

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

PETROLEUM REALTY V, LLC,)

Plaintiff)

v.)

**COMMERCE AND INDUSTRY
INSURANCE COMPANY,**)

Defendant.)

**CIVIL ACTION FILE
NO. _____**

_____)

COMPLAINT

Plaintiff PETROLEUM REALTY V, LLC (“Pet Realty”) hereby files this Complaint against Defendant COMMERCE AND INDUSTRY INSURANCE COMPANY (“C&I”) as follows:

BACKGROUND AND STATEMENT OF THE CASE

1. Pet Realty brings an action for breach of contract, declaratory judgment, attorneys’ fees, and bad faith against C&I for its failure to provide insurance coverage for petroleum releases from underground storage tanks (“USTs”) at stores owned by Pet Realty. Pet Realty is a named insured under C&I environmental insurance policy number 7788317 (the “Policy”) that covers “Clean-Up Costs” and “Loss” related to releases from USTs at the stores identified in Paragraph 2 below.

2. The stores at issue are Store 902 at 5022 Old National Highway, Atlanta, Georgia (“Store 902”); Store 904 at 1417 Highway 138, Conyers, Georgia (“Store 904”); Store 915 at 1836 Mountain Industrial Blvd., Tucker, Georgia (“Store 915”); Store 918 at 4160 Fulton Industrial Blvd., Atlanta, Georgia (“Store 918”); and Store 924 at 809 Thornton Road, Lithia Springs, Georgia (“Store 924”) (collectively, “Stores”).

3. Pet Realty is a real estate and investment financing company that acquired an ownership interest in the USTs at the Stores in October 2006 when the previous owner of the USTs, Trico V Petroleum, Inc., defaulted on its lease obligations. After acquiring ownership of the USTs, the Georgia Environmental Protection Division (EPD) required Pet Realty to investigate and remediate certain releases from the USTs at each of the Stores (“UST Releases”). Therefore, Pet Realty notified C&I of the claims for each Store and sought coverage for related “Clean-Up Costs” and “Loss” under the terms of the Policy.

4. Since that time, Pet Realty has cooperated with EPD to investigate and clean up the UST Releases. To date, Pet Realty has spent over \$628,000 at the Stores under the direction of EPD to address the UST Releases, and anticipates EPD will require additional measures that could cost over \$1,000,000 to implement.

5. C&I has, without justification, continued to refuse to acknowledge or accept coverage or pay Pet Realty's "Clean-Up Costs" and "Loss." The Policy clearly covers the UST Releases. C&I's actions and prolonged delay constitute a bad faith denial of coverage and breach of its duties and obligations under the Policy. Pet Realty is seeking to recover any and all damages and costs permitted under the Policy and as otherwise allowed by law arising from C&I's breach and bad faith conduct.

THE PARTIES

6. Petroleum Realty V, LLC is a Delaware limited liability company with its principal place of business at 801 Arthur Godfrey Road, Miami Beach, FL 33140. Pet Realty is authorized to transact business in the State of Georgia.

7. C&I is a New York corporation with its principal place of business at 175 Water Street, 18th Floor, New York, NY 10038. C&I is authorized to transact business in the State of Georgia. C&I's registered agent for service of process is Corporation Service Company, 40 Technology Parkway South, Norcross, GA 30092.

JURISDICTION AND VENUE

8. This court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1332, 2201, and 2202. Complete diversity of citizenship exists between the

parties, and the amount in controversy exceeds \$75,000 (Seventy-Five Thousand Dollars), exclusive of interest and costs.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

STORE 902

10. Pet Realty acquired ownership of Store 902 in July 2000.

11. Releases from these USTs occurred in 1996 and 2005 and were reported to EPD.

12. Following the 1996 release, EPD required the submittal of a Corrective Action Plan Part A (“CAP A”) to investigate the release.

13. The CAP A was approved by EPD in May 1998.

14. A Corrective Action Plan Part B (“CAP B”) was developed to address the 1996 release and submitted to EPD, and recommended continued groundwater monitoring.

15. The CAP B was approved by EPD on June 18, 2004.

16. On May 11, 2005, EPD granted a “No Further Action” required (“NFA”) determination for the 1996 release, and concurred that a new release had occurred in March 2005.

17. On May 12, 2005, EPD required remediation and submission of monitoring reports.

18. On January 31, 2006, the site operator at that time notified EPD that the monitoring wells had been abandoned.

19. Pet Realty acquired ownership of the UST system in October 2006.

20. On March 7, 2007, EPD ordered Pet Realty to prepare a CAP A for the 2005 release, which was to include the installation of new monitoring wells, and Pet Realty complied.

21. To date, Pet Realty has incurred "Clean-Up Costs" and related expenses of approximately \$155,614.53 covered by the Policy in connection with Store 902.

22. Pet Realty expects to incur additional "Clean-Up Costs" covered by the Policy in connection with Store 902.

STORE 904

23. Pet Realty acquired ownership of Store 904 in July 2000.

24. A release from a UST was detected and reported to EPD in 1998.

25. A CAP A was prepared on April 22, 1999, and submitted to EPD.

26. Eighteen monitoring wells and six product recovery wells were installed.

27. EPD then required the preparation of a CAP B, which was submitted on February 20, 2001.

28. The CAP B recommended the installation of additional monitoring wells and a fluid recovery system with a vapor extraction system, but these were never installed by the then-owner of the UST system.

29. Pet Realty acquired ownership of the UST system in October 2006.

30. On March 7, 2007, EPA directed Pet Realty to prepare a CAP B Monitoring Report and a schedule for future assessment and remediation.

31. To date, Pet Realty has incurred “Clean-Up Costs” and related expenses of approximately \$107,915.89 covered by the Policy in connection with Store 904.

32. Realty expects to incur additional “Clean-Up Costs” covered by the Policy in connection with Store 904.

STORE 915

33. Pet Realty acquired ownership of Store 915 on July 2000.

34. Releases from these USTs occurred in 1998 and 2001, and were reported to EPD.

35. A report was submitted to EPD in August 2001 regarding a groundwater monitoring program.

36. EPD responded in October 2001 requesting the continuation of the groundwater monitoring program and the submittal of a CAP A.

37. Remediation efforts followed for a number of years, with contaminant levels remaining high.

38. Pet Realty acquired ownership of the UST system in October 2006.

39. On March 7, 2007, EPD directed Pet Realty to conduct a groundwater gauging and sampling event, prepare a CAP B Monitoring Report, and submit a schedule for future assessment and remediation of the property.

40. To date, Pet Realty has incurred “Clean-Up Costs” and related expenses of approximately \$131,496.54 covered by the Policy in connection with Store 915.

41. Pet Realty expects to incur additional “Clean-Up Costs” covered by the Policy in connection with Store 915.

STORE 918

42. Pet Realty acquired ownership of Store 918 on July 2000.

43. Releases from these USTs occurred in 1993 and 1998 and were reported to EPD.

44. A CAP A was submitted to EPD in May 1999.

45. EPD requested a groundwater monitoring report and a plan for preparing a CAP B.

46. Pet Realty acquired ownership of the UST system in October 2006.

47. As a result of Pet Realty's efforts, EPD issued an NFA letter stating "no further action is required for the referenced release" on February 3, 2011.

48. To date, Pet Realty has incurred "Clean-Up Costs" and related expenses of approximately \$85,037.09 covered by the Policy in connection with Store 918.

STORE 924

49. Pet Realty acquired ownership Store 924 on July 2000.

50. A release from these USTs was reported to EPD in 1988.

51. Additional releases may have occurred onsite in conjunction with the removal of a UST in 1995.

52. A CAP A was prepared in 1999 and submitted to EPD.

53. Pet Realty acquired ownership of the UST system in October 2006.

54. To date, Pet Realty has incurred "Clean-Up Costs" and related expenses of approximately \$148,851.54 covered by the Policy in connection with Store 924.

55. Pet Realty expects to incur additional "Clean-Up Costs" covered by the Policy in connection with Store 924.

THE C&I ENVIRONMENTAL INSURANCE POLICY

56. C&I issued the Policy, a true and correct copy of the material terms of which is attached as Exhibit A to this Complaint.

57. The Policy has a “Policy Period” of September 29, 1999, through September 29, 2009.

58. Pet Realty is a “Named Insured” under the Policy.

59. The Stores were added to the Policy as “Insured Properties” effective July 18, 2000, through July 18, 2010.

60. The Policy provides limits of liability in the amount of \$2,000,000 for “Each Incident” and \$25,000,000 for all claims.

61. Coverage A of the Policy covers “Clean-Up Costs” and “Loss” sustained by Pet Realty for “Pollution Conditions” that commenced prior to September 29, 1999, but that Pet Realty discovered during the “Policy Period” (“Pre-Existing Conditions”), provided that the “Pollution Conditions” were reported to C&I during the “Policy Period” or within thirty days thereafter and that the “Pollution Conditions” were reported to the appropriate government agency, and provided coverage is not otherwise excluded.

62. Coverage B of the Policy covers “Clean-Up Costs” and “Loss” sustained by Pet Realty for “Pollution Conditions” that commenced on or after September 29, 1999, and that Pet Realty discovered during the “Policy Period” (“New Conditions”), provided that the “Pollution Conditions” were reported to C&I during the “Policy Period” or within thirty days thereafter and that the

“Pollution Conditions” were reported to the appropriate government agency, and provided coverage is not otherwise excluded.

63. “Clean-Up Costs” means expenses “incurred in the investigation, removal, remediation including monitoring, or disposal of soil, surfacewater, groundwater or other contamination...”

64. “Loss” means “(1) monetary awards or settlements of compensatory damages for bodily injury or property damage; (2) costs, charges and expenses incurred in the defense, investigation or adjustment of claims for such compensatory damages or for Clean-Up Costs; or (3) Clean-Up Costs.”

65. “Pollution Conditions” means “the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater...”

66. The Policy’s notice requirements provide that Pet Realty “shall give notice of Claims as soon as practicable, but in any event during the Policy Period...”

NOTICE TO C&I

67. On April 6, 2007, within the Policy Period, Pet Realty provided notice to C&I of the claims relating to the releases from the USTs at the Stores, via a

Notice of Loss/Notice of Claim form (“UST Release Claims”). A copy of said notices are attached as Exhibits B to F. On information and belief, C&I received notice on behalf of Pet Realty even earlier than April 6, 2007, with regard to some or all of the claims at issue in this Complaint.

C&I’S DENIAL OF COVERAGE

68. In a September 19, 2006, letter pertaining to Store 924, AIG Domestic Claims, Inc. (“AIG”) denied coverage for the 1988 release and the 1995 UST removal but requested additional information as to any other claims. A true and correct copy of C&I’s September 19, 2006, letter pertaining to Store 924 is attached as Exhibit G.

69. In a September 27, 2006, letter pertaining to Store 918, AIG denied coverage on behalf of C&I for the 1993 and 1998 releases but requested additional information. A true and correct copy of C&I’s September 27, 2006, letter pertaining to Store 918 is attached as Exhibit H.

70. In an April 6, 2007, letter pertaining to Store 902, AIG denied coverage for the 1996 release and requested additional information regarding the 2005 release. A true and correct copy of C&I’s April 6, 2007, letter pertaining to Store 902 is attached as Exhibit I.

71. In an April 6, 2007, letter pertaining to Store 915, AIG denied coverage for the 1998 release and requested additional information regarding the

2001 release. A true and correct copy of C&I's April 6, 2007, letter pertaining to Store 915 is attached as Exhibit J.

72. AIG requested additional information regarding Pet Realty's UST Release Claims for each Store via e-mail on April 30, 2007.

73. Pet Realty responded to C&I's request on May 22, 2007, providing information on site ownership and ownership history, documentation that EPD was holding Pet Realty responsible for the releases, and other insurance information.

74. In a series of letters dated April 8, 2009, pertaining to Stores 902, 915, 918, and 924, AIG requested that Pet Realty "provide the information noted in the Notice Requirements section of policy PLS 7788317 so that we may determine what claim is being made." True and correct copies of said letters are attached as Exhibits K to N.

75. In a letter dated April 9, 2009, pertaining to Store 904, AIG denied coverage of the 1998 release under the Pre-Existing Conditions section of the Policy but concluded "it is premature to determine coverage under Policy PLS 7788317" as it relates to other conditions. A true and correct copy of C&I's April 9, 2009, letter pertaining to Store 904 is attached as Exhibit O.

76. In the April 9, 2009, letter pertaining to Store 904, AIG also requested the same additional information as requested in the April 6, 2007, letters, plus "the information required per the Notice Provision."

77. On June 23, 2011, Pet Realty, via its attorneys, submitted letters pertaining to each Store to AIG (now known as Chartis Claims, Inc.) (“Chartis”). True and correct copies of said letters are attached, exclusive of their enclosed invoices, as Exhibits P to T.

78. In its June 23, 2011, letters, Pet Realty reasserted its demand for coverage and provided additional discussion of the basis for its assertion that the UST Release Claims are covered by the Policy.

79. In its June 23, 2011, letters, Pet Realty also provided notice under O.C.G.A. § 33-4-6(b) that Pet Realty would seek sanctions for bad faith in the event of nonpayment within 60 days.

80. Chartis responded on August 10, 2011, with requests for extensive additional information related to each of the Pet Realty Stores at issue in this litigation but without agreeing to pay amounts owed or otherwise acknowledging coverage. A true and correct copy of Chartis’ August 10, 2011, letters are attached as Exhibits U to Y.

81. C&I has no factual or legal basis for denying coverage for the “Clean-Up Costs” and “Loss” associated with the UST Release Claims. Therefore, C&I has breached the terms and conditions of the Policy and is liable for all damages as a result therefrom, including a bad faith penalty pursuant to O.C.G.A. § 33-4-6.

COUNT I

BREACH OF CONTRACT

82. Pet Realty incorporates herein and realleges, as if fully set forth in this paragraph, the allegations contained in Paragraphs 1 through 81 above.

83. Pet Realty has complied with all material and relevant terms and conditions of the Policy concerning the UST Release Claims.

84. Because C&I has wrongfully denied coverage for the UST Release Claims, C&I is in breach of the Policy.

85. Moreover, by not accepting coverage under its policy after covered “Clean-Up Costs” and “Loss” have been incurred by Pet Realty, C&I has breached that Policy.

86. As a direct and proximate result of C&I’s breach of its contractual obligations under the Policy, Pet Realty has suffered damages, which are ongoing and continuing.

COUNT II

DECLARATORY RELIEF REGARDING COVERAGE

87. Pet Realty incorporates herein and realleges, as if fully set forth in this paragraph, the allegations contained in Paragraphs 1 through 86 above.

88. C&I’s continued denial of coverage under the Policy and failure to pay Pet Realty’s “Clean-Up Costs” and “Loss” relating to the UST Releases have

generated an actual and justiciable case or controversy that should be resolved by this Court.

89. A declaration of rights pursuant to 28 U.S.C. § 2201 would alleviate the uncertainty currently facing Pet Realty with respect to insurance coverage for “Clean-Up Costs” and “Loss” Pet Realty has incurred and will continue to incur as a result of the UST Releases.

90. Pet Realty is entitled to a declaration that the Policy covers the “Clean-Up Costs” and “Loss” that Pet Realty has incurred and will continue to incur as a result of the UST Releases.

COUNT III

ATTORNEYS’ FEES UNDER NEW YORK LAW

91. Pet Realty incorporates herein and realleges, as if fully set forth in this paragraph, the allegations contained in Paragraphs 1 through 90 above.

92. The Policy contains a choice of law provision making New York law apply.

93. Under New York law, an insured is entitled to reasonable attorneys’ fees and costs if it prevails in a declaratory judgment or coverage case against its insurer.

94. Pet Realty is entitled to its reasonable attorneys’ fees and costs for this litigation.

COUNT IV

BAD FAITH UNDER GEORGIA LAW

95. Pet Realty incorporates herein and realleges, as if fully set forth in this paragraph, the allegations contained in Paragraphs 1 through 94 above.

96. Although New York law governs the terms of the Policy, C&I's conduct in unreasonably refusing to pay amounts owed is subject to sanctions under Georgia law.

97. On June 23, 2011, Pet Realty submitted an insurance bad-faith demand letter to C&I pursuant to O.C.G.A. § 33-4-6.

98. C&I failed to pay amounts owed under the Policy within 60 days of Pet Realty's notice that C&I's refusal to pay was in bad faith.

99. C&I's failure to provide coverage has been in bad faith, warranting the imposition of a 50% penalty plus attorneys' fees, pursuant to O.C.G.A. § 33-4-6.

WHEREFORE, Pet Realty respectfully makes its DEMAND FOR A JURY TRIAL on all issues so triable and respectfully requests that the Court enter judgment in its favor on all Counts contained in its Complaint as follows:

- (a) Find and declare that C&I has a duty to cover the cleanup costs and losses associated with the release of petroleum products at the Stores;

- (b) Award Pet Realty damages for C&I's breach of its contract with Pet Realty in an amount to be proven at trial;
- (c) Award Pet Realty attorneys' fees;
- (d) Award Pet Realty statutory damages for bad faith pursuant to O.C.G.A. § 33-4-6; and
- (e) Grant such other and further relief as is just, equitable, and proper.

Jury Trial Demanded.

This 26th day of September, 2011.

KAZMAREK GEIGER & LASETER LLP

/s/ W. Scott Laseter

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