IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUNOCO, INC., SUNOCO, INC. (R&M), formerly SUN COMPANY, INC. (R&M)	:	CIVIL ACTION
V.	:	
ILLINOIS NATIONAL INSURANCE COMPANY	:	NO. 04-4087

MEMORANDUM

Padova, J. **December , 2006**

I. INTRODUCTION

By Order of August 29, 2005, the Court declared that Illinois National Insurance Co. ("INI") had a duty to defend Sunoco, Inc., and Sunoco (R&M), Inc. (collectively "Sunoco") in underlying lawsuits alleging third party injury and damage as a result of methly tertiary-butyl ether ("MtBE") contamination, pursuant to an INI insurance policy ("the Policy") containing a per occurrence self-insured retention ("SIR"). Sunoco, Inc. v. Illinois Nat'l. Ins. Co., No. 04-cv-4087, 2005 WL 2077258 (E.D. Pa. Aug. 29, 2005) ("Sunoco I"). Presently before the Court is a motion to enforce the Court's Order. For the reasons that follow, the motion is granted in part and denied in part.

The Sunoco I Order declared that Sunoco had satisfied its SIR of $5.25 million under the

Policy in connection with the investigation, defense and resolution of the underlying MtBE suits. On January 13, 2006, the Order was certified as final and appealable because INI expressly waived its affirmative defenses with respect to the duty to defend. That appeal remains pending. INI has not waived its affirmative defenses with respect to indemnity.

As of September 1, 2005, Sunoco had tendered to INI $10,844,253.59 in claimed defense and investigation costs. (Metzler Decl. ¶ 11.) On September 27, 2005, INI made a good faith payment of $5,584,253.59 to cover the tendered costs. (Murray Affidavit. ¶ 5.) On January 24, 2006, Sunoco tendered additional costs incurred through January 19, 2006. (Metzler Decl. ¶ 13.) INI objected to making additional payments on the following grounds: (1) $1,153,653.73 of previously tendered costs were undocumented; (2) some expenses tendered as defense and investigation costs were not related to defense and investigation but to remediation; and (3) the billings revealed unexplained rate increases for attorneys. (Pls.' Ex. 6, 4/26/2006 Letter from Stephen P. Murray to Stephen M. Metzler.)

Sunoco subsequently filed its first Motion for Enforcement of the Sunoco I Order, arguing that (1) res judicata barred objections to the defense and investigation costs because the disputed tendered costs were part of the summary judgment record, and the Court already ruled that these were proper defense costs in finding that the SIRs had been satisfied, see Sunoco I, 2005 WL 2077258, at *1 & n.2; and (2) INI waived any objections to the costs by arguing that the Sunoco I Order was final and appealable and waiving its affirmative defenses with respect to the duty to defend. (See Doc. No. 57.)

By footnoted Order dated August 24, 2006 ("Sunoco II"), we determined that INI could raise objections to the propriety of defense costs because the Court, in concluding that the SIRs had been

satisfied, did not explicitly rule that all costs submitted on the record of the summary judgment motion related to defense and investigation. We also determined that INI did not waive all objections to the propriety of tendered costs by arguing that the Sunoco I ruling was final and appealable because such objections are not necessarily inconsistent with abiding by its duty to defend and its waiver of affirmative defenses on the duty to defend issue. Accordingly, the Motion was denied to the extent that it sought a ruling that the doctrines of res judicata and waiver precluded INI from raising any objections to the propriety of the tendered costs. We directed that (1) INI provide an index of costs tendered that it alleged were insufficiently documented, (2) the parties attempt to mediate the dispute, and (3) the parties conduct discovery on the issue. The pending motion is the result of that discovery and the failure to resolve the issue of whether certain costs incurred by Sunoco related to MtBE contamination in Fort Montgomery, New York constitute defense costs that are within the terms of the Policy.

II. THE POLICY

The record relating to the pending motion is not in dispute. The parties have filed a Joint Submission, along with their own declarations and deposition excerpts and exhibits. The Policy provides for indemnification, requiring INI to "pay damages in excess of the applicable self-insured retention that the insured becomes legally obligated to pay by reason of liability imposed by law . . . for . . . property damage to which this insurance applies caused by an occurrence." (Ex.1 p.4.)[1] The Policy also provides that INI has "the right and duty to defend [Sunoco] against a *suit* seeking damages for bodily injury, property damage, advertising injury or personal injury." (Ex.1 p.6, emphasis added.) The same Policy provision states that INI may, at its "discretion investigate any

[1]All references to "Ex." refer to exhibits attached to the Affidavit of Michael C. Ledley.

occurrence or offense and settle any *claim or suit* that may result." (Id., emphasis added.) The term "claim" is not defined in the Policy. The term "suit" is defined to mean:

> a civil proceeding in which damages because of bodily injury, property damage, advertising injury or personal injury to which this insurance applies are alleged. Suit also includes:
>
> - an arbitration in which such damages are claimed and to which the insured must submit or does submit with our consent; or
> - any other alternative dispute resolution proceeding, in which such damages are claimed and to which the insured submits with our consent.

(Ex.1 p. 26.) INI must also pay "Supplemental Payments" under a Policy provision that states:

> We [INI] will pay, with respect to any claim we investigate or settle, or any suit against an insured we defend:
>
> - all expenses we incur,
>
> . . .
>
> - reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or suit. . . .

(Ex.1 p.6.) Under Endorsement 4 to the Policy, the SIRs "shall include all amounts under the Supplementary Payments section of the policy." (Ex.1 Endorsement 4 p.1.)

III. THE FORT MONTGOMERY INCIDENT

On May 22, 2000, Sunoco detected MtBE in the groundwater in Fort Montgomery, New York, where it operated a retail gas station. The MtBE was detected in a sample collected by Groundwater and Environmental Services, Inc. ("GES"), at the direction of the New York Department of Environmental Conservation ("DEC"), following the removal of an underground heating oil storage tank. Sunoco had retained GES to oversee the tank's removal. Sunoco notified the DEC of the discovery. (Ex. 3 p.24-25.) Additional testing revealed that potable water wells were contaminated with MtBE. (Ex. 9.) By letter of June 15, 2000, the DEC informed Sunoco that it was a potentially responsible party ("PRP") for the MtBE contamination. (Ex. 10.) The PRP letter asked

Sunoco to conduct a subsurface investigation to determine the source and extent of the contamination, and to provide potable water to residents impacted by the contamination. (Id.) Sunoco did not notify INI of its receipt of the PRP letter. INI did not receive a copy of the PRP letter until October 6, 2006, when Sunoco produced it as part of the document production in this case. (Ex. 9.)

Sunoco retained GES to determine the nature and extent of the contamination, determine how to respond to the allegation that it was a PRP, determine how to mitigate third party injury and damage, and provide technical expertise to enable Sunoco to defend itself. (Guttmann Decl., ¶ 13.) It conducted tests of the groundwater and soil at the Sunoco station and at neighboring homes. MtBE was found in the gas station's potable water well, as well as 40 of 88 potable water wells tested in the area. (Ex. 9 p.6.) On August 1, 2000, GES provided Sunoco with a Remedial Action Plan for the site, calling for extensive High Intensity Target remediation, groundwater monitoring and a site-specific Health and Safety Plan. (Id. at p.8-15.) Sunoco installed point of entry treatment systems ("POETs") at affected homes and supplied bottled water to the homeowners who did not believe the POETs would work or otherwise feared their drinking water could still be contaminated. (Brochu Decl., ¶ 10.)

Beginning in June 2003, four lawsuits, involving 145 plaintiffs, were filed against Sunoco over the Fort Montgomery contamination, alleging personal injury and damages. (Guttmann Decl., ¶ 9.) These cases remain pending. Sunoco negotiated a Consent Order with the DEC in February 2004, under which it did not admit liability for the Fort Montgomery contamination. (Guttmann Decl., ¶ 11.) It paid a civil penalty, reimbursed the State's investigation and remediation costs, and agreed to comply with a Schedule of Compliance calling for specific remediation activities. (Ex. 1

to Guttmann Decl.)

IV. DISCUSSION

The issue raised in the current motion is whether INI must reimburse Sunoco for, or more properly, permit Sunoco to apply toward the SIR, the costs it incurred to hire GES to investigate the contamination, conduct remediation at the site, and provide the POETs and bottled water supplies to the affected residents. INI argues that these costs are not within the Policy's coverage because, at the time they were incurred, there was no pending "suit." Under the Policy, it argues, INI's duty to defend, and hence, its duty to reimburse defense costs or count them toward Sunoco's SIR, requires that there be a "suit seeking damages for bodily injury, property damage, advertising injury or personal injury." INI asserts that the case law provides that a PRP letter does not qualify as a "suit" seeking damages. (Mem. of Law at 3.) It also argues that remediation costs are not defense costs, but are indemnity expenses subject to INI's continuing coverage defenses. (Id.)

Sunoco argues that the work GES performed is properly characterized as investigation activity and activity taken to assist Sunoco with its defense of the MtBE related liabilities. (Plaintiffs' Mem. at 18.) It asserts that the Policy provides that the term "suit" can include arbitration and "other alternative dispute resolution proceedings, in which damages are claimed." (Policy p. 26.) It asserts that "the DEC proceeding, and indeed the claims asserted by the town and its residents were in large measure an extended negotiation between these parties . . . and thus qualified as a 'suit' as that term is defined in the Policy." (Plaintiffs' Mem. at 19.) Sunoco also argues that its actions were expressly designed to investigate, mitigate, minimize or avoid the damages that were expected to be claimed by the residents, and are thus covered under the plain language of the Policy. (Plaintiffs' Mem. at 20.) Finally, it asserts that under the public policy of

Pennsylvania, monies spent by the insured to mitigate its potential liability to third parties are covered by comprehensive general liability policies. Having reviewed the parties' submission, we conclude that Pennsylvania's public policy requires that efforts undertaken by the insured to mitigate its liability to third parties can come within the coverage of a comprehensive general liability insurance policy. However, they are not "defense costs." They are indemnity expenses subject to INI's continuing reservation of rights.

A. Sunoco's Public Policy Argument

In Leebov v. United States Fid. & Guar. Co., 165 A.2d 82 (Pa. 1960), the Pennsylvania Supreme Court held that the insurance policy it construed covered the insured's costs for proactively attempting to mitigate and minimize its future liability. The insured, while excavating a hillside, caused a landslide that brought down a neighbor's porch. The insured immediately hired a shoring expert to prevent further damage. Thereafter the insured was sued by the neighbor resulting in a judgment of $1,150, with Leebov having to expend $550 in defense costs. The insured sought indemnity for the judgment and payment of his defense costs, as well as $13,047.37 for expenses incurred in hiring the shoring expert to arrest the landslide. The insurer denied coverage on the basis that landslides were not covered by the policy and because the shoring expense was not the result of tort liability, but was rather a contractual responsibility, which the policy did not cover.

The USF&G policy provided that the insurer agreed to pay "sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages. . . ." Id. at 83.[2] In discussing coverage under this provision for the shoring expense, the Pennsylvania

[2]In reaching its conclusion that the shoring expense was covered, the Court first distinguished the holding of Desrochers v. New York Cas. Co., 106 A.2d 196, 198 (N.H. 1954) (holding that the cost of compliance with a mandatory injunction was not reasonably to be regarded as a sum payable

Supreme Court held:

> If the plaintiff had not taken immediate and substantial measures to remedy the perilous situation, disastrous consequences might have befallen the adjoining and nearby properties. If that had happened, the defendant would have been required to pay considerably more than is involved in the present lawsuit. It would be a strange kind of argument and an equivocal type of justice which would hold that the defendant would be compelled to pay out, let us say, the sum of $100,000 if the plaintiff had not prevented what would have been inevitable, and yet not be called upon to pay the smaller sum which the plaintiff actually expended to avoid a foreseeable disaster.

Id. at 84. The Court continued:

> It is folly to argue that if a policy owner does nothing and thereby permits the piling up of mountainous claims at the eventual expense of the insurance carrier, he will be held harmless of all liability, but if he makes a reasonable expenditure and prevents a catastrophe he must do so at his own cost and expense.

Id.

The holding of Leebov has been applied in several Pennsylvania decisions. In Aronson Assocs., Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 14 Pa. D. & C. 3d 1 (C.P. Dauphin County 1977); aff'd 422 A.2d 689 (Pa. Super. 1979) (per curium), a distributor of petroleum products suffered a burst underground pipe, allowing a large amount of gasoline to escape into the ground and water. The Pennsylvania Department of Environmental Resources notified the plaintiff that it was liable for penalties and that it was required to undertake remediation to prevent injury to property and users of the water. After successfully preventing the migration of the gasoline from its property,

---

"as damages" because damages are recompense for injuries sustained; expense of restoring the plaintiff's property to its former state did not remedy the injury previously done), by pointing out that the that the language of the policy before it was broader in scope than the language of the policy in Desrochers. The Desrochers policy provided that the carrier agreed to pay "all sums which the insured shall become legally obligated to pay *as* damages." Leebov, 165 A.2d at 84 (quoting Desrochers at 198) (emphasis added in Leebov). In contrast, Leebov's policy provided coverage for sums Leebov became obligated to pay *by reason of* liability imposed upon him by law.

Aronson presented a claim for reimbursement of the cost of the remedial measures, which the insurer refused to honor on the ground that, because Aronson successfully contained the gasoline on his own property, the claim was not within the policy's coverage provision, which was identical to the provision at issue in Desrochers. See Aronson at 3-4.

In granting the plaintiff's petition for declaratory judgment that the policy covered the costs of remedial measures, the Aronson Court followed Leebov, which it characterized as holding that "preventive measures can be recovered where they are required to protect against a third person being harmed." Id. at 7. The court opined that to conclude that the costs expended were not recoverable under the policy would lead to the "illogical" result of finding coverage only after the insured allowed the condition on its property to harm others or their property. Id. Stating that the escape of the gasoline was an "occurrence," which resulted in a "legal obligation" required by the policy, the court directed coverage for the preventive measures. See Id. at 7-8.

Lehigh Elec. & Eng. Co. v. Selected Risks Ins. Co., 30 D. & C. 3d 120 (C.P. Luzerne County 1982) involved the insurer's obligation to pay for a cleanup necessitated by the accidental spillage of PCBs on the plaintiff's own property. The plaintiff filed a declaratory judgment action against its insurer, relying on Leebov and Aronson. As with Aronson, the policy language at issue was identical to Desrochers. 30 D. & C. 3d at 122. The insurer moved to dismiss the complaint on the ground that, as a matter of law, preventive measures were not covered by a general liability policy.

Analyzing Leebov and Aronson, the Lehigh Electric court observed that in both cases damage to third parties was not a mere possibility but rather was an established fact, and that the preventive measures were necessary to avoid greater harm. See Id. at 125. The court thus noted that while "an insured may be entitled to reimbursement for the costs or expenses incurred in preventing or

mitigating damage or loss to the property of others[,] . . . it is not any or every loss or damage to others that requires an insurer to pay the cost of preventive measures." Id. at 125. In so doing, the Lehigh Electric court stressed that an insurer "should not be required to pay an insured to clean up his own back yard." Id. As the complaint before it did not allege the extent or location of the PCBs spilled on the insured's own premises, the Lehigh Electric court was unable to determine from the complaint if, when, or to what extent, any injury or loss would be incurred by others. Id. at 127. As the "existence of those facts is pivotal in determining whether or not recovery is warranted under this policy," the court denied the defendant's preliminary objection in the nature of a demurrer and permitted plaintiff to amend its complaint. Id. at 129. The court held that under Leebov and Aronson an occurrence will be covered if the plaintiff demonstrates that the "risk of damage or loss to the property of others is both imminent and substantial." Id. at 127; see also Rohm and Haas Co. v. Continental Cas. Co., No. 3449, 1997 WL 1433810 (C.P. Philadelphia Dec. 8, 1997), rev'd on other grounds, 732 A.2d 1236 (Pa. Super. 1999) (applying Leebov and Aronson to hold that the "imminent and substantial" test applies only to costs of remediation of the insured's own property and is inapplicable to actual damages to off-site third party property); Redevelopment Auth. v. Insurance Co. of N. Am., 675 A.2d 1256, 1259 (Pa. Super. 1996) (holding that the legal obligation to conduct cleanup did not, in itself, overcome the policy exclusion for owned property; under Leebov and its progeny, for coverage to apply to cleanup costs of the insured's own property, there "must also be an imminent threat of substantial harm to the property of others").

Finally, in Interstate Fire & Cas. Co. v. B.T. Washington, Inc., No. 94-cv-232, 1995 WL 273643 (E.D. Pa. May 5, 2005), then District Judge Rendell distinguished Leebov and its progeny in the situation where a fire damaged building was ordered demolished by the Philadelphia

Department of Licences and Inspections because it was imminently dangerous. The owner demolished the building and submitted a claim to its insurer for reimbursement of the demolition costs arguing that, as the costs were necessary to avoid damage to neighboring structures, Leebov applied.

Judge Rendell distinguished Leebov, finding that,

> While the language in Leebov and Aronson is broad, the reach of the principles they announce is narrowed by the distinct factual posture of each case. Leebov presents a situation in which the policy dictates were satisfied, because the plaintiff was liable to the third party homeowner for property damage and to third party landowners for damage to the natural state of their property as a result of his actual interference with their lateral support at the time the landslide occurred. Aronson is also distinguishable because the plaintiff incurred liability to the Commonwealth under applicable environmental laws the instant the gasoline escaped, and therefore he was "obligated" to others as the result of an "occurrence" when he engaged in the clean-up activity, as mandated by the policy.
>
> Accordingly, Leebov and Aronson present fact patterns that are facially similar to the case at bar but are actually substantively distinct. First, damage or legally cognizable injury was actually inflicted upon third party property at the time of the occurrence and liability for that damage attached instantaneously. Next, further damage to third parties was a certainty unless the plaintiffs acted immediately to correct the problem. While the courts may have expanded the stated coverage of the insurance contract somewhat through judicial construction, the underlying facts satisfied the coverage prerequisites of each policy.

Id. at *4 (footnotes omitted). Judge Rendell found that, as the insured presented no evidence that the surrounding properties, or any other property or person, experienced injury at the time of the fire as a result of the structural damage, or that the fire caused the insured to incur immediate liability, thus necessitating the demolition in order to prevent any further such damage, the Leebov and Aronson, holdings, "while instructive, are not controlling in this case and do not mandate coverage." Id.

Unlike the facts in Interstate Fire, we find that the facts of the Fort Montgomery investigation

and cleanup fall squarely within the coverage holding of the Leebov rule. Of highest importance is the fact that imminent threat of substantial harm to third parties was clearly present as a result of the contamination. Like the insured in Leebov, Sunoco did not stand by and do nothing while the health and property of others was truly at risk, but rather took affirmative steps to mitigate its liability to third parties, as well as INI's exposure. Also unlike in Interstate Fire, damage to third parties was actually inflicted here, liability for that damage attached instantaneously, and further damage to third parties was a certainty unless Sunoco acted immediately to correct the problem through the site remediation, installation of the POETs and the provision of bottled water.

This is not the end of the discussion, however. To be reimbursed for the cleanup and remediation expenses – or to have them apply to the SIRs – at this point in the litigation, those expenses must constitute defense costs, rather than indemnity expenses. While INI has waived its affirmative defenses vis-a-vis the Sunoco I ruling on defense costs, it has not waived its affirmative defenses on indemnity. Thus, we must determine whether the cleanup and remediation expenses are properly considered defense costs or indemnity expenses.

B. Was the PRP Letter a "Suit"

In order to constitute defense costs, the investigation and remediation expenses must have been incurred to defend Sunoco "against a *suit* seeking damages for bodily injury, property damage, advertising injury or personal injury." (Ex.1 p.6, emphasis added.) At the time Sunoco conducted the investigation and incurred the remediation expenses, no Fort Montgomery resident or entity had yet filed a suit. The only thing "pending" against Sunoco seeking damages was the PRP letter.

Neither the Pennsylvania Supreme Court, nor the Third Circuit construing Pennsylvania law, have addressed whether an insurer is required to reimburse as defense costs remediation and

investigation costs incurred by a PRP before any person has actually filed a "suit." However, in Simon Wrecking Co., Inc. v AIU Ins. Co., 350 F. Supp. 2d 624 (E.D. Pa. 2004), Judge Brody extensively discussed the question when she faced a statute of limitations issue involving when an insured's cause of action arose against the insurer. The insured, Simon, received a PRP letter from the Environmental Protection Agency in November 1996. Simon notified its carriers of the letter on February 12, 1997. In 1999, certain other PRPs entered into a Consent Decree with EPA, under which they were permitted to file suit against non-settling PRPs, which included Simon. On December 9, 2002, the settled PRPs formally sued Simon.

In addressing a statute of limitations issue concerning when Simon's breach of contract claim against its insurers began to run, Judge Brody was called upon to discuss the meaning of "suit" in circumstances identical to this case. This was because the "language of the policy [identically providing that the duty to defend applies to 'any suit against the insured seeking damages'] indicates that [the insurers] did not have a duty to defend Simon until there was a 'suit' against Simon. Therefore, there was only a duty of immediate performance at the time of [the insurers'] initial denial letters if the EPA PRP letter sent to Simon, for which Simon requested coverage for, was a 'suit.'" Id. at 636. She held:

> In common usage, the word "suit" refers to a proceeding in a court of law. Black's Law Dictionary 1434 (6th ed. 1990) ("Suit" is "[a] generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him. . . . Term 'suit' has generally been replaced by term 'action,' which includes both actions at law and in equity."); Webster's New Collegiate Dictionary 1180 (9th ed. 1987) ("[S]uit" is "an action or process in a court for the recovery of a right or claim."). In the context of [the insurers'] entire policies, the word "suit" and the word "claim" are used separately and distinctly. Under their policies, the insurers have the discretion to settle or investigate any "suit or claim" but only have a duty to defend any "suit." In order to

> give the policies' distinction between "claim" and "suit" any meaning, the word "suit" must be given its common meaning, that of a civil action filed in a court of law, whereas a claim would be anything falling short of a suit. *Under the terms of [the insurers' comprehensive general liability] policies and under Pennsylvania's rules of insurance contract interpretation, the PRP letter is a claim rather than a suit and allows the insurers the discretion to investigate or settle, but does not trigger their duty to defend*.

Simon, 350 F. Supp. 2d at 636-37 (emphasis added). Judge Brody analyzed the issue by looking to how Pennsylvania law applies to the duty to defend. Whether an insurer's duty to defend has arisen is determined by looking to the allegations of the underlying complaint and, if the facts alleged therein fall even potentially within the policy coverage, the insurer has a duty to defend against the complaint. Id. at 637 (citing General Accident Ins. Co. of America v. Allen, 692 A.2d 1089, 1095 (Pa. 1997). As the duty to defend "extends only to suits and not to allegations, accusations or claims which have not been embodied within the context of a complaint," Simon, 350 F. Supp. 2d at 637, she held that the statute of limitations could only have begun to run when the insurers refused to defend Simon before the EPA *if* the PRP letter created an immediate obligation to defend. After reviewing the case law from other jurisdictions, she predicted that the Pennsylvania Supreme Court would hold that a PRP letter is not a "suit" triggering a duty to defend. Id. at 639 ("Under my analysis as to what the Pennsylvania Supreme Court would rule on this issue, [the insurers] had no duty to defend Simon in 1997 before the EPA for proceedings arising from the PRP letter").

Numerous other courts that have addressed the question of whether a PRP letter constitutes a suit triggering an insurer's duty to defend are split on the issue. Those finding that a PRP letter, or a similar notice from a state agency, does not constitute a "suit" include: Foster-Gardner, Inc. v. National Union Fire Ins. Co., 959 P.2d 265 (Cal. 1998); Linemaster Switch Corp. v. Aetna Life & Cas. Corp., 91-CV-396432, 1995 WL 462270 (Conn. Super. July 25, 1995); Lapham-Hickey Steel

Corp. v. Protection Mut. Ins. Co., 655 N.E.2d 842 (Ill. 1995); City of Edgerton v. General Cas. Co. Of Wisconsin, 517 N.W.2d 463, 473 (Wisc. 1994); Professional Rental, Inc. v. Shelby Ins. Co., 599 N.E.2d 423 (Ohio App. 1991); Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16, 20 (Me. 1990); Aetna Cas. & Sur. Co. v. General Dynamics Corp., 968 F.2d 707, 713-714 (8th Cir.1992) (applying Missouri law); Joslyn Mfg. Co. v. Liberty Mut. Ins. Co. 836 F. Supp. 1273, 1279 (W.D. La.1993); Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 834 F. Supp. 1254, 1258 (D. Col.1993); Harleysville Mut. Ins. Co., Inc. v. Sussex County, 831 F. Supp. 1111, 1131 (D. Del. 1993); and Becker Metals Corp. v. Transportation Ins. Co., 802 F. Supp. 235, 241 (E.D. Mo. 1992).

Those finding that a PRP letter does constitute a "suit" triggering a duty to defend include SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305 (Minn. 1995); Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 519 N.W.2d 864 (Mich. 1994); Coakley v. Maine Bonding & Cas. Co., 618 A.2d 777 (N.H. 1992); A.Y. McDonald Indus., Inc. v. Insurance. Co. of N. Am., 475 N.W.2d 607, 628 (Iowa 1991); C.D. Spangler Const. Co. v. Indus. Crankshaft & Eng. Co., Inc., 388 S.E.2d 557 (N.C. 1990); Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp., 948 F.2d 1507, 1517 (9th Cir. 1991) (applying Idaho law); Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1206 (2d Cir. 1989) (applying New York law); Morrisville Water & Light Dept. v. United States Fid. & Guar. Co., 775 F. Supp. 718, 732 (D. Vt. 1991).

Still other courts have determined that a PRP letter or other pre-complaint environmental agency action is a "suit" only if it is sufficiently coercive and threatening. Ryan v. Royal Ins. Co. of Am., 916 F.2d 731, 741-742 (1st Cir. 1990) (applying New York law); Hazen Paper Co. v. United States Fid. & Guar. Co., 555 N.E.2d 576 (Mass. 1990); Professional Rental, Inc. v. Shelby Ins. Co., 599 N.E.2d 423, 428 (Ohio 1991); Hartford Accident & Indem. Co. v. Dana Corp., 690 N.E.2d 285,

296-297 (Ind. App. 1997).

Courts concluding that a PRP letter is a "suit" have done so because they have held that the word "suit" was ambiguous and capable of application to legal proceedings initiated in non-court settings. See, e.g., Michigan Millers Mut. Ins. Co., 519 N.W.2d at 870. Other courts finding that a PRP letter is a "suit" have analyzed the consequences of the receipt of a PRP letter and found that the consequences were similar enough to the commencement of a lawsuit that a duty to defend arose immediately. See, e.g., Hazen Paper Co., 555 N.E.2d at 581.

Those courts finding that a PRP letter or its equivalent is not a "suit" have based their conclusions on a finding that the word "suit" is unambiguous and have given the word its plain meaning, which requires the commencement of a civil action in a court of law before an insurer's duty to defend is triggered. See, e.g., Lapham-Hickey Steel Corp., 655 N.E.2d at 847; Foster-Gardner, Inc., 959 P.2d at 280. In Lapham-Hickey, the court construed Illinois law on the interpretation of insurance contracts, which is similar to Pennsylvania's in that the court must construe the policy as a whole to determine the meaning of words and the parties' intent; a policy term is not ambiguous simply because it is not defined within the policy; a court cannot read ambiguity into the policy; and if a policy provision is unambiguous, a court must give the words of the provision their plain, ordinary and popular meaning. Compare Lapham-Hickey Steel Corp., 655 N.E.2d at 846 with Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs. Assoc. Ins. Co., 517 A.2d 910, 913 (Pa. 1986) (holding that the goal in interpreting insurance contracts is to ascertain the intent of the parties); Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 814 (3d Cir. 1994) (holding that an ambiguity is construed against insurer but policy language should not be tortured to create ambiguities that do not exist); and Borish v. Britamco Underwriters, Inc., 869 F. Supp. 316, 319

(E.D. Pa. 1994) (holding that the mere fact that a term is not defined in the policy does not make it ambiguous). The Lapham-Hickey court agreed with other state courts that the word "suit" is unambiguous. Id. at 847. The Court also found that, in considering a policy that contained a similar use of "claim" and "suit" as in the INI policy, that the policy's distinction between the word "suit" and "claim" had to be respected. "If the word 'suit' was broadened to include 'claim,' in the face of policy language which distinguishes between the two, any distinction between these two words would become superfluous." Id. at 847-48. Thus, the Lapham-Hickey court concluded that the EPA PRP letter did not initiate a suit and the insurance company did not have to cover defense costs expended by the insured in response to the PRP letter. Id. at 848.

The policy interpretation law of California, construed in Foster-Gardner, is also similar to Pennsylvania's law in that the intent of the parties should be inferred solely from the written provisions of the contract; if the contract is clear and explicit, it governs; and the fact that a term is not defined in the policies does not make it ambiguous. Foster-Gardner, Inc., 959 P.2d at 272-73. The California court held that the clear and unambiguous meaning of the word "suit" in the insurance policies meant "a civil action commenced by a filing of a complaint. Anything short of this is a 'claim.'" Id. at 279. In reaching its conclusion, the Foster-Gardner court noted that the words "suit" and "claim" were treated separately in the insurance policies, and it noted that the determination of an insurer's duty to defend depended on the allegations contained in the complaint. Id. at 280-81. The California court concluded that an order from the California Environmental Protection Agency identifying the insured as a PRP for environmental pollution did not trigger a duty to defend on the part of the insurers because the order was not a suit. Id. at 287.

In Foster-Gardner, the California Supreme Court distinguished its holding just one year

earlier in Aerojet-General Corp. v. Transport Indem. Co., 948 P.2d 909 (Cal. 1997), which held that "environmental investigation expenses may constitute defense costs that the insurer must pay in fulfilling its duty to defend. . . . Since the Court held that an insurer has a duty to pay investigative costs pursuant to an administrative order, logic dictates that such administrative orders constitute 'suits' triggering the Carriers' duty to defend." Foster-Gardner, Inc. at 285. Aerojet-General was distinguished on the ground that Aerojet had actually been sued in state and federal court by the State of California and the EPA in three actions that pre-dated the expenditure of the environmental investigation expenses.

Judge Brody, examining many of these decisions, determined that the reasoning of the Illinois Supreme Court in Lapham-Hickey and the California Supreme Court in Foster-Gardner were "in line with Pennsylvania law on the interpretation of insurance contracts and supported the conclusion that, in anticipating a ruling by the Pennsylvania Supreme Court, a PRP letter would not constitute a 'suit' triggering a duty to defend." Simon Wreaking Co., Inc., 350 F. Supp. 2d at 638-39. We agree that this approach is correct and should govern our decision here.

Sunoco bases its argument on the California Supreme Court decision in Aerojet-General Corp. and several cases applying the holding of Michigan Millers Mut. Ins. Co. The holding in Aerojet-General is clearly inapplicable. As the Foster-Gardner decision stated, Aerojet-General involved site investigation expenses incurred *after* the insured had already been sued for the environmental contamination. That is clearly not the case here. The Fort Montgomery contamination was discovered on May 22, 2000. GES began its work around this time and was already conducting site remediation when the DEC informed Sunoco that it was a potentially responsible party ("PRP") for the MtBE contamination on June 15, 2000. Thereafter, GES

conducted its subsurface investigation to determine the source and extent of the contamination pursuant to the PRP letter, and Sunoco began to provide potable water to residents, pursuant to the PRP letter and GES's Remedial Action Plan for the site. Sunoco was not sued until June 2003. Thus, June 2003 is the first time that INI's duty to defend arose with regard to the Fort Montgomery contamination.

In Michigan Millers, upon which Sunoco also relies, the Michigan Supreme Court conceded that most definitions of "suit" do include a reference to some type of court proceeding. Id., 519 N.W. 2d at 869. Nonetheless, it determined that, as the dictionary definitions of the term "suit" – which was undefined in the policy it was construing – did not exclusively speak in terms of seeking redress in a court of law, "a typical layperson might reasonably expect the term to apply to legal proceedings other than a court action initiated by a complaint." Id. Here, of course, the term "suit" *is* defined in the Policy to mean "a civil proceeding," with the proviso that "suit" also includes an "arbitration," or "any other alternative dispute resolution proceeding." Given that the parties specified what types of proceedings can give rise to the duty to defend, we find that the Policy's use of the word "suit" is unambiguous.

As the PRP letter cannot be construed to be a "civil proceeding," unless it can be construed to be an "arbitration" or "any other alternative dispute resolution" the PRP letter cannot be a "suit" and Sunoco's investigation and remediation expenses incurred before June 2003 cannot be defense costs. As stated, Sunoco asserts that the DEC proceeding constituted a "negotiation," which is one type of alternative dispute resolution, and thus qualified as a "suit" as that term is defined in the Policy. Sunoco's "negotiation" cannot be an arbitration or alternative dispute resolution because, in order for an arbitration to qualify as a "suit" it must be an arbitration "to which the insured must

submit or does submit with our consent." Likewise, an alternative dispute resolution must be one "to which the insured submits with our consent." As there is no suggestion that Sunoco was *required* to negotiate with the DEC or the homeowners, or that INI *consented* to Sunoco's negotiation, this argument has no merit.[3]

V. CONCLUSION

Accordingly, we conclude that the investigation and remediation costs incurred by Sunoco can fall within the Policy's indemnity coverage, but are subject to INI's coverage defenses. The investigation and remediation costs cannot be defense costs because the PRP letter does not constitute a "suit" for which INI was required to defend Sunoco. An appropriate order follows.

[3]Similarly, for investigation costs to qualify for reimbursement as Supplemental Payments, they must be "reasonable expenses incurred by the insured *at our request* to assist us in the investigation or defense of the claim or suit." There is no suggestion that Sunoco undertook its investigation at INI's request.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUNOCO, INC., SUNOCO, INC. (R&M), formerly SUN COMPANY, INC. (R&M)	:	CIVIL ACTION
V.	:	
ILLINOIS NATIONAL INSURANCE COMPANY	:	NO. 04-4087

ORDER

AND NOW, this day of December, upon consideration of Plaintiffs' Motion for Enforcement of the Court's Order of August 29, 2005 (Docket Entry # 93), and Defendant's Memorandum of Law in Response thereto (Docket Entry # 94), **IT IS HEREBY ORDERED** that said motion is **GRANTED IN PART AND DENIED IN PART**. The Motion is **GRANTED** to the extent that it seeks a declaration that investigation and remediation costs arising from the Fort Montgomery, New York MtBE claims and suits may be indemnified under Policy Number GL 359 64 85, RA, subject to Defendant's continuing coverage defenses. The motion is **DENIED** to the extent that it seeks a declaration that said costs are immediately payable to Plaintiff, or attributable to Plaintiff's self-insured retention, as part of Defendant's duty to defend.

BY THE COURT:

s/John R. Padova

John R. Padova, J.