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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

RONALD L. KOHLER and BARBARA J. KOHLER, husband and wife; THOMAS F. JONES and RITA JONES, husband and wife; DENNIS A. ARNOLD and GERALDINE N. ARNOLD, husband and wife; and DEBRA K. SYKES,	)	CASE NO. DV 09-1
Plaintiffs,	)	**OPINION & ORDER**
-vs-	)	
KELLER TRANSPORT, INC.; CONOCOPHILLIPS COMPANY; ERICKSON PETROLEUM CORPORATION; WAGNER ENTERPRISES, LLC; AND DOES 1-10,	)	
Defendants.	)	

This matter comes before the Court upon non-party Carolina Casualty Insurance Company's ("CCIC") *Amended Motion to Intervene*, and *Application for Temporary Restraining Order, Preliminary Injunction and Request for Show Cause Hearing.*

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213

Non-party Westchester Surplus Lines Insurance Company ("Westchester") has also moved to intervene and joins in the substantive relief sought by CCIC in its motion to intervene.

Briefing was completed as of January 24, 2011.

CCIC has requested a hearing on the issues, to be held in Ravalli County. Plaintiffs object to the request, but, in the event the Court holds a hearing, contend it should be held in the home venue of this matter, Lake County. In light of the extensive briefing of the issues, the Court has determined a hearing is not necessary.

FACTUAL AND PROCEDURAL BACKGROUND

The incident that gave rise to this action occurred on April 2, 2008, when a tanker truck pulling a pup trailer loaded with 6,380 gallons of gasoline en route from Missoula to Kalispell was involved in a single-vehicle accident. The pup trailer overturned and spilled its load of gasoline into a roadside ditch on a narrow stretch of Montana Highway 35 near Finley Point on Flathead Lake in Lake County. The gasoline flowed downslope underneath the road and beneath Plaintiffs' four properties, which lie on a narrow piece of land between the highway and the east shore of Flathead Lake. Fumes from the gasoline beneath Plaintiffs' properties entered Plaintiffs' residences and prevented Plaintiffs from occupying their residences for over a year.

Although substantial gasoline allegedly remains on their properties, Plaintiffs have returned to their residences, which have been modified with filtration systems to control the gasoline fumes that continue to rise from the ground.

The gasoline that spilled was owned by Defendant Erickson Petroleum Corporation ("Erickson"), a Minnesota corporation whose business includes wholesaling and brokering gasoline and diesel products.

Erickson used Defendant Keller Transport, Inc. ("Keller") as its commercial motor carrier to deliver gasoline from Defendant ConocoPhillips Company's tank farm in Missoula to retailers in western Montana. Keller, a Montana company, owns no trucks of its own. The tanker truck that pulled the pup trailer that overturned was owned by Defendant Wagner Enterprises, LLC ("Wagner"), a Montana limited liability company, and leased by Keller.

At the time of the spill, Keller and Wagner were insured by CCIC pursuant to a "commercial transportation policy" (No. 349852), which provided commercial automobile coverage and commercial general liability ("CGL") coverage.[1] The commercial automobile coverage provided a policy limit of $1 million, with a $1 million aggregate limit. The CGL coverage provided for an "each occurrence" limit of $1 million, and a general aggregate limit of $2 million. In addition to the commercial automobile coverage, Keller had an excess policy (No. G2400631101) with Westchester in the amount of $4 million, with a $4 million aggregate limit.[2]

On April 3, 2008, one day after the accident, CCIC hired Cedar Creek Engineering to begin cleanup of the site of the accident.

On May 22, 2008, the United States Environmental Protection Agency ("EPA") issued an Administrative Order requiring Keller to clean up the contamination resulting from the spill, and assumed oversight of the remediation. To date, Keller has been funding remediation costs,

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[1] Doc. No. 183: *Pls.' Resp. Opposing Insurers' Mots. to Intervene*, Ex. A, ¶¶ 14-16); and Doc. No. 195: [*CCIC's*] *Br. in Reply to Pls.' Resp. Opposing Insurer's* [*sic*] *Mot. to Intervene and Request for Hrg.*, 3, FN 1.

[2] Doc. No. 183: *Pls.' Resp. Opposing Insurers' Mots. to Intervene*, Ex. A, ¶¶ 19-21); Doc. No. 175: *Aff. of Allan H. Baris in Supp. of* [*Westchester's*] *Mot. and Joinder in* [*CCIC's*] *Mot. to Intervene* ¶¶ 2-3.

pursuant to the EPA Order, in excess of $10,000 per month, and it is expected that such remediation will continue for several more years.

By June 2008, CCIC had expended the $1 million policy limits of Keller's commercial automobile policy.

On January 5, 2009, Plaintiffs filed their complaint in this matter. Plaintiffs' amended complaint filed on February 4, 2009 alleges nine causes of action and seeks damages, including restoration damages, pursuant to *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, and punitive damages.

By December 31, 2009, Westchester had expended the limits of its $4 million in excess coverage.

On March 24, 2010, pursuant to Plaintiffs' motion, Defendant ConocoPhillips Company was dismissed without prejudice from this action.

On August 23, 2010, CCIC filed a declaratory judgment action against Keller, Wagner, and Westchester in the Montana Fourth Judicial District Court, Missoula County. CCIC seeks declarations that it has no duty to defend Keller and Wagner in this action, and that it is entitled to reimbursement of its defense fees from Westchester. The Court takes judicial notice of *Carolina Casualty Insurance Co. v. Keller, et al.*, Cause No. DV-10-1133, Mont. Fourth Jud. Dist. Ct., Dept. 1.

On August 27, 2010, Plaintiffs' counsel Roger Sullivan gave notice to Keller and Wagner and their insurers that Plaintiffs were seeking additional policy limits in the amounts of $1

million under Keller's CGL coverage, and an additional $4 million under Westchester's excess coverage.[3]

On September 10, 2010, CCIC filed an amended complaint in its declaratory judgment action in the Fourth Judicial District Court, adding Plaintiffs as defendants, and adding a request for a determination that CCIC has no liability under its CGL policy for the April 2, 2008, gasoline spill.[4]

On November 11, 2010, a mediation conference was held, but no settlement was reached.

On November 24, 2010, Keller moved to impose a constructive trust on the verdict for restoration damages.

On December 7, 2010, CCIC received notice from Keller's counsel that Erickson had settled with Plaintiffs, which cleared the way for Plaintiffs to offer to settle with Keller via consent judgment/covenant not to execute/assignment of rights.[5]

On December 8, 2010, CCIC moved to intervene in this action.

On December 13, 2010, Westchester filed its motion and joinder in CCIC's motion to intervene.

On December 20, 2010, CCIC filed an amended motion to intervene.

On December 27, 2010, CCIC filed a *Motion for Limited Appearance Pending Court Determination on Amended Motion to Intervene* in order to be allowed to file a motion for

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[3] Doc. 189: [*CCIC's*] *Br. in Supp. of App. for TRO, Preliminary Inj.*, Ex. A.

[4] Doc. No. 183: *Pls.' Resp. Opposing Insurers' Mots. to Intervene*, Ex. A, ¶¶ 40, 46).

[5] Doc. No. 195: *Br. in Reply to Pls.' Resp. Opposing Insurer's* [*sic*] *Mot. to Intervene and Request for Hrg.*, 12:12-13; Ex. B.

temporary restraining order ("TRO") and request for hearing regarding any settlement and/or verdict proceeds, pending a decision on CCIC's amended motion to intervene. On that same day, in an *ex parte* telephonic hearing in chambers, the Court granted CCIC's motion for limited appearance.

On December 28, 2010, CCIC filed its *Application for Temporary Restraining Order, Preliminary Injunction and Request for Show Cause Hearing.*

On December 29, 2010, at a telephonic status conference, the Court issued an order setting an expedited briefing schedule regarding CCIC's motion to intervene and application for temporary restraining order and preliminary injunction. After being informed by Plaintiffs that Erickson had paid Plaintiffs $1,250,000 in partial settlement proceeds that morning and the funds had already been disbursed, the Court directed that any further settlement proceeds paid by Erickson to Plaintiffs be held in Plaintiffs' counsels' trust account(s) pending the Court's ruling on the motions at issue.[6]

On December 30, 2010, pursuant to stipulation of Plaintiffs, Erickson was dismissed with prejudice from this action.

On January 7, 2011, Wagner filed a *Confession of Judgment* in favor of Plaintiffs in the amount of $13,066,484, for restoration damages arising from the gasoline spill, to be offset by $3 million received from Erickson.

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[6] Doc. No. 191: *Memo. and Or. Re: Expedited Briefing Schedule, Settlement Proceeds, and Vacating Trial Dates*, 2 (Dec. 30, 2010).

On January 11, 2011, Keller filed a *Confession of Judgment*, jointly and severally with Wagner, in favor of Plaintiffs, in the amount of $13,066,484, for restoration damages arising from the gasoline spill, to be offset by $3 million received from Erickson.

The settlement agreements entered into by Plaintiffs and Keller, and by Plaintiffs and Wagner, purportedly consist of: (1) confessions of judgment by the respective Defendants; (2) Plaintiffs' covenants not to execute on any of Wagner's and Keller's assets beyond insurance proceeds; and (3) assignment of all of Keller's and Wagner's rights arising under CCIC's commercial transportation policy No. 349852 and any excess coverage that may provide additional coverage for the gasoline spill on April 2, 2008.

On January 27, 2011, Plaintiffs' attorney Roger Sullivan filed a *Notice of Receipt of Funds* indicating that Plaintiffs' counsel received a wire transfer of $1,750,000 on January 25, 2011, from Erickson, in accordance with the settlement between Plaintiffs and Erickson, and the funds are being held in counsel's trust account pursuant to Court order. Plaintiffs note their request for a written undertaking to cover the cost of damages suffered by Plaintiffs as a result of any injunction requested by CCIC.

PARTIES' CONTENTIONS

CCIC's and Westchester's (collectively "Insurers") Motions to Intervene

The motions to intervene filed by Insurers were filed before any settlements in this matter had been reached. Initially, Insurers sought to intervene to: (1) participate in jury instructions and submission of special jury verdict forms in order to apportion damages among the various covered and non-covered claims, (2) seek a determination establishing the reasonableness of any damages award, and (3) establish a constructive trust to ensure that any settlement proceeds will

be used for restoration, as opposed to providing windfall gains to Plaintiffs. In light of Plaintiffs' recent settlement with all Defendants, Insurers' first ground for intervention is no longer viable.

CCIC asserts that, given the fact that it has continuously adhered to its duty to defend Keller and Wagner, it is entitled to continue advocacy to establish reasonable damages and to seek a constructive trust, and it contends a denial of its motion to intervene will cause it substantial prejudice. CCIC further notes that no credit is given in Keller's and Wagner's confessions of judgment or the parties' settlement documents for the $5 million in policy limits already expended by Insurers, and nothing in the documents addresses Keller's continuing obligation to fund remediation under the direction of the EPA for years to come. Furthermore, as Keller's insurer, CCIC contends its duty to defend includes assisting Keller with its continuing obligation by imposing a constructive trust on settlement funds.

In addition to the relief CCIC seeks, Westchester requests to be allowed to conduct discovery regarding the settlement negotiations between Plaintiffs and Keller, and Plaintiffs and Wagner, now that Plaintiffs and Defendants "are on the same side." Westchester contends it is in Plaintiffs' interest that the settlement amount be as high as possible, and that Defendants' interest is only to be released from responsibility, regardless of the amount of settlement.

Plaintiffs oppose Insurers motions on the following grounds: (1) Plaintiffs' case is essentially concluded; (2) Insurers' motions to intervene are not ripe until the declaratory judgment action in the Fourth Judicial District Court is resolved; (3) Insurers cannot meet the four criteria necessary for intervention, pursuant to Rule 24, M.R.Civ.P.; and (4) Insurers' proper forum to challenge their responsibility for paying judgments is in the declaratory judgment action. Plaintiffs assert Insurers, by moving to intervene, "want to reopen discovery and send

this case back to square one" nearly two years after it was filed. Plaintiffs further assert a constructive trust is not warranted and argue that "remediation," as required by the EPA, is different from "restoration," for which they have obtained damages under their settlements with Defendants.

Wagner filed a response to Insurers' motions to intervene wherein it warns the Court to view CCIC's representations as to its duties to defend with caution. Wagner asserts the first time it was contacted by CCIC was in January 2010, nearly two years after the spill. Wagner contends it was forced to hire independent counsel and fund its own defense until CCIC assumed its defense costs under a reservation of rights in August 2010, after Wagner was unable to timely secure expert witnesses due to lack of funds, and after Wagner had sued CCIC's named insured Keller for breach of contract. (By the time Plaintiffs filed this action in January 2009, CCIC had paid out its policy limits under Keller's commercial automobile policy and had tendered this claim, including the duty to defend, to excess carrier Westchester. Westchester, pursuant to the language of its policy, opted to "associate" with Keller's defense under a reservation of rights until its limits were paid out in December 2009, but apparently declined to associate with Wagner's defense.)

Additionally, Wagner contends Keller's duty to defend is not contingent upon the resolution of the declaratory judgment action, but must be maintained until the pending cross-claims between Wagner and Keller have been resolved and this action has run its course.

Whether the Insurers have breached their contractual obligations to defend are issues in the declaratory judgment action and will properly be resolved in that action.

CCIC's Application for TRO and Preliminary Injunction

In its application for TRO and preliminary injunction, CCIC seeks an order preventing Plaintiffs from disbursing any settlement proceeds received from Erickson, and requiring the imposition of a constructive trust on all settlement proceeds to ensure the funds will be used for restoration. CCIC asserts a preliminary injunction is necessary to require Plaintiffs and their attorneys to place any settlement and/or verdict proceeds in a constructive trust in order to assure that restoration of Plaintiffs' properties is funded. Without such an order, CCIC contends there is potential for it and its insured, Keller, to be exposed to the payment of remediation expenses claimed by Plaintiffs but unfunded by the only settlement funds available to date.

CCIC adopts the rationale from Keller's earlier motion to impose a constructive trust (which apparently is now moot as to Keller). In its motion brief, Keller notes that the damages Plaintiffs seek (and now have rights to pursue via consent judgments) are for Plaintiffs' expert's $14 million restoration plan, despite the fact that Plaintiffs' four properties were only devalued in the amount of $321,000. Keller further notes that in order for Plaintiffs' expert's plan to be implemented, permits will be required from six or more agencies, as well as permission from neighboring landowners and the neighborhood association. In the event permits or permission are not forthcoming and Plaintiffs' expert's restoration plan cannot be utilized, Keller asks what will happen to any award Plaintiffs receive for restoration damages. Keller contends the only way to ensure that an award for restoration damages are used for restoration is to deposit such funds in a constructive trust administered by an independent trustee, with a reversionary interest for those paying into the trust.

CCIC contends the *Sunburst* court recognized the possibility of a windfall as result of allowing restoration damages in excess of diminution in value, but allowed for such a disparate award based on evidence that the award would be used for remediation of groundwater contamination. *Sunburst*, ¶ 43. CCIC asserts that unlike the facts in *Sunburst*, there has been no representation in the case at bar that settlement proceeds will actually be used for environmental restoration. In its surreply, CCIC advises the Court that "evidence will be submitted that the amount of the judgment was irrelevant to Keller as a confessing Defendant." [*CCIC's*] *Sur Reply Br. to Pls.' Combined Br. in Opposition to Intervention, Imposition of a Constructive Trust, and Injunctive Relief*, 8:17-18.

Plaintiffs counter that Insurers have no legally cognizable basis on which to intervene and thus CCIC lacks standing to assert the imposition of a constructive trust on Plaintiffs' settlement proceeds with Erickson. Plaintiffs further contend: (1) CCIC conflates the distinction between agency-ordered remediation and the restoration damages they seek; (2) there is no apportionment of Plaintiffs' $3 million settlement with Erickson between general damages and restoration damages; (3) Keller and Wagner are represented by able counsel and have determined it is in their best interests to settle and not continue this litigation; and (4) CCIC's application for injunctive relief is an attempt to interfere with Keller's and Wagner's defense by changing essential terms of Plaintiffs' settlement with Erickson, behavior Plaintiffs contend is santionable.

DISCUSSION

By way of background, the Court deems it important to first discuss consent judgments and the public policy considerations of such mechanisms, particularly with respect to environmental contamination cases.

I. BACKGROUND: LAW AND POLICY

A. Consent Judgments

In many jurisdictions (including Montana), consent judgments provide a means for an insured to settle tort claims in situations where an insurer refuses to defend a suit, or where an insurer and the insured dispute coverage of a claim or the appropriate response to a settlement offer. Stephen R. Schmidt, *The Bad Faith Setup*, 29 Tort & Ins. L.J. 705, 720 (Summer 1994). These judgments typically consist of three features: (1) a stipulated judgment against the insured defendant that fixes the amount of damages, or establishes liability while reserving the issue of damages; (2) a covenant by the plaintiff not to execute on the defendant's assets; and (3) the defendant's assignment to the plaintiff of all rights against the defendant's insurer, whether under the policy or for bad faith regarding the insurer's handling of the plaintiff's claim. *Id.* "This procedure frees the insured from monetary liability and, in turn, allows the plaintiff to step into the shoes of the insured and bring suit against the provider for whatever claims the insured assigned to the plaintiff." Justin A. Harris, *Note: Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 Drake L. Rev. 853 (1999).

Consent judgments coupled with assignments of rights provide insureds with leverage to protect their interests, and insurers with an incentive to act in good faith when dealing with their insureds. Chris Wood, *Note: Assignments of Rights and Covenants Not to Execute in Insurance Litigation*, 75 Tex. L. Rev. 1371, 1377 (May 1997). These mechanisms also contain an inherent potential for abuse: since the covenant not to execute relieves the insured defendant of personal liability, the defendant's only incentive is to agree to whatever terms, including amount of

damages, will persuade the plaintiff to abandon his lawsuit. *Id.* at 1385. Thus, stipulated damages may bear little relationship to actual damages.

> Consent judgments are naturally scrutinized for indicia of collusion when that judgment is alleged to estop litigation of an issue determined by the judgment. While some jurisdictions appear not to grant preclusive effects to a consent judgment as a matter of general principles, this is not universal, and elsewhere a consent judgment may, under appropriate circumstances, be asserted as creating an estoppel to litigate a claim or issue, especially when the party against who the estoppel is asserted was given the opportunity to participate in the earlier proceeding, but declined to do so.

3D *Couch on Insurance* § 239:25 (West 2005). (Emphasis added.)

Whether consent judgments may bind insurers varies across jurisdictions and depends on factors including whether the insurer failed in its duty to defend or to settle, whether stipulated damages are reasonable, and whether collusion or fraud was involved.

B. Restoration Damages in Environmental Contamination Cases

The automobile accident exemplifies a typical tort action that may be resolved by a consent judgment: the insured, either because of the insurer's failure to defend or to settle, or the insured's fears that damages will exceed policy limits, agrees to confess to a specified amount of damages in order to be released from personal liability. Whatever damages the plaintiff in such a case ultimately receives are the plaintiff's to be used at the plaintiff's discretion to make the plaintiff whole, and in successful bad faith claims, to punish the insurer.

Where the action resolved by consent judgment is a real property environmental contamination case and the damages sought by the plaintiff and confessed to by the defendant are restoration damages that greatly exceed the value of the property, additional and competing public policies are implicated.

As a general rule, the appropriate measure of damages to real property is the diminution in fair market value. *Sunburst*, ¶ 30. In the environmental contamination case of *Sunburst*, the Montana Supreme Court adopted the Restatement (Second) of Torts § 929, and the "reasons personal" exception to the general rule set forth in comment b. *Id.*, ¶¶ 36-38.

> Section 929 cmt. b provides that restoration damages may be appropriate in cases where "a building, such as a homestead is used for a purpose personal to the owner...." The Restatement explains that restoration damages may be recoverable "even though this might be greater than the entire value of the building." (Citation omitted.) The flexible guidelines of the Restatement (Second) of Torts § 929, and comment b, allow a district court to craft an appropriate remedy for an injury to real property that restores a plaintiff as nearly as possible to the "state the party would have attained had the [wrong] not occurred." (Citation omitted.)

Id., ¶ 32.

In discussing the reasonableness of the amount of restoration damages, the *Sunburst* court first noted the general rule: "courts have assessed the reasonableness of an award of restoration damages against the market value of the property before the damage." *Id.*, ¶ 45. The court then observed that a strict cap on the amount of restoration costs to the pre-tort market value of property that had been contaminated would raise serious public policy concerns in that it would equip the tortfeasor with the equivalent of a private right of inverse condemnation, or a power akin to a private right of eminent domain. *Id.*, ¶ 46. For example, a potential tortfeasor "could undertake any dangerous activity content with the knowledge that the damages from any harm that it may cause to a neighboring property, regardless of the cost of remediating the harm, would be limited to the market value of the neighboring property." *Id.* This would leave injured owners with an unacceptable Hobson's choice of selling homes they do not want to leave or continuing to live under an increased threat of exposure to toxic chemicals. *Id.*, ¶ 47.

The "reasons personal" exception has been used to justify damages in excess of diminution in fair market value, and even in excess of fair market value.[7] Whereas in traditional property damage cases involving damage to houses, ponds, and landscaping, the recovery of restoration damages is generally limited to the property owner's interests, interests and concerns broader than those of the property owner are implicated when real property has suffered environmental contamination: contaminated property has the potential to damage future owners of the contaminated property; neighboring owners; and pets, livestock, and wildlife which do not respect property boundaries. In addition to the possibility of spread of contamination to adjoining properties, contaminated property may affect groundwater and cause damage to present and future members of the public. Thus, there is greater concern in environmental contamination cases that awards of restoration damages are actually used for restoration.

A thought-provoking discussion of the policy concerns implicated by environmentally contaminated property is found in a 2003 law review article: James R. Cox: *Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts*, 20 Pace Envtl. L. Rev. 777 (Spring, 2003). Noting that "[a]wards of restoration damages generally presume that the recipient of such an award, having expended the resources associated with

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[7] See *Roman Catholic Church v. Louisiana Gas,* 618 So.2d 874, 877 (La.1993) (restoration damages awarded for fire damage to a low-income housing complex); *Weld County Bd. of County Com'rs v. Slovek*, 723 P.2d 1309 (Colo.1986) (restoration damages awarded for flood damage causing silt and debris deposits over land and damage to fishing pond and dike); *Orndorff v. Christiana Community Builders,* 217 Cal.App.3d 683 (1990) (restoration damages awarded to repair house constructed on uncompacted fill material); *Heninger v. Dunn*, 101 Cal.App.3d 858, 861 (1980) (restoration damages awarded for wrongful bulldozing of nearly mile-long road through forested mountain land); *Rector, Wardens and Vastry of St. Christopher's Episcopal Church v. C.S. McCrossan, Inc.*, 235 N.W.2d 609 (Minn. 1975) (restoration damages awarded for destruction of mature shade and ornamental trees that acted as sound barrier and screen from highway traffic).

litigation and demonstrated the facially stronger interest in remediation, will actually use the award to effectuate cleanup," the author proceeds to examine the policy concerns raised when a plaintiff chooses personal enrichment over remediation, a choice that leaves unprotected the interests of future property owners and the public. *Id.* at 779. The author posits that the establishment of a constructive trust for restoration damages for the benefit of the property, or on behalf of present, future and adjoining landowners, to be governed by a trustee with a fiduciary duty to ensure effective cleanup of the property, would ensure that damages sought and awarded as restoration damages would actually be used for restoration. *Id.*, 800-06. "[I]t appears clear that if a court were to invoke equitable doctrines permitting the establishment of an equitable trust that would administer cleanup funds, both the plaintiff's interest in a complete remedy and the public's interest in effectuating a prompt and effective cleanup would be well-served." *Id.* at 809.

II. INSURERS' MOTIONS TO INTERVENE

The Court now turns to the non-parties' motions to intervene. Rule 24, M.R.Civ.P., provides a procedure whereby a non-party may move to intervene in an action in one of two ways: by right or permissively. The Montana Supreme Court has provided guidance to the district court in its evaluation of whether a non-party meets Rule 24's requirements for intervention in *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Ct.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400 (establishing criteria for evaluating intervention as a matter of right); and *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶ 22, 305 Mont. 22, 22 P.3d 646 (establishing criteria for evaluating permissive intervention).

Before proceeding with an analysis of whether Insurers are entitled to intervene in this matter, the Court must first determine whether Insurers' motions for intervention are ripe for consideration.

Plaintiffs have settled all of their claims in this matter with all of the Defendants. The remaining cross-claims between Keller and Wagner are independent of any of Plaintiffs' claims.

Currently pending in another jurisdiction is an action for declaratory relief in which it appears a tangled web of claims, counterclaims, and cross-claims are at issue: which insurer, if either, owes Keller and Wagner the duty to defend against Plaintiffs' claims; whether Insurers have breached a duty to defend; and whether CCIC's CGL policy provides coverage for the gasoline spill.

If the Fourth Judicial District Court should determine that CCIC's CGL policy does not provide coverage for the gasoline spill, then Insurers will have no more liability beyond the $5 million they have already paid out under Keller's commercial automobile policy, and Plaintiffs will take nothing from Keller's and Wagner's confessions of judgment. In that event, Insurers' motions to intervene in order to seek adjudication of the issue of reasonableness of damages will become moot.

If the Fourth Judicial District Court should determine that CCIC's CGL policy provides coverage for the gasoline spill, and that Insurers have breached a duty to defend, then Insurers will be liable for the damages admitted to by Keller and Wagner in their confessions of judgment. It is well-settled that an insurer's duty to defend its insured arises when an insured sets forth facts which represent a risk covered by the terms of an insurance policy. *Farmers Union Mutual Ins. Co. v. Staples*, 2004 MT 108, ¶ 20, 321 Mont. 99, 90 P.3d 381 (citations

omitted). An insurer's duty to defend is independent from and broader than the duty to indemnify created by the same insurance contract. *Id.*, ¶ 21 (citations omitted). "The law in Montana 'clearly provides that where the insurer refuses to defend a claim and does so unjustifiably, that insurer becomes liable for defense costs and judgments.' " *Id.*, ¶ 27; *Lee v. USAA Casualty Ins. Co.*, 2004 MT 54, ¶ 19, 320 Mont. 174, 86 P.3d 562. If the Fourth Judicial District Court determines that Insurers have breached a duty to defend, Insurers will become liable for the amount of the confessed judgments, and their motions to intervene in order to seek adjudication of the issue of reasonableness of damages will become moot.

If the Fourth Judicial District Court should determine that CCIC's CGL policy covers the gasoline spill, and that Insurers have not breached a duty to defend, then Insurers' motions to intervene in order to seek adjudication of the issue of reasonableness of damages will become ripe. When an insurer believes there is a legitimate basis for contesting coverage, the more prudent course is to tender the defense under a reservation of rights and file a declaratory judgment action. *Id.*, ¶ 26. Should the Fourth Judicial District Court determine that Insurers have taken this more prudent course, Insurers may well be entitled to intervene to obtain an evidentiary hearing on the reasonableness of the confessed damages. See *Dominici v. State Farm Mutual Automobile Ins. Co.*, 143 Mont. 406, 414, 390 P.2d 806, 810 (1964).[8]

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[8] Additionally, there is a large body of law that has developed from the seminal decisions of *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982) and *USAA v. Morris*, 741 P.2d 246 (Ariz. 1987). On review of a ruling that the insureds, by entering into a consent judgment like the one at bar, had breached their contractual duty to cooperate with the insurer, thus relieving the insurer of its responsibility to pay the judgment, the *Morris* court reversed, holding that an insured being defended under a reservation of rights may enter into a consent judgment without breaching the cooperation clause if such an agreement is made fairly, with notice to the insurer, and without fraud or collusion. *Morris*, 741 P.2d at 252. The court then addressed the binding effect of the consent judgment upon the insurer in light of competing public policy concerns and held that the

Insurers' motions to intervene in order to seek a determination of whether the judgments confessed to by Keller and Wagner are reasonable will not be ripe, if at all, until resolution of the issues regarding coverage of the CGL policy and Insurers' duty to defend. Thus, a ruling on Insurers' motions as to the reasonableness issue should be stayed until the conclusion of the Insurers' action for declaratory relief.

Insurers also seek to intervene in order to request imposition of a constructive trust.

Where restoration damages have been awarded in excess of the value of the real property under the "reasons personal" exception, particularly in an environmental contamination case, an award should be utilized to actually restore the property in order to maintain the integrity of the exception and to avoid a windfall to the plaintiffs. The *Sunburst* court opined that "evidence that an award of restoration damages actually will be used to repair the damaged property could overcome the general rule in favor of diminution in value as the appropriate measure of damages." *Sunburst*, ¶ 43. Unlike in *Sunburst*, where there was a trial on the issues, testimony that the plaintiffs actually intended to use a damages award for remediation of their properties,

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plaintiff need only establish that, given the circumstances affecting liability, defense, and coverage, the settlement was reasonable. *Id.*, 741 P.2d at 253. The case was remanded to the trial court for further determinations:

> If the insurer wins on the coverage issue, it is not liable for any part of the settlement. If it loses, it may or may not be bound by the amount of the judgment taken by [plaintiff] against [the insureds]. [Plaintiff] will have the burden of showing that the judgment was not fraudulent or collusive and was fair and reasonable under the circumstances. If [plaintiff] cannot show that the entire amount of the stipulated judgment was reasonable, he may recover only the portion that he proves was reasonable. A. WINDT, *supra* § 5.16, at 212-13. If he is unable to prove the reasonableness of any portion of the judgment, [the insurer] will not be bound by the settlement.

Id., 741 P.2d at 254.

and a special verdict form seeking a lump sum restoration award), there is no evidence before this Court that Plaintiffs actually intend to use a damages award for restoration.[9]

In its reply brief, CCIC asked Plaintiffs to be forthcoming about their intentions regarding restoration damages:

> Specifically, CCIC challenges Plaintiffs to tell this Court what they are going to do to remediate above and beyond the approved EPA remediation plan in place, when and how they plan to get EPA approval and how they are going to insure that the money goes to remediation as claimed in the context of settlement documents.

Doc. No. 195: *Br. in Reply to Pls.' Response Opposing Insurer's* [*sic*] *Mot. to Intervene*, 19:25-20:1. In their surreply, Plaintiffs do not address CCIC's "challenge," an omission CCIC contends is significant.

The single case on which CCIC relies for legal authority is a New Mexico environmental groundwater contamination case in which the district court held in a memorandum and order that a successful plaintiff can recover future restoration costs, and if recoverable, "any damages recovered for future costs of restoration may be deposited in escrow and maintained in the Registry of this court, awaiting their disbursement upon further order of the court to pay remediation costs as they are incurred." *New Mexico v. General Electric Co.*, 335 F. Supp. 2d 1185, 1263 (D. N.M. 2004). *New Mexico* is readily distinguishable from the matter at bar: here, Plaintiffs have alleged injuries as owners of real property and have prosecuted this case on their

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[9] Keller's and Wagner's *Confessions of Judgment* contain the following language regarding the amount of judgment confessed to: "This amount is justly due to Plaintiffs for their damages in this matter for the restoration of their properties contaminated by the gasoline release at issue in this lawsuit, as well as Plaintiffs' general damages resultant from the gasoline release." *Keller Transport, Inc.'s Confession of J.*, 2:7-10; *Wagner Enterprises, LLC's Confession of J.*, 2:6-9. This language at least gives the appearance that Plaintiffs intend to use the confessed judgments "for the restoration of their properties contaminated by the gasoline release at issue."

own behalf, not as trustees for the State's interest or for any other entity. Plaintiffs in *New Mexico* "allege an injury to the State's interest as trustee, and not as an owner or holder of water rights, or as a beneficial user of water. Plaintiffs are not here as appropriators or users of water; nor are they here on behalf of other water rights holders or water users." *Id.*, 1202-03. Because of these factual differences, *New Mexico* fails to provide persuasive authority for imposition of a constructive trust.

In Keller's motion to impose constructive trust (which has been adopted by CCIC), Keller quotes from the previously discussed law review article by James R. Cox (see pages 15-16 above):

> Clearly, it would be well within the authority of a court sitting in equity to establish a constructive or equitable trust using the proceeds of an award of restoration damages. Just as public and charitable trusts may establish a vague or uncertain class of beneficiaries, including current and future members of the public, so too could an equitable trust created for the purpose of remediating environmental contamination on a specific parcel of property be established for the benefit of the present and future neighboring community. The trustee could be designated as the current property owner, a special master designated for the purpose of ensuring remediation, or a specific governmental agency or entity. The right to enforce the fiduciary relationship could be specifically defined by the court, or vested in an arm of the state government. In this manner, a court addressing a claim for restoration damages could establish a framework for ensuring effective remediation, while alleviating concerns over plaintiffs' unjust enrichment.

Cox, 20 Pace Envtl. L. Rev. at 806.

Although Cox's scenario is interesting to contemplate, it is the Court's view that the Legislature is the appropriate entity to establish any such "framework for ensuring effective remediation, while alleviating concerns over plaintiffs' unjust enrichment." An order issued by this Court imposing a constructive trust would give rise to numerous issues, such as who would administer the trust, who would pay for its administration, who would determine the rules of the

trust, who would decide the appropriate plan for restoration of the properties, and who would coordinate with any public agency already engaged in remediation. Such an order would effectively place the Court in the improper position of passing on the issue of remediation of Plaintiffs' properties, like a mini-EPA. Furthermore, the constructive trust Insurers seek to impose, at least initially, is upon settlement funds that have been paid by a party with no relation to Insurers.

In the absence of legal precedence for its request, and in the absence of any sort of framework such as that suggested by Cox, the Court concludes that CCIC cannot meet its burden to show that a constructive trust should be imposed. Thus, intervention for that purpose should be denied.

III. CCIC'S APPLICATION FOR TRO AND PRELIMINARY INJUNCTION

Based on the rationale set forth above for determining that CCIC's motion to intervene in order to seek imposition of a constructive trust should be denied, CCIC's application for TRO and preliminary injunction should likewise be denied.

IV. CONCLUSION

Insurers seek to intervene for two purposes: (1) to seek a reasonableness determination on Keller's and Wagner's confessed judgments; and (2) to seek imposition of a constructive trust on settlement proceeds and any additional insurance proceeds to ensure that such monies will be used for restoration of Plaintiffs' properties.

CCIC's application for TRO and preliminary injunction seeks to restrain Plaintiffs' settlement proceeds via constructive trust.

A reasonableness determination is not yet ripe; its ripeness, if it indeed ripens, will depend on the resolution of the declaratory relief action in the Fourth Judicial District Court. Accordingly, the Court determines that Insurers' motions to intervene in order to seek a reasonableness determination as to confessed damages should be stayed until resolution of *Carolina Casualty Insurance Co. v. Keller, et al.*, Cause No. DV-10-1133, Fourth Judicial District Court. At such time as the reasonableness issue becomes ripe, the Court will evaluate Insurers' motions to intervene for the purpose of scheduling an evidentiary hearing on reasonableness.

The Court has addressed the constructive trust issue above and determined that such a remedy is neither proper nor authorized in law or equity. Accordingly, CCIC's application for TRO and preliminary injunction should be denied.

The Court's order issued on December 29, 2010, based on the parties' agreement, directing that any further settlement proceeds paid to Plaintiffs be held in Plaintiffs' counsels' trust account pending adjudication of CCIC's motion to intervene and application for TRO and preliminary injunction, should be dissolved.

Having considered CCIC's application for TRO and preliminary injunction and determined that it should be denied, the Court declines to grant Plaintiffs' request for a written undertaking by CCIC to cover the cost of any damages suffered by Plaintiffs pending this decision.

ORDER

IT IS THEREFORE ORDERED that non-party Carolina Casualty Insurance Company's *Amended Motion to Intervene* is hereby **STAYED** as to the issue of reasonableness pending

resolution of *Carolina Casualty Insurance Co. v. Keller, et al.*, Cause No. DV-10-1133, Fourth Judicial District Court.

IT IS FURTHER ORDERED that non-party Westchester Surplus Lines Insurance Company's *Motion and Joinder in Carolina Casualty Insurance Company's Motion to Intervene* is hereby **STAYED** as to the issue of reasonableness pending resolution of *Carolina Casualty Insurance Co. v. Keller, et al.*, Cause No. DV-10-1133, Fourth Judicial District Court.

IT IS FURTHER ORDERED that Carolina Casualty Insurance Company's *Application for Temporary Restraining Order, Preliminary Injunction, and Show Cause Hearing* is hereby **DENIED**.

IT IS FURTHER ORDERED that the Court's order issued on December 29, 2010 directing that any settlement proceeds paid to Plaintiffs after the December 29, 2010, status conference be held in Plaintiffs' counsels' trust account(s) pending rulings on the above motions is hereby **DISSOLVED**.

DATED this 15th day of February, 2011.

HON. JEFFREY H. LANGTON, District Judge

cc: counsel of record

2/17/11 lmr