EXHIBIT 7

NAPA COMMUNITY REDEVELOPMENT AGENCY, Plaintiff, v. CONTINENTAL INSURANCE CO., PLANET INSURANCE CO., and DOES 1 - 50, Defendants.

No. C-94-3284 DLJ

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1995 U.S. Dist. LEXIS 22542

November 17, 1995, Decided

SUBSEQUENT HISTORY: Summary judgment granted by, Judgment entered by *NAPA Cmty. Redevelopment Agency v. Cont'l Ins. Co., 1996 U.S. Dist. LEXIS 22991 (N.D. Cal., Sept. 16, 1996)*

COUNSEL: [*1] For Napa Community Redevelopment Agency, Plaintiff: Kirk Edward Trost, LEAD ATTORNEY, Hyde Miller & Owen, Sacramento, CA.

For Continental Insurance Company, The, Defendant: James Hugh Wilkins, LEAD ATTORNEY, Wilkins,Drolshagen & Czeshinski, Fresno, Ca.

For Planet Insurance Company, Defendant: Brian Gearinger, LEAD ATTORNEY, Mosley & Gearinger LLP, San Francisco, CA; Kelly L. Quigley, LEAD ATTORNEY, Hancock Rothert & Bunshoft LLP, San Francisco, CA.

JUDGES: D. Lowell Jensen, United States District Judge.

OPINION BY: D. Lowell Jensen

OPINION

ORDER

On November 15, 1995, the Court heard argument on defendant Planet Insurance company's motion for reconsideration, or in the alternative, for certification for interlocutory appeal. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES defendant's motion for reconsideration and DENIES defendant's request for certification for interlocutory appeal.

I. BACKGROUND

A. Factual Background and Procedural History

1. Cal savings' Suit Against Napa Community Redevelopment Agency ("NCRA")

On August 31, 1987, California Savings & Loan ("Cal Savings" or "CSL") filed a claim with plaintiff NCRA. The Cal Savings [*2] action arose out of NCRA's acquisition of a portion of the Cal Savings property in downtown Napa for an urban redevelopment project. The property acquired consisted of landscaping and 12 on-site parking spaces adjacent to the Cal Savings branch office. According to NCRA, when it acquired the property in 1981, its redevelopment plans contemplated the construction of a "sandwich-style" parking structure on the acquired site. The proposed "sandwich-style" parking structure would have underground parking on one level, a department store on the main level, and

rooftop parking on the third level. The parties executed an acquisition contract in November 1980, NCRA paid $148,069, and a grant deed was recorded in February 1981.

Ultimately, NCRA did not construct the "sandwich-style" parking structure. NCRA commenced construction of alternative improvements on the acquired site in September 1986 and completed construction in November 1987. On August 31, 1987, Cal Savings filed a government claim against NCRA and, on February 20, 1990, filed a complaint in Napa County Superior Court. On November 16, 1990, Cal Savings filed a First Amended Complaint for Inverse Condemnation and Breach of Contract [*3] and Misrepresentation (negligent and intentional). Among other things, Cal Savings alleged that NCRA had represented that the "sandwich-style" parking structure would be built without a reasonable basis for believing that to be true.

After a bifurcated trial on all legal and equitable issues, the trial court determined that (1) the doctrine of estoppel by deed barred the cause of action for inverse condemnation; and (2) the acquisition contract and deed were fully integrated. NCRA then moved for summary judgment on the breach of contract and misrepresentation causes of action, which motion the trial court granted on October 27, 1992. The trial court reasoned that as the contract and deed were fully integrated and there was no provision promising to build a parking structure, Cal Savings' breach of contract claim must fail. The court also found that Cal Savings' misrepresentation claim sounded in tort and not contract. Accordingly, the court found that as a public agency, NCRA was statutorily immune from misrepresentation.

Cal Savings subsequently appealed the trial court rulings and, on July 23, 1994, the Court of Appeal upheld the judgment for NCRA. The court of appeal agreed that estoppel [*4] by deed barred the inverse condemnation cause of action and that as the contract was integrated, there could be no claim for breach of contract. The court of appeal affirmed judgment on the misrepresentation claim on somewhat different grounds that the trial court. To the extent the misrepresentation claim sounded in tort, the court agreed that NCRA was statutorily immune. To the extent the misrepresentation claim sounded in contract, it failed for the same reason the contract claim failed.

2. NCRA's Tender of the Defense

NCRA initially tendered the Cal Savings action to Planet Insurance Company. Planet denied the tender on the grounds, inter alia, that the relevant date of loss was when the alleged misrepresentations were made or when the property was sold. These actions happened in 1980-81. Planet's coverage period is from June 1986 forward.

NCRA then tendered defense of the Cal Savings action to Continental Insurance Company. Continental denied the tender on the grounds, inter alia, that the loss did not occur until September 1986, when the new parking structure was actually built, continental's coverage period ended in June, 1986.

This action followed. In August 1994, NCRA sued Planet [*5] and Continental for declaratory judgment, breach of contract and bad faith failure to defend in state court. Defendants removed the case to this Court.

On May 17, 1995, the Court heard arguments on defendants' motions for summary judgment and plaintiff's crossmotions for partial summary judgment. By Order dated August 1, 1995 ("the Order"), this Court granted defendant Continental's motion for summary judgment against NCRA, denied NCRA's crossmotion for partial summary judgment against Continental, denied defendant Planet's motion for summary judgment against NCRA, and granted NCRA's motion for partial summary judgment against Planet. On October 3, 1995, Planet filed this motion for reconsideration, or in the alternative, for certification for interlocutory appeal.

B. Legal Standard

1. Motion for Reconsideration

Under *Rule 54(b)*, a court has discretion to review orders prior to entry of final judgment: "[A]ny order which . . . adjudicates fewer than all the claims or rights or liabilities of fewer than all the parties . . is subject to revision at any time before the entry of [final] judgment." *Fed.R.Civ.P 54(b)*.

Under *Rule 60(b) of the Federal Rules of Civil Procedure*, motions to reconsider [*6] are committed to the discretion of the trial court. *Combs v. Nick Garin Trucking, 825 F.2d 437, 441, 263 U.S. App. D.C. 300 (D.C. Cir. 1987)*. To succeed in a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision.

See, e.g., *Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986)*, aff'd in part and rev'd in part on other grounds, *828 F.2d 514 (9th Cir. 1987)*, cert. denied. *486 U.S. 1015, 108 S. Ct. 1752, 100 L. Ed. 2d 214 (1988)*.

An order may be reconsidered if the Court made a clear error of law or if the prior order caused a manifest injustice to occur. In order for a party to demonstrate clear error, the moving party's arguments cannot be the same as those made earlier. *Great Hawaiian Fin. Corp. v. Aiu, 116 F.R.D. 612, 617 (D.Haw. 1987)* (citations omitted). If a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived. Id. To succeed on a such a motion to reconsider, a party "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id. at 616*.

In the Northern District, a motion for reconsideration is governed by *Civil Local Rule 7-9*. [*7] *Rule 7-9(a)* first requires that "[n]o party shall notice a motion for reconsideration without first obtaining leave of court to file the motion." *Rule 7-9(b)* provides in relevant part that:

> The moving party must specifically show . . . . (3) A manifest failure by the court to consider material facts which were presented to the court before such interlocutory order [for which reconsideration is sought]."

However, "[n]o motion . . . for reconsideration shall repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered." *civil L.R. 7-9(c)*.

2. Interlocutory Appeal - *28 U.S.C. § 1292(b)*

The general rule is that an appellate court should not review a district court ruling until after entry of a final judgment. *Coopers & Lybrand v. Livesay, 437 U.S. 463, 474, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)*; *In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982)*, aff'd sub nom. *Arizona v. Ash Grove Cement Co., 459 U.S. 1190, 103 S. Ct. 1172, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (1983)*; *Fukuda v. County of Los Angeles, 630 F. Supp. 228, 229 (C.D. Cal. 1986)*; see *28 U.S.C. § 1291*.

The Interlocutory Appeals Act of 1958 creates an exception to the general rule. The statute states [*8] that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon . . . permit an appeal . . . if application is made to it within ten days. . . .

28 U.S.C. § 1292(b)[hereinafter "*Section 1292(b)*"]. This statute exists for those exceptional circumstances where considerations of judicial economy and fairness demand interlocutory review of an order. The party seeking certification of an interlocutory appeal has the burden to show the presence of those exceptional circumstances. *Coopers & Lybrand, 437 U.S. at 474-75*; *Fukuda, 630 F. Supp. at 229*.

Section 1292 identifies three factors that must be present in order for the Court to certify an appeal. First, the issue to be certified must involve a controlling issue of law. The Ninth Circuit has ruled that an issue is "controlling" if "resolution of the issue on [*9] appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig., 673 F.2d at 1026* (citing *U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)*); see *Shurance v. Planning Control Int'l. Inc., 839 F.2d 1347, 1347-48 (9th Cir. 1988)*.

Second, there must be substantial ground for difference of opinion on that issue. A party's strong disagreement with the Court's ruling is not sufficient for there to be a "substantial ground for difference"; the proponent of an appeal must make some greater showing. *Kern-Tulare Water Dist. v. Bakersfield, 634 F. Supp. 656, 667 (E.D. Cal. 1986)*, aff'd in part and rev'd in part on other grounds, *828 F.2d 514 (9th Cir. 1987)*, cert. denied, *486 U.S. 1015, 108 S. Ct. 1752, 100 L. Ed. 2d 214 (1988)*.

Third, an interlocutory appeal must be likely to materially speed the termination of the litigation. This factor is linked to whether an issue of law is "controlling"

in that the Court should consider the effect of a reversal by the Ninth Circuit on the management of the case. In addition, in light of the legislative policy that the statute only be used in exceptional circumstances, the Court should consider whether litigation in reliance on its order [*10] permitting an interlocutory appeal would be "protracted and expensive." *In re Cement Antitrust Litig., 673 F.2d at 1026*; see 16 Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 3930, at 163-66 (1977). If an interlocutory appeal would actually delay the conclusion of the litigation, the Court should not certify the appeal. See *Shurance, 839 F.2d at 1348* (refusing to hear certified appeal in part because decision of Ninth Circuit might come after scheduled trial date).

II. ARGUMENTS

A. Procedural Defects

1. Failure to Comply with Local Rules

The Local Rules require that a party moving for reconsideration must first seek leave of the court. *Civil L.R. 7-9(a)*. Planet has not done so. Therefore, Planet's motion is technically deficient and not properly before this Court.

NCRA contends that this failure to comply with the Local Rules is fatal to Planet's motion. They also have asked for sanctions pursuant to *Civil Local Rule 7-9(c)* in the amount of attorney's fees and costs. However, there does not appear to have been any prejudice to NCRA or to Continental as a result of Planet's procedurally improper motion. Because all parties have had an adequate opportunity to respond, [*11] and have in fact done so, it is not inappropriate to consider Planet's motion on the merits.

2. Failure to Identify a Federal Rule

Planet has also given no indication which Federal Rule governs its motion for reconsideration. Planet apparently relies on *Rule 54(b)* as the foundation for its motion. Under *Rule 54(b)*, this Court does have the authority to "revise" any order that adjudicates fewer than all the claims. *Rule 54(b)* does not, however, provide a mechanism by which parties may seek reconsideration.

Rather, "a motion for reconsideration of summary judgment is appropriately brought under either *Rule 59(e)* or *Rule 60(b)*." *Fuller v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991)* (citations omitted). Under *Rule 59(e)*, a motion for reconsideration must be brought within ten (10) days of the entry of summary judgment. *Fed.R.Civ.P. 59(e)*. This Court's Order of summary judgment was entered August 1, 1995. Planet filed its motion for reconsideration on October 3, 1995, and the motion is therefore untimely under *Rule 59(e)*. Consequently, for this Court to give effect to Planet's motion, it must be considered as a motion for reconsideration pursuant to *Rule 60(b)*.

Rule 60(b) "provides for [*12] reconsideration upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." Id. (citing *Fed.R.Civ.P. 60(b)*; *Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985)*. The factors relied upon by Planet in *Civil Local Rule 7-9*, "a manifest failure . . . to consider material facts," are sufficiently similar to *Rule 60(b)* to warrant consideration under that Rule.

B. Motion for Reconsideration

Planet asserts that this Court failed to consider material facts in connection with the Planet policy that indicated Planet had no duty to defend NCRA against Cal Savings. Planet posits four different "facts" that this Court allegedly neglected to evaluate. [1]

1 Most of the "material facts" identified in Planet's motion were expressly considered in the Court's prior Order. As such, these facts so not provide sufficient basis for reconsideration. Nonetheless, for the benefit of the parties, this order reviews all of Planet's grounds for reconsideration.

1. Date of Occurrence

Planet first alleges that this Court failed to consider facts [*13] relating to the date of the insurance policy "occurrence."

On motion for summary judgment, Planet claimed that it was not liable under the policy because the alleged misrepresentation occurred in 1980 or 1981, prior to the Planet policy period. It argued that for purposes of negligent misrepresentation, damage occurs at the time the representations are made and not when the complaining party is actually injured.

This Court disagreed, finding that "Cal Savings did not sustain any damage until NCRA began construction without including 'sandwich-style' parking facilities." Thus, the date of the "occurrence" for purposes of coverage was found to be September, 1986.

Planet now claims that this Court ignored "the crux of [its] motion . . . which is that actual damage to [Cal Savings] took place at least by the time the property was sold in 1980." The focus of Planet's argument centers around two "facts" that this Court allegedly failed to consider.

a. Cal Savings's Lost Use Claim

Planet argues that this Court ignored facts alleged by Cal Savings in the original complaint that indicate the "occurrence" was in 1980 or 1981 when the actual misrepresentation was made.

Planet contends that the damages [*14] flowing from the misrepresentation claim are different from either the breach of contract or inverse condemnation damages, and that the only possible damage arising from Cal Savings' misrepresentation claim is the loss of use of the parking spots. It asserts that Cal Savings' complaint alleged that it lost use of the parking spots in 1980/81. Planet argues that this loss amounted to "property damage" within the terms of the Continental policy, so that liability for the misrepresentation should have been triggered well before 1986. Planet now claims that "[i]t is without reason that the Court then finds the date of construction as the date of actual damage -- especially where CSL clearly lost use of the property by 1981."

This argument is unconvincing because it assumes that Cal Savings suffered injury when it allegedly "lost use" of the parking slots in 1980/81. The only evidence Planet presents on this issue is a letter indicating that Cal Savings would lose "exclusive" use of the parking spots when escrow closed. (See Planet's Exhibit D). This is not evidence that Cal Savings was injured by the loss of exclusive use at that time. Planet does not dispute the fact that Cal Savings consented [*15] to at least a temporary "lost use" of those spots. As such, this Court remains convinced that the misrepresentation at issue in the underlying action did not manifest itself as injury to Cal Savings until it became apparent that the "sandwich-style" parking structure would not be built.

Second, Planet's argument also fails in the context of a motion for reconsideration because it is essentially the same argument that Planet made in its motion for summary judgment. Planet does not point to any fact or allegation that was not already considered by this Court. It simply disagrees with this Court's finding based on the same facts now presented for reconsideration. Presenting the same argument that has previously been considered and rejected is inappropriate in a motion for reconsideration. See *Backlund, 778 F.2d at 1388*.

b. NCRA's Allegations against Continental

Planet also claims that this Court failed to consider NCRA's "admission" that the occurrence "indisputably occurred" in 1980/81. This plainly mischaracterizes NCRA's claim. NCRA does not state that the relevant "occurrence" "indisputably" took place in 1980/81. NCRA does allege that there was "arguably" an "occurrence" in 1980/81. [*16] It also claims that there was an occurrence in 1986. However, the fact that NCRA argues that 1980/81 was a relevant "occurrence" date is not dispositive of the issue.

NCRA's pleadings were clearly considered by this Court when it determined that Cal Savings had been damaged in 1986, and not in 1980/81. The Order plainly notes that "[p]laintiff contends that both [1980/81 and 1986] are relevant 'occurrence' dates." Thus, it is inapposite for Planet to claim that this Court, in making its decision, did not consider Cal Savings' arguments to the effect that 1980/81 was also an 'occurrence' date. That consideration was at the heart of the Order.

Planet argues that judicial estoppel should bar NCRA from arguing that there were two "occurrences." Planet contends that by alleging "occurrences" in 1980/81 and 1986, NCRA has taken impermissibly inconsistent legal positions with respect to the "meaning and effect" of the facts of this case.

The law of judicial estoppel is unclear in the Ninth Circuit. *Yanez v. United States, 989 F.2d 323, 326 (9th Cir. 1993)*. "As a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation." Id. (quoting [*17] *Morris v. California, 966 F.2d 448 (9th Cir. 1991))*. The majority of courts hold that judicial estoppel does not apply unless the assertion inconsistent with the claim made in the subsequent litigation was adopted in some manner by the court in the prior litigation. See *In re Corey, 892 F.2d 829, 836 (9th Cir. 1989)*. A minority of

courts follow the less rigorous rule that applies judicial estoppel where a party is playing 'fast and loose' with the court. Id. The Ninth Circuit has not adopted either the "majority" position or the "minority" position in determining when judicial estoppel applies. See *Britton v. Coop Banking Group, 4 F.3d 742, 744 (9th Cir. 1993)*.

In either case, a threshold requirement for judicial estoppel to apply is the "inconsistency" of the factual or legal positions. *Yanez, 989 F.2d at 326*. It is not entirely clear that NCRA's pleadings are inconsistent. It is possible that NCRA could have pursued claims against both continental and Planet on a "continuous injury trigger" theory. See e.g., *Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal.4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878 (1995)* (applying continuous injury trigger to coverage under a comprehensive general liability (CGL) insurance policy [*18] where injury or damage is continuous over successive policy periods).

Most continuous injury trigger cases involve repeated injury or progressive deterioration as the triggering events. See *Id. at 686, n.22* (discussing cases such as asbestos exposure or environmental contamination). While it is not certain whether or not this case involves the type of "continuous" injury contemplated by Montrose, it is not necessary that this Court decide the issue. For purposes of this motion, NCRA's pleadings could not be said to be so inconsistent as to be "playing 'fast and loose'" with the Court. *Britton, 4 F.3d at 744* (citations omitted). Thus, judicial estoppel does not apply.

The crux of Planet's motion appears to be that the Court picked the wrong date when it found that the "occurrence" was in 1986. This disagreement with the Court's finding alone does not provide a basis for reconsideration. See *Backlund, 778 F.2d at 1388*.

2. This Court's Interpretation of "Coverage C"

Planet next argues that footnote four in the Order was "blatantly" erroneous. Footnote four states that:

> [i]n the alternative, if Cal Savings' claim against Napa were considered one not for property damage but rather for economic [*19] injury, then the suit would fall within the scope of Planet policy Coverage C which provides coverage for "any actual or alleged error or misstatement or misleading statement" excluding "damages because of 'bodily injury,' 'property damage,' personal injury' or 'advertising injury.

Planet argues that the Court ignored unambiguous language in the policy that would not allow for recovery under Coverage C. However, it is unlikely that the Court failed to consider the terms of the Coverage C policy in light of the fact that much of the language Planet claims was not considered by this Court is quoted in the offending footnote.

Planet also apparently believes that the Coverage C liability noted in footnote four was necessary to the Court's decision to grant partial summary judgment. Liability under Coverage C was only relevant if this Court found that Cal Savings had alleged economic injury rather than property damage. Because this Court found that Cal Savings' claim amounted to property damage, Planet had a duty to defend under Coverage A whether or not Coverage C applied.

Planet's attempts to read Coverage C exclusions into Coverage A are misguided. Different liability and different exclusions [*20] attach to each Coverage. Planet cannot deny its obligation to defend under Coverage A through an exclusion that applies only to Coverage C. To so read the policy would mean that Planet could always deny coverage for property damage through the exclusion in Coverage C. In any event, Planet is unable to show that this Court failed to consider the terms of Coverage C, and thus its motion for reconsideration fails.

4. Contractual Misrepresentation

Planet finally argues that the misrepresentation claim asserted by Cal Savings was contractual in nature, and is therefore barred a matter of law. It is true that Cal Savings tried to argue its misrepresentation claim at least in part as a claim for contractual misrepresentation. This appears to have been an attempt to avoid the statutory governmental immunity afforded to NCRA against tort claims. However, Planet relies only on the arguments of Cal Savings, and not on the complaint itself, to support the proposition that it had no duty to defend. This misconstrues an insurer's obligations. The duty to defend attaches where the facts suggest even the possibility that a claim may arise under any conceivable theory. See *Montrose, 6 Cal. 4th at 295-300;* [*21] *Gray v. Zurich*

Ins. Co., 65 Cal.2d 263, 276-77, 54 Cal. Rptr. 104, 419 P.2d 168 (1966). It is clear from Cal Savings' complaint that the misrepresentation claim could sound in tort. The fact that the insured likely has a valid defense to that claim does not absolve the insurer from its obligation to provide that defense. See *Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081-88, 17 Cal. Rptr. 2d 210, 846 P.2d 792*. Thus, even if it was unlikely Cal Savings could succeed on its tort Claim, Planet nonetheless had a duty to defend.

In any event, this claim too appears to have been considered and rejected by this Court:

> Planet contends that even if the negligent misrepresentation claim by Cal Savings against NCRA is an occurrence within the relevant policy period, Planet did not have a duty to defend against Cal Savings' claim because the claim was without legal merit. The Court disagrees. As the California supreme Court has said, "If [the] claims were indeed so insubstantial as not to warrant any damages, [the insurer] should have raised that defense in the underlying action for [the insured's] benefit, rather than in this . . . action to his detriment (citations). Order at 15:8-22.

Having judged Planet's claim to be without merit, this Court need not [*22] grant a motion to reconsider the identical argument.

C. Certification for Interlocutory Appeal

Planet requests that, if this Court denies its motion for reconsideration, the question of whether or not it had a duty to defend be certified for appeal to the Ninth circuit under *Section 1292(b)*. Planet contends that this issue is "controlling" within the meaning of the statute. It claims that a Ninth Circuit decision could dispose of the entire action. If the Ninth Circuit were to find that Planet did not have a duty to defend, according to Planet, there would be no claim against it for failure to tender a defense in bad faith.

NCRA counters that the question of whether Planet had a duty to defend is not necessarily the only issue left open by the Order. NCRA has argued that Planet waived defenses to its coverage obligation. It claims that it can still maintain a cause of action for bad faith failure to defend even if this court finds no coverage. It argues that these issues would not be resolved by appeal to the Ninth Circuit, and thus there is no "controlling" issue to be certified.

It is possible that the question of Planet's duty to defend is controlling here. Planet correctly points out [*23] that this Court denied NCRA's claim of waiver as to Continental's right to deny coverage. The Court found that NCRA had not established either intentional or implied waiver of Continental's defenses. While the Order did not address the question of waiver as it relates to Planet, it is possible that the same reasoning would apply to both insurers, and Planet would not be said to have waived its defenses to its coverage obligation. In that case, the question of whether Planet had a duty to defend would "materially affect the outcome of the litigation . . . ." *In re Cement Antitrust Litig., 673 F.2d at 1026* (citations omitted).

However, even if Planet could establish that the only remaining question was its duty to defend, it has not demonstrated a substantial ground for difference of opinion. Planet's motion for reconsideration is evidence of little more than a strong disagreement with a decision of this Court. The fact that Planet does not agree with this Court's order, however, is not sufficient to justify certification. See *Kern-Tulare Water Dist., 634 F.Supp. at 667*.

In addition, appeal does not seem certain to hasten the outcome of this case. There is no guarantee that the Ninth Circuit [*24] would agree with Planet. If it does not, only one of several issues regarding Planet's liability will have been settled. Trial will still be necessary, and will have been unnecessarily delayed. Moreover, if as Planet contends, the only issue remaining to be decided is NCRA's bad faith claim, a trial might resolve that question more quickly than would an appeal to the Ninth circuit for a decision that may or may not be dispositive of the entire case. Therefore, Planet's motion to certify for appeal under *Section 1292(b)* is denied.

D. Motion to Stay Pending Appeal

Planet also requests that this action be stayed pending the outcome of an appeal to the Ninth Circuit. Obviously, because Planet's motion to seek appellate review is denied, there is no reason to stay the proceedings.

III. CONCLUSION

Planet did not comply with the Local Rules in its motion for reconsideration. However, the Court does not find it appropriate to deny Planet's motion or impose sanctions on those grounds.

Although Planet contends that its motion is based on this Court's failure to consider material facts in granting partial summary judgment for NCRA, the facts identified by Planet in its motion were either expressly [*25] considered by this Court's prior Order or immaterial to the summary judgment decision. That Planet disagrees with this court's findings is evident. However, this disagreement alone does not entitle it to seek reconsideration of claims that have been considered and ruled upon by this Court. The motion for reconsideration is DENIED.

Planet also has requested that this Court certify the question of Planet's duty to defend for interlocutory review. However, this case is neither so complicated nor likely to be so protracted as to warrant such "exceptional" treatment. Therefore, Planet's motion for certification, and its motion to stay the proceedings, are also DENIED.

IT IS SO ORDERED.

Dated: November 17, 1995.

/s/ D. Lowell Jensen

D. Lowell Jensen

United States District Judge