STATE OF VERMONT
WASHINGTON COUNTY, SS.

STATE OF VERMONT	)	
	)	**Washington Superior Court**
v.	)	**Docket No. 681-12-01 Wrcv**
	)	
PEERLESS INSURANCE CO.	)	

MEMORANDUM OF DECISION
Cross Motions for Summary Judgment on Liability

The State seeks reimbursement for expenses incurred in cleaning up petroleum contaminants which leaked from underground storage tanks at the East Clarendon General Store. Judith Webster, the owner of the East Clarendon General Store, maintained comprehensive business liability insurance with the Peerless Insurance Company (Peerless). Here the State seeks reimbursement directly from Peerless under 10 V.S.A. § 1941(f). In a related case, the State seeks reimbursement for cleanup of a second petroleum leak at the adjacent Jorgensen Honda dealership.

Peerless filed a Motion for Summary Judgment on April 16, 2003. The State opposed Peerless's Motion, and filed its own Motion for Partial Summary Judgment on July 2, 2003. The issue is whether damages resulting from the petroleum spill at the East Clarendon General Store are covered by Ms. Webster's policy with Peerless. Assistant Attorney General Bridget C. Asay represents the State. Attorney Richard Windish represents Peerless. The court heard oral argument on January 23, 2004.

Undisputed Facts

Based on the parties' Rule 56(c)(2) statements, the following facts are undisputed:[1]

In June of 1990, the Agency of Natural Resources (ANR), Department of Environmental Conservation (Department), received reports that petroleum had been released in East Clarendon, Vermont. On June 15, 1990 two employees of the Department visited the site and conducted a preliminary investigation. They confirmed that petroleum products had contaminated seven drinking wells in the area. They identified both the East Clarendon General Store and the Jorgensen Honda dealership as potential sources of the contamination. Both sites had underground storage tanks. The East Clarendon General Store was owned by Judith Webster.

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[1] Under V.R.C.P. 56(c)(2), the moving party's facts are deemed undisputed when supported by the record and not controverted by the nonmoving party's statement. Boulton v. CLD Consulting Engineers, Inc., 2003 VT 72 ¶ 29, 14 Vt.L.W. 238, 242 (citing Richart v. Jackson, 171 Vt. 94, 97 (2000)).

On July 9, 1990, William E. Ahearn, Director of ANR's Hazardous Materials Management Division, wrote to Ms. Webster, giving her notice that it considered her a responsible party under 10 V.S.A. § 1941. Mr. Ahearn did not identify in the letter the precise source of the contamination. Rather, he suggested that underground storage tanks were a possible source, and directed Ms. Webster to develop and implement a plan to remediate and monitor the contamination. The Department sent a similar letter to the Jorgensens.

On July 25, 1990, Ms. Webster wrote back to Mr. Ahearn, expressing doubt as to the origin of the contamination, and declining responsibility for the mitigation. The Department then further investigated the contamination in the vicinity of the Jorgensen and Webster properties. Robert Haslam of the Sites Management Section was assigned to serve as the project manager.

Based on a competitive bid process, the Department hired Dennison Environmental to conduct the initial investigation. Dennison completed its report in January of 1991, at a cost of $20,839. The Dennison investigation showed two distinct releases contributing to the petroleum contamination in the bedrock water wells, one from the Webster property and one from the Jorgensen property.

Based on the Dennison report, and again following a competitive bid process, the Department hired Tri-S Environmental Consulting to conduct additional investigation. Tri-S completed its report in July of 1991. The Tri-S report confirmed that there were two separate sources responsible for the contamination, namely the Webster and Jorgensen properties. In August of 1991, the Department sought proposals for site remediation.

Again based on a competitive bid process, the Department hired Griffin International to perform site remediation work. The Department paid Griffin $142,436 for the design, installation, and one-year operation of remedial systems on the Webster and Jorgensen properties. The work included design and installation of groundwater treatment and soil vapor extraction systems. The remedial system on the Webster property began operating in January of 1992. Griffin submitted a report in March of 1992 describing the installation and operation of the systems.

On October 22, 1992, Judith Webster agreed to responsibility for the remedial work at the site. She applied to the Petroleum Cleanup Fund (PCF) for reimbursement of the costs. The Jorgensens applied to the PCF as well. Thus, pursuant to 10 V.S.A. § 1941, the costs of remediation and reimbursement for third party property damage continued to be paid out of the PCF.

Ms. Webster first purchased her comprehensive business liability insurance policy from Peerless effective March 1, 1987 through March 1, 1988. By renewing the policy each year for several years, Ms. Webster maintained coverage under the same policy number through March 1, 1993.

The Peerless policy provided liability coverage as follows:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, property damage or personal injury caused by an occurrence to which this insurance applies.

The original form of the policy contained an endorsement that excluded pollution coverage:

> 5. The Company shall not be liable for loss caused by the release, discharge or dispersal of pollutants unless the release, discharge or dispersal is itself caused by fire, lightning, aircraft, explosion, riot, civil commotion, smoke, [illegible], windstorm or hail to property contained in any building, vandalism, malicious mischief or leakage or accidental discharge from automatic fire protection systems. But if loss by any of the above twelve perils ensues, then this Company shall be liable for only loss caused by the ensuing peril.

Endorsement BU 0134 0486, Section VIII(B)(5). (Defendant's Exhibit G)

However, the above-described exclusion was deleted and replaced by coverage under substitute endorsement BU 0114 0285, Businessowners Vermont Contamination or Pollution Exception. This provided for pollution coverage, but on a claims-made basis, whereas coverage under the general terms of the comprehensive general liability business policy was on an occurrence basis. The claims-made pollution endorsement provided as follows:

> 2. With respect to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants, COVERAGE E – BUSINESS LIABILITY is replaced by the following:
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> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence to which this insurance applies provided that the claim for such damages is first made in writing against the insured and reported to the Company during the policy period.
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> A claim by a person or organization seeking damages shall be deemed to have been made when written notice of such claim is received by the insured or by the Company, whichever comes first.

Endorsement BU 0114 0285, Section II (2). (Defendant's Exhibit G)

* * *

Peerless sought approval for the pollution exclusion endorsement (BU 0134 0486, quoted above) to the policy through the "consent to rate" process of the Vermont Department of Banking and Insurance (VDBI), which required the consent of the insured. On June 19, 1987, Ms. Webster signed a "pollution exclusion," but VDBI disapproved the filing because it was submitted more than 60 days after the start date of the policy. There is no evidence that Ms. Webster was ever informed that the consent-to-rate filing had been disapproved.

The Declaration page for the policy beginning on 1987 listed the endorsement that provided for claims-made pollution coverage (BU 0114 0285) in addition to the pollution exclusion. The claims-made pollution coverage endorsement was not listed on the Declaration pages for 1988-89 or 1989-90. The endorsement for pollution exclusion, BU 0134 0486, was listed on the Declaration pages for all six years of the policy, even though it had been *disapproved* by VDBI. Peerless made two further attempts to obtain approval of exclusion of pollution coverage under the consent-to-rate process, but the exclusion was never approved.

As of March 1, 1990, the claims-made pollution coverage endorsement was again listed on the Declaration page, and it continued in effect throughout the remaining three years of policy coverage, to March 1, 1993. The number of the overall CGL policy, BOP 0001204, never changed.

Each year a Declarations page set forth the time periods, endorsements, and premiums as follows (the only endorsements noted below are those related to pollution:

3-1-87 to 3-1-88	Endorsement BU 0114 0285 (claims-made pollution coverage), " BU 0134 0486 (exclusion not approved by VDBI)	$1,247
3-1-88 to 3-1-89	Endorsement BU 0134 0486 (exclusion not approved by VDBI)	$1,303
3-1-89 to 3-1-90	Endorsement BU 0134 0486 (exclusion not approved by VDBI)	$1,359
3-1-90 to 3-1-91	Endorsement BU 0114 0285 (claims-made pollution coverage) " BU 0134 0486 (exclusion not approved by VDBI)	$1,259
3-1-91 to 3-1-92	Endorsement BU 0114 0285 (claims-made pollution coverage) " BU 0134 0486 (exclusion not approved by VDBI)	$1,326
3-1-92 to 3-1-93	Endorsement BU 0114 0285 (claims-made pollution coverage) " BU 0134 0486 (exclusion not approved by VDBI)	$1,088

It was on October 30, 1992 that Ms. Webster's attorney, Mary Ashcroft, filed a notice of loss with the Hull-Maynard Insurance Company. That notice was the first written notice provided to Peerless regarding the petroleum leaks from the underground storage tanks at the East Clarendon General Store. The remedial system installed at the direction of the State had been in place for approximately nine months. On January 27, 1993, John Koester, a claims adjuster for Peerless, went

to the East Clarendon General Store and met with Ms. Webster. They signed a non-waiver agreement at that time.

On February 1, 1993, Mr. Koester wrote a memorandum to Ted Tether, a Peerless claims adjuster in the Environmental Claims Unit. That memorandum describes Mr. Koester's knowledge of the claim made by Ms. Webster. Mr. Koester noted that the "materials we have so far received dealing with State inspection are very difficult to interpret." Mr. Koester agreed with Mr. Tether's recommendation that an expert needed to be retained to review the entire situation. Mr. Tether took over the handling of Ms. Webster's claim in February of 1993. Neither Mr. Koester nor Mr. Tether had any formal training or expertise in geology or hydrogeology.

On February 9, 1993, Mr. Tether sent a letter to Ms. Webster's attorney, Mary Ashcroft, concluding that Peerless' ability to conduct an investigation was prejudiced. This was over three months after the claim was reported, and the only activities Peerless had conducted to investigate the claim were (1) Mr. Koester's review of some documents obtained from Ms. Webster's attorney, and (2) Mr. Koester's visit to the site and recorded interview with Ms. Webster.

Shortly after he took over handling of Ms. Webster's claim, Mr. Tether engaged attorney Edward Kiel to look into the claim and advise Peerless. Attorney Kiel hired an expert named Jeffrey Noyes to investigate the claim on behalf of Peerless. Peerless hired no other expert to investigate the claim. Peerless' claim activity log shows that there was no activity on Ms. Webster's claim between October 8, 1993, and December 9, 1994.

Griffin documented its work throughout the time that it operated the remedial systems. ANR staff reviewed and accepted Griffin's quarterly and annual reports. As of December 1993, the remedial system on the Webster property had recovered the equivalent of approximately 467 gallons of petroleum product.

On September 7, 1995, Attorney Kiel sent a letter to Attorney Frederick Harlow, who was then representing Ms. Webster. Peerless had not conducted any technical investigation of the petroleum release on the Webster property.

Peerless formally denied coverage to Ms. Webster in a letter dated January 3, 1996. That letter outlined four reasons for the denial: (1) late notice, (2) exclusion for property owned or occupied, (3) prejudice resulting from late notice, and (4) pollution exclusion under BU 0134 0486 (the endorsement that had been disapproved by VDBI). Peerless explained its claim of prejudice as follows:

> As noted, our first notice of the alleged ocurrence [sic] was received by this Company on October 30, 1992. You first suspected petroleum contamination in your water at least as early as of July of 1990. The State of Vermont undertook further testing of the property, commissioned environmental firms to continue testing and develop remediation plans, and remediation efforts were undertaken at the

contamination site by Griffin International in January, 1992. By October 30, 1992, the site had been substantially changed by the testing and remediation efforts. Your failure to notify Peerless on a timely basis has prejudiced Peerless's ability to conduct a proper investigation and constitutes a violation of the above-cited notice provisions of the policy.

On June 18, 1997, an attorney in the Vermont Attorney General's Office sent a letter to Peerless' counsel, Andrew Boxer. Attorney Boxer responded to Assistant Attorney General John Kessler in a letter dated July 2, 1997. In this letter, Peerless claimed prejudice from the late notice, and also asserted that the claim was barred because it had not been reported to Peerless during the policy year.

As a discovery request in this case, the State asked Peerless to produce a person to testify regarding, among other things, "Peerless Insurance Company's investigation of the claim for coverage made by Judith Webster under Peerless Policy No. BOP 0001204 arising out of the petroleum contamination at the East Clarendon General Store and the [former] Jorgenson Honda site." Peerless produced Michael McGrath, and the State deposed him on May 20, 2003. Mr. McGrath agreed that Peerless had retained Jeffrey Noyes, from a firm of consulting geologists, to assist the company in its investigation of the background of the claim. Mr. Noyes would have had technical expertise relevant to this claim, and Peerless "would rely upon his technical expertise to discuss potentially in this specific case the source of the contamination." (McGrath Deposition, Plaintiff's Exhibit 27, at 83).

When asked what Mr. Noyes did to investigate the claim, Mr. McGrath replied, "Boy, I'm not sure." (Id.) Mr. McGrath did not know how Peerless reached the determination, expressed in the January 3, 1996 letter denying coverage, that Peerless's ability to conduct an investigation was prejudiced by late notice. (Id. at 110). Mr. McGrath stated his opinions that Peerless "may have been prejudiced in our ability to ascertain the source of the contamination," and that "we were definitely prejudiced in our ability to more timely respond to any potential leak." (Id. at 111). He believes that, with timely notice, further leaks could have been prevented, and that the costs involved in testing and remediation would have been lower. (Id.). He explained that his opinions were based on his experiences with other cases, and not on his own technical expertise; he is not a technical expert in this area. (Id. at 112-13). To the best of Mr. McGrath's knowledge, Peerless did not conduct a technical investigation of whether different steps could have been taken starting in July 1990 that would have decreased the cost of the investigation and remediation at the site. (Id. at 115).

At a deposition on June 5, 2003, Ted Tether testified that he did not know what Mr. Noyes had done to investigate the claim, and that he did not know whether Mr. Noyes had gone to the site. (Tether deposition, Plaintiff's Exhibit 28, at 20). Mr. Tether did recall that Mr. Noyes had been asked to give his expert opinion on the question of whether the delay in reporting the claim to Peerless had resulted in prejudice to the company. However, counsel for Peerless asserted work product protection and instructed Mr. Tether not to answer questions about what opinions or conclusions Mr. Noyes had reached. (Id. at 20-21).

Mr. Tether acknowledged that it was "fair" to say that the January 3, 1996 letter stated the entire basis for Peerless' conclusion that it was prejudiced by late notice in this case. (Tether deposition at 29). He also testified that Peerless had determined that, because of the delay, an investigation would not be possible. He explained that "Mr. Noyes had so reported to our counsel that a determination could not be made because of the length of time that had gone on, that certain measures could have been taken had it been promptly reported to do a chemical analysis of the petroleum under the property to determine its origin." (Id. at 51-52). Mr. Tether went on to say that Mr. Noyes believed that, because of the time that had passed, there was no way a chemical analysis would be accurate. (Id. at 52). According to Mr. Tether, Mr. Noyes reached that conclusion at the end of 1995. Mr. Tether did not know whether Mr. Noyes had considered whether an investigation would have been possible in October of 1992. (Id.)

Since June of 1990, the PCF has reimbursed significant third party costs, including supplying bottled water to affected homes, designing and installing a water treatment system for the Whispering Pines trailer park, and providing point-of-entry water treatment systems for individual homes. With the exception of part of the bottled water costs, and a $9,250 consulting contract for a drinking water feasibility study, these third-party costs were incurred after October 30, 1992.

No representative of Peerless has ever contacted the Department to inquire about conducting additional investigation of the site, or to suggest any alterations to the remedial systems operating at the site, or to discuss the water treatment systems installed at the affected homes.

From 1990 to the present, the Department has expended funds from the PCF to investigate and remediate the site and to reimburse for third-party property damage caused by the contamination. The total cost to date has been about $1.2 million. Although the remedial systems on the Webster and Jorgensen properties were decommissioned in May of 1997, the monitoring and third-party costs may continue for another five to ten years.

Conclusions of Law

Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. V.R.C.P. 56(c)(3). In determining whether a genuine issue of fact exists, the nonmoving party receives the benefit of all reasonable doubts and inferences; however, allegations to the contrary must be supported by specific facts sufficient to create a genuine issue of material fact. Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22 (1996).

Interpretation of Insurance Contracts

Where the facts are reasonably clear, it is appropriate for a court to interpret an insurance contract as a matter of law. The court must interpret the policy according to its terms and the evident intent of the parties. Disputed terms must be read according to their plain, ordinary and popular meaning. Ambiguities are strictly construed against the insurer, which is in the better position to

avoid the ambiguity. However, the insurer should not be deprived of unambiguous provisions placed in a policy for its benefit. The court is bound to enforce the contract as written and not to rewrite it on behalf of one or both of the parties. ANR v. U.S. Fire Ins. Co., 173 Vt. 302, 308 (2001); Waters v. The Concord Group Ins. Co., 169 Vt. 534, 536 (1999); City of Burlington v. National Union Fire Ins. Co., 163 Vt. 124, 127-28 (1994); Peerless Ins. Co. v. Wells, 154 Vt. 491, 493-94 (1990). The proper focus is on the agreement reasonably contemplated by the parties. State Farm Mutual Automobile Insurance Co. v. Roberts, 166 Vt. 452, 460-61 (1997).

Summaries of the Parties' Positions

Peerless maintains that, because the claims-made pollution coverage endorsement (BU 0114 0285) describes "claims-made" coverage, Ms. Webster forfeited coverage when she failed to report the petroleum release during the policy year when the release was discovered, March 1, 1990 to March 1, 1991. (It was in July of 1990 that the Webster property was suspected of being a source of discharge. In January of 1991 the Dennison Investigation report identified the Webster property as one of the two sources of petroleum discharge.) According to Peerless, under the terms of the claims-made pollution coverage endorsement, damages are not covered unless the claim and the report to the insurer were both made during a specific one-year period. Under this view, the policy purchased for 1990-91 does not cover a claim that was first reported to Peerless in 1992, and the policy purchased for 1992-93 does not cover a claim that Ms. Webster first learned about in 1990. Furthermore, Peerless argues, if the policy does not cover the loss, then Peerless need not show prejudice resulting from any delay.

The State maintains that the policy covers the claim because (1) Ms. Webster both received the claim and reported it to Peerless while the policy was in force, (2) the overall structure of the policy supports a construction that the reporting requirement for the claims-made pollution endorsement was similar to the general notice requirement of the occurrence coverage, and (3) Peerless was not prejudiced by any delay. According to the State, the term "policy period" as used in the endorsement is ambiguous, and can be reasonably construed as including the three years during which Ms. Webster maintained the same policy with the same terms. The State further argues that ambiguity is also created by the structure of this hybrid policy, specifically by including a claims-made pollution endorsement within a policy that generally provides occurrence coverage without calling attention to any special reporting requirement as a condition of pollution coverage. Given these ambiguities, the State argues, it would be unfair to construe the reporting requirement strictly; the reporting requirement should be the same as is applicable to claims under the main occurrence policy. Under this view, coverage is not precluded by the fact that the report was made in 1992 as the policy was still in effect; Peerless may avoid liability only by showing that its investigation or defense was prejudiced by a reporting delay.

Occurrence and Claims-Made Coverage; Time Requirements for Reporting

It is undisputed that the release of petroleum on Ms. Webster's property, and the resulting contamination of the water supply, was an "occurrence." *See* ANR v. U.S. Fire Ins. Co., 173 Vt.

302, 310-11 (2001) (no evidence leak was intentional or by design). Also, the Vermont Supreme Court has recognized that "contamination of soil and water by pollutants is property damages." State v. CNA Ins. Co., 172 Vt. 318, 327 (2001).

The parties agree that any coverage for pollution claims made between 3-1-90 and 3-1-93 was "claims-made" coverage under pollution endorsement BU 0114 0285. "A claims made policy provides coverage for claims brought against the insured only during the life of the policy. An occurrence policy provides coverage for acts done during the policy period regardless of when the claim is brought." United States v. A.C. Strip, 868 F.2d 181, 184 (6th Cir. 1989). A "claims made" policy may provide retroactive coverage for past undiscovered injuries; it does not provide prospective coverage for future claims. Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395, 398 (N.J. 1985) (citation omitted). It can also be distinguished from occurrence coverage based on differences in the peril insured.

> In the "occurrence" policy, the peril insured is the "occurrence" itself. Once the occurrence takes place, coverage attaches even though the claim may not be made for some time thereafter. While in the "claims made" policy, it is the making of the claim which is the event and peril being insured and, subject to policy language, regardless of when the occurrence took place.

Zuckerman at 398 (quoting S. Kroll, "The Professional Liability Policy 'Claims Made,'" 13 Forum 842, 843 (1978)). In this case, there is a claims-made coverage endorsement within the framework of a CGL occurrence policy.

Limiting coverage of pollution damages by use of a claims-made endorsement can benefit the insurer by avoiding the possibility of "stacking." As the State suggests, a leakage and spread of contaminants could take place over an extended period of time, and a single claim based on a prolonged occurrence could support a stacking of claims under multiple policies. However, if the pollution is covered by a "claims-made" endorsement, the single claim can only be made once, regardless of the length of the occurrence. Thus, by offering coverage on a claims-made basis, the insurer can limit its exposure to a single policy. The State's demand in this case – for coverage based on the claim made against Ms. Webster – is consistent with the claims-made nature of the endorsement.

Claims-made insurance does require that the claim be made while the policy is in force, and generally the claim must also be reported to the insurer before the coverage ends. In many cases, including A.C. Strip and Zuckerman, courts have denied coverage under claims-made policies because the claims were not reported to the insurers until after the policies had expired. In most of those cases, the policies are clearly labeled as "claims made" policies. A.C. Strip's policy with Pacific Employers Insurance Company included a NOTICE provision on the cover sheet, beginning with the words: "NOTICE: THIS IS A CLAIMS MADE POLICY." A.C. Strip at 186. Mr. Zuckerman's policy with National Union Fire Insurance Company bore a legend in bold letters stating, "This Is A Claims-Made Policy – Read Carefully." Zuckerman at 404. Under similar

circumstances, courts have assumed that the insured party knows, or should know, that the claim must be reported before the coverage expires.

This case differs from both A.C. Strip and Zuckerman in that Ms. Webster reported the claim to Peerless while her insurance was still in force. The parties disagree about whether she made her report during the policy period, but she had not allowed her insurance to lapse. In cases addressing similar circumstances, courts are divided as to whether the "policy period" is limited to the "policy year." Both Peerless and the State have submitted cases supporting their respective positions on this issue.

Cases supporting Peerless include National Union Fire Ins. Co. v. Talcott, 931 F.2d 166, 168 (1st Cir. 1991) (insurer may deny coverage under "claims made" policy if insured did not report claim with the same policy year in which he received notice of it); Ehrgood v. Coregis Ins. Co., 59 F.Supp.2d 438 (M.D. Pa. 1998) (where plaintiff purchased three successive policies, with different numbers and different terms, the continued coverage did not operate as an extended reporting period for the earlier policies); Checkrite Limited, Inc. v. Illinois National Ins. Co., 95 F.Supp.2d 180 (S.D.N.Y. 2000) (renewal of claims-made policy did not extend reporting period for claims made during previous policy period, where the critical term "policy period" was clearly defined as a one-year period).

In the above three cases, the policies contained conspicuous provisions alerting consumers about the "claims made" nature of the policies. *See* Talcott at 168 (at least three clauses in the policy provided that the policy was of the "claims made" variety); Ehrgood at 444 (policy is a "claims-made-and-reported" policy, as it states on the front page of the policy); Checkrite at 185-86 (policy included detailed definitions of "claim" and "policy period" and offered extended reporting period).

Cases supporting the State on this issue include Ballow v. Phico Ins. Co., 875 P.2d 1354, 1359-60 (Colo. 1993) (when all the contract provisions are considered as a whole, the term "policy period" is ambiguous, and it may reasonably refer to multiple-year periods covered by renewals); Helberg v. National Union Fire Ins. Co., 657 N.E.2d 832 (Ohio App. 1995) (language of policy indicated that parties expected the coverage to be continuous if the policy was renewed at each successive policy expiration); Oliver v. Coregis Ins. Co., 41 Fed.Appx. 101, 2002 WL 1478530 (9th Cir. 2002) (notice of claim given during policy's second renewal period was given during the policy period, where policy was ambiguous regarding the question of when notice must be given).

In Helberg, the Ohio Court of Appeals specifically distinguished the circumstances of the case from those of A.C. Strip, in which the federal courts had applied Ohio law. The most significant difference was that Mr. Helberg had renewed his claims-made policy, and he was insured with the same company at all pertinent times. Helberg at 833.

> In the present case [*i.e.* Helberg], there was no cancellation of coverage, nor did the insured change insurance carriers. The insured merely renewed his claims-made policy. Such an event should not precipitate a trap wherein claims spanning the

renewal are denied.

Helberg at 834.

In the instant case, Ms. Webster maintained her insurance policy for six years, including the three years now at issue (3-1-90 to 3-1-93). During those three years, the policy number stayed the same (BOP 0001204), and the terms stayed the same. The policy as a whole is an "occurrence" policy. The pollution endorsement (BU 0114 0285) is the only part of the policy requiring a claim to be made and reported during the "policy period." However, the pollution endorsement is not clearly labeled as "claims made" coverage, nor does it specify that a claim must be made or reported during a specific policy year. The term used, "policy period," is not defined within the pollution endorsement, nor is it defined within the Definitions section of the Businessowners' Policy. Contrast Checkrite, 95 F.Supp.2d at 185, where the policy defines the "policy period" as "the period commencing on the inception date and ending on the expiration date stated in Item 2 of the Declarations. . . ."

In general, the Businessowners' policy provides coverage as long as the policy remains in force, and the coverage is not limited to any particular policy year. The General Conditions state that "this policy may be continued in force by payment of the required continuation premium for each successive one year period," thus suggesting that the *same policy* remains in force. This makes sense where the policy generally provides "occurrence" coverage, under which a claim may be made for injuries that occur while the policy is in force. It is only the pollution endorsement that describes "claims-made" coverage; however the pollution endorsement contains no indication that the insurance company will construe the term "policy period" narrowly for purposes of the pollution endorsement, or differently for endorsement coverage than for other purposes.

As both parties point out, the Declaration pages for each renewal describe the policy period as a one-year period. For example, the Declaration for the period beginning March 1, 1990 lists the Policy Period as 03/01/90 to 03/01/91. However, the obvious purpose of this reference is to define a period of time to be added to the existing coverage upon payment of the annual premium, which is also listed in the Declaration. It is clear from the General Conditions that the policy will remain in force as long as the annual premium is paid. There is no clear indication that the pollution endorsement is intended to limit the "claims-made" coverage to the specific one-year period for which the premium is paid.

Peerless suggests that the reporting requirements of a claims-made policy must be strictly construed, because the parties have bargained for limited coverage at a limited price. However, there is no evidence in this case that the parties ever bargained over the claims-made pollution endorsement, or that the price was ever adjusted to reflect a limited form of coverage. To the contrary, the evidence suggests that neither party paid much attention to the terms of the endorsement until several years after Ms. Webster filed her claim. The Declaration pages for each of the 6 years listed the pollution exclusion endorsement (BU 0134 0486), even though it was never approved by VDBI despite three attempts.

The non-waiver agreement, signed January 27, 1993, made no mention of the reporting requirement as a condition of coverage. (State's Exhibit 19). Moreover, as late as January 3, 1996, Peerless wrote a letter which denied coverage and cited the pollution exclusion (BU 0134 0486), even though that provision, never having been approved, was void. The claims-made pollution coverage endorsement was the one in effect. (State's Exhibit 26). This record contradicts any inference that the parties bargained for a limited form of claims-made coverage at a reduced cost to the insured.

Coverage would be very limited under Peerless's interpretation of the policy. Peerless claims that this policy provided coverage only if the claim and the report were both made during a specific one-year period. Under this strict interpretation, a claim that is received shortly before the end of a policy year would still have to be reported before the end of that year, even when the policy is renewed unchanged. Under those circumstances, a delay of a few days could forfeit the coverage. Moreover, a party who wished to obtain extended coverage would actually have to purchase a "tail" for each year of coverage, even if the policy were renewed and maintained for many years. A reasonable insured would not think to inquire about purchasing a tail for every single year when he or she was renewing coverage of the same policy, with the same policy number, and the policy itself states that it will remain in effect as long as renewed. The Eleventh Circuit found ambiguity, which it resolved in favor of the insured, under similar circumstances. Cast Steel Products, Inc. v. Admiral Ins. Co., 348 F. 3d 1298 (2003) (ambiguity where a claims-made policy specified purchase of tail was required to extend the reporting period in the event of cancellation or nonrenewal, but was silent as to renewal; court approved Helberg analysis and declared coverage where a report was made in a renewal year for a claim that accrued during the prior year).

The court agrees with the State that Peerless's proposed interpretation of the policy is so restrictive that it must be rejected. First, nothing in the written terms of the policy or endorsement puts the insured on notice of such strict time limits. Second, it does not make sense that an insured who receives notice of a claim on February 28 risks losing coverage for reporting a day or two later, whereas one who receives notice on March 1 has a year to report, where both renew their policies as of March 1. Public policy, which underlies VDBI's regulation of insurance contracts, does not support constructions of contract terms that allow traps to be sprung for the benefit of insurers at the expense of unwary or unlucky insureds. Peerless's proposed interpretation can only be justified if the insured has clear warning, which this contract did not provide.

As part of its argument, Peerless maintains that the claimed coverage is barred by the "known loss" principle. The "known loss" principle, which is also known as the "known risk" defense, is based on the idea "that an insured cannot collect on an insurance claim for a loss that the insured subjectively knew would occur at the time the insurance was purchased." Public Util. Dis. No. 1 v. International Ins. Co., 881 P.2d 1020, 1030 (Wash. 1994). According to Peerless, Ms. Webster should be barred from reporting and recovering for a claim made in October of 1992, because she knew about the State's claim before she renewed her policy in March of 1992. However, Ms. Webster had no knowledge of the claim when she first purchased her policy. As the State points out, the leak, the discovery, the claim, and the report all occurred while the policy was in continuous

effect. The "known loss" doctrine does not bar the claim in this case. The doctrine should not be applied in a technical manner without regard to its purpose.

Peerless also argues that the claims-made pollution coverage endorsement (BU 0114 0285) *added* coverage where it would not otherwise exist, and that therefore its exposure should not be interpreted broadly. It bases this argument on the plain meaning of the pollution exclusion (BU 0134 0486) that was proposed under the consent-to-rate filing. However, the VDBI did not approve the pollution exclusion, and did not approve it for the following year despite two letter requests. In fact, the record shows that VDBI *disapproved* the filing despite Ms. Webster's written consent. Under these circumstances, the pollution exclusion was void, and claims-made coverage was in effect for the three years at issue. *See* Gerrish Corp. v. Universal Underwriters Inc. Co., 754 F.Supp. 358 (D.Vt. 1990), aff'd, 947 F.2d 1023 (2d Cir. 1991), cert. denied, 504 U.S. 973 (1992) (claims-made endorsement was deemed to be part of the policy, based on ISO filing).

Peerless cannot rely on terms of a void exclusion for the proposition that there was no pollution coverage before the claims-made endorsement became effective. The claims-made pollution endorsement did not represent an addition to the coverage. Rather, it was an attempt by Peerless to limit pollution coverage as much as VDBI would allow. Without the endorsement, Peerless would have had broader exposure under the comprehensive occurrence policy. Therefore, there is no reason to construe Peerless's exposure narrowly on the grounds that it added coverage.

After considering all of the above circumstances, the court concludes that the claims-made pollution endorsement within the occurrence policy is ambiguous in two ways. First, there are two reasonable interpretations for the term "policy period." That term may refer to the one-year period described in the Declaration, or it may refer to the period of time during which the policy is in force, inclusive of annual renewals, based on the terms in the General Conditions. Second, the overall structure of the policy leads to an ambiguity in the notice requirement. Where the underlying Businessowners' Policy generally provides "occurrence" coverage, and calls for notice of the occurrence "as soon as practicable," and where the claims-made pollution endorsement provides for more limited "claims-made" coverage and only states that the report is to be "during the policy period" without defining that term for purposes of the endorsement, ambiguity is created as to the standard governing the insured's duty to report: whether it is governed by the general provisions of the main policy or stricter requirements implied from undefined language in the endorsement.

Both of these sources of ambiguity make the insured's reporting duty difficult to ascertain from the contract itself, which was prepared by Peerless. Ambiguities are resolved in favor of the insured, "since the insurer is in a far better position to avoid latent ambiguity in the text of a policy." Sanders v. St. Paul Mercury Ins. Co., 148 Vt. 496, 500 (1987). Here the insurer failed to alert the insured that it intended to apply a strict requirement of reporting any claim within the policy year under the endorsement. Because of this ambiguity, the insured is entitled to the benefit of a construction that since she reported within the three years of continuous renewals with unchanged coverage, she reported during the "policy period."

There is no indication that the parties bargained for the more restrictive interpretations of these terms, or that the premiums were somehow tailored to limitations in the coverage. A policy holder would not expect to forfeit coverage because of notice given while the policy was still in force. Therefore, the court concludes that the claim was reported during the policy period.

Prejudice

Peerless maintains that, even if the claim was reported during the policy period, Ms. Webster forfeited coverage by failing to report the claim promptly. The policy does require the insured to give notice of an occurrence "as soon as practicable." Here the date the claim was made is not entirely clear. ANR's letter in July of 1990 notified Ms. Webster, during the early stages of its investigation, that it suspected a discharge from her property. Its suspicions were confirmed only after further investigation. It identified the property as a source of discharge in January of 1991. Nevertheless, when the evidence is viewed in a light favorable to Peerless, Ms. Webster was on notice as of July of 1990, and there was a delay of approximately 27 months before she notified Peerless in October of 1992.

Under these circumstances, the question arises whether Peerless was prejudiced by the delay. Cooperative Fire Ins. Ass'n v. White Caps, Inc., 166 Vt. 355 (1997). Where the insured reported the claim during the policy period, there is no reason to vary from the prejudice rule announced in White Caps, even though the Supreme Court declined to address that issue within the context of a "claims-made" policy. Id. at 363, n.2. Imposing a forfeiture of coverage based solely on a reporting delay would fall "beyond the reasonable expectations of the ordinary insurance consumer." Id. at 360 (quoting Jones v. Bituminous Casualty Corp., 821 S.W.2d 798, 802 (Ky. 1991)).

> [A] reasonable notice clause is designed to protect the insurance company from being placed in a substantially less favorable position than it would have been in had timely notice been provided. . . . In short, the function of a notice requirement is to protect the insurance company's interests from being *prejudiced.*

Id. at 362 (quoting Brakeman v. Potomac Ins. Co., 371 A.2d 193, 197 (Pa. 1977)) (emphasis added by Vermont Supreme Court). "[W]here a late notice does not harm the insurer's interests, the reason for the notice clause has not been undermined." Id. "Properly understood and applied, the notice clause should not function as a technical escape-hatch by which to deny coverage in the absence of prejudice." Id. (internal quotation omitted). "[A]n insurer may not forfeit its insured's protection unless it demonstrates that the notice provision was breached, and that it suffered substantial prejudice from the delay in notice." Id. (internal quotation omitted).

In White Caps the Supreme Court upheld the trial court's grant of summary judgment on the issue of prejudice, because the insurer "had failed to adduce any evidence that its position in defending the underlying claim had been prejudiced by the delay." Id. at 363. Cooperative Fire Insurance Association did not assert "that it had made any investigative effort to identify potential witnesses . . ., that any particular witness was unavailable or had suffered memory loss, that any

evidence had been lost or was unavailable, or that it had actually made any significant investigation of the incident following notice of the claim." Id. at 363-64. The Supreme Court concluded that "[A]n insurer cannot assert prejudice with regard to its ability to conduct an investigation that it never even tried to conduct." Id. at 364 (quoting General Accident Ins. Co. v. Scott, 669 A.2d 773, 780 (Md. Ct. Spec. App. 1996)) (additional citation omitted).

This case resembles White Caps in that there is no substantial evidence that Peerless ever made, or attempted to make, any significant investigation of the site. Mr. Koester met with Ms. Webster in January of 1993, and he later communicated with the claims adjuster Ted Tether. However, neither Mr. Koester nor Mr. Tether had any formal training or expertise in geology or hydrogeology, and they agreed with one another that Peerless would need to hire an expert to review the entire situation. Apparently, the only expert who ever reviewed the situation for Peerless was Jeffrey Noyes. However, there is no indication that Mr. Noyes conducted any investigation prior to 1995 (*i.e.* approximately three years after Peerless was notified of the claim). Moreover, Peerless has not offered any testimony from Mr. Noyes, so Peerless cannot rely upon his investigation to show prejudice.

At every step, Peerless has asserted that it was prejudiced by the delay in reporting, but these assertions have been vague and conclusory. Even now, Peerless relies on assumptions that it could have done something if it had been notified earlier. Peerless offers no evidence to contradict the State's position that the damage had already occurred by 1990, when the petroleum compounds had already reached and contaminated the bedrock aquifer. Furthermore, it is not as if information was lost as a result of the delay. On the contrary, the State conducted investigations by experts retained after competitive bidding processes, resulting in preservation of material evidence. Under these circumstances, it is difficult for Peerless to show that it could have done anything differently to limit the damages. *See* Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Surety, 89 F.3d 976, 996-97 (3d Cir. 1996) (given strict liability for pollution remediation, the issue is whether the insurer can demonstrate that it would have been able to make better arrangements for the cleanup).

On summary judgment, Peerless must show that it has admissible evidence to support its claim of prejudice. V.R.C.P. 56(e); Madden v. Omega Optical, Inc., 165 Vt. 306, 311 (1996) (evidence must be admissible). Peerless has not met its burden by citing to deposition testimony from Michael McGrath (who relies upon his experiences with other cases, and not on any technical expertise), or from Ted Tether (who relies upon unspecified conclusions reached by Jeffrey Noyes). A witness's recollection about what other employees have said is insufficient to show the existence of admissible evidence. Ross v. Times Mirror, Inc., 164 Vt. 13, 22 (1995). In short, Peerless' assertion of prejudice is based entirely on speculation. As in White Caps, the insurer has "failed to adduce any evidence that its position in defending the underlying claim [was] prejudiced by the delay." White Caps, 166 Vt. at 363.

evidence had been lost or was unavailable, or that it had actually made any significant investigation of the incident following notice of the claim." Id. at 363-64. The Supreme Court concluded that "[A]n insurer cannot assert prejudice with regard to its ability to conduct an investigation that it never even tried to conduct." Id. at 364 (quoting General Accident Ins. Co. v. Scott, 669 A.2d 773, 780 (Md. Ct. Spec. App. 1996)) (additional citation omitted).

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Summary

For the foregoing reasons, the court concludes that Ms. Webster made her report of the claim to Peerless during the policy period, and Peerless was not prejudiced by the fact that her report was delayed until October of 1992. The State is entitled to judgment as a matter of law.

The Scope of the State's Motion

The parties disagree over the scope of the State's motion. The State has argued for summary judgment on "liability" whereas Peerless contends that, at most, the State may be entitled to summary judgment on "coverage." To the extent there is any difference between the two positions, the court concludes that the State is entitled to summary judgment on liability. The undisputed facts show that there was coverage under Ms. Webster's policy. The State has expended significant sums for investigation and cleanup, and the State is entitled to seek reimbursement of PCF cleanup expenditures when there is insurance coverage. 10 V.S.A. §1941(f). A.N.R. v. U.S. Fire Ins. Co., 173 Vt. 302 (2001). Under these circumstances, coverage is equivalent to liability. Nevertheless, there are remaining issues to be decided in the damages portion of the case, where the State will bear the burden of proof.

Order

For the foregoing reasons,

Defendant's Motion for Summary Judgment is *denied*, and
Plaintiff's Motion for Partial Summary Judgment is *granted* as to liability.

The court will schedule a pretrial status conference in preparation for the hearing on damages, which is consolidated with the hearing on damages in State v. Universal Underwriters Ins. Co., Docket No. 539-9-98 Wncv. Attorneys in both cases shall proceed to schedule consolidated mediation to take place by May 31, 2004, and shall notify the court of the date of scheduled mediation.

Dated this 23rd day of March, 2004.

Mary Miles Teachout
Superior Judge