

IN THE SUPREME COURT OF THE STATE OF VERMONT

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VERMONT SUPREME COURT

THOMAS QUESNEL and ELIZABETH QUESNEL,  
and THOMAS QUESNEL as Co-Administrator of the  
Estate of MATTHEW J. QUESNEL,  
Plaintiffs-Appellants,

v.

THE TOWN OF MIDDLEBURY, ET AL  
and CHRISTOPHER DUNDON,  
Defendants-Appellees,

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.,  
Third-Party Plaintiffs-Cross-Appellants,

v.

HANOVER INSURANCE COMPANY and  
MASSACHUSETTS BAY INSURANCE COMPANY,  
Third-Party Defendants-Appellees.

SUPREME COURT DOCKET NO. 96-553

Appeal from  
Addison Superior Court  
Docket No. S151-94Ac

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CROSS-APPELLANTS' PRINTED CASE

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Allan R. Keyes, Esquire  
Ryan Smith & Carbine, Ltd.  
PO Box 310  
Rutland, Vermont 05702-0310

Attorneys for Cross Appellants

## TABLE OF CONTENTS

Order entered September 12, 1995.....	1
Order entered May 17, 1996 .....	5
Order entered August 22, 1996 .....	9
Judgment entered October 25, 1996 .....	11
Docket Entries .....	14
Dundon's Third-party Complaint, filed December 21, 1994 (with coverage position letters).....	21
Hanover's Third-party Answer, filed January 30, 1995 .....	32
Hanover's Motion for Protective Order, filed May 9, 1995 .....	35
Dundon's Motion to Compel and Reply to Hanover's Motion for Protective Order, filed May 16, 1995 .....	39
Hanover's Motion to Stay Discovery, filed November 27, 1995.....	44
Dundon's Motion for Reconsideration (of Motion to Compel), filed November 30, 1995 .....	48
Entry Order re Motion to Stay Discovery, December 4, 1995.....	50
Entry Order re Motion for Reconsideration, March 7, 1996 .....	51
Hanover's Motion for Summary Judgment, filed November 27, 1995 .....	52
Hanover's Statement of Undisputed Facts, filed November 27, 1995 (with excerpt of Exhibit B, general liability policy) .....	54
Dundon's Motion for Partial Summary Judgment with Statement of Material Facts, filed January 8, 1996 .....	75
Hanover's Response to Dundon's Statement of Material Facts, filed February 20, 1996 .....	82
Transcript of Oral Argument, April 3, 1996 .....	85

STATE OF VERMONT  
Addison County, ss.:

SUPERIOR COURT  
Docket No. S 151-94 Ac

THOMAS QUESNEL, et al.     )  
  )  
v.                                     )  
  )  
TOWN OF MIDDLEBURY, et al.   )  
  )  
v.                                     )  
  )  
CHRISTOPHER DUNDON, et al.   )  
  )  
v.                                     )  
  )  
HANOVER INS. CO., et al.       )

ENTRY

Matthew Quesnel died in a Middlebury sewer while working for Dundon. His parents bring this action under Vermont's Wrongful Death Act and under common law "seeking damages for [their] lost love, companionship, consortium, future support and care and other pecuniary and non-pecuniary injuries." At his death, Matthew Quesnel left a wife and child. These latter survivors, however, have waived any claim to be next of kin for the purposes of this action or the Wrongful Death Act, "disclaimed" their rights as "next of kin," and thereby purport to permit decedent's parents to maintain this action.

Defendants seek to dismiss the complaint, on the ground that it is insufficient on its face. They assert that Vermont's Wrongful Death Act limits the class of persons who may recover under it to the decedent's "wife and next

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SEP 13 1995

of kin," 14 V.S.A. sec. 1492(b), and that surviving parents are not within that class when there are a surviving wife and child.

We agree with defendants that surviving parents are not entitled to damages under the Act when there is a wife and child surviving. The statutory language is plain; as such it must be followed. Were there not such survivors, the parents would be able to pursue this claim, but that is not the case here. There is no provision in the Act for the surviving wife and child to step aside or disclaim their status. The Act does not state that the wife and child must commence an action, that act must be done by the personal representative. Rather, the award specified by the Act is "such damages as are just, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin...." Hence, the parents' loss of consortium or support is not the relevant measure of statutory damages, as they are not the next of kin. "Next of kin" carries the same meaning in the Wrongful Death Act as it does in the law of descent. Mobbs v. Central Vt. Rlwy., 150 Vt. 311, 315 (1988). Although the law of descent is thereby adopted for the purpose of determining who is the next of kin, it is not adopted for any other purpose to which it may conceivably be put, such as disclaimer. Plaintiff has pointed us to no caselaw suggesting that disclaimer has somehow been permitted by next of kin in wrongful death claims, thereby permitting the next thereafter of kin to recover. By contrast, defendants cite Lawrence v. Whittle, 146 Ga.App. 686, 247 S.E.2d 212 (1978), which refused to permit a wrongful death claim by a former wife, when a second wife survived. Although not directly on point, Lawrence v. Whittle does support the proposition that relatives in general, even close relatives, may not initiate wrongful death actions unless directly within the permitted class. Hence, it is the loss suffered by wife and child which must govern this case. For having stated a claim based on the loss of other persons, plaintiff's complaint must fail; it states a claim for which relief may not be granted.

Plaintiff asserts that he has a common law right, with his wife, to recover their damages. Although he cites Moragne v. States Marine Lines, 398 U.S. 375 (1970), for the proposition that the common law may fashion a remedy in the absence of any governing wrongful death statute, that is not the case we face here. In this case, there is a statute, it provides a remedy and thereby an obligation. But the remedy is for the benefit of other persons than

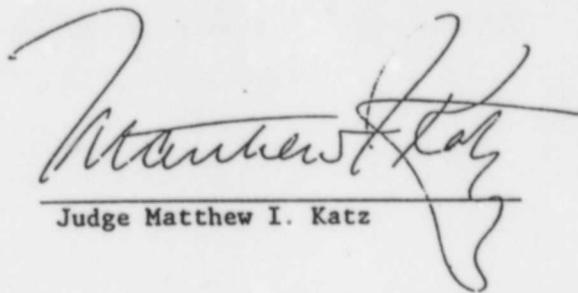
plaintiff and his wife. The Legislature has spoken on the question of compensation for wrongful death. Hence, Moragne, which is written against the backdrop of legislative silence, is not germane.

Plaintiff next argues that denial of a remedy to surviving parents is unconstitutional as a denial of remedy. But we are not dealing with access to courts or court procedure. Instead, we are dealing with substantive rights or recovery and the measure of damage. This area of rights and remedies in civil litigation is normally to be measured by the "rational state interest" test in the face of constitutional challenge. We conclude that a rational purpose exists and is served by the present statutory scheme, and it is therefore a permissible policy decision on the part of the Legislature. By limiting the class of persons permitted to recover, the Legislature has left those within the class better situated. The tortfeasor's assets are available to those within the class, and need not be divided among some larger class, thereby diminishing those remaining for the beneficiary class. Without limitation, it would be reasonable to permit recovery by surviving parents, but it might also be permissible to permit recovery by "significant others," old friends, employers. All such potential persons may well have suffered pecuniary loss in a wrongful death. May they all recover? If so, the available recovery is diluted, or at least may be. A tortfeasor may be more reluctant to settle with the closest of surviving kin, while waiting to see what other claims may be asserted. That would deny benefits to the next of kin in the period soon after death, when they might be most needed. For all these reasons, we deny the constitutional challenge to statutory scheme.

Regarding the cross motions of Dundon and Hanover Insurance Company, the court denied the motion of Dundon regarding duty to defend and indemnify and for damages. The court grants Hanover's motion for partial summary judgment, and declares that any claim of Dundon against his insurers is presently premature, as Dundon's retained limit has not yet been reached.

All other motions appear moot in light of the ruling dismissing the complaint.

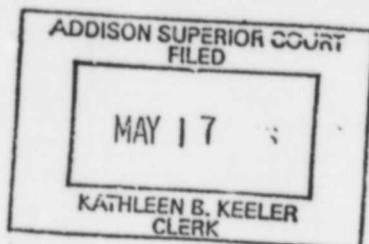
Dated at Middlebury, Vermont, September 12<sup>th</sup>, 1995.

  
Judge Matthew I. Katz

STATE OF VERMONT  
ADDISON COUNTY, SS

ADDISON SUPERIOR COURT  
DOCKET NO: S151-94Ac

THOMAS QUESNEL, et al. )  
Plaintiffs )  
v. )  
THE TOWN OF MIDDLEBURY and )  
CHRISTOPHER DUNDON )  
Defendants )  
CHRISTOPHER DUNDON and DUNDON )  
HEATING & PLUMBING, INC. )  
Third-party Plaintiffs )  
v. )  
HANOVER INSURANCE COMPANY and )  
MASSACHUSETTS BAY INSURANCE )  
COMPANY )  
Third-party Defendants )



ORDER

Hearing was held on April 3, 1996 on the cross motions for summary judgment filed by Third-party Plaintiffs and Third-party Defendants. On consideration thereof and the written and oral arguments of counsel, it is hereby DECLARED and ORDERED:

1. The Third-Party Defendants' Motion for Summary Judgment is Granted in part: In view of the dismissal of Quesnel's claim against Christopher Dundon in this Court's Entry dated September 12, 1995, the Third-party Plaintiffs' claims for indemnity with respect to Quesnel's claim are also dismissed; the dismissal of these indemnification claims is without prejudice to their renewal if the dismissal of Quesnel's claim is reversed on appeal.

2. The Third-Party Plaintiffs' Motion for Partial Summary Judgment is granted in part: Under commercial general liability

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policy no. ZDV 3989031 issued to Dundon Heating and Plumbing, Inc., Third-party Defendant Massachusetts Bay Insurance Company has a duty to defend Christopher Dundon against the Quesnel claim. Pursuant to the terms and conditions of policy no. ZDV 3989031, Massachusetts Bay Insurance Company is obligated to reimburse Third-party Plaintiffs for those expenses and costs, including attorneys fees, that have been reasonably incurred in investigating and defending the Quesnel claim. Massachusetts Bay Insurance Company's defense of Christopher Dundon hereunder shall be without waiver or loss of any contractual or legal rights, including without limitation (i) its right to avail itself of any and all coverage defenses, and to appeal this Court's rulings with respect to such coverage defenses, and (ii) any right of recoupment of defense costs, in the event that this declaration that Massachusetts Bay Insurance Company must defend Christopher Dundon is reversed upon appeal.

3. With respect to umbrella policy UHV 3989032 issued to Dundon Heating and Plumbing, Inc., there is no reason at this time to change the Court's Entry dated September 12, 1995; whether there is a duty to defend under that policy remains premature because the retained limit has not been reached. The cross motions of Third-party plaintiff and Third-party defendant are therefore denied in pertinent part without prejudice.

4. The question of whether there is a duty to defend under workers compensation and employers liability policy no. WHV 3998638-01 is rendered moot by the Court's declaration that there is a duty to defend under the comprehensive general liability

policy. The cross motions of Third-party plaintiff and Third-party  
" defendant are therefore denied in pertinent part without prejudice.

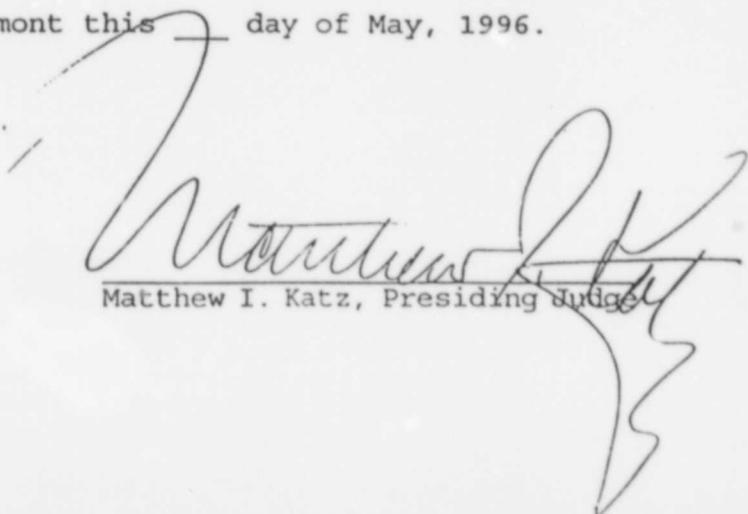
5. The parties shall attempt to resolve by agreement the amount of attorney's fees and expenses that have been reasonably incurred by Third-Party Plaintiffs in investigating and defending the Quesnel claim, and within 30 days shall file a stipulation, or notify the Court if they have been unable to agree.

6. Third-party Defendants' denial of coverage under all three of the insurance policies at issue in this case was reasonable, and therefore Third-party Plaintiffs' claims for attorneys' fees in prosecuting the third-party claims, and for punitive damages, are dismissed.

7. Third-Party Plaintiffs shall ~~shall not~~ recover from Massachusetts Bay Insurance Company their costs in bringing the third-party action.

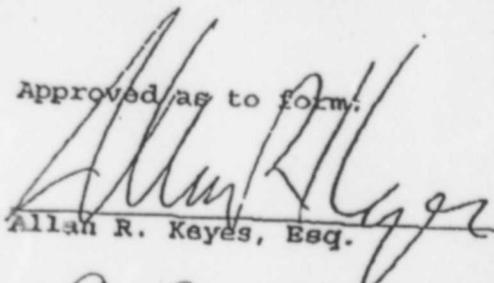
8. All other motions are moot in the light of the above rulings, and any and all claims and counterclaims between Third-Party Plaintiffs and Third-Party Defendants are dismissed without prejudice.

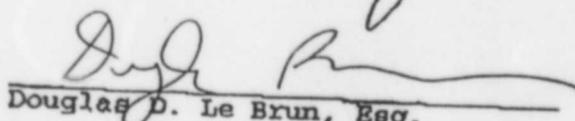
Dated at Middlebury, Vermont this 7 day of May, 1996.

  
Matthew I. Katz, Presiding Judge

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Approved as to form:

  
Allan R. Keyes, Esq.

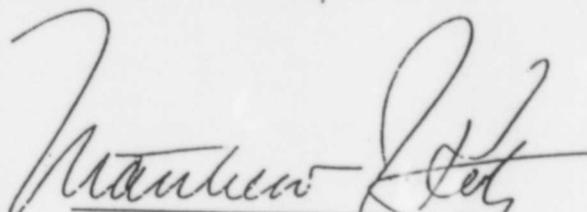
  
Douglas D. Le Brun, Esq.



does not show why Dundon's own attorneys, who have not been guaranteed payment by Hanover, and enjoy no expectation of future employment from it, should have to work on Hanover's schedule. In the absence of any agreement, it is the court's obligation to award reasonable attorneys fees.

We find no factual dispute on this latter standard. Further, we have no difficulty finding that the fees charged were reasonable, under all the circumstances. We therefore approve the application for fees in the amount of \$5,732.61, and will expect to execute a judgment incorporating such an award.

Dated at Middlebury, Vermont, this 22<sup>nd</sup> day of July, 1996.

  
Matthew I. Katz Judge

STATE OF VERMONT  
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT  
DOCKET NO. S151-94Ac

THOMAS QUESNEL, ET AL  
Plaintiffs,

vs.

THE TOWN OF MIDDLEBURY, ET AL  
Defendants

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.,  
Third-Party Plaintiffs,

vs.

HANOVER INSURANCE COMPANY and  
MASSACHUSETTS BAY INSURANCE COMPANY,  
Third-Party Defendants.

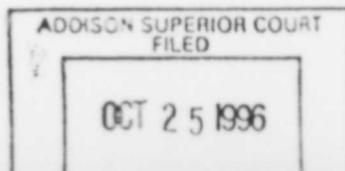
JUDGMENT

By Order entered September 12, 1995, the Court granted Defendants' motions to dismiss Plaintiffs' claim. By Order entered May 17, 1986, the Court ruled on cross-motions for summary judgment filed by Third-Party Plaintiffs and Third-Party Defendants. By entry of August 22, 1996, the Court granted summary judgment approving Third-Party Plaintiffs' application for fees and requested submission of a judgment incorporating such award.

The entry of August 22, 1996, together with prior orders in the file, resolves all matters in controversy between all parties. Therefore, based on said orders:

IT IS ORDERED AND ADJUDGED

1. that Plaintiffs take nothing, that the action is dismissed on the merits, and that Defendants recover of the Plaintiffs Defendants' costs of action;
2. that Third-Party Defendants' Motion for Summary Judgment is Granted in part: In view of the dismissal of Quesnel's claim against Christopher Dundon in this Court's Entry



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dated September 12, 1995, the Third-Party Plaintiffs' claims for indemnity with respect to Quesnel's claim are also dismissed; the dismissal of these indemnification claims is without prejudice to their renewal if the dismissal of Quesnel's claim is reversed on appeal;

3. that Third-Party Plaintiffs' Motion for Partial Summary Judgment is granted in part: Under commercial general liability policy no. ZDV 3989031 issued to Dundon Heating & Plumbing, Inc., Third-Party Defendant Massachusetts Bay Insurance Company has a duty to defend Christopher Dundon against the Quesnel claim. Pursuant to the terms and conditions of policy no. ZDV 3989031, Massachusetts Bay Insurance Company is obligated to reimburse Third-Party Plaintiffs for those expenses and costs, including attorneys fees, that have been reasonably incurred in investigating and defending the Quesnel claim. Massachusetts Bay Insurance Company's defense of Christopher Dundon hereunder shall be without waiver or loss of any contractual or legal rights, including without limitation (i) its right to avail itself of any and all coverage defenses, and to appeal this Court's rulings with respect to such coverage defenses, and (ii) any right of recoupment of defense costs, in the event that this declaration that Massachusetts Bay Insurance Company must defend Christopher Dundon is reversed upon appeal.

4. that with respect to umbrella policy UHV 3989032 issued to Dundon Heating and Plumbing, Inc., there is no reason at this time to change the Court's Entry dated September 12, 1995; whether there is a duty to defend under that policy remains premature because the retained limit has not been reached. The cross motions of Third-Party Plaintiff and Third-Party Defendant are therefore denied in pertinent part without prejudice.

5. that the question of whether there is a duty to defend under workers compensation and employers liability policy no. WHV 3998638-01 is rendered moot by the Court's

declaration that there is a duty to defend under the comprehensive general liability policy. The cross motions of Third-Party Plaintiff and Third-Party Defendant are therefore denied in pertinent part without prejudice.

6. that Third-Party Plaintiffs recover of Third-Party Defendant Massachusetts Bay Insurance Company the sum of \$5,732.61 representing attorneys fees and expenses of defending the Quesnel claim through April 9, 1996.

7. that Third-Party Defendants' denial of coverage under all three of the insurance policies at issue in this case was reasonable, and therefore Third-Party Plaintiffs' claims for attorneys fees' in prosecuting the third-party claims, and for punitive damages, are dismissed.

8. that Third-Party Plaintiffs shall recover from Massachusetts Bay Insurance Company their costs in bringing the third-party action;

9. that all other motions are moot in the light of the above rulings, and any and all claims and counterclaims between Third-Party Plaintiffs and Third-Party Defendants are dismissed without prejudice.

Dated this 25<sup>th</sup> day of October, 1996.

  
Matthew I. Katz, Presiding Judge

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JURY

THOMAS QUESNEL and ELIZABETH QUESNEL

VS.

TOWN OF MIDDLEBURY,  
THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS,  
THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS,  
THE MIDDLEBURY BOARD OF SELECTMEN,  
and CHRISTOPHER DUNDON vs. Hanover Ins. Co. & Mass. Bay I  
CIVIL ACTION

Complaint dated June 30, 1994  
Service (Dundon) @ Middlebury July 15, 1994  
(all Middlebury Dfts) @ Middlebury July 15, 1994  
ENTERED June 30, 1994

June 30, 1994	J.Dumont filed Jury Demand.
Sept. 28, 1994	J. Dumont advises Court he will be amending the complaint and Dfts will answer thereafter.
Nov. 18, 1994	J. Dumont filed <u>Motion</u> to Amend Complaint.
Dec. 14, 1994	W. O'Rourke filed Answer to Amended Complaint, Defenses, Jury Demand, Discovery Certificate of First Interrogatories and Requests to Produce.
Dec. 16, 1994	Order filed <u>granting</u> Motion to Amend Complaint; copies to Dumont, O'Rourke. Amended Complaint filed.
Dec. 19, 1994	M. Gannon filed Notice of Appearance for Town of Middlebury.
Dec. 21, 1994	A. Keyes filed Third-Party Complaint against Hanover Insurance Co. and Massachusetts Bay Inc. Co., Jury Demand.
Dec. 27, 1994	Served on MA Bay Ins.Co. @ Montpelier Dec. 22, 1994 Served on Hanover Ins.Co. @ Montpelier Dec. 22, 1994 A. Keyes filed Affidavit of Mailing on Third-Party Defendants.
Jan. 27, 1995	A. Keyes filed Request to Enter Default of 3rd Party Dfts. Hanover Ins. Co. and Massachusetts Bay Ins. Co., Affid. for Entry of Default, Cert. of Service. Default Noted. J. Spink filed faxed Appearance, Answer for Third Party Dfts. Hanover Ins. Co. and Mass. Ins. Co. A. Keyes <u>Withdraws</u> Request to Enter Default of 3rd Party Dfts. via telephone.
Jan. 30, 1995	J. Spink filed Original Notice of Appearance, Answer and Affirmative Defenses for Hanover Insurance and Massachusetts Bay Insurance.
Jan. 31, 1995	A. Keyes files <u>withdrawal</u> of Request for Default.
Feb. 23, 1995	M.Gannon filed Answer of Middlebury to Amended Complaint, Discovery Certificate of Interrogs & Requests to Produce.
Mar. 2, 1995	A. Keyes filed Discovery Certificate of Expert Interrogato
March 17, 1995	Status conference, M.Gannon did not appear, Pre-trial Order issued: discovery on coverage complete 8/15/95 & Motion for

000014

THOMAS QUESNEL and ELIZABETH QUESNEL

VS.

TOWN OF MIDDLEBURY,  
THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS,  
THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS,  
THE MIDDLEBURY BOARD OF SELECTMEN,  
and CHRISTOPHER DUNDON

VS. HANOVER INSURANCE  
and MASSACHUSETTS BAY INSURANCE

CIVIL ACTION

PAGE TWO:

March 21, 1995	A. Keyes filed Discovery Certificate of First Interrogos & Requests to Produce.
May 4, 1995	A. Keyes filed <u>Motion</u> for Partial Summary Judgment with Statement of Material Facts and Memorandum of Law, Affidavit of C. Dundon, Memorandum of Atty's Fees and Disbursements.
May 9, 1995	D. LeBrun filed <u>Motion</u> to Dismiss Third-Party Complaint, <u>Motion</u> for Protective Order, Discovery Certificate of Responses to Expert Interrogatories and Partial Responses to First Set of Interrogatories and Requests to Produce.
May 12, 1995	A. Keyes filed Dundon's Reply to Motion to Dismiss Third-Party Complaint.
May 15, 1995	J. Dumont filed Discovery Certificate of Answers to Dft's Interrogatories and Requests to Produce.
May 16, 1995	A. Keyes filed <u>Motion</u> for Judgment on the Pleadings. A. Keyes filed Dundon's <u>Motion</u> to Compel and Reply to Hanover's Motion for Protective Order.
May 24, 1995	D. LeBrun filed Hanover's Opposition to Motion to Compel.
May 26, 1995	A. Keyes filed Dundon's Further Reply to Motion to Dismiss Third-Party Complaint & Memo in Support of Motion to Compel.
May 31, 1995	J. Dumont filed <u>Motion</u> for Extension of Time (to 6/2/95) to respond to Dundon's Motion for Judgment on the Pleadings.
June 5, 1995	J. Dumont filed Memo in Opposition to Motion for Judgment on the Pleadings, <u>Motion</u> to Amend Complaint Paragraph 23. D. LeBrun filed Opposition to Motion for Partial Summary Jdgmt <u>Cross-Motion</u> for Partial Summary Judgment.
June 7, 1995	D. LeBrun filed Hanover's Further Reply to Dundon's Reply.
June 15, 1995	J. Dumont filed Discovery Certificate of Answers to Interrogatories and Requests to Produce.
June 16, 1995	A. Keyes filed Reply Memorandum in Support of Motion for Judgment on the Pleadings. Copy to J. Katz.
June 23, 1995	D. LeBrun filed Hanover's Memorandum in Support of Dundon's Motion for Judgment on the Pleadings. Copy to J. Katz. M. Gannon filed <u>Motion</u> for Summary Judgment of Dfts Middlebury Copy to J. Katz.
June 26, 1995	J. Dumont filed Second Memorandum in Opposition to Motion for Judgment on the Pleadings. Copy to J. Katz. 000015

JURY

S151-94Ac(6)  
James Dumont

ADDISON SUPERIOR COURT

S151-94Ac(6)  
William O'Rourke/Dundon  
Michael Gannon/Midd.  
James Glapp/Hanover & Ma  
James Spink

THOMAS QUESNEL AND ELIZABETH QUESNEL

VS.

TOWN OF MIDDLEBURY,  
THE MIDDLEBURY BOARD OF SEWAGE SYSTEM COMMISSIONERS,  
THE MIDDLEBURY BOARD OF SEWAGE DISPOSAL COMMISSIONERS,  
THE MIDDLEBURY BOARD OF SELECTMEN, AND CHRISTOPHER DUNDON

VS.

HANOVER INSURANCE CO. AND MASSACHUSETTS BAY INSURANCE CO.  
CIVIL ACTION

PAGE #3:

July 3, 1995	M. Gannon filed Supplemental Memorandum of Dfts' Middlebury in Support of their Motion for Summary Judgment.
July 7, 1995	A. Keyes filed Reply Memorandum in Opposition to Cross-Motion for Summary Judgment and in Support of Dundon's Motion for Partial Summary Judgment. Copy to J. Katz.
Aug. 15, 1995	D. LeBrun filed Reply to Dundon's Reply Memorandum in Opposition.
Sept. 5, 1995	M. Gannon filed <u>Motion</u> for Summary Judgment, Exhibits A,B,C; Statement of Uncontested Facts, Discovery certificate of Supplemental Interrogatories and Requests to Produce.
* SEE COMPUTER FOR FURTHER ENTRIES Sept. 12, 1995	ORDER filed: Dft Dundon's Motion for Judgment on the Pleadings <u>granted</u> , Middlebury Dfts' Motion for Summary Judgment of 6/23/95 <u>granted</u> , Dundon's Motion for Partial Summary Judgment against 3rd Party Dfts denied, Hanover & Mass. Bay Insurances' Motion to Dismiss and Motion for Summary Judgment <u>granted</u> , all other pending motions <u>moot</u> . Order filed <u>granting</u> Pltff's Motion to Amend Complaint ¶13; copies to attys.
Sept. 13, 1995	M. Gannon filed Affidavits in Support of Motion for Summary Judgment.
Oct. 6, 1995	J. Dumont filed Notice of Appeal. Notice of Appeal, \$100 filing fee, certified copy of docket entries mailed to Supreme Court, copy to attys.
Oct. 12, 1995	A. Keyes filed Notice of Appeal, check in amount of \$100. Original Notice of Appeal and check in the amount of \$100 forwarded to Supreme Court.
Nov. 27, 1995	D. LeBrun filed <u>Motion</u> to Stay Discovery and for Expedite Consideration; <u>Motion</u> to Dismiss Third Party Complaint of Dundon Heating & Plumbing, Inc.; <u>Motion</u> for Summary Judgment; Statement of Undisputed Facts w/Exhib
Nov. 30, 1995	A. Keyes filed Dundons' Memorandum in Opposition to <u>Motion</u> to Stay Discovery and for Expedited Consideration; Memorandum in Opposition to <u>Motion</u> to Dismiss Third-Part,

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Docket No. 151-6-94 Ancv

Quesnel et al vs. Middlebury, Town of et

Case Type:

Case Track: Not set

Last judge: Matthew I. Katz

Case Status: Disposed

Recused: None

Court/Jury: Jury Trial

Next Hearing:

PARTIES

Case No.	Role	Litigant Name	Attorney Name	Telephone
# 1	plf	Quesnel, Thomas	Dumont, James A.	388-4906
# 2	plf	Quesnel, Elizabeth	Dumont, James A.	388-4906
# 3	def	Middlebury, Town of	Murnane, Janet C.	863-4531
# 4	def	Middlebury Bd. of Sewage System	Murnane, Janet C.	863-4531
# 5	def	Middlebury Bd. of Sewage Disposal	Murnane, Janet C.	863-4531
# 6	def	Middlebury Bd. of Selectmen	Murnane, Janet C.	863-4531
# 7	def	Dundon, Christopher	Keyes, Allan R.	773-3344
# 8	def	Hanover Insurance Company	Lebrun, Douglas	864-5751
# 9	def	Massachusetts Bay Insurance Co	Lebrun, Douglas	864-5751
# 10	ccd	Murnane, Janet C. REMOVED		W:863-4531

DISPUTES

Case Name	Disputants	Dispo Date
cmpl Wrongful Death	p#1-2 v p#3	jdsum 10/25/96
cmpl Wrongful Death	p#1-2 v p#4	jdsum 10/25/96
cmpl Wrongful Death	p#1-2 v p#5	jdsum 10/25/96
cmpl Wrongful Death	p#1-2 v p#6	jdsum 10/25/96
cmpl Wrongful Death	p#1-2 v p#7	jdsum 10/25/96
thp Insurance/Defense & Indemnification	p#7 v p#8	jdsum 10/25/96
thp Insurance/Defense & Indemnification	p#7 v p#9	jdsum 10/25/96

MOTIONS/PETITIONS/REQUESTS FOR RELIEF

Type	Status	Judge	Date
M/for Partial Summary Judgment	denied	MIK	09/12/95
M/to Dismiss Third-Party Complaint	granted	MIK	09/12/95
M/for Judgment on the Pleadings	granted	MIK	09/12/95
M/for Protective Order	moot	MIK	09/12/95
M/to Compel	moot	MIK	09/12/95
M/to Amend Complaint Paragraph 23	granted	MIK	09/12/95
M/for Partial Summary Judgment	granted	MIK	09/12/95
M/for Summary Judgment	granted	MIK	09/12/95
M/for Summary Judgment	granted	MIK	09/12/95
M/to Stay Discovery/for Expedited Consider	moot	MIK	09/12/95
M/to Dismiss 3rd Party Complaint	granted	MIK	12/05/95
M/for Summary Judgment	denied	MIK	03/07/96
M/for Reconsideration (of Motion to Compel.	granted	MIK	04/03/96
M/for Enlargement of Time	order	MIK	03/07/96
M/to Enlarge Time to Respond to Motion	granted	MIK	01/09/96
M/for Partial Summary Judgment	moot	MIK	03/07/96
M/to Amend Complaint	disposed	MIK	05/17/96
M/for Summary Judgment	granted	MIK	04/03/96
M/to Withdraw as Attorney	granted	MIK	08/22/96
	granted	MIK	08/22/96

10/94 Wrongful Death case filed by Plaintiff Thomas Quesnel and Plaintiff Elizabeth Quesnel against Defendant Middlebury, Town of and Defendant Middlebury Bd. Of Sewage System and Defendant Middlebury Bd. Of Sewage Disposal and Defendant Middlebury Bd. Of Selectmen and Defendant Christopher Dundon. Jury trial requested.

15/94 Service complete on party(s) 3-6: personal service. Documents served: Summary of Complaint. Service complete on party(s) 7: personal

service. Documents served: Summons & Complaint.

12/21/94 Third Party Claim filed by Defendant Christopher Dundon against Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. (Dispute 6-7).

05/04/95 MPR 1) Motion for Partial Summary Judgment filed by Defendant Christopher Dundon. Motion for Partial Summary Judgment given to judge.

05/09/95 MPR 2) Motion to Dismiss Third-Party Complaint filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion to Dismiss Third-Party Complaint given to judge.

MPR 4) Motion for Protective Order filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion for Protective Order given to judge.

5/15/95 MPR 3) Motion for Judgment on the Pleadings filed by Defendant Christopher Dundon. Motion for Judgment on the Pleadings given to judge.

5/16/95 MPR 5) Motion to Compel filed by Defendant Christopher Dundon. Motion to Compel given to judge.

05/05/95 MPR 6) Motion to Amend Complaint Paragraph 23 filed by Plaintiff Thomas Quesnel and Plaintiff Elizabeth Quesnel. Motion to Amend Complaint Paragraph 23 given to judge.

MPR 7) Motion for Partial Summary Judgment filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion for Partial Summary Judgment given to judge.

5/23/95 MPR 8) Motion for Summary Judgment filed by Defendant Christopher Dundon. Motion for Summary Judgment given to judge.

05/05/95 MPR 9) Motion for Summary Judgment filed by Defendant Middlebury, Town of and Defendant Middlebury Bd. Of Sewage System and Defendant Middlebury Bd. Of Sewage Disposal and Defendant Middlebury Bd. Of Selectmen. Motion for Summary Judgment given to judge.

05/12/95 SEE FILE/DOCKET BOOK FOR PREVIOUS/OTHER ENTRIES. Finding Filed on MPR 1 by MIK. Finding Filed on MPR 2 by MIK. Finding Filed on MPR 3 by MIK. Finding Filed on MPR 7 by MIK. Finding Filed on MPR 8 by MIK.

Entry Order by Judge Matthew I. Katz: ORDER filed GRANTING Dundon's Motion for Judgment on the Pleadings, GRANTING Middlebury's Motion for Summary Judgment of 6/23/95, DENYING Dundon's Motion for Partial Summary Judgment on 3rd Party Complaint, GRANTING 3rd Party Dfts' Motion to Dismiss & Motion for Summary Judgment. All other pending motions MOOT. Copies to attys. Finding Filed on MPR 4 by MIK.

Finding Filed on MPR 5 by MIK. Finding Filed on MPR 9 by MIK.

Entry order re MPR 6) Motion to Amend Complaint Paragraph 23.

M/Reaction Form. Granted by MIK. Dispute 1-5 Summary Judgment for Defendant. Dispute 6-7 Summary Judgment for Defendant. MPR status changed to denied, MPR 1. MPR status changed to granted, MPR 2. MPR status changed to granted, MPR 3. MPR status changed to moot, MPR 4. MPR status changed to moot, MPR 5. MPR status changed to granted, MPR 7. MPR status changed to granted, MPR 8. MPR status changed to moot, MPR 9. Case Closed.

03/95 M. Gannon filed Affidavits in Support of 9/5/95 Motion for Summary Judgment.

06/95 Notice of Appeal from Party 1-2.

09/95 Complete file mailed to Supreme Court.

12/95 Notice of Appeal from Party 7.

Original Notice of Appeal and check #24977 in amt of \$100.00 forwarded to Supreme Court.

11/95 A. Keyes filed Discovery Certificate of Notice of Deposition of Dft. Hanover.

07/95 MPR 10) Motion to Stay Discovery/for Expedited Consider filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion to Stay Discovery/for Expedited Consider given to judge.

MPR 11) Motion to Dismiss 3rd Party Complaint filed by Defendant Hanover Insurance Company and Defendant Massachusetts Bay Insurance Co. Motion to Dismiss 3rd Party Complaint given to judge.

MPR 12) Motion for Summary Judgment filed by Defendant Hanover

000018

Insurance Company and Defendant Massachusetts Bay Insurance Co.  
Motion for Summary Judgment waiting for Memo in Opposition.

D. LeBrun filed Statement of Undisputed Facts.

11/30/95 Party 7 filed response to MPR 10. Party 7 filed response to MPR 11.  
MPR 13) Motion for Reconsideration (of Motion to Compel filed by  
Defendant Christopher Dundon. Motion for Reconsideration (of Motion  
to Compel waiting for Memo in Opposition.

12/05/95 Entry order re MPR 10) Motion to Stay Discovery/for Expedited  
Consider. M/Reaction Form. Granted by MIK. Until further order.  
Court will review pleadings on 3rd party claims. Copies to Dumont,  
Gannon, Keyes, LeBrun.

12/22/95 D. LeBrun filed Affidavit of C. Poulin in support of Motion for Summary  
Jdgmt.

MPR 14) Request for Enlargement of Time filed by Defendant  
Christopher Dundon. Request for Enlargement of Time given to judge.

01/08/96 Party 7 filed response to MPR 12.

MPR 16) Motion for Partial Summary Judgment filed by Defendant  
Christopher Dundon. Motion for Partial Summary Judgment waiting for  
Memo in Opposition.

01/09/96 Entry order re MPR 14) Request for Enlargement of Time. M/Reaction  
Form. Granted by MIK.

01/10/96 Re-open: to reverse closing entries made in error.

01/16/96 MPR 15) Motion to Enlarge Time to Respond to Motion filed by  
Defendant Hanover Insurance Company. Motion to Enlarge Time to  
Respond to Motion given to judge.

02/20/96 Party 8-9 filed response to MPR 16.

D. LeBrun filed Response to Dundon's Statement of Material Facts.  
MPR status changed to judge, MPR 16.

03/07/96 Entry order re MPR 13) Motion for Reconsideration (of Motion to  
Compel. M/Reaction Form. Order issued by MIK. Counsel ought to  
be able to resolve. Court unlikely to bar summary judgment - if  
appropriate - solely for lack of opportunity to fish.

Entry order re MPR 11) Motion to Dismiss 3rd Party Complaint.  
M/Reaction Form. Denied by MIK. Corporate policyholder joined as 3rd  
party plaintiff.

Entry order re MPR 12) Motion for Summary Judgment. M/Reaction Form.  
Set for hearing per by MIK.

Motion Hearing set for 04/03/96 at 09:00 AM. MPR status changed to  
moot. MPR 15.

04/03/96 MPR 17) Motion to Amend Complaint filed by Plaintiff Thomas Quesnel  
and Plaintiff Elizabeth Quesnel. Motion to Amend Complaint given to  
judge.

Motion Hearing held. MIK/TAPE.

Entry Order by Judge Matthew I. Katz: Motion GRANTED IN PART;  
Coverage Declared; Not Bad Faith to Deny Coverage; A. Keyes to  
prepare Order. Motion to Amend Complaint GRANTED, Amended Complaint  
DISMISSED for grounds previously stated.

Entry order re MPR 12) Motion for Summary Judgment. Contested  
Hearing. Granted by MIK. Notice was given on record.

Entry order re MPR 17) Motion to Amend Complaint. Contested Hearing.  
Granted by MIK. Notice was given on record.

Entry order re MPR 16) Motion for Partial Summary Judgment.  
Contested Hearing. Granted in part, denied in part by MIK.

5/17/96 ORDER filed disposing of Third-party Pltffs' & Dfts' cross-motions  
for summary judgment. Copies to LeBrun, Keyes, Dumont, Gannon.  
Dispute 1-7 Summary Judgment for Defendant. MPR status changed to  
disposed, MPR 16. Case Closed.

5/23/96 J. Dumont filed Notice of Appeal. Notice, certified copy of docket  
entries, filing fee forwarded to Supreme Court.

5/28/96 File hand-delivered to Supreme Court by Linda Richards.

6/17/96 Notice of Appeal from Party 8-9.

Notice of Appeal, filing fee forwarded to Supreme Court. Copies to  
attys.

6/18/96 MPR 18) Motion for Summary Judgment filed by Defendant Christopher  
Dundon. Motion for Summary Judgment waiting for Memo in Opposition.

06/21/96 Notice of Appeal from Party 7

000019

07/23/96 Party 8-9 filed response to MPR 18. MPR status changed to judge, MPR 18.

7/26/96 A. Keys filed Dundon's Reply Memorandum in support of Motion for Summary Jdgt.

08/06/96 Supreme Court entry: cross-appellant Dundon's Motion to Dismiss is granted.

8/19/96 Appearance by Janet C. Murnane as Co-counsel for Defendant. J.Murnane filed Notice of Appearance & Substitution of Counsel (for Dfts).  
MPR 19) Motion to Withdraw as Attorney filed by Defendant Middlebury, Town of and Defendant Middlebury Bd. Of Sewage System and Defendant Middlebury Bd.Of Sewage Disposal and Defendant Middlebury Bd. Of Selectmen. Motion to Withdraw as Attorney given to judge.

8/22/96 Entry order re MPR 19) Motion to Withdraw as Attorney. M/Reaction Form. Granted by MIK.  
Attorney Michael J. Gannon withdraws.  
Appearance entered by Janet C. Murnane on behalf of Defendant Middlebury, Town of and Defendant Middlebury Bd. Of Sewage System and Defendant Middlebury Bd.Of Sewage Disposal and Defendant Middlebury Bd. Of Selectmen. Party 10 Co-counsel for Defendant removed: Substitution of Party.  
Entry Order by Judge Matthew I. Katz: Entry Order regarding Motion for Summary Judgment filed: no factual dispute, fees reasonable, application for fees approved in amount of \$5732.61, judgment to be filed. Copies to Dumont, Keyes, LeBrun, Murnane. MPR status changed to granted, MPR 18.

10/25/96 Entry Order by Judge Matthew I. Katz: JUDGMENT ORDER filed; copies to attys. Dispute 1-7 Summary Judgment for Defendant. Case Closed.

11/05/96 Notice of Appeal from Party 1-2.  
Notice of Appeal, certified copy of docket sheet to Supreme Ct; copy of Notice, docket sheet, transcript order form, docketing statements to attys. S.Lee to Request Waiver of Filing Fee of Supreme Ct.

000020

STATE OF VERMONT  
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT  
DOCKET NO. S151-94Ac

THOMAS QUESNEL, ET AL  
Plaintiffs,

vs.

THE TOWN OF MIDDLEBURY, ET AL  
Defendants

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.,  
Third-Party Plaintiffs,

vs.

HANOVER INSURANCE COMPANY and  
MASSACHUSETTS BAY INSURANCE COMPANY,  
Third-Party Defendants.

### THIRD-PARTY COMPLAINT

1. Christopher Dundon is an individual residing in Orwell, Vermont. Dundon Heating & Plumbing, Inc. is a corporation duly organized and existing under the laws of the State of Vermont authorized to do business in Vermont.

2. Hanover Insurance Company is an insurance company organized and existing under the laws of the State of New Hampshire with a principal place of business at 100 N. Parkway, Worcester MA (01605). It is affiliated with Massachusetts Bay Insurance Company in a group of insurers known as the "Hanover Insurance Companies."

3. Massachusetts Bay Insurance Company is an insurance company organized and existing under the laws of the State of Massachusetts with a principal place of business at 100 N. Parkway, Worcester MA (01605). It is affiliated with Hanover Insurance Company in a group of insurers known as the "Hanover Insurance Companies."

000021

4. On May 8, 1993 Christopher Dundon was President and 51% owner of Dundon Heating & Plumbing, Inc.

5. Hanover Insurance Company issued a certain worker's compensation and employer's liability policy No. 3998638 to Dundon Heating & Plumbing, Inc. which was in full force and effect on May 8, 1993.

6. Massachusetts Bay Insurance Company issued a certain commercial general liability policy No. ZDV 3989031 to Dundon Heating & Plumbing, Inc. which was in full force and effect on May 8, 1993.

7. Hanover Insurance Company issued a certain commercial umbrella policy No. U3989032 to Dundon Heating & Plumbing, Inc. which was in full force and effect on May 8, 1993.

8. Plaintiffs Thomas Quesnel and Elizabeth Quesnel, and Thomas Quesnel as Co-Administrator of the Estate of Matthew J. Quesnel have filed against Christopher Dundon an Amended Complaint, a copy of which is attached. [The "Quesnel claim"].

9. Christopher Dundon timely notified Hanover Insurance Company of the Quesnel claim and has complied with all conditions precedent of the employer's liability policy.

10. Christopher Dundon timely notified Massachusetts Bay Insurance Company of the Quesnel claim and has complied with all conditions precedent of the general liability policy.

11. Christopher Dundon timely notified Hanover Insurance Company of the Quesnel claim and has complied with all conditions precedent of the umbrella policy.

12. The Hanover Insurance Companies have failed or refused to provide Christopher Dundon with a defense and indemnity for the Quesnel claim. Attached are copies of letters stating the Hanover Insurance Companies' grounds.

13. The Hanover Insurance Companies' denial of defense and coverage to Christopher Dundon is wrongful and in breach of their obligations under the law and the policies.

14. Christopher Dundon and Dundon Heating & Plumbing, Inc. have incurred and will incur expense to investigate and defend the Quesnel claim, including attorney's fees.

15. The failure and refusal of the Hanover Insurance Companies to provide a defense and indemnity to Christopher Dundon for the Quesnel claim is such that would allow a jury to award punitive damages.

WHEREFORE, Christopher Dundon and Dundon Heating & Plumbing, Inc. request judgment against Hanover Insurance Company and Massachusetts Bay Insurance Company

- for compensatory damages, including attorneys fees incurred in investigating and defending the Quesnel claim;

- for attorney's fees in prosecuting this third-party claim;

- for punitive damages;

- declaring that Third-Party Defendants Hanover Insurance Company and Massachusetts Bay Insurance Company have a duty to defend and indemnify Christopher Dundon against the Quesnel claim;

- for all sums that may be adjudged against Defendant Christopher Dundon in favor of Plaintiffs Quesnel; and

• for such other relief to which Third-Party Plaintiffs are entitled pursuant to Rule 54(c).

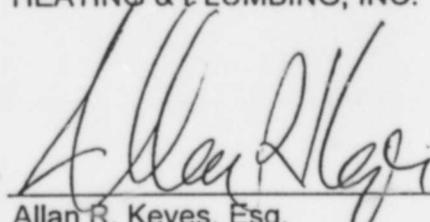
JURY DEMAND

Third-Party Plaintiffs demand trial by jury on all issues so triable.

Dated this 20 day of December, 1994.

CHRISTOPHER DUNDON and DUNDON  
HEATING & PLUMBING, INC.

By

  
Allan R. Keyes, Esq.  
Ryan Smith & Carbine, Ltd.  
PO Box 310  
Rutland, VT 05702-0310

Attachments: Quesnel Amended Complaint  
Coverage Position Letters

5083-1  
#19558

The Hanover Insurance Companies  
Bedford Springs Office Park  
P. O. Box 9599  
Manchester NH 03108  
Telephone: 603/472-9990  
NH Toll-Free: 800/421-9990  
Fax: 603/471-0042

August 1, 1994

DUNDON'S PLUMBING &  
HEATING INC  
ROUTE 22A  
ORWELL VT 05760

Re: Our Insured: DUNDON'S PLUMBING &  
Our File Number: 05 061341 003  
Date of Loss: 05/08/93

Dear Sirs :

We have received notice of your claim for benefits under policy number WHV 3998638 EFFECTIVE 10/1/92 TO 10/1/93. After careful consideration, we have determined that there is no coverage afforded to Chris Dundon for this loss. Please refer to the General Section Part B. of your policy which reads "Who is an insured" You are insured if you are an employer named in ITEM 1 of the Information page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

Unfortunately, Christopher Dundon does not qualify as insured, therefore, we cannot provide a defense nor can we indemnify you for this loss. We also reserve our rights to rely on any other coverage defenses that are known and unknown, and those that may become apparent in the future.

Very truly yours,

Cheryl-Anne Joyal  
Sr. Claims Adjuster



Bedford Springs Office Park  
 PO Box 9599  
 Manchester, NH 03108-9599  
 Tel: (603) 472-9990  
 Toll-Free: 800-421-9990  
 Fax: (603) 472-5588  
 Fax: (603) 471-0042 Claims Only

December 9, 1994

DUNDON PLUMBING AND HEATING INC  
 ROUTE 22A  
 ORWELL VT 05760

ATTENTION: Mr. Christopher Dundon

RE: Claim No.: 05-061275-25 and  
 05-061277-25  
 Insured: Dundon Plumbing and Heating, Inc.  
 Plaintiffs: Thomas and Elizabeth Quesnel  
 D.O.L.: May 8, 1993

Dear Mr. Dundon:

This letter will acknowledge receipt of an Amended Summons and Complaint filed in the Addison County Superior Court served upon you July 15, 1994 entitled Thomas Quesnel and Elizabeth Quesnel vs. Town of Middlebury, the Middlebury Board of Sewage System Commissioners, the Middlebury Board of Sewage Disposal Commissioners, the Middlebury Board of Selectmen and Christopher Dundon.

The Hanover Insurance Company provides Dundon Plumbing and Heating Inc. with two insurance policies. We provide a Commercial General Liability Policy No. ZDV 3989031 with the effective policy dates 10/1/92 - 10/1/93. This policy provides \$1,000,000 in bodily injury - property damage coverage.

In addition, the Hanover Insurance Company provides Dundon Plumbing and Heating with a Commercial Catastrophe Liability Policy under Policy No. UHV 3989032 with the effective policy dates 10/1/92 - 10/1/93. This policy provides \$2,000,000 bodily occurrence coverage with a \$10,000 retained limit.

Please be advised that under your Commercial General Liability Coverage, particularly Section I - Coverages,

1. Insuring Agreement.
  - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right

DEC 19 1994

and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
- (2) Our right and duty to defend and when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B.

b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and
- (2) The "bodily injury" or "property damage" occurs during the policy period.

c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury."

We wish to highlight the specific definitions concerning the policy terms:

"Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

"Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

"WHO IS AN INSURED"

1. If you are designated in the Declarations as:

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

2. Each of the following is also an insured:

- a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you, However, no employee is an insured for:

- (1) "Bodily injury" or "personal injury" to you or to a co-employee while in the course of his or her employment, or the spouse, child, parent, brother or sister of that co-employee as a consequence of such "bodily injury" or "personal injury," or for any obligation to share damages with or repay someone else who must pay damages because of the injury; or

Your Commercial General Liability Policy also has certain exclusions which may limit your coverage.

2. Exclusions -

This insurance does not apply to:

- e. "Bodily injury" to:

DUNDON PLUMBING AND HEATING INC  
December 9, 1994  
Page Four

- (1) An employee of the insured arising out of and in the course of employment by the insured; or
- (2) The spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract."

The Hanover Insurance Company also provides Dundon Plumbing and Heating with a Commercial Catastrophe Liability Policy under Policy No. UHV 3989032. Please be advised that under the Insuring Agreement of your Commercial Catastrophe Liability Policy,

I Coverage. To pay on behalf of the insured the ultimate net loss in excess of the applicable underlying (or retained) limit hereinafter stated, which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law or assumed by the insured under contract:

- (a) PERSONAL INJURY LIABILITY. For damages, including damage for care and loss of services because of personal injury, including death at any time resulting therefrom, sustained by any person or persons.
- (b) PROPERTY DAMAGE LIABILITY. For damages because of injury to or destruction of tangible property including consequential loss resulting therefrom,
- (c) ADVERTISING LIABILITY. For damages because of libel, slander, defamation, infringement of copyright, title or slogan, piracy, unfair competition, idea misappropriation or invasion of right of privacy arising out of the named insured's advertising activities,

to which this insurance applies under Coverage 1(a), 1(b) and 1(c) above, caused by an occurrence.

We wish to highlight these specific definitions concerning these key policy terms;

000023

DUNDON PLUMBING AND HEATING INC  
December 9, 1994  
Page Five

"Occurrence": With respect to coverage I (a) and I (b), occurrence shall mean an accident, including injurious exposure to substantially the same general harmful conditions, which result in personal injury or property damage during the policy period which is neither expected nor intended from the standpoint of the insured.

For the purpose of determining the limit of the company's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general harmful conditions shall be considered as arising out of one occurrence.

Your Commercial Catastrophe Liability Policy also has certain exclusions which may limit your coverage.

This policy does not apply:

- (a) under Coverage I (a), to any obligation for which the insured or any of its insurers may be held liable under any workmen's compensation, unemployment compensation, disability benefits law, or under any similar law, provided, however, that this exclusion does not apply to liability of others assumed by the named insured under contract:

The Hanover Insurance Company has reviewed the Amended Complaint filed by Thomas and Elizabeth Quesnel, in particular the 27 allegations relative to the death of their son, Matthew Quesnel. Please be advised that Exclusion E under your Commercial General Liability Coverage would exclude coverage for allegations 11 through 24 as stated in the Complaint. Further, under your Commercial Catastrophe Liability Policy, allegations 11 through 24 would be excluded under (a) as stated above. Therefore, the Hanover Insurance Company respectfully denies both coverage and defense of this lawsuit.

000030

DUNDON PLUMBING AND HEATING INC  
December 9, 1994  
Page Six

Should there be any additional facts relevant to this matter which have not come to our attention, please advise us immediately.

Very truly yours,

Christopher J. Poulin  
Sr. Claims Adjuster

CJP:iml

CC: Hickok and Boardman Agency, Inc.  
346 Shelburne St.  
P.O. Box 1064  
Burlington, VT 05402-1064

Attorney Allan Keyes  
Ryan, Smith and Carbine  
Attorneys-at-Law  
98 Merchants Row  
P.O. Box 310  
Rutland, VT 05702-0310

120994il.012

000031

STATE OF VERMONT  
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT  
DOCKET NO. S151-94 Ac

THOMAS QUESNEL and ELIZABETH QUESNEL )  
and THOMAS QUESNEL as Co-Administrator )  
of the ESTATE OF MATTHEW J. QUESNEL, )  
Plaintiffs )

v. )

THE TOWN OF MIDDLEBURY, the MIDDLEBURY )  
BOARD OF SEWAGE SYSTEM COMMISSIONERS, )  
the MIDDLEBURY BOARD OF SEWAGE DISPOSAL )  
COMMISSIONERS, the MIDDLEBURY BOARD OF )  
SELECTMEN, and CHRISTOPHER DUNDON, )  
Defendants )

CHRISTOPHER DUNDON and DUNDON HEATING )  
& PLUMBING, INC., )  
Third-Party Plaintiffs )

v. )

HANOVER INSURANCE COMPANY and )  
MASSACHUSETTS BAY INSURANCE COMPANY, )  
Third-Party Defendants )

ENTRY OF APPEARANCE

NOW COME Dinse, Erdmann & Clapp and hereby enter their appearance in the above-entitled cause of behalf of Third-Party Defendants Hanover Insurance Company and Massachusetts Bay Insurance Company.

ANSWER

NOW COME Third-Party Defendants Hanover Insurance Company and Massachusetts Bay Insurance Company, by and through counsel, Dinse, Erdmann & Clapp, and hereby answer the third-party complaint in this matter as follows.

JAN 30 1995

1. The Third-party Defendants are without sufficient information to admit or deny the allegations of ¶1 of the third-party complaint, but they are believed to be true.

2. Admitted.

3. Admitted.

4. Without sufficient information, therefore denied.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Without sufficient information, therefore denied.

10. Without sufficient information, therefore denied.

11. Without sufficient information, therefore denied.

12. The Third-party Defendants have declined to provide Christopher Dundon with a defense or indemnity for the Quesnel claim, but have asserted sound bases for the denial of coverage based upon the terms of the insurance policies in question. Any remaining allegations set forth in ¶12 of the third-party complaint are denied.

13. Denied.

14. The Third-party Defendants are without sufficient information to admit or deny the allegations of ¶14 of the third-party complaint, but believe them to be true.

15. Denied.

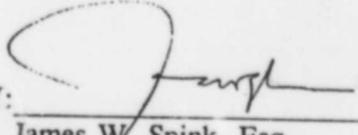
AFFIRMATIVE DEFENSE

Any claim for punitive damages against either Third-party Defendant violates the due process clause and related provisions of the United States and Vermont Constitutions.

WHEREFORE, Third-party Defendants and each of them respectfully request the Court to enter judgment in favor of Hanover Insurance Company and Massachusetts Bay Insurance Company and to award Third-party Defendants their costs and such other relief as the Court shall deem just.

DATED at Burlington, Vermont, this 27th day of January, 1995.

DINSE, ERDMANN & CLAPP

BY: 

James W. Spink, Esq.

cc: Allan R. Keyes, Esq.  
James A. Dumont, Esq.  
Michael J. Gannon, Esq.

File

STATE OF VERMONT  
ADDISON COUNTY, SS

ADDISON SUPERIOR COURT  
DOCKET NO: S151-94Ac

THOMAS QUESNEL, ET AL. )  
 Plaintiffs) )  
 )  
 v. )  
 )  
 THE TOWN OF MIDDLEBURY, ET AL.)  
 Defendants) )  
 )  
 v. )  
 )  
 CHRISTOPHER DUNDON and DUNDON )  
 HEATING & PLUMBING, INC. )  
 Third-party Plaintiffs) )  
 )  
 v. )  
 )  
 HANOVER INSURANCE COMPANY and )  
 MASSACHUSETTS BAY INSURANCE )  
 COMPANY )  
 Third-party Defendants)

MOTION FOR PROTECTIVE ORDER

NOW COME third-party defendants, Hanover Insurance Company and Massachusetts Bay Insurance Company (hereinafter collectively "Hanover"), by and through their counsel, Dinse, Erdmann & Clapp, and hereby move under V.R.C.P. 26(c), for a protective order preventing third-party plaintiffs, Christopher Dundon and Dundon Heating & Plumbing, Inc. (herein collectively "Dundon") from undertaking any further discovery directed at Hanover until the issue of whether Hanover is obligated to defend or indemnify Dundon has been determined by this Court.

In support whereof, Hanover submits the following memorandum of law.

DINSE, ERDMANN  
 & CLAPP  
 ATTORNEYS AT LAW  
 BATTERY STREET  
 WASHINGTON, VERMONT  
 804-22-0988

MAY 9 1995

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MEMORANDUM OF LAW

1. Under V.R.C.P. 26(c), a party may move for a protective order to protect itself from annoyance and undue burden or expense. A judge can order "that the discovery may be had only on specified terms and conditions, including a designation of the time or place."

2. Dundon filed a Third-Party Complaint against Hanover on December 20, 1994, seeking an order declaring that Hanover has a duty to defend and indemnify Christopher Dundon.

3. Concurrently herewith, Hanover has filed a Motion to Dismiss the Third-Party Complaint on the ground that it fails to state a claim upon which relief can be granted.

4. Notwithstanding the pending Motion to Dismiss, it is axiomatic that whether there is insurance coverage is determined by comparing the allegations on the face of the complaint to the language of the insurance policy. Garneau v. Curtis & Bedell, Inc., 158 Vt. 363, 366, 610 A.2d 132, 133-34 (1992) (quoting Town of So. Burlington v. American Fid. Co., 125 Vt. 348, 349-50, 215 A.2d 508, 510 (1965)). In order to determine whether Hanover has a duty to defend or indemnify Christopher Dundon, therefore, all that the Court need look at is the plaintiffs' Complaint against Christopher Dundon, and the three insurance policies that Dundon has alleged provide him coverage. Hanover's denial-of-coverage letters are also potentially relevant. See Segalla v. United States Fire Ins. Co., 135 Vt. 185, 373 A.2d 535 (1977). There is no need for any discovery beyond these few documents, in order to

dispose of the Third-Party Complaint by Dundon against Hanover.

5. Dundon has promulgated to Hanover "Third-Party Plaintiffs' First Set of Interrogatories and Requests to Produce to Third-Party Defendants" dated March 20, 1995. These have been attached hereto as Exhibit "A". These discovery requests obviously go far beyond the discovery necessary in order for the Court to decide Dundon's Third-Party Complaint.

6. Hanover has responded to third-party plaintiff's interrogatories nos. 30(a) and 31(a), and requests to produce no. 7 and 9; these ask for production of the policies and denial-of-coverage letters. These documents--the complaint, the policies, and the denial-of-coverage letters--are the only evidence that is relevant to the decision of the Third-Party Complaint.

7. All of the other discovery requested in the above-mentioned discovery requests is irrelevant, oppressive, and would put Hanover to undue burden and expense, if it were allowed to go forward before the Court determines the threshold issue of whether or not Hanover must defend or indemnify Dundon.

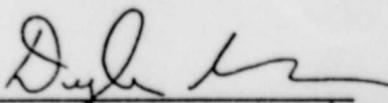
8. It is therefore appropriate, under Rule 26(c), that the Court issue a protective order that Hanover need not respond to any other discovery requests of Dundon until after the Court decides whether Hanover must defend or indemnify Dundon.

WHEREFORE, Hanover Insurance Company and Massachusetts Bay Insurance Company pray that the Court issue a protective order preventing Dundon from undertaking any further discovery until after the Court has decided the issue of whether Hanover has a duty

to defend or indemnify Dundon under any of the relevant insurance policies.

Dated at Burlington, Vermont, this 8th day of May, 1995.

DINSE, ERDMANN & CLAPP

BY:   
Douglas D. Le Brun, Esquire

cc: Allan R. Keyes, Esquire  
James A. Dumont, Esquire  
Michael J. Gannon, Esquire

s:\...dundon\prot.ord

STATE OF VERMONT  
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT  
DOCKET NO. S151-94Ac

THOMAS QUESNEL, ET AL  
Plaintiffs,  
vs.

THE TOWN OF MIDDLEBURY, ET AL  
Defendants

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.,  
Third-Party Plaintiffs,  
vs.

HANOVER INSURANCE COMPANY and  
MASSACHUSETTS BAY INSURANCE COMPANY,  
Third-Party Defendants.

**DUNDON'S MOTION TO COMPEL**  
**AND**  
**REPLY TO HANOVER'S MOTION FOR PROTECTIVE ORDER**

Third-Party Plaintiffs request an order compelling Third-Party Defendants to answer separately and fully in writing under oath each interrogatory propounded to them dated March 20, 1995 and to produce for Third-Party Plaintiffs' inspection and copying at the offices of Ryan Smith & Carbine, Ltd., each and every document designated in Defendant's Requests for Production dated March 20, 1995. The court should deny Hanover's motion for protective order dated May 8, 1995.

**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL**  
**AND**  
**IN OPPOSITION TO THE MOTION FOR PROTECTIVE ORDER**

The third-party claim is an action arising from Hanover's breach of its insurance agreement with Dundon. Dundon seeks damages for breach of the duty to defend, declaratory relief, and indemnity for any judgment in the underlying action. Dundon also seeks

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attorney's fees incurred in establishing coverage and punitive damages for Hanover's bad faith refusal to defend. At a status conference March 17, 1995 the court ordered discovery closed on the third-party claim by August 15, 1995.

Dundon filed Interrogatories and Requests for Production directed to the Third-Party Defendants dated March 20, 1995. Rules 33 and 34 provide that a party shall answer interrogatories and respond to requests for production within 30 days after service. Third-Party Defendants failed to respond to this discovery until May 8, 1995, when Hanover produced the policies, but refused to provide any other information. Hanover claims "undue burden or expense," and requests an order that no discovery be had until the court has decided whether Hanover has a duty to defend and indemnify Dundon.

Rule 37 provides that when a party fails or refuses to allow discovery, the requesting party may apply for an order compelling discovery and for such other sanctions or action as the court deems appropriate. Rule 37(d) also provides that, in the absence of a request for a protective order, the failure to respond to interrogatories or requests to produce within the time allowed by rule operates as a waiver of any objections thereto. Because of the unnecessary delays in presenting Hanover's objections to the court, and because Dundon's discovery requests are important to both the breach of contract and bad faith claims, the court should order full and complete answers to Interrogatories and production as requested.

Hanover's motion to dismiss the third-party complaint is groundless. Hanover has a duty to defend, regardless of the merits of the underlying claim. Dundon has incurred expenses in defending the Quesnel claim which must be compensated. Further, Dundon has

stated a claim for bad faith refusal to defend, on which discovery must proceed if the court's schedule is to be met.

Hanover has identified no undue burden or expense. The bulk of Dundon's discovery can be answered simply by producing the claims files and the underwriting file, and by identifying company personnel familiar with the coverage issues and the handling of the claim.

The location of documents and the identity of persons with knowledge of discoverable matter is basic information discoverable under rule 26(a). The claims file and underwriting file are discoverable because, in the words of the rule, "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The company's internal memoranda and comments concerning coverage may lead to a basis for compelling defense and coverage independent of the traditional comparison of the policy language with the underlying complaint. The files may contain admissions of coverage; waivers of the grounds now relied on; promises of coverage to the agent; other evidence of the original understanding of the parties; grants of additional coverage beyond the original policy, as by adoption of new, more liberal, forms; or other information relevant to the terms and meaning of the insuring agreement.

Beyond the merits of the breach of contract claim, the information requested is essential to the bad faith claim. Bad faith actions can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered, and why the company took the action it did. The plaintiff must obtain the information in the claims file. *Brown v. Superior Court*, 137 Ariz. 327, 336, 670 P.2d 725, 734 (1983) (stating "the need for the information in the [claims] file is not only substantial, but overwhelming"). The claims file is

"focal point of the insured's discovery." A. Windt, *Insurance Claims and Disputes* § 9.19 at 477 (2d Ed. 1988). "[T]he file should be held to be discoverable." *Id.*

There is no just reason for delaying Dundon's discovery on the bad faith claim. Dundon had moved for summary judgment on the umbrella policy and has made more than a *prima facie* showing that Hanover had no reasonable basis to deny coverage. Discovery must now proceed to find whether this was a simple error by an inexperienced claims handler, or was conduct encouraged and approved by company officials.

#### RULE 26(h) CERTIFICATION

The undersigned counsel certifies that he has conferred or has attempted to confer with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by this motion without the intervention of the Court, but has been unable to reach such an agreement, except as stated below. The dates of contacts with opposing counsel, and the names of the participants are:

April 12, 1995      Allan R. Keyes letter to Douglas LeBrun

April 27, 1995      Allan R. Keyes letter to Douglas LeBrun

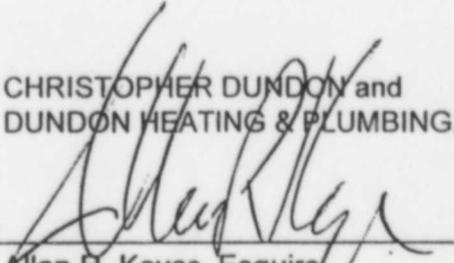
#### **CONCLUSION**

Because of the unnecessary delays in presenting Hanover's objections to the court, and because Dundon's discovery requests are important to both the breach of contract and bad faith claims, the court should order full and complete answers to Interrogatories and production as requested. The court should compel Third-Party Defendants to answer separately and fully in writing under oath each interrogatory propounded to them dated March 20, 1995 and to produce for Third-Party Plaintiffs' inspection and copying at the offices of

Ryan Smith & Carbine, Ltd., each and every document designated in Defendant's Requests for Production dated March 20, 1995. The court should deny Hanover's motion for protective order dated May 8, 1995.

Dated this 15th day of May, 1995.

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.,

By 

Allan R. Keyes, Esquire  
Ryan Smith & Carbine, Ltd.  
P. O. Box 310  
Rutland, VT 05702-0310

cc: Douglas LeBrun, Esq.  
James A. Dumont, Esq.  
Michael J. Gannon, Esq.

5083-2/#35946

*File*

STATE OF VERMONT  
ADDISON COUNTY, SS

ADDISON SUPERIOR COURT  
DOCKET NO: S151-94Ac

THOMAS QUESNEL, <u>et al.</u>	)
Plaintiffs	)
	)
v.	)
	)
THE TOWN OF MIDDLEBURY and	)
CHRISTOPHER DUNDON	)
Defendants	)
	)
CHRISTOPHER DUNDON and DUNDON	)
HEATING & PLUMBING, INC.	)
Third-party Plaintiffs	)
	)
v.	)
	)
HANOVER INSURANCE COMPANY and	)
MASSACHUSETTS BAY INSURANCE	)
COMPANY	)
Third-party Defendants	)

MOTION TO STAY DISCOVERY AND FOR EXPEDITED CONSIDERATION

NOW COME the third-party defendants, Hanover Insurance Company and Massachusetts Bay Insurance Company (collectively "Hanover"), by and through their counsel, Dinse, Erdmann & Clapp, and hereby move under V.R.C.P. 26 for a stay of discovery preventing third-party plaintiffs, Christopher Dundon and Dundon Heating & Plumbing, Inc. (herein collectively "Dundon"), from undertaking any further discovery directed at Hanover until the issue of whether Hanover is obligated to defend or indemnify Dundon has been determined by this Court. In the alternative, Hanover moves for a stay of discovery until after the Supreme Court of Vermont decides the pending appeal of the dismissal of plaintiff's action against Dundon.

In support whereof, Hanover submits the following memorandum of law.

ERDMANN  
& CLAPP  
ATTORNEYS AT LAW  
BATTERY STREET  
WASHINGTON, VERMONT  
802-401-0988

NOV 27 1995  
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& Plumbing, Inc. was not a defendant in plaintiff's action, thus has no right to file a third-party action.

5. Hanover seeks a stay of all discovery until after the Court decides the pending case-dispositive motions. Other courts have exercised their discretion to stay discovery until the decision of case-dispositive motions. E.g., Moldea v. New York Times Co., 137 F.R.D. 1, 2 (D.D.C. 1990); Brennan v. Local Union No. 639, 494 F.2d 1092, 1100 (D.D.C. 1974). Copies of these cases are attached hereto for the Court's convenience.

6. Reduced to its essence, what is at issue here is Hanover's desire to avoid the trouble and expense of responding to voluminous discovery when Dundon faces no extant claim and has only incurred \$931.25 in attorney's fees. Rule 26(b) provides that a court may fashion an appropriate order if it is determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, [etc.]." Here, Dundon should not be allowed to put Hanover to any further expense in its \$900 case until Hanover's pending motions are decided.

7. Recall further that it is axiomatic that whether there is insurance coverage is determined by comparing the allegations on the face of the complaint to the language of the insurance policy. Garneau v. Curtis & Bedell, Inc., 158 Vt. 363, 366, 610 A.2d 132, 133-34 (1992) (quoting Town of So. Burlington v. American Fid. Co., 125 Vt. 348, 349-50, 215 A.2d 508, 510 (1965)). Dundon has all the discovery it needs in this regard: the plaintiffs' Complaint

against Christopher Dundon, the three insurance policies that Dundon has alleged provide him coverage, and Hanover's denial-of-coverage letters. See Segalla v. United States Fire Ins. Co., 135 Vt. 185, 373 A.2d 535 (1977). There is no need for any discovery beyond these few documents.

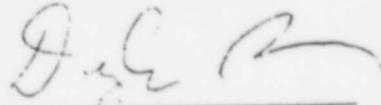
8. In the alternative, Hanover requests that this Court stay all further discovery until after the Supreme Court of Vermont decides the pending appeal of the dismissal of plaintiff's action against Dundon. If this Court's decision is confirmed on appeal, damages will be "capped" at the amount of Dundon's attorney fees expended in the underlying action, at which point settlement may be likely.

9. Since the said deposition and production has been noticed for December 6, 1995, we would appreciate an expedited consideration of this motion.

WHEREFORE, Hanover Insurance Company and Massachusetts Bay Insurance Company pray that the Court issue a stay of discovery until after the Court has decided Hanover's pending motions, or in the alternative until after the Supreme Court decides the pending appeal dismissing plaintiff's lawsuit.

Dated at Burlington, Vermont, this 22nd day of November, 1995.

DINSE, ERDMANN & CLAPP

BY: 

Douglas D. Le Brun, Esquire

cc: Allan R. Keyes, Esquire  
James A. Dumont, Esquire  
Michael J. Gannon, Esquire

cc: Dundon/stay 11

STATE OF VERMONT  
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT  
DOCKET NO. S151-94Ac

THOMAS QUESNEL, ET AL  
Plaintiffs,

vs.

THE TOWN OF MIDDLEBURY, ET AL  
Defendants

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.,  
Third-Party Plaintiffs,

vs.

HANOVER INSURANCE COMPANY and  
MASSACHUSETTS BAY INSURANCE COMPANY,  
Third-Party Defendants.

**MOTION TO RECONSIDER**

Christopher Dundon and Dundon Heating & Plumbing, Inc. ("Dundon") ask the Court to rule on its Motion to Compel filed May 16, 1995.

On September 12, 1995, the Court dismissed the underlying wrongful death claim because it is not brought on behalf of the spouse or next of kin of the decedent. The Court ruled the issue of defense costs under the umbrella policy is moot because they have not reached the \$10,000 retained limit specified in that policy. Finally, the Court ruled all pending motions "appear moot."

Among those motions, was Dundon's Motion to Compel Hanover to respond to its written discovery. This motion is not moot, because Dundon's claims against the primary carriers and Dundon's bad faith claim are still pending. The cross motions for summary judgment in the third-party action addressed only the issue of coverage under the umbrella policies.

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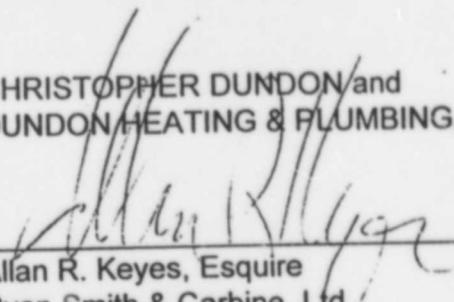
There is no retained limit in the primary policies, and Hanover's refusal to pay past and future defense costs is a live controversy. For the reasons stated in Dundon's original Motion to Compel and in Dundon's Memorandum of November 29, 1995 in Opposition to Hanover's Motion Stay Discovery, Dundon should be allowed to obtain discovery on the remaining issues in the case.

Dated this 29th day of November, 1995.

Respectfully submitted.

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.

By

  
Allan R. Keyes, Esquire  
Ryan Smith & Carbine, Ltd.  
PO Box 310  
Rutland, VT 05702-0310

cc: Douglas D. Le Brun, Esq.  
James A. Dumont, Esq.  
Michael J. Gannon, Esq.

#59116

*File*

Superior Court of Vermont  
County of Addison

ENTRY REGARDING MOTION

Quesnel et al vs. Middlebury, Town of et al  
[Dumont/Keyes/Gannon/Lebrun]

151-6-94 Ancv

Title: Motion to Stay Discovery//for Expedited Consider, No. 10  
Filed on: November 27, 1995  
Filed By: Lebrun, Douglas, Attorney for:  
Defendant Hanover Insurance Company  
Defendant Massachusetts Bay Insurance Co.

Response filed on 11/30/95 by Attorney Keyes

Granted ~~Compliance by~~ Until further order.

De 4

Re and for hearing on: \_\_\_\_\_ at \_\_\_\_\_; Time Allotted \_\_\_\_\_

Other Court will review pleadings  
on 3rd party claims.

ADDISON SUPERIOR COURT  
DEC -4

[Signature]  
Judge

12/4/95  
Date

Date copies sent to: \_\_\_\_\_ Clerk's Initials \_\_\_\_\_

- Copies sent to:
- Attorney James A. Dumont for Plaintiff Thomas Quesnel
  - Attorney James A. Dumont for Plaintiff Elizabeth Quesnel
  - Attorney Michael J. Gannon for Defendant Middlebury, Town of
  - Attorney Michael J. Gannon for Defendant Middlebury Bd. of Sewage System
  - Attorney Michael J. Gannon for Defendant Middlebury Bd. of Sewage Disposal
  - Attorney Michael J. Gannon for Defendant Middlebury Bd. of Selectmen
  - Attorney Allan R. Keyes for Defendant Christopher Dundon
  - Attorney Douglas Lebrun for Defendant Hanover Insurance Company
  - Attorney Douglas Lebrun for Defendant Massachusetts Bay Insurance Co.

DEC 7 1995

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*file*

Superior Court of Vermont  
County of Addison

ENTRY REGARDING MOTION

Quesnel et al vs. Middlebury, Town of et al  
[Dumont/Keyes/Gannon/Lebrun]

151-6-94 Ancv

Title: Motion for Reconsideration (of Motion to Compel, No. 13  
Filed on: November 30, 1995  
Filed By: Keyes, Allan R., Attorney for:  
Defendant Christopher Dundon

Response: NONE

Granted Compliance by \_\_\_\_\_

Denied

Scheduled for hearing on: \_\_\_\_\_ at \_\_\_\_\_; Time Allotted \_\_\_\_\_

Other

*Counsel ought to be able to resol.  
Court unlikely to bar summary judgment -  
appropriate - solely for lack of opdy. to  
fish.*

ADDITIONAL SUPERIOR COURT  
MAR - 7  
KEELER

*[Handwritten signature]*

Judge MATTHEW I. KATZ

March 7, 1996  
Date

Date copies sent to: *3/7/96*  
Copies sent to:

Clerk's Initials \_\_\_\_\_

- Attorney James A. Dumont for Plaintiff Thomas Quesnel
- Attorney James A. Dumont for Plaintiff Elizabeth Quesnel
- Attorney Michael J. Gannon for Defendant Middlebury, Town of
- Attorney Michael J. Gannon for Defendant Middlebury Bd. of Sewage System
- Attorney Michael J. Gannon for Defendant Middlebury Bd. of Sewage Disposal
- Attorney Michael J. Gannon for Defendant Middlebury Bd. of Selectmen
- Attorney Allan R. Keyes for Defendant Christopher Dundon
- Attorney Douglas Lebrun for Defendant Hanover Insurance Company
- Attorney Douglas Lebrun for Defendant Massachusetts Bay Insurance Co.

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*File*

STATE OF VERMONT  
ADDISON COUNTY, SS

ADDISON SUPERIOR COURT  
DOCKET NO: S151-94Ac

THOMAS QUESNEL, <u>et al.</u>	)
Plaintiffs	)
	)
v.	)
	)
THE TOWN OF MIDDLEBURY and	)
CHRISTOPHER DUNDON	)
Defendants	)
	)
CHRISTOPHER DUNDON and DUNDON	)
HEATING & PLUMBING, INC.	)
Third-party Plaintiffs	)
	)
v.	)
	)
HANOVER INSURANCE COMPANY and	)
MASSACHUSETTS BAY INSURANCE	)
COMPANY	)
Third-party Defendants	)

MOTION FOR SUMMARY JUDGMENT

NOW COME the third-party defendants, Hanover Insurance Company and Massachusetts Bay Insurance Company (collectively "Hanover"), by and through their counsel, Dinse, Erdmann & Clapp, and hereby move under V.R.C.P. 56(b) for summary judgment that none of the policies alleged in the Third-Party Complaint obligates Hanover to provide a defense or indemnity with respect to the claims alleged in plaintiff's Amended Complaint.

In support, Hanover has submitted a Statement of Undisputed Facts, and submits herewith the following Memorandum of Law.

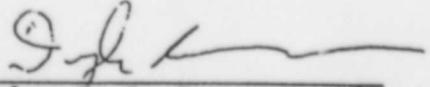
MEMORANDUM OF LAW

We will address the coverage issues with respect to each of the three alleged policies in turn, after discussing one ground for denying coverage that is common to all three of the policies.

WHEREFORE, third-party defendants, Hanover Insurance Company and Massachusetts Bay Insurance Company pray that their Motion for Summary Judgment be granted, and that the Court award Hanover attorneys' fees, costs, and such other relief as the Court deems just.

Dated at Burlington, Vermont, this 22nd day of November, 1995.

DINSE, ERDMANN & CLAPP

BY:   
Douglas D. Le Brun, Esquire

cc: Allan R. Keyes, Esquire  
James A. Dumont, Esquire  
Michael J. Gannon, Esquire

s:\...\lebrun\dundon\summary.11

STATE OF VERMONT  
ADDISON COUNTY, SS

ADDISON SUPERIOR COURT  
DOCKET NO: S151-94Ac

THOMAS QUESNEL, et al. )  
Plaintiffs )  
v. )  
THE TOWN OF MIDDLEBURY and )  
CHRISTOPHER DUNDON )  
Defendants )  
CHRISTOPHER DUNDON and DUNDON )  
HEATING & PLUMBING, INC. )  
Third-party Plaintiffs )  
v. )  
HANOVER INSURANCE COMPANY and )  
MASSACHUSETTS BAY INSURANCE )  
COMPANY )  
Third-party Defendants )

STATEMENT OF UNDISPUTED FACTS

NOW COME third-party defendants and pursuant to V.R.C.P. 56(c)(2) submit the following statement of undisputed facts:

1. Workers' Compensation and Employers' Liability Insurance Policy No. WHV 3998638 (hereinafter the "Workers Compensation Policy") attached as Exhibit "A" hereto is an accurate and complete copy and was in effect for the 10\1\92 through 10\1\93 policy period. See Affidavit of Christopher J. Poulin.

2. Package Policy No. ZDV 398 90 31 (hereinafter the CGL Policy) attached as exhibit "B" hereto is an accurate and complete copy and was in effect for the 10\1\92 through 10\1\93 policy period. See certification attached to Exhibit "B" hereto.

3. Policy UHV 398 90 32 (hereinafter the "Umbrella Policy") is an accurate and complete copy and was in effect for the 10\1\92 through 10\1\93 policy period. See Exhibit A to "Opposition to

JOHN CROMANN  
CLAPP  
ATTORNEY AT LAW  
100 STATE STREET  
MIDDLEBURY, VERMONT

NOV 27 1994

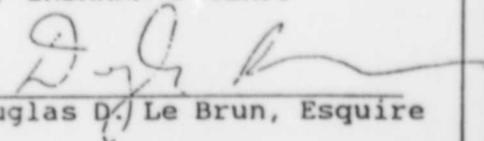
000054

Dundon's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment" dated June 2, 1995.

Dated at Burlington, Vermont, this 22nd day of November, 1995.

DINSE, ERDMANN & CLAPP

BY:

  
Douglas D. Le Brun, Esquire

cc: Allan R. Keyes, Esquire  
James A. Dumont, Esquire  
Michael J. Gannon, Esquire

S:...\\lebrun\dundon\undisp.fac

ERDMANN

CLAPP

ATTORNEYS AT LAW

100 STATE STREET

BURLINGTON, VERMONT

PHONE 248-1111

MASSACHUSETTS BAY INSURANCE COMPANY, 100 NORTH PARKWAY, WORCESTER, MA 01605

COMMERCIAL LINES POLICY  
COMMON DECLARATIONS

POLICY NUMBER	FROM	POLICY PERIOD TO	COVERAGE IS PROVIDED IN THE	AGENCY CODE
ZDV 3989031 01	10/01/92	10/01/93	MASSACHUSETTS BAY INS. COMPANY	2801153
AMED INSURED AND ADDRESS			AGENT	
DUNDON PLUMBING & HEATING INC ROUTE 22A ORWELL VT 05760			HICKOK & BOARDMAN INC INSURANCE DIVISION P O BOX 1064 BURLINGTON VT 05402	

AMENDMENT OF POLICY EFFECTIVE: NOV. 23, 1992

THIS SUPERSEDES ANY PREVIOUS DECLARATION BEARING THE SAME POLICY NUMBER FOR THIS POLICY PERIOD.

POLICY PERIOD: FROM: OCT. 01, 1992 TO: OCT. 01, 1993 AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

BUSINESS DESCRIPTION: PLUMBING/HEATING CONTRACTOR

LEGAL ENTITY: CORPORATION

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

	PREMIUM
COMMERCIAL PROPERTY COVERAGE	\$1,675.00
COMMERCIAL CRIME COVERAGE	\$129.00
COMMERCIAL GENERAL LIABILITY COVERAGE	\$7,691.00
COMMERCIAL INLAND MARINE COVERAGE	\$515.00
<i>SBC</i> TOTAL PREMIUM:	\$10,010.00

SUBJECT TO AGENT  
MANOCASH

COUNTERSIGNED \_\_\_\_\_ BY \_\_\_\_\_ (AUTHORIZED REPRESENTATIVE)

THESE DECLARATIONS TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE PART COVERAGE FORM(S) AND FORMS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART HEREOF, COMPLETE THE ABOVE NUMBERED POLICY.

FORM NO. 401-0022A 2/89

ISSUED 12/17/92

AGENCY BILL M

THE HANOVER INSURANCE COMPANIES

MASSACHUSETTS BAY INSURANCE COMPANY, 100 NORTH PARKWAY, WORCESTER, MA 01605

COMMERCIAL LINES POLICY  
ENDORSEMENT RECAP

POLICY NUMBER	FROM	POLICY PERIOD	TO	COVERAGE IS PROVIDED IN THE	AGENCY CODE
EDV 3989031 01	10/01/92	10/01/93		MASSACHUSETTS BAY INS. COMPANY	2801153
MED INSURED AND ADDRESS				AGENT	
DUNDON PLUMBING & HEATING INC ROUTE 22A ORWELL VT 05760				HICKOK & BOARDMAN INC INSURANCE DIVISION P O BOX 1064 BURLINGTON VT 05402	

AMENDMENT OF POLICY EFFECTIVE: OCT. 01, 1992

AMENDMENT 01

THIS SUPERSEDES ANY PREVIOUS DECLARATION BEARING  
THE SAME POLICY NUMBER FOR THIS POLICY PERIOD.

REASON FOR AMENDMENT:

ADD LIABILITY CLASSES 91580 AND 91585

FORM NO. 401-0022A 2/89

ISSUED 11/25/92

AGENCY BILL

PAGE 2

000057

COMPANY COPY

EXHIBIT B, PAGE 7

AMENDMENT 1  
 MASSACHUSETTS BAY INSURANCE COMPANY, 100 NORTH PARKWAY, WORCESTER, MA 01605

COMMERCIAL GENERAL LIABILITY DECLARATION

POLICY NUMBER	POLICY PERIOD		COVERAGE IS PROVIDED IN THE	AGENCY CODE
	FROM	TO		
ZDV 3989031 01	10/01/92	10/01/93	MASSACHUSETTS BAY INS. COMPANY	2801153
NAMED INSURED AND ADDRESS			AGENT	
DUNDON PLUMBING & HEATING INC ROUTE 22A ORWELL VT 05760			HICKOK & BOARDMAN INC INSURANCE DIVISION P O BOX 1064 BURLINGTON VT 05402	

AMENDMENT OF POLICY EFFECTIVE: OCT. 01, 1992  
 THIS ENDORSEMENT CHANGES THE POLICY.  
 PLEASE READ IT CAREFULLY.

AUDIT FREQUENCY: ANNUAL

LIMITS OF INSURANCE:

GENERAL AGGREGATE LIMIT	\$2,000,000
PRODUCTS - COMPLETED OPERATIONS AGGREGATE LIMIT	\$2,000,000
EACH OCCURRENCE LIMIT	\$1,000,000
PERSONAL AND ADVERTISING INJURY LIMIT	\$1,000,000
FIRE DAMAGE LIMIT, ANY ONE FIRE	\$50,000
MEDICAL EXPENSE LIMIT, ANY ONE PERSON	\$5,000

THE HANOVER INSURANCE COMPANIES

AMENDMENT 1

MASSACHUSETTS BAY INSURANCE COMPANY, 100 NORTH PARKWAY, WORCESTER, MA 01605

COMMERCIAL GENERAL LIABILITY CLASSIFICATION SCHEDULE

POLICY NUMBER	FROM	POLICY PERIOD TO	COVERAGE IS PROVIDED IN THE	AGENCY CODE
ZDV 3989031 01	10/01/92	10/01/93	MASSACHUSETTS BAY INS. COMPANY	2801153
NAMED INSURED AND ADDRESS			AGENT	
DUNDON PLUMBING & HEATING INC ROUTE 22A ORWELL VT 05760			HICKOK & BOARDMAN INC INSURANCE DIVISION P O BOX 1064 BURLINGTON VT 05402	

AMENDMENT OF POLICY EFFECTIVE: OCT. 01, 1992  
THIS ENDORSEMENT CHANGES THE POLICY.  
PLEASE READ IT CAREFULLY.

THE FOLLOWING COVERAGE HAS BEEN ADDED:

LOC ST TER CODE	SUBLINE	PREMIUM BASIS	PER	RATE	ADVANCE PREMIUM
1 VT 999 91580	334	IF ANY PAYROLL	1000	\$40.098	\$0
CONTRACTORS - EXECUTIVE SUPERVISORS OR EXECUTIVE SUPERINTENDENTS INCLUDING PRODUCTS-COMPLETED OPERATIONS.					

THE FOLLOWING COVERAGE HAS BEEN ADDED:

LOC ST TER CODE	SUBLINE	PREMIUM BASIS	PER	RATE	ADVANCE PREMIUM
1 VT 999 91585	334 336	IF ANY TOTAL COST	1000	\$0.710 \$0.341	\$0 \$0
CONTRACTORS - SUBCONTRACTED WORK - IN CONNECTION WITH CONSTRUCTION, RECONSTRUCTION, REPAIR OR ERECTION OF BUILDINGS					

SUBLINE 334 PREMISES AND OPERATIONS  
SUBLINE 336 PRODUCTS AND COMPLETED OPERATIONS

FORM NO. 421-0001A 2/89

ISSUED 11/25/92

AGENCY BILL

MASSACHUSETTS BAY INSURANCE COMPANY, 100 NORTH PARKWAY, WORCESTER, MA 01605

COMMERCIAL GENERAL LIABILITY DECLARATION

POLICY NUMBER	FROM	POLICY PERIOD TO	COVERAGE IS PROVIDED IN THE	AGENCY CODE
ADV 3989031 01	10/01/92	10/01/93	MASSACHUSETTS BAY INS. COMPANY	2801153
NAMED INSURED AND ADDRESS			AGENT	
DUNDON PLUMBING & HEATING INC ROUTE 22A ORWELL VT 05760			HICKOK & BOARDMAN INC INSURANCE DIVISION P O BOX 1064 BURLINGTON VT 05402	

AUDIT FREQUENCY: ANNUAL

LIMITS OF INSURANCE:

GENERAL AGGREGATE LIMIT	\$2,000,000
PRODUCTS - COMPLETED OPERATIONS AGGREGATE LIMIT	\$2,000,000
EACH OCCURRENCE LIMIT	\$1,000,000
PERSONAL AND ADVERTISING INJURY LIMIT	\$1,000,000
FIRE DAMAGE LIMIT, ANY ONE FIRE	\$50,000
MEDICAL EXPENSE LIMIT, ANY ONE PERSON	\$5,000

TOTAL ADVANCE COMMERCIAL GENERAL LIABILITY PREMIUM: \$7,691.00

FORMS APPLICABLE TO COMMERCIAL GENERAL LIABILITY:

CG 00 01 11/88	IL 00 21 11/85	IL 01 26 11/85	CL 133 09/89
CG 99 01 11/85	IL 02 19 03/91	421-0022 12/90	CG 01 54 01/87

FORM NO. 421-0001A 2/89

ISSUED 09/04/92

AGENCY BILL

# COMMERCIAL GENERAL LIABILITY INSURANCE

## IMPORTANT CHANGES IN YOUR COVERAGE

Your Commercial General Liability insurance coverage is being renewed at this time. Some changes have been made in certain coverage forms and endorsements applying to the Commercial General Liability insurance. These changes result in some broadenings or reductions of coverage.

Following is a summary of the major changes found in the new editions of the Commercial General Liability Coverage Forms. NO COVERAGE IS PROVIDED BY THIS SUMMARY nor can it be construed to replace any provision of your policy. YOU SHOULD READ YOUR POLICY AND REVIEW YOUR DECLARATIONS PAGE for complete information on the coverages you are provided. If there is any conflict between the policy and this summary, THE PROVISIONS OF THE POLICY SHALL PREVAIL.

### I. REDUCTIONS IN COVERAGE

#### A. Coverage for Personal Property:

Coverage is no longer provided for personal property under the care, custody or control of the insured. Previously, this exclusion was applicable only to the named insured.

#### B. Definition of Insured Contract:

Coverage is no longer provided for agreements which involve construction or demolition operations within 50 feet of any railroad property.

#### C. Coverage for Personal Injury:

Coverage for wrongful eviction from or wrongful entry into a room, dwelling or premises is provided only if such offenses are committed by or on behalf of the owner, landlord or lessor.

#### D. Who Is An Insured Provision:

This provision has been revised to preclude coverage for third party actions involving co-employees to track with the employer's liability exclusion.

### II. BROADENINGS IN COVERAGE

#### A. Coverage for Personal Injury:

Coverage is now provided for the invasion of a person's right to private occupancy of a room, dwelling or premises if such offense is committed by or on behalf of the owner, landlord or lessor.

#### B. Definition of "Suit":

The definition of "Suit" has been expanded to recognize all types of alternative dispute resolution proceedings, including arbitration and pre-trial mediation as well as traditional civil proceedings.

### III. CLARIFYING, EDITORIAL AND PROCEDURAL CHANGES

#### A. Pollution Liability Coverage:

1. The CGL Basic Pollution Exclusion has been clarified to state that coverage does not exist for the emission of pollutants:

- a. at or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to, any insured;
- b. at or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
- c. which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom the named insured may become legally responsible;
- d. at or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
  - (1) if the pollutants are brought on to the premises, site or location in connection with such operations by such insured, contractor or subcontractor;

2. This exclusion has been clarified to indicate that coverage is not provided for the new liabilities imposed by the Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) by the introduction of the words "or in any way respond to or assess the effects of pollutants".

3. This exclusion has also been clarified to state that coverage does not exist for any claim or suit made by or on behalf of a governmental authority for damages or reimbursement expenses arising from the testing for, monitoring, clean-up, containment, etc., of pollutants.

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000061

4. The terms "seepage" and "migration" have been added to form a more complete expression of the ways in which pollutants may enter the environment.
5. A new provision has been added to render the CGL Basic Pollution Exclusion inapplicable to injury or damage arising from smoke from a hostile fire. This language was previously contained in Endorsement CG 00 41 05 86 but is now included in the policy.

**B. Definition of "You":**

The definition of "You" has been expanded to include newly acquired organizations. Newly acquired organizations are granted named insured status under the WHO IS AN INSURED provision of the policy.

**C. Contractual Liability Coverage:**

The contractual liability exclusion has been editorially revised to clearly indicate that there is no coverage for injury or damage that occurs prior to the execution of any contract or agreement.

**D. Personal and Advertising Injury Coverage Trigger:**

The coverage trigger for Coverage B, Personal and Advertising Injury Liability in the CGL Claims-made version, has been revised to apply on a claims-made basis for consistency with Coverage A, Bodily Injury and Property Damage Liability. Previously, the coverage trigger for Coverage B was under an "Offenses Committed" basis which is similar to an "Occurrence" trigger.

**E. Who Is An Insured Provision:**

This section has been editorially revised to track with the changes made in the definition of "You".

**F. Limits of Insurance:**

This section has been editorially revised to remove any reference to the "Products/Completed Operations Hazard" under Coverage B, Personal and Advertising Injury Liability since Products coverage is not provided under Coverage B.

This section has also been editorially revised to replace the less descriptive terms "injury or damage" with the more technically precise defined terms "bodily injury" and "property damage".

**G. Commercial General Liability Conditions:**

The following editorial changes have been made to COMMERCIAL GENERAL LIABILITY CONDITIONS (Section IV):

1. Under the Duties In The Event Of Occurrence, Claim Or Suit condition, references to "or offenses" have been added to track with the coverage trigger described in Coverage B, Personal and Advertising Injury;
2. The "occurrence" version of the Duties In The Event Of Occurrence, Claim Or Suit condition has been revised to track with the same condition in the "Claims-made" version for consistency;
3. The Your Right To Claim and Occurrence Information condition in the CGL "Claims-made" version has been amended to prohibit disclosure of occurrence or claim information without consent of the insurer;
4. Language previously provided in Endorsement CG 00 04 02 86, When We Do Not Renew, has been incorporated into the CGL "Occurrence" version for consistency. This change was previously made and approved for the CGL "Claims-made" version.

**H. Extended Reporting Period Coverage:**

Extended Reporting Period Coverage is now provided for Personal and Advertising Injury Liability since this coverage is now provided on a claims-made basis (see Change D. this section).

**I. Definition of Insured Contract:**

The definition of "Insured Contract" has been editorially revised to clearly indicate that coverage is provided when work is being performed for a municipality, and a contract exists indemnifying that municipality, if liability would be imposed by law in the absence of any contract or agreement.

**J. Definition of "Property Damage":**

The definition of "Property Damage" has been editorially revised to clarify:

1. That when there is physical injury to tangible property, all resulting loss of use of that property shall be deemed to occur at the time of the physical injury that caused it; and
2. That when there is loss of use of tangible property that is not physically injured, the loss shall be deemed to occur at the time of the occurrence that caused it.

**K. Definition of "Your Product" and "Your Work":**

The definitions of "Your Product" and "Your Work" have been editorially revised to clearly indicate that coverage for failure to provide adequate warnings and instructions shall be provided under the "Products/Completed Operations Hazard".

000062

# COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we," "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under WHO IS AN INSURED (SECTION II).

Other words and phrases that appear in quotation marks have special meaning. Refer to DEFINITIONS (SECTION V).

## SECTION I - COVERAGES

### COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

#### 1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B.

b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and
- (2) The "bodily injury" or "property damage" occurs during the policy period.

c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury."

#### 2. Exclusions.

This insurance does not apply to:

a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
- (2) That the insured would have in the absence of the contract or agreement.

c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

d. Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. "Bodily injury" to:

- (1) An employee of the insured arising out of and in the course of employment by the insured; or
- (2) The spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract."

f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

- (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
- (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
- (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

- (i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or
- (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Subparagraphs (a) and (d)(i) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

(2) Any loss, cost or expense arising out of any:

- (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

g. "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
  - (2) A watercraft you do not own that is:
    - (a) Less than 26 feet long; and
    - (b) Not being used to carry persons or property for a charge;
  - (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
  - (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or
  - (5) "Bodily injury" or "property damage" arising out of the operation of any of the equipment listed in paragraph f.(2) or f.(3) of the definition of "mobile equipment" (Section V.8.).
- h. "Bodily injury" or "property damage" arising out of:
- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
  - (2) The use of "mobile equipment" in, or while in practice or preparation for, a prearranged racing, speed or demolition contest or in any stunting activity.
- i. "Bodily injury" or "property damage" due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution. This exclusion applies only to liability assumed under a contract or agreement.
- j. "Property damage" to:
- (1) Property you own, rent, or occupy;
  - (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
  - (3) Property loaned to you;
  - (4) Personal property in the care, custody or control of the insured;

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

- k. "Property damage" to "your product" arising out of it or any part of it.
- l. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

- m. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work;" or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

- n. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

- (1) "Your product;"
- (2) "Your work," or
- (3) "Impaired property;"

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Exclusions c. through n. do not apply to damage by fire to premises rented to you. A separate limit of insurance applies to this coverage as described in LIMITS OF INSURANCE (SECTION III).

**COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY**

**1. Insuring Agreement.**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this coverage part applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B.

b. This insurance applies to:

- (1) "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;
- (2) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the "coverage territory" during the policy period.

**2. Exclusions.**

This insurance does not apply to:

a. "Personal injury" or "advertising injury:"

- (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
- (2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
- (3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured; or
- (4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

b. "Advertising injury" arising out of:

- (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract;

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

- (2) The failure of goods, products or services to conform with advertised quality or performance;
- (3) The wrong description of the price of goods, products or services; or
- (4) An offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

**COVERAGE C. MEDICAL PAYMENTS**

**1. Insuring Agreement.**

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations; provided that:

(1) The accident takes place in the "coverage territory" and during the policy period;

(2) The expenses are incurred and reported to us within one year of the date of the accident; and

(3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

**2. Exclusions.**

We will not pay expenses for "bodily injury:"

- a. To any insured.
- b. To a person hired to do work for or on behalf of any insured or a tenant of any insured.
- c. To a person injured on that part of premises you own or rent that the person normally occupies.
- d. To a person, whether or not an employee of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.
- e. To a person injured while taking part in athletics.
- f. Included within the "products-completed operations hazard."
- g. Excluded under Coverage A.
- h. Due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

**SUPPLEMENTARY PAYMENTS - COVERAGES A AND B**

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

1. All expenses we incur.
2. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
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.

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

4. 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.
5. All costs taxed against the insured in the "suit."
6. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:
  - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
  - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
  - c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
2. Each of the following is also an insured:
  - a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you. However, no employee is an insured for:
    - (1) "Bodily injury" or "personal injury" to you or to a co-employee while in the course of his or her employment, or the spouse, child, parent, brother or sister of that co-employee as a consequence of such "bodily injury" or "personal injury," or for any obligation to share damages with or repay someone else who must pay damages because of the injury; or
    - (2) "Bodily injury" or "personal injury" arising out of his or her providing or failing to

provide professional health care services; or

- (3) "Property damage" to property owned or occupied by or rented or loaned to that employee, any of your other employees, or any of your partners or members (if you are a partnership or joint venture).
  - b. Any person (other than your employee), or any organization while acting as your real estate manager.
  - c. Any person or organization having proper temporary custody of your property if you die, but only:
    - (1) With respect to liability arising out of the maintenance or use of that property; and
    - (2) Until your legal representative has been appointed.
  - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. With respect to "mobile equipment" registered in your name under any motor vehicle registration law, any person is an insured while driving such equipment along a public highway with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for this liability. However, no person or organization is an insured with respect to:
    - a. "Bodily injury" to a co-employee of the person driving the equipment; or
    - b. "Property damage" to property owned by, rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision.
  4. Any organization you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
    - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier.

- b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
- c. Coverage B does not apply to "personal injury" or "advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

### SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
  - a. Insureds;
  - b. Claims made or "suits" brought; or
  - c. Persons or organizations making claims or bringing "suits."
2. The General Aggregate Limit is the most we will pay for the sum of:
  - a. Medical expenses under Coverage C;
  - b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard;" and
  - c. Damages under Coverage B.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard."
4. Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal injury" and all "advertising injury" sustained by any one person or organization.
5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
  - a. Damages under Coverage A; and
  - b. Medical expenses under Coverage C because of all "bodily injury" and "property damage" arising out of any one "occurrence."

6. Subject to 5. above, the Fire Damage Limit is the most we will pay under Coverage A for damages because of "property damage" to premises rented to you arising out of any one fire.
7. Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The limits of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

### SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

#### 1. Bankruptcy.

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

#### 2. Duties In The Event Of Occurrence, Claim Or Suit.

- 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.

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit."
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation, settlement or defense of the claim or "suit;" and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us.

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected

unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

- (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work;"
- (2) That is Fire insurance for premises rented to you; or
- (3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

When this insurance is excess, we will have no duty under Coverage A or B to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

**5. Premium Audit.**

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy term is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

**6. Representations.**

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

**7. Separation Of Insureds.**

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

**8. Transfer Of Rights Of Recovery Against Others To Us.**

If the insured has rights to recover all or part of any payment we have made under this Coverage

Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

**9. When We Do Not Renew.**

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

**SECTION V - DEFINITIONS**

1. "Advertising injury" means injury arising out of one or more of the following offenses:
  - a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
  - b. Oral or written publication of material that violates a person's right of privacy;
  - c. Misappropriation of advertising ideas or style of doing business; or
  - d. Infringement of copyright, title or slogan.
2. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment."
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
  - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
  - b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or
  - c. All parts of the world if:
    - (1) The injury or damage arises out of:
      - (a) Goods or products made or sold by you in the territory described in a. above; or

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

- (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
- (2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
5. "Impaired property" means tangible property, other than "your product" or "your work," that cannot be used or is less useful because:
- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
  - b. You have failed to fulfill the terms of a contract or agreement;
- if such property can be restored to use by:
- a. The repair, replacement, adjustment or removal of "your product" or "your work;" or
  - b. Your fulfilling the terms of the contract or agreement.
6. "Insured contract" means:
- a. A lease of premises;
  - b. A sidetrack agreement;
  - c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
  - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
  - e. An elevator maintenance agreement;
  - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

An "insured contract" does not include that part of any contract or agreement:

- a. That indemnifies any person or organization for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
  - b. That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
    - (1) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or
    - (2) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage;
  - c. Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in b. above and supervisory, inspection or engineering services; or
  - d. That indemnifies any person or organization for damage by fire to premises rented or loaned to you.
7. "Loading or unloading" means the handling of property:
- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto;"
  - b. While it is in or on an aircraft, watercraft or "auto;" or
  - c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;
- but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto."
8. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
  - b. Vehicles maintained for use solely on or next to premises you own or rent;
  - c. Vehicles that travel on crawler treads;
  - d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
    - (1) Power cranes, shovels, loaders, diggers or drills; or
    - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
  - e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
    - (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
    - (2) Cherry pickers and similar devices used to raise or lower workers;
  - f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.  
However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
    - (1) Equipment designed primarily for:
      - (a) Snow removal;
      - (b) Road maintenance, but not construction or resurfacing;
      - (c) Street cleaning;
    - (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
    - (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.
9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

10. "Personal injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
  - b. Malicious prosecution;
  - 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;
  - d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
  - e. Oral or written publication of material that violates a person's right of privacy.
- 11.a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
- (1) Products that are still in your physical possession; or
  - (2) Work that has not yet been completed or abandoned.
- b. "Your work" will be deemed completed at the earliest of the following times:
- (1) When all of the work called for in your contract has been completed.
  - (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
  - (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
- Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
- c. This hazard does not include "bodily injury" or "property damage" arising out of:

COMMERCIAL GENERAL LIABILITY  
COVERAGE FORM

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle created by the "loading or unloading" of it;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials;
- (3) Products or operations for which the classification in this Coverage Part or in our manual of rules includes products or completed operations.

12. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

13. "Suit" means a civil proceeding in which damage because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit with our consent.

14. "Your product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- (1) You;
- (2) Others trading under your name; or
- (3) A person or organization whose business or assets you have acquired; and

- b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product;" and
- b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

15. "Your work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work;" and
- b. The providing of or failure to provide warnings or instructions.

STATE OF VERMONT  
ADDISON COUNTY, SS.

ADDISON SUPERIOR COURT  
DOCKET NO. S151-94Ac

THOMAS QUESNEL, ET AL  
Plaintiffs,

vs.

THE TOWN OF MIDDLEBURY, ET AL  
Defendants

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.,  
Third-Party Plaintiffs,

vs.

HANOVER INSURANCE COMPANY and  
MASSACHUSETTS BAY INSURANCE COMPANY,  
Third-Party Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT  
WITH  
STATEMENT OF MATERIAL FACTS  
AND  
MEMORANDUM OF LAW

CHRISTOPHER DUNDON and DUNDON HEATING & PLUMBING, INC. ("Dundon") move for partial summary judgment against HANOVER INSURANCE COMPANY and MASSACHUSETTS BAY INSURANCE COMPANY (collectively the "Hanover Insurance Companies") on the grounds there is no genuine dispute as to any material fact and Dundon is entitled to judgment as a matter of law. Specifically, Dundon requests judgment:

- declaring that Third-Party Defendants Hanover Insurance Company and Massachusetts Bay Insurance Company have a duty to defend and indemnify Christopher Dundon against the Quesnel claim; and
- declaring that Third-Party Defendants Hanover Insurance Company and Massachusetts Bay Insurance Company are obliged to reimburse Dundon for

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expenses and costs, including attorneys fees, incurred in investigating and defending the Quesnel claim.

Dundon reserves to further proceedings their claims for attorney's fees in prosecuting this third-party claim, for punitive damages, and for such other relief to which they are entitled pursuant to Rule 54(c).

## TABLE OF CONTENTS

Statement of Material Facts.....	3
Memorandum of Law.....	6
I. HANOVER HAS WAIVED THE GROUNDS FOR COVERAGE DENIAL ASSERTED FOR THE FIRST TIME IN ITS SUMMARY JUDGMENT PAPERS.....	7
II. THE GROUNDS FOR COVERAGE DENIAL STATED BY HANOVER IN ITS COVERAGE POSITION LETTERS HAVE NO MERIT. ....	10
A. THE EMPLOYEE EXCLUSION IN THE GENERAL LIABILITY POLICY IS INAPPLICABLE BECAUSE QUESNEL WAS NOT THE EMPLOYEE OF CHRISTOPHER DUNDON, THE INSURED CLAIMING COVERAGE. ....	10
B. THE WORKERS' COMPENSATION EXCLUSION IN THE UMBRELLA POLICY IS INAPPLICABLE BECAUSE THE QUESNELS ARE MAKING A LIABILITY CLAIM, NOT A WORKERS' COMPENSATION CLAIM, AND BECAUSE CHRISTOPHER DUNDON HAS NO OBLIGATION TO PAY WORKERS' COMPENSATION. ....	11
1. <i>The Quesnel Claim Is Not A Workers' Compensation Obligation.</i> ....	11
2. <i>The Principle Of Severability Of Interests Makes The Workers' Compensation Exclusion Inapplicable To Christopher Dundon.</i> ....	14
C. CHRISTOPHER DUNDON IS AN INSURED UNDER THE EMPLOYERS LIABILITY POLICY.....	16
III. THE GROUNDS FOR COVERAGE DENIAL STATED BY HANOVER FOR THE FIRST TIME IN ITS SUMMARY JUDGMENT PAPERS HAVE NO MERIT.....	17
A. HANOVER IS LIABLE FOR THE ONGOING COST OF DEFENSE OF LEGALLY GROUNDLESS CLAIMS. ....	17
B. CHRISTOPHER DUNDON IS AN INSURED UNDER THE <u>GENERAL LIABILITY</u> POLICY.....	19
C. THE EMPLOYEE EXCLUSION OF THE <u>UMBRELLA</u> POLICY IS INAPPLICABLE BECAUSE QUESNEL WAS NOT THE EMPLOYEE OF CHRISTOPHER DUNDON, THE INSURED CLAIMING COVERAGE.....	20
Conclusion.....	20

## STATEMENT OF MATERIAL FACTS

The following matters represent facts which Dundon contends cannot genuinely be disputed or which are taken in the light most favorable to Hanover and may be assumed to be true for purposes of this motion.

1. Christopher Dundon is an individual residing in Orwell, Vermont. Dundon Heating & Plumbing, Inc. is a corporation duly organized and existing under the laws of the State of Vermont authorized to do business in Vermont.

2. Hanover Insurance Company is an insurance company organized and existing under the laws of the State of New Hampshire with a principal place of business at 100 N. Parkway, Worcester MA (01605). It is affiliated with Massachusetts Bay Insurance Company in a group of insurers known as the "Hanover Insurance Companies."

3. Massachusetts Bay Insurance Company is an insurance company organized and existing under the laws of the State of Massachusetts with a principal place of business at 100 N. Parkway, Worcester MA (01605). It is affiliated with Hanover Insurance Company in a group of insurers known as the "Hanover Insurance Companies."

4. On May 8, 1993 Christopher Dundon was President and 51% owner of Dundon Heating & Plumbing, Inc.

5. Hanover Insurance Company issued a certain worker's compensation and employer's liability policy No. 3998638 to Dundon Heating & Plumbing, Inc. which was in full force and effect on May 8, 1993.

6. Massachusetts Bay Insurance Company issued a certain commercial general liability policy No. ZDV 3989031 to Dundon Heating & Plumbing, Inc. which was in full force and effect on May 8, 1993.

7. Hanover Insurance Company issued a certain commercial umbrella policy No. UHV3989032 to Dundon Heating & Plumbing, Inc. which was in full force and effect on May 8, 1993.

8. Plaintiffs Thomas Quesnel and Elizabeth Quesnel, and Thomas Quesnel as Co-Administrator of the Estate of Matthew J. Quesnel have filed against Christopher Dundon an Amended Complaint, a copy of which is attached to the Third Party Complaint. [The "Quesnel claim"].

9. Christopher Dundon timely notified Hanover Insurance Company of the Quesnel claim and has complied with all conditions precedent of the employer's liability policy.

10. Christopher Dundon timely notified Massachusetts Bay Insurance Company of the Quesnel claim and has complied with all conditions precedent of the general liability policy.

11. Christopher Dundon timely notified Hanover Insurance Company of the Quesnel claim and has complied with all conditions precedent of the umbrella policy.

12. The Hanover Insurance Companies have refused to provide Christopher Dundon with a defense and indemnity for the Quesnel claim. Attached to the Third Party Complaint are copies of letters stating the Hanover Insurance Companies' grounds.

13. The Hanover Insurance Companies denied defense and indemnity under the employer's liability policy solely on the grounds that "Christopher Dundon does not qualify as an insured." (Letter dated August 1, 1994, attached to third party complaint.)

14. The general liability policy does not apply:

e. "bodily injury" to:

(1) An employee of the insured arising out of and in the course of employment by the insured;...

(Letter dated December 9, 1994, p. 3-4, attached to third party complaint.)

15. The Hanover Insurance Companies denied defense and indemnity under the general liability policy solely on the grounds that "Exclusion E would exclude coverage for allegations 11 through 24 as stated in the [Quesnel amended] complaint."

(Letter dated December 9, 1994, p. 5, attached to third party complaint.)

16. The umbrella policy does not apply:

(a) under Coverage I (a), to any obligation for which the insured or any of its insurers may be held liable under any workmen's compensation, unemployment compensation, disability benefits law, or under any similar, provided, however, that this exclusion does not apply to liability of others assumed by the named insured under contract.

(Letter dated December 9, 1994, p. 5, attached to third party complaint )

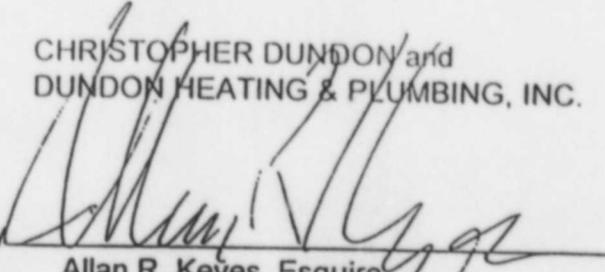
17. The Hanover Insurance Companies denied defense and indemnity under the umbrella policy solely on the grounds that "allegations 11 through 24 [of the Quesnel amended complaint] would be excluded under (a) as stated above." (Letter dated December 9, 1994, p. 5, attached to third party complaint.)

18. Christopher Dundon and Dundon Heating & Plumbing, Inc. have incurred and will incur costs and expense to investigate and defend the Quesnel claim, including attorney's fees.

Dated this 5 day of January, 1996.

CHRISTOPHER DUNDON and  
DUNDON HEATING & PLUMBING, INC.

By

  
Allan R. Keyes, Esquire  
RYAN SMITH & CARBINE, LTD.  
PO Box 310  
Rutland, VT 05702-0310

cc: James DuMont, Esq.  
Douglas Le Brun, Esq.  
Michael Gannon, Esq.

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STATE OF VERMONT  
ADDISON COUNTY, SS

ADDISON SUPERIOR COURT  
DOCKET NO: S151-94Ac

THOMAS QUESNEL, et al. )  
Plaintiffs )  
v. )  
THE TOWN OF MIDDLEBURY and )  
CHRISTOPHER DUNDON )  
Defendants )  
CHRISTOPHER DUNDON and DUNDON )  
HEATING & PLUMBING, INC. )  
Third-party Plaintiffs )  
v. )  
HANOVER INSURANCE COMPANY and )  
MASSACHUSETTS BAY INSURANCE )  
COMPANY )  
Third-party Defendants )

DEFENDANT HANOVER'S RESPONSE TO  
DUNDON'S STATEMENT OF MATERIAL FACTS

NOW COMES Hanover Insurance Company and Massachusetts Bay Insurance Company (hereinafter collectively "Hanover") by and through their counsel, Dinse, Erdmann, Knapp & McAndrew, and pursuant to V.R.C.P. 56(c)(3) respond to the "Statement of Material Facts" submitted by third-party plaintiffs dated January 5, 1990.

1. With respect to third-party plaintiffs' paragraph 4, Hanover objects to its materiality for coverage purposes because it was not alleged in plaintiffs' complaint; Hanover objects to its admissibility for Rule 56 purposes because it is not supported by any evidentiary materials, as required by Rule 56(c).

2. With respect to third-party plaintiffs' paragraphs 9, 10, and 11, Hanover objects to the term "all conditions precedent" (i) on grounds of ambiguity, since the particular policy provisions at

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usc. Erdmann.  
McAndrew, P.  
SUSAN L. W.  
COURT REPORTER  
100 S. VERMONT  
ST. ALBANS

issue are not even identified, (ii) because the assertions therein are conclusions of law, not statements of fact as required by Rule 56, and (iii) because the assertions therein are not supported by any evidentiary materials, as required by Rule 56(c).

3. With respect to third-party plaintiffs' paragraph 13 Hanover objects, and states that the referenced letter reserved the right to state additional grounds for denying coverage, and Hanover has since stated more grounds. The letter itself is the best evidence of its contents, and third-party plaintiffs' assertions are legal conclusions regarding the interpretation of the letter, not statements of fact as required by Rule 56.

4. With respect to third-party plaintiffs' paragraph 15 Hanover objects, and states that the referenced letter set forth the insuring clause in extenso, and that Hanover has since stated additional reasons for denying coverage, as it is entitled to do. The letter itself is the best evidence of its contents, and third-party plaintiffs' assertions are legal conclusions regarding the interpretation of the letter, not statements of fact as required by Rule 56.

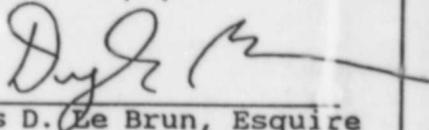
5. With respect to third-party plaintiffs' paragraph 17 Hanover objects, and states that the referenced letter set forth the insuring clause in extenso, and that Hanover has since stated additional reasons for denying coverage, as it is entitled to do. The letter itself is the best evidence of its contents, and third-party plaintiffs' assertions are legal conclusions regarding the interpretation of the letter, not statements of fact as required by

Rule 56.

6. With respect to third-party plaintiffs' paragraph 18, Hanover states that there has never been any Rule 56 evidence that third-party plaintiffs--or more to the point Mr. Dundon individually--has ever actually paid a penny of attorney's fees or suffered a penny of other actual out-of-pocket costs in this lawsuit.

Dated at Burlington, Vermont, this 20th day of February, 1996.

DINSE, ERDMANN, KNAPP & McANDREW

BY: 

Douglas D. Le Brun, Esquire

cc: Allan R. Keyes, Esquire  
James A. Dumont, Esquire  
Michael J. Gannon, Esquire

S:... \lebrun\dundon\sjfacts.96

STATE OF VERMONT  
ADDISON COUNTY, ss.

O R I G I N A L

THOMAS QUESNEL, et al.

ADDISON SUPERIOR COURT

v.

UNIT

TOWN OF MIDDLEBURY, et al.

DOCKET NO. S-151-94 Ac

MOTION HEARING

HEARD ON

APRIL 3, 1996

APPEARANCES:

The Honorable MATTHEW I. KATZ, Presiding

ALLAN R. KEYES, ESQ., On Behalf of Dundon

DOUGLAS D. LeBRUN, ESQ., On Behalf of Hanover Insurance Co.

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PROCEEDINGS

THE COURT: Okay, I read these a few weeks ago, and I said wait a minute, each memo deals with something new, each one gets better as it goes back and forth, so I better set this one for argument.

MR. LeBRUN: Good morning, Your Honor, I'm Doug LeBrun and I represent Hanover Insurance Companies in this case. As you know, this case grows out of an underlying accident where Matthew Quesnel, an employee of a corporation called Dundon Heating and Plumbing, Inc., went down into a manhole while on the job and died. This is an insurance coverage dispute, there are three policies involved.

THE COURT: Worker's Comp, CGL, umbrella.

MR. LeBRUN: Well, I thought I'd begin with the easiest one first, instead of, in that order. Okay, I'd just like to touch on a couple of points, first, very briefly. As you know, you decide a coverage question by putting the insurance policies in one hand, the complaint against the purported insured in the other and comparing them, and I just want to mention in passing that because the complaint is only against Mr. Dundon individually, and is not against the Corporation, there's nothing to compare, you know, there's no complaint with regard to the corporation to

1 use, and I just want to mention, in passing, again,  
2 that there's, I can find no basis for adjudicating a  
3 coverage claim with respect to the corporation.

4 Now, Your Honor has, I think, correctly  
5 dismissed the underlying claim because the people  
6 purporting to bring it were not the next of kin. You  
7 have to be the next of kin to bring a wrongful death  
8 ac claim, they weren't, so the Plaintiffs didn't have  
9 a standing. Under Rivlet Tramway, when the underlying  
10 complaint is dismissed, so the third party complaint  
11 should be dismissed.

12 As we have stated throughout, the relation  
13 of a third party complaint to an underlying complaint  
14 is one of logical dependency...

15 THE COURT: But wait a minute, the third  
16 party complaint is for coverage.

17 MR. LeBRUN: For indemnity and defense.

18 THE COURT: Well, whether we call it third  
19 party or we dismiss it and they go bring a new one,  
20 we're going to get back to this same point anyway. If  
21 they're entitled indemnity and defense, then why  
22 shouldn't we get to it? We don't lose jurisdiction  
23 over the third party.

24 MR. LeBRUN: No, no, we do not lose  
25 jurisdiction over the third party.

1 THE COURT: All right, so the Court is going  
2 to try and reach the merits.

3 MR. LeBRUN: Okay, okay, well let me just get  
4 right to the merits then. The easiest of the three  
5 policies to address, is the Worker's Compensation  
6 policy. There, only the corporation is a named  
7 insured, and there's no clause creating any additional  
8 insureds in the policy. That makes sense in the  
9 worker's comp policy. The only insured is the  
10 corporation. Mr. Dundon personally is not an insured.  
11 Therefore, that policy does not provide coverage to  
12 Mr. Dundon.

13 THE COURT: The CGL policy would seem to be  
14 the more interesting one to discuss.

15 MR. LeBRUN: Okay, well then I'll skip right  
16 to the CGL policy. The first...

17 THE COURT: Does it make sense that there  
18 would be a gap in coverage, that if some crafty  
19 Plaintiff's lawyer says all right, I've already gotten  
20 all I can from the company, the claim, now I'll go sue  
21 the owner. I mean does it make sense that, you know,  
22 there would be a gap in coverage as to the owner,  
23 Christopher Dundon?

24 MR. LeBRUN: Well, I think, I don't think of  
25 it as being a gap. Under each policy...

1 THE COURT: But you could see that  
2 Christopher would.

3 MR. LeBRUN: Well, yeah, I would hesitate to  
4 characterize as a gap, any situation where there was  
5 no coverage for someone. I think that's, seeing  
6 things in a backward light.

7 THE COURT: Yeah, from the carrier's point of  
8 view, no doubt, but I mean here's this plumber, he  
9 goes into his insurance agent and he says, look, this  
10 guy Dumont's in town, you've got to protect me, and so  
11 they say, okay, boy we have three policies for you,  
12 and all of a sudden he's falling in the cracks. I  
13 mean that's a gap for him.

14 MR. LeBRUN: With respect to him, it is a  
15 lack of coverage. I still would say it's not  
16 appropriate to characterize that as a gap. He could  
17 have purchased coverage and been the insured. He  
18 could of, but he did not. The insured under each  
19 policy is a corporate entity. Yes, he happens to own  
20 part of it, I take it. Yes, he works for it, but  
21 there's a corporate entity that's the named insured,  
22 so in determining whether any individual, Mr. Dundon,  
23 or any other individual, has coverage under the  
24 policies, you have to look at them and see, well is he  
25 within the definition of an insured. Is this

1 individual within the definition of an insured under  
2 the policy? I don't perceive that as being in any way  
3 illegitimate.

4 THE COURT: Do you think that's what somebody  
5 like Christopher, I have never met him, but we're  
6 obviously good friends at this point, would view it, I  
7 mean it as a likely way to do business with his  
8 carrier?

9 MR. LeBRUN: Well, the way I would answer  
10 that is to say that the claim against him, or the  
11 claim that used to be against him was a bogus claim.  
12 There's always a point at which a claim against  
13 someone is so meritless, that there is a problem with  
14 that victim of a meritless claim, trying to get  
15 insurance coverage. I mean it may be unfortunate, but  
16 that's really is what is motivating it. The nature of  
17 the claim against him and the fact that it is no  
18 claim, it's not, that's where the problem really  
19 arises...

20 THE COURT: That's a tough standard to apply,  
21 though, the so bogus standard.

22 MR. LeBRUN: Well, you know, I've looked high  
23 and low for a case, as I assume my colleague has,  
24 dealing with a situation where a claim isn't even  
25 stated against a purported insured and is there a duty

1 to defend or indemnify in that situation, and the  
2 closest I have come to, having looked everywhere, are  
3 that, is that line of Maine cases, which I have cited,  
4 you know, numerous times. That's the best I can do in  
5 terms of finding law and addressing it.

6 THE COURT: What else do you buy insurance  
7 for? I mean very often paying you and Allan Keyes is  
8 more expensive, or more correctly to pay Berger and  
9 Badgewick, they're the ones who really run up the  
10 bills, is more expensive than buying off Dumont. But  
11 I mean that's what you buy insurance for.

12 MR. LeBRUN: Well, the fact that you buy  
13 insurance, doesn't mean that you always have coverage.  
14 You have to look at the policies and you've got to  
15 look at the complaint, and there are situations where  
16 the claim against an insured, and this is one of them,  
17 is so strange that unfortunately, there is no  
18 insurance. Now, I would say the saving grace in this  
19 situation is that Your Honor has properly dismissed  
20 the underlying complaint. For all we, the only  
21 evidence I have seen is that Mr. Dundon incurred \$900  
22 in attorney's fees, I'm sure it's gone up since then,  
23 but, so the impact of looking at the policy and the  
24 complaint, rather than just giving him coverage, is  
25 minimal because the complaint is bogus, if you see

1           where I'm coming from...

2                   THE COURT: I see where you're coming from,  
3           but you don't have a single case that supports this.  
4           You're at this main line that by implication says that  
5           but, I mean, why else do people buy insurance? I have  
6           a hard time buying that our Court's going to affirm  
7           such a holding.

8                   MR. LeBRUN: Well, it would depend, the  
9           holding presumably would not take the form of why do  
10          people buy insurance if not to somehow get it. The  
11          holding, it would seem to me, would have to address  
12          the language of the policies and the language of the  
13          complaint, and I continue to feel that if you do that,  
14          the Court would have no trouble in affirming that sort  
15          of a holding because when you look at the language of  
16          the policies, and I'll address the CGL policy  
17          language, I don't believe there is a duty to defend.

18                   Now clearly, you can sort of, I think, put  
19          to one side the duty to indemnify. The claim against  
20          him has been dismissed. There is no indemnity  
21          potential at this point, out there.

22                   THE COURT: And the duty to defend is  
23          broader.

24                   MR. LeBRUN: Right, and so that's alive in my  
25          perception of the case, that's an issue. So, if I

1 could just address that, referring to the language of  
2 the CGL policy. The first thing, part of the policy  
3 that should be looked at, it seems to me, is the  
4 insuring agreement of the policy which just  
5 fundamentally says that there's insurance for a bodily  
6 injury damages which the insured may be legally  
7 obligated to pay, something to the effect, the gist of  
8 it being, there has to be a potential, legal  
9 obligation to pay damages before the policy even  
10 begins to be triggered.

11 Here the claim against him has been  
12 dismissed, he is not facing any legal obligation to  
13 pay damages.

14 THE COURT: Well, he's facing an appeal.

15 MR. LeBRUN: He is facing defense costs for  
16 an appeal for a case that has been dismissed, that is  
17 true, that's true.

18 The next thing to look at, it seems to me,  
19 is the definition of insured and the policy issued to  
20 the corporation defines as insured, in pertinent part,  
21 directors and officers only with respect to their  
22 duties as officers and directors. That's what it  
23 insures directors and officers for. Now, Mr. Dundon  
24 is a...

25 THE COURT: And you don't think that includes

1 any kind of or might it be held at trial to include  
2 some obligation to insure safe work places?

3 MR. LeBRUN: Well again, the way I am  
4 approaching the issue, is to look at the complaint and  
5 the policies. The policies say only with respect to  
6 their duties as officers and directors, the complaint  
7 says explicitly that Mr. Dundon violated his "duties  
8 as a fellow employee," so we have two, it's apples and  
9 oranges. Now, I don't know, it seems to me in  
10 resolving this coverage issue, that what should be  
11 done is what is always done...

12 THE COURT: Well, you know, that's the  
13 language of the complaint, but we don't really want to  
14 hold Dumont to some standard of careful draftsmanship.

15 MR. LeBRUN: I don't believe, I mean...

16 THE COURT: I mean, he just wants to know  
17 what he's pleading. I mean, what he really means is,  
18 if Dundon and I, Chris and I were, and I use Chris to  
19 make it clear, I'm talking about the human being, if  
20 we were equal, I wouldn't be here says Dumont. I'm  
21 here because Chris is above me, literally and  
22 figuratively. I'm here because Christopher failed to  
23 check out the workplace before he sent me down into  
24 it. Now, isn't that an executive decision in a small  
25 company?

1 MR. LeBRUN: My response to that is that that  
2 really begs the questions. Directors and officers  
3 have certain duties. You can look at cases, you can  
4 figure out what they are, they are defined set of  
5 duties owed by directors and officers to employees.

6 There's another set of duties owed by one  
7 employee to another. They are two distinct things.  
8 Now, the complaint has been amended, I think, at least  
9 once already and it's never been amended to assert  
10 duties that are breached by him by a director or  
11 officer.

12 THE COURT: Yeah, but you're reading this  
13 complaint very carefully. I mean we live in an era of  
14 notice pleading. Dumont's got the survivors of a  
15 young man who was drowned in the sewer, and he wants  
16 to recover whatever he can recover, and what more does  
17 he have to say in the complaint? If he throws around  
18 whether rightfully, wrongfully, carefully, or  
19 otherwise, a couple of phrases, we really hold him to  
20 all those phrases? I mean...

21 MR. LeBRUN: Well, I think you have to draw a  
22 distinction even there, factual allegation is one  
23 thing, I mean if there was a series of factual  
24 allegations, that could be read various ways, then,  
25 you know, I don't get to read it carefully. I have to

1 accept all of those factual allegations as true and  
2 accept it for purposes of determining coverage but  
3 what you have is a conclusory legal allegation which  
4 is not neither gain said, nor contradicted by any  
5 factual allegation, I think Defendant is entitled to  
6 point to that and to say, hey wait a minute, I'm  
7 entitled to notice of the nature of the claim being  
8 asserted against me. He has said that I am being sued  
9 in my capacity as a coemployee.

10 THE COURT: Ah, but now you're talking about  
11 Christopher, the Defendant. Christopher, the  
12 Defendant is entitled to be notified of the claims  
13 against him. But Christopher, the insured, he's a  
14 more nervous guy yet. He's worried about the numbers,  
15 not just the theories.

16 MR. LeBRUN: My response would remain the  
17 same. I don't think, I'm unaware of cases, deciding  
18 terms coverage issues, drawing a distinction between  
19 reading the Plaintiff as, I mean reading the complaint  
20 as Defendant and reading it as purported insured, I am  
21 unaware of any such case, so that would be my, the  
22 core of my response there. I do want to say, though,  
23 that the definition of insured is not just what we've  
24 been discussing, but also it says, employees are  
25 insured except as to injuries to coemployees while in

1 the course of employment. What could be clearer than  
2 that? You know, we might have a nervous Mr. Dundon.  
3 When he reads the definition of insured and says  
4 employees are insured except to injuries to  
5 coemployees in the course of employment, I don't think  
6 he has a legitimate basis for saying, I'm an insured.  
7 He does not fall within the policy definition of  
8 insured. So those are two, two...

9 THE COURT: Now Allan keeps using this  
10 phrase, any insured. He seems to think that there's  
11 some kind of broader concept.

12 MR. LeBRUN: Yeah, that arises in a slightly  
13 different context, not with respect to the insuring  
14 agreement or with respect to the definition of  
15 insured, but with respect to some of the exclusions.  
16 Now, then the burden of proof is on me for the  
17 exclusions until then, it's been on Mr. Keyes and it's  
18 true, if you reach, if you find, if you get past the  
19 insuring agreement, or the complaint has been  
20 dismissed. If you get past the definition of insured  
21 which does not seem to cover him, and you reach the  
22 exclusions, then the concept of what is the meaning of  
23 the word insured is in that sphere, implicated.

24 If you reach the exclusions, there is a  
25 conflict in authority. I'll acknowledge that. Now,

1 I'll point out, though, having made that  
2 acknowledgment, that we have seen no cases  
3 contradicting Hanover's position on any of those  
4 preliminary issues. For example, you may say the  
5 Maine cases aren't that persuasive, but they're more  
6 persuasive than the authority or lack thereof that has  
7 been brought to your attention in opposition to those  
8 cases, but there is a conflict of authority with  
9 respect to the meaning of insured in the worker's comp  
10 exclusion.

11 In, I think I'm not mischaracterizing...

12 THE COURT: If your doctrine, you know, that  
13 you think is foreshadowed by Maine, were correct, we  
14 practically have to litigate the underlying claim  
15 every time in order before we decided whether there  
16 was coverage.

17 MR. LeBRUN: I would strongly disagree. What  
18 those cases say, is that if the complaint fails to  
19 state a claim in which relief can be granted...

20 THE COURT: Which is the typical appellate  
21 complaint. I mean they're all like that.

22 MR. LeBRUN: No, seriously, I think, it's  
23 that, the only way in which my position would ever  
24 result in there being no insurance is if the complaint  
25 had been dismissed for failure to state a claim. In

1 no case, would my position result in litigation of the  
2 underlying complaint. My position is only, comes into  
3 being when it's been dismissed for failure to state a  
4 claim from the get go so, you know, I really don't  
5 think that notion is...

6 THE COURT: Is that what those Maine cases,  
7 is that procedural posture of the Maine cases?

8 MR. LeBRUN: Yes, it is. Those cases are all  
9 cases where there was a Motion to Dismiss pending or  
10 granted and the Court, and then there was an insurance  
11 claim. And the reason allowed, required a defense, is  
12 because those underlying complaints, though they might  
13 not have survived the Motion to Dismiss as the Courts  
14 themselves say, have foggy language about negligence  
15 and personal injury. They arise in the context of PI  
16 cases where -- one of them, for example, the Lavoie  
17 case. Maine, apparently, okay, the complaint said  
18 assault and battery, that was the complaint. The  
19 policy had an intentional acts exclusion, assault and  
20 battery, are necessarily intentional, there was no  
21 coverage. However, there was this ATLA-like phrase in  
22 the complaint saying, he committed assault and battery  
23 due to his negligence, I sustained bodily injury, and  
24 that mere mention of negligence, foggy though it was,  
25 and although the Court acknowledged, the complaint

1           itself might not survive a Motion to Dismiss. That  
2           language was sufficient to trigger a duty to defend,  
3           so that's the kind of context in which the Maine cases  
4           arose in. In our case, we have a purely legal basis  
5           for objecting to the claim. Wrongful death act claims  
6           can only be brought by next of kin. It's different,  
7           the word negligence in that kind of complaint, or some  
8           other verbiage, doesn't raise the same kind of doubt  
9           that it did in the Maine cases.

10           THE COURT: I don't know, you know, three or  
11           four years ago, I would have said, you know, that's  
12           great logic, Doug, it applies to dram shop cases, too.  
13           They can be brought by next of kin, but who would have  
14           ever thought that the drunk himself could bring a Dram  
15           Shop Act claim. Now, of course, we live in the age of  
16           wisdom, and we've been educated.

17           MR. LeBRUN: I would exhort, Your Honor, not  
18           to work backwards from what the Supreme Court might  
19           say in its flights of fancy and then to issue based on  
20           that basis. I would exhort, Your Honor, to really  
21           look at the policy and the complaint.

22           THE COURT: Well that's what they pay me for,  
23           to try and envision those flights.

24           MR. LeBRUN: I think one is on shaky ground  
25           in trying to go out to the limits of where those

1 flights might go.

2 THE COURT: I don't know, I just have this  
3 basic idea, that hey, that's why you buy insurance.

4 MR. LeBRUN: Well, that leads to the  
5 conclusion that any time a corporation buys insurance,  
6 there must be a duty to defend, a corporate  
7 stockholder, a majority stockholder, I mean to put  
8 into no abstract terms, that's what you're sort of  
9 saying, and I don't think that that's the law  
10 anywhere. I mean I think this may be in some respects  
11 a hard case, on a personal gut level, however, since  
12 you have dismissed the case, and since I do think it  
13 is likely that your dismissal will be affirmed, he's  
14 only out \$900. This isn't that hard of a case. I  
15 mean, it's, so I think it's not a case, I think it's a  
16 case where the law can actually be applied without  
17 feeling that anyone's life is being destroyed.

18 THE COURT: Although Christopher, not here,  
19 as stockholder, I mean, don't you think that Dumont  
20 could, with a straight face, say Christopher is here  
21 as Executive Officer?

22 MR. LeBRUN: I think he's president, so that  
23 also could be said, and what follows from that?

24 THE COURT: That, that's the reason that he  
25 was ordering Christopher about, that's his role, viz-

1 a-viz Christopher, and that's where he breached his  
2 duty to Christopher by not supplying a safe work  
3 place.

4 MR. LeBRUN: Well, this isn't a safe  
5 workplace claim. I think, without looking back to the  
6 complaint, the allegation is failure to supervise,  
7 failure to properly train. It's not a safe workplace  
8 claim, so could he say it with a straight face the  
9 duty, could he have said, more to the point, could he  
10 have said with a straight face, these duties were owed  
11 by Dundon and Cornell, and Dundon's (inaudible) a  
12 corporate officer, could he have said that with a  
13 straight face? Yes

14 THE COURT: Well doesn't that make  
15 Christopher an insured then?

16 MR. LeBRUN: If he had said that, there would  
17 have been the opportunity to contest whether the  
18 alleged duties were, in fact, among those owed by an  
19 officer, and if it survived that, yes, but that's  
20 speculation. That is not what was, in fact, alleged,  
21 and there's been no argument made, that the particular  
22 duties that were allegedly breached, the duty to train  
23 and supervise, I believe they are, there's been no  
24 authority brought to my or the Court's attention,  
25 saying that those really were duties owed by an

1 officer, hence, hence, hence. There's a lack of  
2 authority coming back at me when I have presented the  
3 Court with good authority to the contrary. Now,  
4 that's the definition of insured. There's still more  
5 to look at. If the insuring agreement is surmounted,  
6 albeit the complaint has been dismissed, if he's  
7 within the definition of insured, there are still  
8 exclusions, if you want to look at the policy, and I  
9 think you've got to.

10 There are two exclusions. One of them is  
11 the worker's compensation exclusion and it says, I  
12 don't have it in front of me, excluded are, in fact I  
13 have with me down here.

14 THE COURT: Isn't that the one exclusion  
15 everybody agrees applies? I mean Dumont will be  
16 saying at the slightest cue, this is not a worker's  
17 comp claim. I mean everybody agrees on that.

18 MR. LeBRUN: Yes, if you characterize it in  
19 terms of what kind of legal cause of action is  
20 presently being alleged. It is not a worker's comp  
21 cause of action. However, the caselaw, including the  
22 American Fidelity case, an old District of Vermont  
23 case, 43 F.2d 841, they interpret that as saying  
24 whenever, it applied whenever the Plaintiff is injured  
25 on the job. It's, so that there are many cases out

1 there just applying it in that kind of a common sense  
2 way. Now, think of the common sense of it.

3 Hanover got a claim made by its insured,  
4 wonder of wonders, the corporation, the wife and the  
5 child were making a worker's comp claim and it paid  
6 out more than \$200,000 to the next of kin, and now  
7 it's being, an unusual claim being asserted against  
8 the insured, and it is pointing to this exclusion,  
9 which has been interpreted in numerous cases which we  
10 have cited, as applying when an insured is injured on  
11 the job, a more common sense interpretation, a less  
12 narrow reading, if that is the approach that is being  
13 taken with respect to these policy terms, and they are  
14 appointed to it, and there are numerous cases  
15 supporting it.

16 There is a second exclusion, and here we  
17 face a waiver issue, but I will address the exclusion  
18 itself first. There's no coverage for bodily injury  
19 to, and I'm essentially quoting, to an employee of the  
20 insured arising out of and in the course of employment  
21 by the insured or to that injured guy's spouse, and  
22 this exclusion applies whether the insured may be  
23 liable as an employer or in any other capacity.

24 THE COURT: Yeah, but this is not to the  
25 employer or spouse, this is to the parents.

1 MR. LeBRUN: That policy exclusion says, in  
2 effect, if I can just substitute the names. There is  
3 no coverage for bodily injury to Matthew Quesnel, the  
4 employee of the insured, and the insured, if we define  
5 it as including both the corporation and the  
6 individual, okay, so there we have, there is no  
7 coverage for bodily injury to the employee of the  
8 insured arising out of and in the course of that guy's  
9 employment. It applies as clear as day. The question  
10 is, has it been waived? And here, our arguments are  
11 completely straight forward.

12 THE COURT: You kind of word processed your  
13 way out of it. You wrote a letter saying no coverage  
14 because, and anything we may be able to think of  
15 later.

16 MR. LeBRUN: No, that was the worker's comp  
17 denial of coverage letter, and that is under Vermont  
18 law, completely valid, but unfortunately, the adjuster  
19 did not put a similar clause in to the denial of  
20 coverage letter with respect to the CGL policy. That  
21 is really what the problem is, if he had, I don't  
22 think we would even be here today, but he didn't, so  
23 there's a waiver question and it is a legitimate  
24 issue. However, we have cited cases saying that the  
25 only party who has -- in a way, this is predicated on

1 the guy's status as an insured. If Mr. Dundon is not  
2 defined as an insured, then he has no standing to  
3 assert a waiver because only parties to a contract can  
4 assert the waiver. You can't have a stranger, a  
5 noninsured asset waiver. I've cited cases that say  
6 that, and there is a recent case, 888 Fed. Sup. 1372  
7 which says the same thing, in 1995, Southern District  
8 of Texas case, it says the same thing.

9 THE COURT: Well, but it's not Christopher  
10 who's saying waiver, it's his boss, your insured,  
11 that's saying waiver because the boss, Dundon Heating  
12 and Plumbing, is going to have to pay Christopher's  
13 bills.

14 MR. LeBRUN: No, the party who is asserting  
15 waiver, the party who is saying to us, you can't use  
16 that exclusion, which clearly says that there's no  
17 coverage here, is Christopher Dundon. He is the one  
18 that is facing, he's the one trying to get insurance.  
19 He's the one who is saying, no Hanover, you can't use  
20 that exclusion, that's Mr. Dundon, clearly, and under  
21 the cases we have cited, he does not have standing to  
22 do that unless he is an insured. If he is not within  
23 the definition of insured, he has no more right than  
24 you, I, or the guy on the street to come in and say  
25 there has been a waiver. A waiver can only operate

1 internally among the parties to an agreement. There  
2 are Vermont laws that we have cited on that very  
3 point. So, we say there has been no waiver.

4 THE COURT: Now what did the adjuster write  
5 on the CGL denial letter?

6 MR. LeBRUN: Well, he, it's a long letter and  
7 he quoted quite a bit of the policy in (inaudible), he  
8 quoted the insuring agreement, he quoted a lot of  
9 things, but then when he went back and explained why  
10 there was no coverage...

11 THE COURT: Is this the December 9 letter?

12 MR. LeBRUN: You know I don't have it in  
13 front of me.

14 MR. KEYES: Yes, it is, Your Honor. It's  
15 appended to...

16 THE COURT: Okay, you can look at mine if you  
17 want.

18 MR. LeBRUN: Well I may not need to,  
19 depending on what point you want to make about it.

20 THE COURT: Well, okay, I, how do you meet  
21 their waiver argument from this letter?

22 MR. LeBRUN: Okay. The insuring agreement is  
23 quoted in full, and it provides that, the insurance  
24 only applies to some, the insured becomes legally  
25 obligated to pay his damages. Here the complainant

1 has been thrown out, there's no potential of the  
2 insured becoming legally obligated to pay any damages.  
3 Yeah, he's got to pay his attorney's fees, that's not  
4 damages.

5 Second, the definition of insured is quoted  
6 in full and it includes all the different sections  
7 that we have just talked about. Then it lists a bunch  
8 of exclusion in extenso, and it includes listing info  
9 that exclusion that they say has been waived, the one  
10 saying no coverage for an employee...

11 THE COURT: Bodily injury to an employee of  
12 the insured arising out of the course of employment.

13 MR. LeBRUN: Right, right, there it is in  
14 black and white and it goes on and on, but then on  
15 page 5, when the adjuster starts explaining why there  
16 is no coverage, he does not go back and recapitulate  
17 everything. He says, he confines his explanation to  
18 just the worker's comp exclusion, and that's the  
19 reason he gives for denying coverage, albeit. The  
20 other exclusion was quoted in full.

21 Now, there is Vermont law saying, giving the  
22 underlying basis for why the doctrine of waiver  
23 exists. That has not been traversed in the briefs but  
24 the insured had before him, it's based essentially on  
25 the concept of being misled by the insurer or a sudden

1 change in the position. I think it can definitely be  
2 argued that when a (inaudible) in extenso, but just  
3 not later wound up into the adjuster's explanation,  
4 that nonetheless does not mislead a purported insured.  
5 So, that's the gist of that, that's how I would  
6 briefly address waiver.

7 THE COURT: So Allan's quoting the kind of  
8 conclusory, concluding paragraph and saying, he  
9 doesn't really explain his denial.

10 MR. LeBRUN: Yes, in his explanation, he does  
11 not incorporate both exclusions or the definition of  
12 insured, but I don't think that can be waived. He  
13 doesn't incorporate both exclusions into his  
14 explanation, albeit, he has set it out. That's the  
15 short of it.

16 THE COURT: All right.

17 MR. LeBRUN: So, you know, we've traversed a  
18 lot of issues, but in my view, it can simply be  
19 decided. Riblit Tramway says when the underlying  
20 complaint goes out, so does the third party complaint.  
21 Here the purported insured is not even facing a live  
22 claim.

23 THE COURT: It's facing a live appeal.

24 MR. LeBRUN: That's a Court, that's not  
25 damages, though, that is simply his attorney's fees,

1 that is correct, but that is not damages within the  
2 meaning of the insuring agreement.

3 MR. KEYES: That case now is about defense,  
4 and that is as the Court has indicated, one of the  
5 reasons why people buy insurance policies, it's  
6 because the defense is expensive, groundless claims  
7 have to be defended, claims that will be thrown out or  
8 the pleadings have to be defended, and I'm sure I  
9 can't count the number of motions that Ryan, Smith,  
10 and Carbine have filed to dismiss a complaint, under  
11 Rule 12(b)(6) in the last 50 years, where we've been  
12 paid by the insurance company to do so, and here, it  
13 may have only been \$900, I don't think that's a  
14 principle basis for the insurance company to say to  
15 Mr. Dundon, you have to pay for this defense. To me  
16 the case is beyond, really beyond those points. If  
17 there's any possibility that the claim will be within  
18 the coverage, that it will be against Mr. Dundon as an  
19 executive officer, any possibility, then the duty to  
20 defend attaches.

21 This company has walked away from that duty,  
22 they've raised this argument that complaint that fails  
23 to state a claim need not be defended which has, in my  
24 view, no precedent, no authority. They've raised  
25 unreasonable readings of their policy, and their

1 exclusions, the worker's...

2 THE COURT: What do you say about Exclusion  
3 E?

4 MR. KEYES: The employee exclusion? The  
5 employee exclusion reads, we don't cover claims by  
6 employees of the insured. It does not read we do not  
7 cover claims by employees of any insured. It is to be  
8 read as an integrated contract with the severability  
9 of interest clause, which says the policy is a  
10 separate contract for each insured, and the precedent  
11 we've cited is that if the claimant is not the  
12 employee of the insured claiming coverage, this  
13 exclusion does not apply.

14 The company knows very well how to exclude  
15 these claims. They quoted in their letter and now in  
16 the summary judgment motion, we don't cover insureds  
17 or insureds as employees in respect to claims by  
18 coemployees. They are not insureds. They know how to  
19 write that, and they did in this case as excluding  
20 employees from the definition of insureds. So this  
21 exclusion is not intended as a company, as assertive  
22 to exclude any claims by any employees. Mr. Dundon is  
23 insured not because he's an employee, he's insured  
24 under the separate clause as an executive officer as  
25 to which this exclusion does not apply.

1                   The company purchased the coverage to  
2 protect to the fullest extent allowed, and it protects  
3 executive officers against all suits, even if they are  
4 by an employee of a company because they are not a  
5 suit by the employee of the insured seeking coverage.

6                   The, I think that's the heart of the CGL  
7 issue, and we're asking on that exclusion and on the  
8 worker's comp exclusion that they've raised, and on  
9 this argument that a complaint that failed to state a  
10 claim need not be defended, not merely that the Court  
11 say, well, there's ambiguities in the policy, it could  
12 be read in the company's favor, and it could be read  
13 in our favor, and therefore, if there is a reasonable  
14 reading, under which there's coverage, especially  
15 since we're talking about defense, under which there's  
16 any possibility that there will be coverage, we're  
17 asking the Court to read these exclusions, to read the  
18 grounds that were originally stated, and the grounds  
19 that have now been stated, and say, these are not  
20 reasonable positions. This case, if the Court makes  
21 such a finding, the case would then go to the next  
22 stage, and into the discovery phase to find out  
23 whether the company knew if position was unreasonable,  
24 so that we could cover the more substantial costs of  
25 establishing the coverage to which we were entitled,

1 the \$900 defense that we were not given, even though  
2 we paid these premiums.

3 THE COURT: Well, all right, your, are you,  
4 you have a Cross Motion for Summary Judgment,  
5 declaring coverage?

6 MR. KEYES: Yes.

7 THE COURT: But that's not the end of your  
8 claim?

9 MR. KEYES: No, the, I'm seeking attorney's  
10 fees in connection with establishing coverage, and I  
11 understand I can't merely prove breach of contract, I  
12 have to prove a willing, knowing breach of contract,  
13 but my first step is to prove breach of contract, and  
14 if you say, well there's two reasonable readings, and  
15 therefore, Keyes, you win, then I guess the case ends.  
16 I get my defense costs of the underlying case, Mr.  
17 Dundon pays the cost of this suit, but if you say,  
18 Keyes, you're right, these new grounds never should  
19 have been raised, they're baseless in any event that  
20 this severability of interest clause was put in there  
21 to provide coverage the company's adjusters have  
22 overlooked. They're supposed to be looking for  
23 coverage. The underwriters, if you look at the  
24 history of this clause, put it in because they wanted  
25 to broaden the protection and the product they were

1 selling. They used the word "the", advisedly, some  
2 companies have retracted and put in the word "any,"  
3 but this company has written a policy with good  
4 protection for a company like Mr. Dundon's and it's  
5 adjuster, look for ways to get out of coverage, and  
6 stated unreasonable basis, and we'd ask the Court to  
7 say that they're unreasonable, that there is a duty to  
8 defend, and to defend the appeal, and we will then  
9 deal with whether my client wishes to continue to  
10 pursue the second half of the case.

11 MR. LeBRUN: May I respond? The threshold  
12 issue, and I would submit, the issue is, is there any  
13 possibility of Mr. Dundon being held liable for the  
14 underlying claim. That's, as my colleague, that's  
15 where he started, that's where I started, and that's  
16 where actually the case can end. The claim against  
17 him has been dismissed, because the guy who brought it  
18 didn't even have standing to bring it. He is not  
19 facing a claim for which he could be held legally  
20 liable, that's the short of it. The duty to defend  
21 groundless claims, as we have briefed several times,  
22 means that you have to accept the factual allegations  
23 as true. It doesn't mean that you have to defend any  
24 claim.

25 For example, there's a claim that says John

1 Smith assaulted me and the defense knows John Smith  
2 was in California at the time. They still have to  
3 defend, because that is, the allegation itself may be  
4 fraudulent, may be groundless but if true, would be  
5 within the policy. Here, even accepting all the  
6 factual allegations as true, the guy didn't have  
7 standing to bring the claim, so it's not within the  
8 jurisprudence concerning groundless or fraudulent  
9 claims.

10 Now, my opponent has said, referred to the  
11 number of times in which his law firm has defended  
12 cases that were ultimately dismissed on a Motion to  
13 Dismiss. I'll opine out that there is no case that  
14 has been cited stating as a legal principle, you must  
15 defend cases where no claim has been stated. In other  
16 words, there are no cases he has cited in opposition  
17 to the Maine cases. Make that point. He has  
18 suggested that our readings are unreasonable. They  
19 are not. Each and every one of our readings is  
20 supported by numerous cases. The Court, in addressing  
21 this issue for the first time in Vermont, may  
22 disagree, but it is absurd to claim our well reasoned  
23 positions as being unreasonable. He then argues that  
24 the word "the" qualifies the word "insured" for  
25 purposes of the exclusion. The Traveler's case that

1 we have cited, at 441 P.2d 180 rejects that  
2 proposition and in redressing the (inaudible) that you  
3 said "the" does not qualify the term insured. The  
4 term "insured" is defined and when that defined term  
5 is used, you refer to the definition, it is not  
6 qualified to be the term "the." He says we are  
7 reading the policy as if it said any insured. I would  
8 respectfully submit that he is reading it as if it  
9 said insured who is claiming coverage. He is sticking  
10 in that clause. The term "the" does not modify  
11 insured. The term "insured" is defined and it should  
12 be plugged in, in its entire definition when it is  
13 used and let's see, finally, D and O's are not,  
14 Directors and Officers are not insured for any claims  
15 as the policy says. They're only insured with respect  
16 to claims against them as Directors and Officers, so I  
17 would just say our opposition has been completely  
18 reasonable, up and down the line, and we have cited  
19 numerous cases on points where they have cited none.

20 THE COURT: Okay, I have forgotten my cue,  
21 not my cue, but my line. You gave it to me and I've  
22 forgotten it. The first part of it is, Keyes you win,  
23 but the second part of it is, I think they were  
24 reasonable in denying coverage. You phrased it  
25 better, but that's the ruling.

1 MR. LeBRUN: And that's with respect to the  
2 CGL policy only, is that true?

3 THE COURT: Well, isn't that enough?

4 MR. LeBRUN: Yes, but...

5 THE COURT: We're certainly not into  
6 umbrella.

7 MR. LeBRUN: Okay, so can I just restate your  
8 ruling for my own comfort? So, we have a duty to  
9 defend this claim under the CGL policy but our denial  
10 of a defense was reasonable.

11 THE COURT: Right.

12 MR. LeBRUN: Okay.

13 MR. KEYES: Thank you.

14 MR. LeBRUN: Thank you, Your Honor.

15 THE COURT: Off to Montpelier now?

16 MR. DUMONT: Yes, this is for the record,  
17 this is the original Plaintiff...

18 THE COURT: You want to have your Eleventh  
19 Amendment?

20 MR. DUMONT: The Eleventh Amendment is one of  
21 my favorite amendments. I don't know if Your Honor  
22 has had a chance to read the Garrity case. It's not  
23 in A.2d, it's not on the CD-ROMs yet, but it was  
24 issued on January 5th of this year.

25 THE COURT: Was that reversed?

1 MR. DUMONT: Let's see, were you the trial  
2 judge, I've forgotten.

3 THE COURT: What's the name of the case?

4 MR. DUMONT: Garrity v. Manning. I don't  
5 believe you were the trial judge.

6 THE COURT: It must be good law then.

7 MR. DUMONT: Actually I don't recall the  
8 trial court's position in that matter. I just looked  
9 at the large picture which is that Justice Dooley  
10 wrote, we are overruling, maybe more accurately  
11 speaking, modifying but, I think the opinion says  
12 overruling, Steele v. Eaton, and I just found out  
13 about the case recently and so that the record is more  
14 clear on appeal I just want to amend Paragraph 11, and  
15 then it can go up and the next of kin issue will be  
16 decided.

17 THE COURT: Well, I mean, ordinarily I'll let  
18 you amend anything. I'm a little bit concerned,  
19 Gannon's not here, he's really involved...

20 MR. DUMONT: Not on this issue, because this,  
21 we don't have the Garrity issue as to the town,  
22 because the town is the landowner. This issue doesn't  
23 affect Mr. Gannon at all. It only affects...

24 THE COURT: All right, so Allan is defending  
25 that part of it?

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MR. DUMONT: Yes.

MR. KEYES: My suggestion would be to deny without prejudice to renewal in the event the Supreme Court reverses your earlier ruling because it doesn't cut across that ruling, that ruling still stands and would apply to this new theory, so we don't need to address it now.

THE COURT: The amendment doesn't cut across the ruling, but the ruling cuts across the amendment though.

MR. KEYES: Right. If the ruling stands, the amendment is relevant.

THE COURT: So why don't we just defer?

MR. KEYES: If the Supreme Court affirms, then this is irrelevant. But I've...

THE COURT: Right, so why don't I just not rule on it now, say that it's premature, it has meaning only in the event of a remand.

MR. KEYES: Okay, all right, I thought it should be in there, I'm just concerned as I'm sure the Court is aware that the Supreme Court can affirm for reasons that no side is briefed, and if they looked at the bare complaint, although the parties today have said we are aware that this isn't a worker's comp case, and it's a duty separate than the worker's comp

1 area covers, I wanted to be sure, that's all.

2 THE COURT: Well, Allan, how are you harmed  
3 if he gets to amend?

4 MR. KEYES: Well then I have to move to  
5 dismiss it so we get a final order. I'd just like a  
6 basis for dismissal to be the same thing.

7 MR. LeBRUN: I would agree that the same  
8 grounds for dismissal that you eloquently argued  
9 before apply and can be dismissed from the Bench --  
10 the Motion to Amend granted and then dismissed for the  
11 same reasons as before.

12 THE COURT: Done. You got that? Motion to  
13 Amend granted, amended complaint dismissed for grounds  
14 previously...

15 CLERK: I'm sorry, I didn't hear that.

16 THE COURT: Amended complaint dismissed for  
17 grounds previously stated.

18 MR. LeBRUN: Thank you. That was an  
19 education.

20 THE COURT: Well this was the toughest stream  
21 of briefs I've had to deal with since getting to  
22 Middlebury.

23 MR. LeBRUN: They were well written briefs.

24 MR. KEYES: Shall we prepare a written order  
25 on the coverage issues.

1 THE COURT: Can't hurt.

2 MR. KEYES: I'm kind of up in the air on my  
3 claim for damages on the, for the costs of defense of  
4 this coverage, should we, the ruling those would be,  
5 those are dismissed because the grounds of denial were  
6 reason, but I will submit an order to counsel and then  
7 to the Court. Thank you, Judge.

8 END OF HEARING  
9

10 CERTIFICATE OF TRANSCRIPT  
11

12 I, Theresa M. Webster, do hereby certify that the  
13 foregoing pages numbered from 1 through 37 are a true,  
14 accurate and complete transcript of the proceedings taped  
15 in the matter of Quesnel v. Middlebury et al., Dundon v.  
16 Hanover, et al., Docket No. S-151-94 Ac, heard on April 3,  
17 1996, for which a transcript was duly requested.  
18

19 Theresa Webster

20 THERESA M. WEBSTER  
21

22 8-12-96

23 DATED  
24  
25