

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 30, 2018

SEAN F. MCAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE TRAVELERS INDEMNITY
COMPANY,

Plaintiff,

v.

CITY OF RICHLAND, a
Washington municipal corporation;
and GUARANTEE INSURANCE
COMPANY,

Defendants.

NO: 4:17-CV-5200-RMP

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are Plaintiffs’ Motion for Summary Judgment, ECF
No. 12, and Defendant’s Cross-Motion for Summary Judgment, ECF No. 16. The
Court held a hearing on May 24, 2018. Everett Jack, Jr. appeared on behalf of
Plaintiff. Stephen Parkinson appeared on behalf of Defendant. The Court has heard
the parties’ arguments, has reviewed the pleadings, and is fully informed.

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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT ~ 1

1 **BACKGROUND**

2 Plaintiff Travelers Indemnity Company (“Travelers”) brings this suit against
3 Defendants City of Richland and Guarantee Insurance Company pursuant to the
4 Federal Declaratory Judgment Act, 28 U.S.C. § 2201. ECF No. 1 at 1. Travelers
5 seeks a declaration that insurance policies it issued to Defendant City of Richland
6 (“Richland”) do not provide further defense coverage, or indemnity coverage, to
7 Richland with respect to environmental liability claims at the Horn Rapids Landfill.
8 *Id.* at 1-2. In the current motion, Travelers seeks only a partial summary judgment
9 that the Court find that any investigatory costs that Richland incurs are damages.
10 Defendant Guarantee Insurance Company has not yet appeared, and is not involved
11 in the resolution of these cross-summary judgment motions between Travelers and
12 Richland.

13 **Factual Background**

14 ***Horn Rapids Landfill***

15 In 1974, Richland designated approximately 46 acres of land as the Horn
16 Rapids Landfill, a municipal landfill. ECF No. 12 at 1. In 1987, Richland began
17 monitoring water quality at the Horn Rapids Landfill using monitoring wells. *Id.* at
18 2. In 1996, to comply with new groundwater monitoring and reporting rules,
19 Richland implemented a groundwater monitoring plan. *Id.*

20 / / /

1 ***Travelers Insurance Policies Issued to City of Richland***

2 Between August 1975 and August 1978, Travelers issued insurance policies to
3 Richland. ECF No. 13 at 3; ECF No. 14-2. These policies provide that “Travelers
4 will pay on behalf of the Insured all sums which the Insured shall become legally
5 obligated to pay as damages because of: (a) bodily injury; or (b) property damage; to
6 which this insurance applies.” ECF No. 14-2 at 54. The policies further provide that
7 “Travelers shall have the right and duty to defend any suit against the Insured
8 seeking damages on account of such bodily injury or property damage.” *Id.*

9 ***Washington Model Toxins Control Act***

10 The Model Toxins Control Act (“MTCA”), RCW 70.105D, establishes
11 procedures for protecting the public interest in the awareness of releases of
12 hazardous substances and what clean-up processes are being done. RCW
13 70.105D.010. The primary purpose of the MTCA is to “raise sufficient funds to
14 clean up all hazardous waste sites and to prevent the creation of future hazards due
15 to improper disposal of toxic waste into the state’s land and waters.” *Id.* “Each
16 person who is liable under [the MTCA] is strictly liable, jointly and severally, for all
17 remedial action costs and for all natural resource damages resulting from the releases
18 or threatened releases of hazardous substances.” RCW 70.105D.040(2). WAC 173-
19 340 provides the regulatory provisions implementing the MTCA.

1 Under the MTCA, the Department of Ecology (“DOE”) may investigate or
2 require the investigation of releases or threatened releases of hazardous substances,
3 and may conduct or require a potentially liable person to conduct remedial actions,
4 which may include investigations, to remedy releases or threatened releases of
5 hazardous substances. RCW 70.105D.030(1). The MTCA defines a potentially
6 liable person (“PLP”) as “any person whom [DOE] finds, based on credible
7 evidence, to be liable under RCW 70.105D.040.” RCW 70.105D.020(26). RCW
8 70.105D.040 establishes which persons are liable with respect to a facility. The
9 standard of liability under RCW 70.105D.040 includes the owner or operator of the
10 facility, as well as any person who owned or operated the facility at the time of
11 disposal or release of the hazardous substances. RCW 70.105D.040(1)(a)-(b).

12 The regulations implementing the MTCA outline the process of hazardous
13 substance cleanup. *See* WAC 173-340-120. Detailed site investigations and cleanup
14 decisions follow the identification of a hazardous site. *Id.* The site investigations
15 include a remedial investigation and a feasibility study (“RI/FS”). WAC 173-340-
16 120(4). “The purpose of a remedial investigation is to collect data and information
17 necessary to define the extent of contamination and to characterize the site.” WAC
18 173-340-120(4)(a). “The purpose of a feasibility study is to develop and evaluate
19 alternative cleanup actions.” WAC 173-340-120(4)(b). DOE then evaluates the
20 results of an RI/FS and “select[s] a cleanup action that protects human health and the

1 environment and is based on the remedy selection criteria and requirements”
2 enumerated in the regulations. WAC 173-340-120(4)(b).

3 DOE enforces MTCA requirements by order or agreed order. RCW
4 70.105D.050(1). The MTCA defines “agreed order” as “an order . . . under [the
5 MTCA] with which the [PLP] . . . receiving the order agrees to comply,” and states
6 that “[a]n agreed order may be used to require or approve any cleanup or other
7 remedial actions but it is not a settlement under 70.105D.040(4).” RCW
8 70.105D.020(1). A PLP who refuses without sufficient cause to comply with a DOE
9 order or agreed order may face civil penalties of up to twenty-five thousand dollars
10 for each day the party refuses to comply, and up to three times the amount of any
11 costs incurred by the state as a result of the party’s refusal to comply. RCW
12 70.105D.050(1).

13 The MTCA also provides for the settlement of environmental cleanup claims.
14 *See* RCW 70.105D.040(4). “A settlement agreement under [the MTCA] shall be
15 entered as a consent decree issued by a court of competent jurisdiction.” RCW
16 70.105D.040(4)(b). Under a settlement, a party may resolve its MTCA liability and
17 enter into a covenant not to sue. *Id.* (4)(c)-(d).

18 ***Initial Assessment of Richland’s Environmental Liability***

19 In March 2016, DOE notified Richland of DOE’s preliminary determination
20 that Richland was liable under the MTCA “for remedial action costs and for all

1 natural resources damages resulting from the release of hazardous chemical
2 substances” the Horn Rapids Landfill site. ECF 17-1 at 2-5. Richland
3 subsequently notified DOE that it accepted its status as a PLP for contamination at
4 the Horns Rapid Landfill site. ECF No. 13 at 2.

5 ***Agreed Order and Insurance Dispute***

6 After accepting its status as a PLP, Richland tendered DOE’s claim to
7 Travelers, and demanded that Travelers provide a defense and indemnity under
8 Richland’s Travelers insurance policies. ECF No. 13 at 2. Richland alleges that
9 Travelers initially refused to defend Richland until Richland provided notice of an
10 intent to sue and prepared a complaint. ECF No. 16 at 16. After Travelers agreed
11 to defend Richland, Richland further alleges that Travelers refused to pay defense
12 costs from the date of DOE’s preliminary determination notification in March 2016
13 until the date Richland tendered DOE’s claim to Travelers. *Id.* After Travelers
14 agreed to pay Richland’s defense costs from the date of DOE’s preliminary
15 determination notification, Richland alleges that Travelers refused and then agreed
16 to pay consultant defense costs. *Id.*

17 In July 2017, Richland executed Agreed Order 13717 (“Agreed Order”) with
18 DOE. ECF No. 13 at 2. Travelers reviewed the Agreed Order several times before
19 Richland and DOE executed the Agreed Order. ECF No. 18 at 4. Under the
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1 Agreed Order, Richland agreed to undertake an RI/FS of the Horn Rapids Landfill
2 site. ECF No. 14-4.

3 In a letter dated October 11, 2017, Travelers notified Richland that it agreed
4 to pay Richland's defense costs associated with Richland's RI/FS costs that had
5 been incurred prior to the execution of the Agreed Order. ECF No. 18 at 5.

6 Travelers has paid for Richland's defense costs associated with Richland's Horn
7 Rapids Landfill environmental liability for the period between DOE's preliminary
8 determination notification and the execution of the Agreed Order. ECF 12 at 5.

9 Travelers asserts that it has satisfied its obligations under its insurance policies to
10 pay Richland's defense costs with respect to the defense of the Agreed Order
11 requiring Richland to undertake an RI/FS of Horn Rapids Landfill. *See* ECF No.
12 12 at 2.

13 **Procedural Background**

14 The parties have filed cross-summary judgment motions. Travelers argues
15 that Richland's costs associated with the Agreed Order are "damages" and should be
16 characterized as indemnity, *see* ECF No. 12 at 2, rather than defense costs. *Id.* at 9.
17 Richland argues that Travelers' duty to defend has not been terminated by the
18 Agreed Order, and that Travelers' handling of Richland's claim constitutes bad faith.
19 ECF No. 16 at 2.

1 The Court has subject matter jurisdiction over this matter pursuant 28 U.S.C.
2 § 1332 based on the diversity of the parties and the amount in controversy.
3 Plaintiff Travelers Insurance Co. is a Connecticut corporation authorized to do
4 business in Washington. ECF No. 1 at 2. Defendant City of Richland is duly
5 organized under the laws of the State of Washington. *Id.* Defendant Guarantee
6 Insurance Company is a Florida corporation authorized to do business in
7 Washington. *Id.* Travelers asserts that the amount in controversy exceeds the
8 statutory requirement of \$75,000. *Id.* at 2.

9 DISCUSSION

10 *Legal Standard for Summary Judgment*

11 A court may grant summary judgment where “there is no genuine dispute as
12 to any material fact” of a party’s prima facie case, and the moving party is entitled to
13 judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-33 (1986);
14 *see also* Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if sufficient
15 evidence supports the claimed factual dispute, requiring “a jury or judge to resolve
16 the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac.*
17 *Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). “A key purpose of
18 summary judgment ‘is to isolate and dispose of factually unsupported claims.’” *Id.*
19 (citing *Celotex*, 477 U.S at 324).

1 The moving party bears the burden of showing the absence of a genuine issue
2 of material fact, or in the alternative, the moving party may discharge this burden by
3 showing that there is an absence of evidence to support the nonmoving party's prima
4 facie case. *See Celotex*, 477 U.S. at 325. The Court will not infer evidence that does
5 not exist in the record. *See Lujan v. National Wildlife Federation*, 497 U.S. 871,
6 888-89 (1990) (court will not presume missing facts).

7 When parties file cross-motions for summary judgment, the Court considers
8 each motion on its own merits. *See Fair Housing Council of Riverside County,*
9 *Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). The filing of cross-
10 motions for summary judgment "does not vitiate the court's responsibility to
11 determine whether disputed issues of material fact are present." *Id.*

12 Travelers argues that it is not obligated to continue to defend Richland after
13 Richland entered into the Agreed Order with DOE. *See* ECF No. 12. Richland
14 argues that Travelers has a duty to defend that continues despite the Agreed Order
15 with DOE, and that Travelers has acted in bad faith. *See* ECF No. 16.

16 ***Costs of Performing RI/FS Under the Agreed Order Are Damages***

17 Travelers argues that, under Washington law, costs incurred by Richland to
18 perform the RI/FS in satisfaction of the Agreed Order constitute "damages" that, if
19 covered under the Travelers insurance policies, are payable as indemnity costs,
20 rather than as defense costs. ECF No. 12 at 2. Richland contends that Travelers

1 has a continuing obligation to pay Richland's costs as defense costs, in addition to
2 any indemnity costs, until Richland's cleanup liability at the Horn Rapids Landfill
3 is resolved because the Agreed Order does not constitute a settlement. ECF No. 16
4 at 10-11.

5 Under Washington law, comprehensive general liability policies "may
6 provide coverage when an insured engages in the cleanup of pollution damages in
7 cooperation with an environmental agency." *Weyerhaeuser Co. v. Aetna Casualty*
8 *& Sur. Co.*, 874 P.2d 142, 145 (Wash. 1994). Where a party enters into a
9 settlement agreement with an environmental agency, resolving the party's liability,
10 the cleanup costs constitute damages for insurance coverage purposes. *See Teck*
11 *Metals, Ltd. v. Certain Underwriters at Lloyd's*, 735 F. Supp. 2d 1260, 1266-67
12 (E.D. Wash. 2010).

13 "When a particular claim is settled, it is no longer being defended." *Teck*
14 *Metals, Ltd.*, 735 F. Supp. 2d at 1267. In *Teck Metals, Ltd. v. Certain*
15 *Underwriters at Lloyd's*, the plaintiff company entered into a settlement agreement
16 with the Environmental Protection Agency ("EPA") regarding environmental
17 cleanup liability under the Comprehensive Environmental Response,
18 Compensation, and Liability Act ("CERCLA"). *Id.* at 1262-63. The settlement
19 agreement required an RI/FS. *Id.* The court in *Teck* found that because Teck
20 Metals had an obligation to pay the RI/FS costs, the defendant insurers had an

1 obligation to pay these costs as damages. *Id.* at 1263-65. Therefore, “[t]he RI/FS
2 costs do not represent investigation costs incurred in defense of a claim.” *Teck*
3 *Metals, Ltd.*, 735 F. Supp. 2d at 1267.

4 Washington courts have held that response costs may constitute damages
5 when they are paid as a result of a liability “imposed by law.” *See Teck Metals,*
6 *Ltd.*, 735 F. Supp. 2d at 1265. The MTCA imposes strict liability for cleanup of
7 pollution damages. *See Weyerhaeuser Co.*, 874 P.2d at 146.

8 Under the MTCA, an agreed order is not a settlement agreement. *See RCW*
9 *70.105D.020(1)*. The Agreed Order between Richland and DOE expressly states
10 that it is not a settlement agreement. ECF No. 16 at 9. Richland argues that the
11 Agreed Order lacks certain characteristics that must be present to have a
12 “settlement,” such as a court order and an admission or determination of liability.
13 *Id.* at 3, 11. However, the Agreed Order settled the question of whether Richland
14 would perform the RI/FS. *See ECF No. 14-4*. Under the MTCA, Richland is
15 strictly liable for the performance of the RI/FS. *See RCW 70.105D.040(2);*
16 *Weyerhaeuser Co.*, 874 P.2d at 146.

17 Therefore, the Court finds that the costs of performing the RI/FS are
18 damages, rather than defense costs. *See Teck Metals, Ltd.*, 735 F. Supp. 2d at
19 1267. Accordingly, the Court finds that summary judgment in favor of Travelers is
20 appropriate on the question of whether Richland’s remedial investigation and

1 feasibility study costs associated with the Agreed Order are “damages” and should
2 be characterized as indemnity under the Travelers insurance policies.

3 ***Travelers Has a Duty to Defend***

4 Richland argues that Travelers has breached its duty to defend Richland by
5 refusing to pay investigation costs incurred after the execution of the Agreed
6 Order. ECF No. 16 at 13-14. Travelers contends that it has no duty to defend
7 Richland’s performance under the Agree Order. ECF No. 22 at 4-5.

8 Under Washington law, the duty to defend is based on “potential for
9 liability.” *Woo v. Fireman’s Fund Ins. Co.*, 164 P.3d 454, 459 (Wash. 2007).

10 Summary judgment “may be granted in favor of the insured if there are any facts in
11 the Complaint [against the insured] that could conceivably impose liability upon
12 the insured within the policy’s coverage.” *King County v. Travelers Indem. Co.*,
13 234 F. Supp. 3d 1074, 1079 (W.D. Wash. 2017).

14 “[T]he insurer's duty to defend, unlike its duty to pay, arises when the
15 complaint [against the insured] is filed and is to be determined from the allegations
16 of the complaint.” *Holland Amer. Ins. Co. v. Nat’l Indem.*, 454 P.2d 383, 385
17 (Wash. 1969). “Generally, insurers have a duty to defend any complaint alleging
18 facts which, if proven, would render the insurer liable for indemnification of the
19 insured.” *Viking Ins. Co. v. Hill*, 787 P.2d 1385, 1387 (Wash. Ct. App. 1990)
20 (citing *Greer v. Northwestern Nat'l Ins. Co.*, 743 P.2d 1244, 1247 (Wash. 1987));

1 *see also Safeco Ins. Co. v. McGrath*, 708 P.2d 657, 659 (Wash. Ct. App. 1985)
2 (“[A]n insurer's duty to defend its insured arises where any allegation in the
3 complaint, if proved true, would render the insurer liable under the policy.”).

4 In determining the duty to defend, “the pleadings must be liberally
5 construed, and if they are subject to an interpretation that creates a duty to defend,
6 the insurer must comply with that duty.” *Travelers Ins. v. N. Seattle Christian &*
7 *Missionary Alliance*, 650 P.2d 250, 253 (Wash. Ct. App. 1982). Under
8 Washington law, “if there is any reasonable interpretation of the facts or the law
9 that could result in coverage, the insurer must defend.” *Xia v. ProBuilders*
10 *Specialty Ins. RRG*, 400 P.3d 1234, 1240 (Wash. 2017) (citations omitted).

11 The Washington State Supreme Court has stated that a “primary insurer’s
12 duty to defend continues until the suit it is defending is resolved by settlement or
13 judgment.” *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 134
14 (Wash. 2000). In *King County v. Travelers Indemnity Co.*, the court stated that
15 “[t]he RI/FS is but one step of the many necessary to address such legal and
16 environmental quagmires. Travelers’ argument, in effect, suggests that the Court
17 should rule that an incomplete resolution of liability is sufficient to extinguish the
18 entire proceeding and relieve it of its duty to defend its policyholder.” 234 F.
19 Supp. 3d at 1082. The *King County* court proceeded to reject Travelers’ argument
20 in that case, which is similar to the one presented here, and concluded that

1 Travelers had breached its duty to defend where it refused to defend the plaintiff
2 because the plaintiff cooperated with EPA and DOE to undertake an RI/FS. *Id.* at
3 1080-83.

4 Richland argues that Travelers is obligated to defend Richland because its
5 exposure to damages has not been resolved. ECF No. 16 at 11. Richland argues
6 that it “still needs to defend itself until Ecology’s claim is resolved by either a
7 settlement or a judgment regarding a final cleanup action at the Site, and Travelers
8 is obligated to fund that defense.” ECF No. 16 at 2. Travelers contends that
9 Travelers has paid reasonable and necessary costs of defense that Richland
10 incurred in responding to DOE’s demand that Richland conduct remedial actions to
11 investigate and clean up the release of hazardous substances at Horn Rapids
12 Landfill. ECF No. 12 at 5.

13 The Court has concluded that the Agreed Order resolved Richland’s liability
14 to perform the RI/FS. *See supra.* However, the RI/FS is just one step of the
15 hazardous substances cleanup process. Richland likely faces future liability related
16 to the cleanup of the Horn Rapids Landfill. Therefore, the Court finds that
17 Travelers has a duty to continue to defend Richland while liability is being
18 determined, because Richland faces future liability for hazardous substances
19 cleanup under the MTCA. *See King County*, 234 F. Supp. 3d at 1082-83. The

1 Court finds that summary judgment in favor of Richland is proper on the question
2 of whether Travelers has an ongoing duty to defend.

3 ***Travelers' Actions Do Not Constitute Bad Faith***

4 Richland argues that Travelers' handling of Richland's claim and Travelers'
5 refusal to pay investigation costs under its duty to defend constitute bad faith. ECF
6 No. 16 at 14-15. Travelers contends that Richland has not satisfied the prima facie
7 elements of its bad faith claim, and that the facts in this case do not support such a
8 claim. ECF No. 22 at 11-12.

9 To establish a bad faith claim, an insured must prove the elements of duty,
10 breach, causation, and damages. *St. Paul Fire & Ins. Co. v. Onvia, Inc.*, 196 P.3d
11 664, 668 (Wash. 2008). The insured must show that the insurer's conduct was
12 "unreasonable, frivolous, or unfounded." *Smith v. Safeco Ins. Co.*, 78 P.3d 1274,
13 1277 (Wash. 2003). "If the insured claims that the insurer denied coverage
14 unreasonably in bad faith, then the insured must come forward with evidence that
15 the insurer acted unreasonably." *Id.* The burden of proof is on the policyholder.
16 *Id.*

17 "Whether an insurer acted in bad faith is a question of fact." *Onvia, Inc.*,
18 196 P.3d at 668. "The insurer is entitled to summary judgment if reasonable minds
19 could not differ that its denial of coverage was based upon reasonable grounds."
20 *Smith*, 78 P.3d at 1277. "If the insurer can point to a reasonable basis for its action,

1 this reasonable basis is significant evidence that it did not act in bad faith” *Id.*
2 at 1278.

3 Richland argues that Travelers should have known that it had a duty to
4 defend, and, therefore, that it refused to pay defense costs in bad faith. ECF No. 16
5 at 15. Richland also argues that Travelers acted unreasonably by not responding to
6 Richland’s letter regarding defense costs and for bringing this lawsuit seeking a
7 declaratory judgment. *Id.* Richland further argues that Travelers unreasonably
8 delayed in providing defense costs. *Id.* at 16. Travelers contended at oral
9 argument that Richland has failed to prove its prima facie case, that genuine issues
10 of material fact exist, and that it acted reasonably.

11 The Court finds that genuine issues of material fact exist that prohibit the
12 Court from deciding the bad faith claim at this juncture. Therefore, the Court
13 denies without prejudice Richland’s summary judgment motion as to its bad faith
14 claim.

15 ***Travelers’ Motion to Strike Exhibits***

16 Travelers moves to strike several exhibits provided by Richland in support
17 of its claim that Travelers acted in bad faith. ECF No. 22 at 13-14. Travelers have
18 not shown evidence that they are prejudiced by the exhibits, but because the Court
19 has denied Richland’s motion for summary judgment regarding their bad faith
20 claim, the Court denies Traveler’s motion to strike as moot.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Partial Summary Judgment, **ECF No. 12**, is

3 **GRANTED.**

4 2. Defendant's Cross-Motion for Summary Judgment, **ECF No. 16**, is

5 **GRANTED in part** as to its duty to defend claim and **DENIED in part**

6 as to its bad faith claim.

7 3. Plaintiff's Motion to Strike exhibits, in **ECF No. 22** at 13, is **DENIED as**

8 **moot.**

9 4. Judgment shall be entered accordingly.

10 The District Court Clerk is directed to enter this Order and provide copies to
11 counsel.

12 **DATED** May 30, 2018.

13
14 *s/ Rosanna Malouf Peterson*
15 ROSANNA MALOUF PETERSON
16 United States District Judge
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