeopardize Rhone-Poulenc's attempt to seek reimbursement or contribution. See Kelley's Supplemental Declaration, filed December 7, 1994, and the pleadings filed in the underlying action contained in Exhibit 8 to the Kelley Declaration, filed November 14, 1994, including the answer, cross-claims and counterclaims.

Prophylactic Issue

The carriers did not present sufficient grounds to support their position that the "future harm" defense can be adjudicated at this time. Rhone-Poulenc showed that significant issues overlap and

that it would be potentially prejudiced if this defense were adjudicated. To rebut this defense and preserve its right to coverage, there is a likelihood that Rhone-Poulenc would have to take the following two positions at odds with its position in the underlying action: (1) that property damage occurred and (2) that the EPA's orders are properly responding to past property damage. In the underlying case, Rhone-Poulenc is asserting that there is no property damage and that the EPA's response has been arbitrary and capricious.

As the plaintiffs object, it appears that inquiry into this defense would necessarily involve foundational evidence as to the existence, cause, timing and extent of the damage which are all issues in the underlying 107 proceeding where plaintiff seeks to avoid liability or allocate costs to third parties.

Additionally, as plaintiffs object, adjudicating this defense at this time would be premature. The defendants are asking the court to examine the EPA orders on a piecemeal basis.

Finally, it should be noted that this court denies the specific request which Travelers made at the hearing for permission to file a summary judgment motion based on the future harm defense.

Known Loss/Loss in Progress Defense

Plaintiffs showed that adjudication of the known loss defense at this time would potentially prejudice them. There is an overlap of issues of consequence. As presented in the carriers' papers, this defense turns on their position that there is no fortuity because AMD from Iron Mountain has been a "perceived," a known problem for decades. Rhone-Poulenc, however, asserts convincingly that responding to this defense would necessitate briefing on and

adjudication of at least two key issues in the underlying case, (1) whether there has been any property damage associated with Iron Mountain and (2) whether Rhone-Poulenc knew of the damage or the "perception" of damage - i.e. whether Rhone-Poulenc was an "innocent." (See Transcript of the January 5, 1995 hearing, pages 77 & 78.) Rhone-Poulenc has alleged in the underlying proceedings that AMD released from Iron Mountain has not caused the injury or necessitated the EPA's response. See e.g. Kelley Declaration, filed November 14, 1994, paras. 4 and 12 and Exhibit 2. It also takes the position below that it was not aware of any problem or perceived problem during the relevant period.

In responding to this defense, Rhone-Poulenc could also be compelled to take positions that compromise its assertions in the underlying action (1) that the EPA's response has been arbitrary and capricious and (2) that the EPA has responded to problems created by others. The court's adjudication of this defense could adversely affect Rhone-Poulenc as to these two issues.

"Occurrence" Exclusion Defense

Adjudication of the carriers' defense of no "occurrence" would also expose Rhone-Poulenc to prejudice in the underlying litigation. Plaintiffs have shown that there are at least the following two areas where issues overlap: (1) property damage and (2) whether property damage was expected or intended. In the underlying case, it is Rhone-Poulenc's position that there was no damage from AMD, and in any event, it did not intend or expect any harm. Adjudication of the "no occurrence" coverage defense would very likely prejudice plaintiff's position in the underlying case.

Pollution Exclusion Defense

Similarly, responding to the pollution exclusion defense would require Rhone-Poulenc to present evidence on issues of consequence in the underlying case. There would also be a risk that in ruling on this defense, the court would make factual determinations adverse to the policyholder in the underlying proceedings.

Overlapping issues of consequence include the issue of whether there is property damage on account of the AMD, whether AMD from Iron Mountain is a cause of the releases and the resultant injury alleged or whether the release and damage were caused by acts of God (the "boom" events), the government's conduct and/or other mines. These are issues in the underlying case where the policyholder seeks contribution, indemnification and/or recoupment. (See Exhibit 8 to Kelley Declaration, including Rhone-Poulenc's Answer and Counterclaims.) They are also issues in the underlying proceedings where plaintiff asserts that the EPA's remedies are arbitrary and capricious. Plaintiffs' papers showed that the aforementioned issues would be raised here if the defendants are permitted to litigate their pollution exclusion defense. Other obvious overlapping issues of consequence include the policyholder's knowledge, expectation and intention.

Findings Re: Stringfellow

The findings regarding the Stringfellow site are similar to those findings set forth above with respect to the Iron Mountain site.

Finality Issue

As plaintiffs asserted in their written materials and oral argument, the federal action concerning the Stringfellow site is

still pending. For example, issues of allocation among potentially responsible parties, including the insureds remain to be adjudicated. The consent decree is only a partial disposition. (See Insureds' Memorandum, filed November 14, 1994, pages 52 - 56, and transcript of the proceedings on January 6, 1995, pages 43 - 48. See also Dahlquist Declaration, filed November 14, 1994.)

Defendant Travelers presented insufficient evidence to the contrary.

Prophylactic Issue

As plaintiffs assert, adjudication of this issue would inevitably lead to multiple proceedings, since it appears that the government has not selected final remediation measures. Moreover, the prophylactic defense involves litigation of facts that are logically related to unresolved issues of consequence in the Stringfellow action. Plaintiffs have shown that inquiry into the nature of the costs would necessarily involve foundational evidence relating to the existence, cause, timing and extent of property damage - issues that remain to be litigated during the allocation phase of the underlying action. Additionally, the issue of whether the responses constitute proper remedial measures is logically related to the issue in the underlying proceedings as to whether the response costs are inconsistent with the National Contingency Plan and therefore unrecoverable.

Trigger of Coverage Issue

As plaintiffs assert, adjudicating the "trigger" issue would potentially prejudice the plaintiffs in the underlying case. In addressing this issue, the plaintiffs probably would have to present evidence that conditions at the Stringfellow site

constitute property damage, resulting from releases of their waste or their customers' waste from the site. There would probably be evidence that particular chemicals were released from the site at certain periods of time and that such releases caused the property damage in question at certain periods of time. (See e.g. Dahlquist Declaration, filed November 14, 1994, paragraphs 23 & 25.)

In sum, there are overlapping issues as to whether and when there were releases and property damage.

Expected/Intended Defense

As plaintiffs contend and Travelers concedes, adjudication of the elements in this defense would prejudice plaintiffs in the underlying action. Plaintiffs' intentions and expectations are clearly relevant to the allocation proceedings in the underlying action. (See e.g. Dahlquist Declaration, paragraphs 25 and 26.)

Known Loss/Loss in Progress Defense

Litigating this defense would also implicate significant unresolved underlying issues, including the issue of the existence and timing of specific damage as well as the plaintiffs' knowledge and expectation of such damage. All these issues bear upon the allocation question in the underlying case.

Pollution Exclusion Defense

Adjudication of this defense would also involve issues and evidence which are significant in the allocation-related proceedings in the Stringfellow site, including evidence as to the existence, extent, sources, causes, expectation and nature of releases from the Stringfellow facility. (See e.g. Dahlquist Declaration, paragraphs 23 & 24 and Exhibit 1 thereon, particularly at pages 227 & 228.) Although defendants assert that their motion

would not be prejudicial because it would be based on underlying allegations, there is still a reasonable likelihood that plaintiffs would have to present the aforementioned evidence to respond to the motion. In other words, whether there was property damage, whether it arose out of particular releases and whether plaintiffs expected or intended any releases from the Stringfellow site are all overlapping issues of consequence.

Findings Re: The Parr-Richmond Action

The findings with respect to the Parr-Richmond action are similar to the findings with respect to the Iron Mountain and Stringfellow proceedings as forth above.

Finality

Pending matters pertaining to the Parr-Richmond site are a consolidated, private CERCLA cost-recovery action filed in 1984 by the present owner of the site where the Heckathron formulating facility once stood, and related EPA administrative proceedings under CERCLA section 106. Issues still pending include Montrose's liability under CERCLA and whether Montrose should be held responsible for alleged property damage at the Heckathron site. If Montrose is found liable, then allocation proceedings will take place. See e.g. Raushenbush Declaration, filed November 14, 1994, and Insureds' Memorandum, filed November 14, 1994, pages 67 - 69.)

Expected/Intended Defense

As plaintiff asserts and as Travelers appears to concede, it would be prejudicial to adjudicate this defense at this time. (See transcript of proceedings on January 6, 1995, page 89. See also Insureds' Memorandum, filed November 14, 1994, pages 71 - 72.)

Trigger of Coverage Issue

Montrose has shown an overlap of issues of consequence relating to when and where releases of DDT took place. In responding to this defense, Montrose asserts that it would have to prove property damage during the policy period and that it would be prejudiced in the underlying action where it contends that DDT did not cause the property damage. (See Raushenbush Declaration, filed November 14, 1994, paragraph 15 and Insureds' Memorandum, filed November 14, 1994, pages 70 & 71; transcript of the proceedings on January 6, 1995, pages 98 - 100 and 119 - 120.)

Known Loss/Loss in Progress Defense

Adjudication of this defense would also implicate unresolved underlying issues, including the existence and timing of property damage and knowledge of such property damage on the part of Montrose and Heckathorn. (See e.g. Raushenbush Declaration, filed November 14, 1994, paragraphs 13 & 14.)

Pollution Exclusion Defense

Montrose has also shown that the pollution exclusion defense is inextricably entwined with facts at issue in the underlying proceedings and that adjudication of this defense would be prejudicial. Overlapping issues of consequence include the following: whether there was property damage; whether Heckathorn intended or expected all of the damage; whether Heckathorn complied with the laws; whether Heckathorn is a person or organization for whose acts or omissions Montrose is liable. Even if the carrier's motion was based on "allegations," it is likely that the aforementioned factual issues would be addressed by Montrose in its response to a summary judgment motion. It appears that evidence

would be presented concerning the source of releases at the Heckathorn site, the nature of those releases and whether such releases were caused

in a "sudden and accidental" manner or were "expected or intended."

(See e.g. transcript of proceedings on January 6, 1995, pages 91 - 97 and 116 - 119; Insureds' Memorandum, filed November 14, 1994, page page 73.)

The court clerk shall mail a copy of this minute order to liason counsel, who in turn shall serve copies of this order on other counsel within three court days. On behalf of the plaintiffs, the clerk shall serve Cary Lerman, Esq., of Munger Tolles & Olson who shall serve other counsel for plaintiffs. On behalf of the defendants, the clerk shall serve Fred Gregory, Esq. of Gibson, Dunn & Crutcher who shall serve other defense counsel.

Dated: February 10, 1995

~~VALERIE I BAKER~~
VALERIE BAKER
Judge

DECLARATION OF SERVICE

I, Heather E. Bond, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the parties listed below were served in the manner listed below:

On October 18, 2012, I caused a copy of Plaintiffs/Appellants' (1) Reply to Answer to Motion for Discretionary Review; (2) Appendix to Plaintiffs/Appellants' Motion for Discretionary Review; and (3) this Declaration of Service to be delivered on this date via Legal Messenger to:

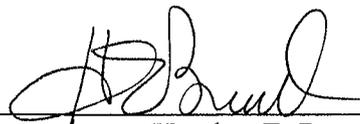
Michael Hooks
Matthew Adams
FORSBERG UMLAUF, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-2047

On October 18, 2012, I further served via FedEx copies of the above-referenced documents to Defendants/Respondents' out-of-state co-counsel:

J. Randy Evans
Joanne L. Zimolzak
McKENNA LONG & ALDRIDGE LLP
1900 K Street NW
Washington, D.C. 20006

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of October, 2012, at Seattle, Washington.



Heather E. Bond