

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

PICERNE MILITARY HOUSING, :  
LLC, et al. :  
 :  
v. : C.A. No. 08-273S  
 :  
AMERICAN INTERNATIONAL :  
SPECIALTY LINES INSURANCE :  
COMPANY :

**MEMORANDUM AND ORDER**

This is an insurance coverage dispute over the costs of removal of buried construction and demolition (“C&D”) debris. Plaintiffs (collectively “Picerne”) were insured under a Pollution Legal Liability Insurance Policy (the “Policy”) issued by Defendant (“AISLIC”). The C&D debris was apparently buried illegally by one of Picerne’s land development subcontractors at a military housing project located at Fort Bragg, North Carolina. Currently pending before the Court for determination (28 U.S.C. § 636(b)(1)(A); LR Cv 72(a)) is Picerne’s Motion to Compel AISLIC to produce documents responsive to Request Nos. 3, 4 and 6-10. (Document No. 103). AISLIC objects. (Document No. 127). A hearing was held on September 13, 2010.

**Background**

This case was commenced by Picerne on July 22, 2008. Shortly after AISLIC answered (Document No. 17) and prior to a Rule 16 scheduling conference, Picerne moved for partial summary judgment on October 10, 2008. (Document No. 18). Picerne argued that there was “no genuine issue as to any material facts as to liability” on the policy claims and that “[t]he Court need only construe the Policy to determine whether the Policy provides coverage for the claim at issue.”

Id. at p. 1. This initial Rule 56 Motion was denied without prejudice as prematurely filed. (Document No. 40).

On June 5, 2009, Picerne renewed its Motion for Partial Summary Judgment again arguing the absence of disputed facts and that the Court “need only construe the Policy” to resolve the coverage dispute. (Document No. 52). AISLIC opposed the Motion (Document No. 66) and, on September 1, 2009, Judge Smith denied Picerne’s Motion. Judge Smith rejected the parties’ competing constructions of the Policy’s “Pollution Conditions” definition and noted that “even under the Court’s construction of ‘irritant or contaminant’ there are too many open questions to grant Picerne the relief it seeks.”<sup>1</sup> (Document No. 79 at p. 13). Judge Smith raised the potential of whether sinkholes or methane gas release related to the buried C&D debris posed health or environmental hazards and, in the end, gave Picerne “the benefit of the doubt that it may have evidence sufficient to prove the C&D debris is an ‘irritant or contaminant’ within this Court’s construction of the Policy.” Id. at p. 14. (emphasis added). After a period of fact and expert discovery, AISLIC moved for summary judgment on June 30, 2010 (Document No. 105) and Picerne cross-moved on July 30, 2010. (Document No. 129). Again, Picerne points out the absence of disputed facts as to liability and asserts that “the Court need only construe the Policy to determine whether [it] provides coverage for the claim at issue.” (Document No. 129 at p. 2). In its summary judgment brief, Picerne does not invoke Rule 56(f)<sup>2</sup> or otherwise argue that consideration of summary judgment is premature at this time due to outstanding discovery. In fact, Picerne points

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<sup>1</sup> Judge Smith also noted the existence of disputed factual issues as to knowledge, discovery and the Policy’s “Intentional Noncompliance” exclusion. (Document No. 79 at p. 13 14, n.4).

<sup>2</sup> Fed. R. Civ. P. 56(f) protects a party opposing summary judgment who, for valid reasons, such as the absence of discovery, cannot “present facts essential to justify its opposition.”

out that Judge Smith indicated that “the illegally buried waste material could be a contaminant (and thus a pollutant) if it posed a hazard to health or the environment” and makes clear that Judge Smith “already identified the factors that will govern whether the buried waste materials are contaminants.” (Document No. 141 at p. 10).

### **Discussion**

Picerne’s Motion to Compel primarily seeks discovery potentially relevant to policy interpretation (claim and underwriting manuals, policy drafting history and state regulatory filings) and also documents generally related to the environmental/health hazards posed by sinkholes or methane gas. AISLIC raises a number of arguments in response including dilatoriness, lack of relevance and undue burden.

The document requests in question were served on AISLIC by Picerne on or about September 25, 2009 and were responded to initially on October 26, 2009 and by supplement on December 11, 2009. Yet, it took Picerne more than six months to move to compel and it did so after the date when Judge Smith ordered that discovery was to be “completed” and on the eve of the current-round of summary judgment briefing. (Document No. 102). If discovery was incomplete due to a deficient response or unfounded objection tendered by AISLIC, Picerne should have moved to compel prior to the date ordered by Judge Smith for the completion of discovery. It is apparent from Judge Smith’s Order that he contemplated that the completion of discovery would precede another full round of summary judgment briefing which has now been completed. Id.

Consistent with its arguments that there are no issues of fact as to liability, that the Court need only construe the Policy, and that the Court has already identified the factors that will govern resolution of the contaminant issue (Document No. 141 at p. 10), Picerne conceded at the hearing

that the allegedly outstanding documents were not needed to decide the pending summary judgment motions and, in particular, that they were not necessary for Picerne to prevail on the legal and factual issues it has presented to the Court. Rather, Picerne indicated that it wanted the documents in the event the case went to trial and suggested that the Court hold this Motion under advisement until the Summary Judgment Motions were resolved.

Picerne's arguments that the documents are not necessary to resolve the coverage issues presently before the Court on summary judgment but may be relevant if such issues go to trial are contradictory. It makes no practical sense for this Court to delve deeply into the discovery disputes presented in Picerne's Motion which may be mooted by the outcome of the Summary Judgment Motions, or to potentially require AISLIC to invest the time and money to search for and produce documents as part of what may potentially be an academic exercise. Moreover, Picerne concedes that its Motion to Compel which was filed after the discovery completion date, is untimely in its words, it was "filed a little too late."

Finally, Picerne's attempt to use the McDonough deposition as an excuse for its late filing is unconvincing. Ms. McDonough, a former AISLIC underwriter, was deposed on May 10, 2010, three weeks prior to the discovery completion date. Although Ms. McDonough did apparently testify about the existence of underwriting training materials which may or may not have been responsive to Requests 3 or 4, Picerne has not shown that her testimony was relevant to any of the other requests in dispute. Thus, Ms. McDonough's deposition does not provide a credible excuse for the overall six-month delay in moving to compel, and Picerne provides no justification for the narrower failure to move to compel in the three-week period between Ms. McDonough's deposition and the discovery completion deadline.

## **Conclusion**

For the foregoing reasons, Picerne's Motion to Compel Discovery (Document No. 103) is DENIED. Such denial is, however, without prejudice to Picerne seeking leave from Judge Smith to take further discovery in anticipation of trial, if appropriate and necessary, following the ruling on the parties' pending cross-motions for summary judgment.

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
September 15, 2010