IP 01-0572-C Y/F Hartford v Guide
Judge Richard L. Young Signed on 2/14/05

NOT INTENDED FOR PUBLICATION IN PRINT

HARTFORD FIRE INSURANCE CO.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GUIDE CORPORATION,	)	**CAUSE NO. IP 01-572-C-Y/F**
	)	
Defendant, Counter-claim Plaintiff, and Cross-claim plaintiff,	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE CO. and NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA., *et al.*,	)	
	)	
Defendants and Cross-claim Defendants.	)	

In the
UNITED STATES DISTRICT COURT
for the SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

HARTFORD FIRE INSURANCE CO.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GUIDE CORPORATION,	)	**CAUSE NO. IP 01-572-C-Y/F**
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Defendant, Counter-claim Plaintiff, and Cross-claim plaintiff,	)	
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	)	
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ENTRY ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT ON FINES AND PENALTIES (doc. nos. 601 and 625)

Both sides in this case have cross-moved for summary judgment on the question of whether AISLIC and National Union (the "insurers") are obligated to indemnify Guide's civil penalty, criminal fine, and forfeiture under their policies. Summary judgment shall be granted if the evidence presented on the motion "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). For the reasons set forth below, the cross motions are granted in part and denied in part.

AISLIC's policy contains the following two applicable coverage provisions:

. . . the Company agrees with the **Named Insured** as follows:

> To pay **Loss** on behalf of the **Insured** that the **Insured** becomes legally obligated to pay as a result of **Claims** first made against the **Insured** and reported to the Company in writing . . . for **Clean-Up Costs** beyond the boundaries of the **Insured Property** resulting from **Pollution Conditions** . . . .
>
> To pay **Loss** on behalf of the **Insured** that the **Insured** becomes legally obligated to pay as a result of **Claims** first made against the **Insured** and reported to the Company in writing . . . for **Bodily Injury** or **Property Damage** beyond the boundaries of the **Insured Property** that result from **Pollution Conditions** on or under the **Insured Property** which have migrated beyond the boundaries of the **Insured Property**.

AISLIC Policy, § I. 1. Coverages E and F, respectively.

"Loss" is defined as:

> **Loss** means, under the applicable Coverages: (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**.

Id., § VI. M.

"Clean-Up Costs" is defined as:

> **Clean-Up Costs** means expenses including reasonable and necessary legal expenses incurred with the Company's written consent, incurred in the investigation, removal, remediation or disposal of soil, surfacewater, groundwater or other contamination:
>
> (1) to the extent required by **Environmental Laws**, or specifically mandated by court order, the government or any political subdivision of the United States of America or any state thereof, or Canada or any province thereof duly acting under the authority of **Environmental Law(s)**; or
>
> (2) which have been actually incurred by the government or any political subdivision of the United States of America or any state thereof or Canada or any province thereof, or by third parties.

Id., § VI. E.

> "Property Damage" is defined as:
>
> **Property Damage** means:
>
> (1) Physical injury to or destruction of tangible property of parties other than the **Insured**, including the resulting loss of use or value thereof; and
>
> (2) Loss of use, but not loss of value, of tangible property of parties other than the **Insured** which has not been physically injured or destroyed.

Id., § VI. U.

> The AISLIC policy also contains an exclusion for punitive damages, fines, and penalties:
>
> This Policy does not apply to **Clean-Up Costs**, **Claims**, **Loss**, **Actual Loss**, **Extra Expense**, or loss of **Rental Value** . . . due to or for any punitive, exemplary or the multiplied portion of multiple damages, or any civil or administrative fines, penalties or assessments, except where such damages, fines, penalties or assessments are insurable by applicable law; or any criminal fines, penalties or assessments.

Id., § IV. 1. A.

> The National Union policy contains the following general coverage provision:
>
> We will pay on behalf of the **Insured** those sums in excess of the Retained Limit that the **Insured** becomes legally obligated to pay by reason of liability imposed by law or assumed by the **Insured** under an **Insured Contract** because of **Bodily Injury**, **Property Damage**, **Personal Injury** or **Advertising Injury** that takes place during the Policy Period and is caused by an **Occurrence** happening anywhere in the world. The amount we will pay for damages is limited as described in Insuring Agreement III, Limits of Insurance.

National Union Policy, § I. The court held that the Named Peril and Time Element Pollution Endorsement (Endorsement # 6), which Guide purchased, is ambiguous as a matter of law and void, thus rendering coverage under the policy for Guide's claims dependent on the general

coverage terms of the policy.

The policy defines "Property Damage" as:

1. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

2. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the **Occurrence** that caused it.

Id., § IV. K.

On April 27, 2000, the United States, on behalf of the Environmental Protection Agency ("EPA"), and the State of Indiana, on behalf of the Indiana Department of Environmental Management ("IDEM") and the Indiana Department of Natural Resources ("DNR"), filed a civil action against Guide in this court. Cause No. IP 00-702-C-Y/F. The claims were pursuant to the Clean Water Act, the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), corresponding state laws, and state common law. The parties reached a settlement of the case and, on September 21, 2001, the court approved a consent decree that contained the following provisions:

1. Establishment of two "White River Restoration Funds", funded with a total of six million dollars, in settlement of Indiana's claims for natural resource damages. The funds are designed "to pay for ongoing efforts to restock the White River with fish and for performance of projects designed to restore natural resources and rehabilitate the White River, thereby enhancing its quality and its value for conservation and recreational purposes. The $6 million to be paid into the Funds will finance White River fish restocking efforts and river monitoring efforts planned by the State, and will also finance restoration projects which are expected to

yield conservation- and recreation-related benefits that would be valued at substantially more than the $6 million to be paid into the Funds." Three million dollars ($3,000,000), plus one-half of the accrued interest on the funds deposited in the court's registry account, were designated for Fund no. 1 and three million dollars ($3,000,000) for Fund no. 2. (The other one-half of the accrued interest on the funds deposited into the court's registry account was to be returned to Guide.)

2. Reimbursement of two million, twenty-five thousand dollars ($2,025,000) that the responsible governmental agencies expended in responding to and assessing the fish kill, including attorney's fees and IDEM and DNR staff time: two million dollars ($2,000,000) to Indiana and twenty-five thousand dollars ($25,000) to the United States Department of the Interior for assessment costs.

3. A civil penalty of two million dollars ($2,000,000): one million dollars ($1,000,000) to Indiana and one million dollars ($1,000,000) to the United States, four hundred thousand dollars ($400,000) of which was designated to the EPA Hazardous Substances Superfund as a civil penalty.

United States v. Guide Corp. and Crown EG Inc., Cause No. IP 00-702-C-Y/F, Consent Decree §§ I. F. and V. 6. b. (doc. no. 74). In total, Guide paid the sum of ten million, twenty-five thousand dollars ($10,025,000) in settlement of the governmental civil suit.

On June 18, 2001, the United States filed a criminal misdemeanor information charging Guide with seven counts of "Negligent Discharge" for "negligently violat[ing] a requirement imposed in a U.S. Environmental Protection Agency-approved pretreatment program by negligently contributing to the Anderson POTW ["publicly owned treatment works"] a substance

containing pollutants, that being, GUIDE's industrial wastewater, at a pollutant concentration which, either singly or by interaction with other pollutants, will cause an interference with the Anderson POTW, or any wastewater treatment or sludge process, or will constitute a hazard to animals, in violation of the Anderson Code of Ordinances . . . . All of which are violations of Title 33, United States Code, Section 1319(c)(1)(A)." The seven counts represent negligent discharges of pollutants on seven different days from December 9 to 20, 1999. *United States v. Guide Corp.*, Cause No. IP 01-73-CR-01-H/F, Information, ¶¶ 18 and 19 (doc. no. 1). On this date as well, Guide entered into and there was filed, a plea agreement wherein Guide agreed to plead guilty to the seven "negligent violations of the Clean Water Act as charged in the Information." *Id.*, Guilty Plea Agreement (doc. no. 5). The agreed sentence, which was accepted by the court, was composed of the following:

1. A term of probation of five years with the conditions that Guide implement a comprehensive environmental compliance training and education program and comply with all federal, state, and local laws, regulations, and ordinances concerning the environment.

2. A fine of one million, nine hundred and fifty-six thousand dollars ($1,956,000). According to 18 U.S.C. § 3571(c) and (d), a corporation violating the Clean Water Act may be fined up to two hundred thousand dollars ($200,000) per offense or twice the corporation's total pecuniary gain from the offenses. The parties agreed, for the purposes of the plea agreement, that Guide's total pecuniary gain from its violations was one million, nine hundred and fifty-six thousand dollars ($1,956,000), rendering a total maximum possible fine of three million, nine hundred and twelve thousand dollars ($3,912,000). The fine agreed to and actually imposed was one-half of this amount; the remaining one-half being reserved as a potential additional penalty if

Guide violates a term of its probation.

3. Restitution of two hundred and seventy-five thousand dollars ($275,000) to the City of Anderson, Indiana for damage to its sewer system.

4. A special assessment fee of eight hundred and seventy-five dollars ($875), being the mandatory special assessment pursuant to 18 U.S.C. § 3013.

5. An asset forfeiture of one million, nine hundred and fifty-six thousand dollars ($1,956,000), representing the agreed amount of economic benefit Guide allegedly obtained through the charged events. *Id.*

The insurers argue that the civil penalty, the criminal fine, and the asset forfeiture are not covered under either of their policies and that public policy forbids their insurability.

AISLIC's policy

AISLIC argues that Guide's fine, penalty, and forfeiture do not constitute "loss" under the policy and that the policy expressly excludes fines and penalties.

As quoted above, both coverages E and F in the AISLIC policy — for payment of third-party claims for off-site clean up and for property damage — provide that AISLIC will pay for "loss" which is defined as monetary awards or settlements of compensatory damages for property damage; costs, charges, and expenses incurred in the defense, investigation, or adjustment of claims for such compensatory damages or clean-up costs; and clean-up costs. AISLIC makes the argument that, because the five million, nine hundred and twelve thousand

dollars ($5,912,000) designated as civil penalty, criminal fine, and asset forfeiture[1] are not compensatory but punitive damages; thus, they do not fall within the definition of "loss" and are not covered under the policy. AISLIC is correct that, by itself, this definition of loss does not include fines, penalties, and forfeitures. AISLIC then argues that fines and penalties are also expressly excluded by the following policy language: "'this policy does not apply to . . . Loss . . . due to or for any . . . civil or administrative fines, penalties or assessments . . .; or any criminal fines, penalties or assessments.'" (Insurers' Brief, p. 16). In its entirety, this exclusion reads:

> This Policy does not apply to **Clean-Up Costs**, **Claims**, **Loss**, **Actual Loss**, **Extra Expense**, or loss of **Rental Value** due to or for any punitive, exemplary or the multiplied portion of multiple damages, or any civil or administrative fines, penalties or assessments, *except where such damages, fines, penalties or assessments are insurable by applicable law*; or any criminal fines, penalties or assessments.

AISLIC Policy, § IV. 1. A. (emphasis added). The emphasized clause, not quoted by AISLIC, is the operative part of this exclusion for civil fines and penalties. While the last clause of this exclusion and the definition of "loss" exclude coverage of criminal fines, penalties, and assessments, the preceding clause establishes a potential inconsistency with the definition of loss as it respects civil fines and penalties and, thus, a patent ambiguity in the policy. *Adams v. Reinaker*, 808 N.E.2d 192, 196 (Ind. App. 2004) ("A patent ambiguity is apparent on the face of the instrument and arises by reason of an inconsistency or inherent uncertainty of language used

[1] These are the two million dollars ($2,000,000) specifically designated as a civil penalty in the consent decree; the one million, nine hundred and fifty-six thousand dollars ($1,956,000) specifically designated as a fine in the plea agreement and criminal judgment; and the one million, nine hundred and fifty-six thousand dollars ($1,956,000) specifically designated as an asset forfeiture in the plea agreement and criminal judgment. The insurers' motion does not seek summary judgment regarding the remaining payments Guide made pursuant to the consent decree and the criminal judgment, including the criminal special assessment fee of eight hundred and seventy-five dollars ($875).

so that the effect is either to convey no definite meaning or a confused meaning"). According to the plain meaning of the exclusion, if punitive damages and civil or administrative fines, penalties, or assessments are insurable by applicable law, then the policy provides coverage for them. The plain meaning of the policy's definition of "loss", however, excludes coverage for punitive-type awards. Ambiguities in insurance policies are resolved in favor of the insured. *Stevenson v. Hamilton Mutual Ins. Co.*, 672 N.E.2d 467, 471 (Ind. App. 1996) ("Where there is an ambiguity, policies are to be construed strictly against the insurance company"), *trans. denied*. Whether there is an effective ambiguity depends on the insurability of civil penalties under Indiana law.

In Indiana, public policy permits companies to insure against punitive damages that are vicariously imposed on the company:

> Punitive damages are intended to punish the culpable party. Where corporate management commits an outrageous act, punishment [of the corporation itself] is appropriate. Where the act is committed by a lowly functionary or agent, not pursuant to corporate policy or plan, the corporation, though vicariously liable for punitive damages, is entitled to insure against such damages.

Stevenson, 672 N.E.2d at 474 (original brackets). *Executive Builders, Inc. v. Motorists Insurance Companies*, Cause no. IP 00-18-C-T/G, Entry on Summary Judgment Motions and Motion to Strike, 2001 U.S. Dist. LEXIS 6775, *15-18 (S.D. Ind., Mar. 30, 2001) (exception to rule against insurability of punitive damages exists "when an employer or corporation is held liable for a punitive damage award on the basis of vicarious liability for the acts or conduct of its agent under respondeat superior"); *Norfolk & Western Railway Co. v. Hartford Accident & Indemnity Co.*, 420 F.Supp. 92 (N.D. Ind. 1976). The principle of the rule was stated in *Norfolk & Western*:

> To the extent, then, that the law imposes punitive damages upon an insured in order to shape or deter the insured's conduct, the insured may not avoid the penalty by means of insurance.
>
> * * *
>
> Where the corporation is strictly liable without fault, as where liability arises solely by operation of *respondeat superior*, the policy against shifting of punitive damages has already been put aside, and it would make no sense to revive that policy as between the innocent corporation and its insurer.
>
> * * *
>
> There is, accordingly, a distinction to be made in Indiana law between liability for punitive damages directly imposed and such liability when vicariously imposed. The former situation arises in cases . . . in which the corporation itself is found to have acted maliciously or oppressively. The latter situation arises when the corporation, without itself being guilty of willful misconduct, is held to respond in damages for the intentional tort of its agent. In the former case, it would contravene public policy to allow the corporation to shift to an insurer the deterrent award imposed on account of the corporation's own wrongful acts; in the latter case, it would not be inconsistent with public policy to allow the corporation to shift to an insurer the punitive damages award when that award is placed upon the corporation solely as a matter of vicarious liability.

Norfolk & Western, 420 F.Supp. at 95-97.

No Indiana authority was presented or discovered applying this rule in the precise circumstances of the present case. The fines and penalties imposed on Guide resulted from a civil action against only the company by name, no employees were named, and it was concluded by a consent decree that included no findings or admissions of facts. Thus, the penalties technically were not expressly imposed according to *respondeat superior* or any other vicarious liability theory and it was not determined whether the alleged violations were caused by lower-level employees or by management personnel of a high-enough level that their actions could be attributed to the company directly. The court does not conclude, however, that Indiana's public

policy regarding the insurability of punitive awards applies only where the doctrine of vicarious liability is formally applied, litigated, and adjudged. The public policy is based on the principle that, while deliberate wrongdoers should not be allowed to avoid the deterring and punishing effect of punitive sanctions by shifting them to insurers, innocent persons may shift their liability to insurers. Because there is no apparent reason why Indiana would not apply this principle to the circumstances of this case, the court finds and concludes that, according to Indiana law, a company's civil fines and penalties are insurable if the penalized wrongdoing was in fact caused by the wrongdoing of lower-level employees and not the acts or omissions of the company's management.[2]

Therefore, the court interprets AISLIC's policy exclusion, IV. 1. A., as expressing coverage for Guide's civil fines and penalties except to the extent that company management was responsible for the wrongdoing penalized. Therefore, the conflict between the exclusion's acknowledgment of coverage and the policy's definition of "loss" which excludes coverage, must be resolved in favor of coverage. The court finds and concludes that AISLIC's policy provides coverage for civil fines and penalties that are imposed not because of the insured's own direct wrongdoing.

Because the consent decree itself contains no findings or admissions, no cause for the alleged violations can be discerned therefrom. The situation is similar to a general verdict

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[2] *See Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 343 (7th Cir. 1994) ("Public policy does on occasion demand that a wrongdoer be forbidden to shift the cost of liability to another through insurance or some other form of indemnification, but that is in cases of deliberate wrongdoing") *cert. denied*.

awarding punitive damages:

> Where an Indiana jury returns a punitive damage verdict against an employer, and where the complaint and instructions equally allow the verdict to rest on alternative theories of direct and vicarious liability, it appears it would be impossible for either the insurer or the insured to prove which theory was actually accepted by the jury. In an action such as this case, in which the insurer and the insured seek a determination of coverage, whichever party had the burden of proof would necessarily fail. On the other hand, the fact that the insurance consequences will be quite different if the award is direct or if it is vicarious may justify separate trials on the two theories. *Cf*. Ind. Trial Rule TR 42(B). If, in fact, it cannot be ascertained from a general verdict whether the jury accepted the theory of direct liability or of vicarious liability, or both, determination by separate trials commends itself.

Norfolk & Western, 420 F.Supp. at 97 n. 3. The factual issues regarding the causes of the releases from Guide's facility into the White River and, thereby, the coverage of Guide's civil fines and penalties, will be litigated at trial and determined by the jury. If the jury apportions responsibility for Guide's pollutant releases among management, lower-level employees, and/or third parties, coverage of Guide's civil fines and penalties will be apportioned accordingly.[3]

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[3] AISLIC's policy contains an exclusion for intentional and illegal acts: "This policy does not apply to **Clean-Up Costs**, **Claims**, **Loss** . . . arising from **Pollution Conditions** that result from an intentional or illegal act or omission of a **Responsible Insured**, if he or she knew or reasonably could have expected that **Pollution Conditions** would result." AISLIC Policy, § IV. 1. E. "Responsible Insured" is defined as "any employee of the **Named Insured** responsible for environmental affairs, control or compliance, or any manager, supervisor, officer, director or partner of the **Named Insured**." *Id.*, § VI. W. If the jury finds that a responsible insured of Guide intentionally caused the pollution conditions and that he knew or reasonably could have expected that pollution conditions would result, this provision might exclude coverage for Guide's civil fines and penalties. As an exclusion, however, it would be subject to estoppel. Indiana's public policy also prohibits a person from insuring against harms he intentional and unlawfully causes to another. *City of Muncie v. United National Ins. Co.*, 564 N.E.2d 979, 982 (Ind. App. 1991); *Home Insurance Co. v. Neilson*, 332 N.E.2d 240, 244 (Ind. App. 1975).

Guide argues that the court already determined that Guide management was not responsible for the pollutant releases when it found that "Guide executives became aware of Guide's potential involvement in the White River fish kill on December 28, 1999." Entry on Guide's Motion for Partial Summary Judgment on National Union's Policy (doc. no. 483), ¶ 6.

Because the one million, nine hundred and fifty-six thousand dollars ($1,956,000) of criminal asset forfeiture represents the economic benefit Guide gained from its wrongful releases, Indiana public policy does not allow its insurability. *Estate of Chiesi v. First Citizens Bank*, 604 N.E.2d 3, 5 (Ind. App. 1992); *Standard Mutual Ins. Co. v. Pleasants*, 627 N.E.2d 1327, 1329 (Ind. App. 1977). Therefore, the court's interpretation of AISLIC's policy would not allow coverage for Guide's criminal asset forfeiture.

Guide argues that, if the jury finds that AISLIC unreasonably delayed reaching a coverage/defense decision and/or breached its duty of defense, then AISLIC would be estopped from asserting a defense that fines and penalties are not covered under its policy. As more fully explained in the court's entry on Guide's motion for summary judgment on the insurers' notice and cooperation defenses, estoppel may not extend a policy's coverage although it may prevent the assertion of policy defenses based on exclusions and conditions precedent. As respects AISLIC's policy, the court's ruling that criminal fines and forfeitures are not covered is based on the policy's definition of "loss," which is fundamental to the scope of coverage, and on public policy, not on an exclusion or condition precedent. This defense, therefore, is not subject to estoppel.[4] (Exclusion IV. 1. A. does not pose a conflict as it also excludes criminal fines and

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This finding, however, addresses only when management became aware that Guide might have been responsible for the injurious results of the waste releases into the White River. It does not address whether management's previous acts or omissions negligently or deliberately caused the injurious releases or whether Guide management should have been aware of the foreseeable results of its acts or omissions.

[4] As noted in the previous footnote, AISLIC's policy excludes coverage arising from pollution conditions that result from an illegal act or omission of a responsible insured if he knew or reasonably could have known that pollution conditions would result. AISLIC Policy, § IV. 1. E. Although this exclusion would be subject to estoppel, the court has already held that

penalties without exception.) Similarly, the court's resolution of the conflict between the exclusion and the "loss" definition as it relates to the coverage of civil penalties is a ruling on the fundamental scope of coverage and is not subject to estoppel.

National Union's policy

National Union first argues that Guide cannot show that the fines, penalties, and asset forfeitures that it was obligated to pay under the civil consent decree and the criminal sentence constitute "damages" under the National Union policy. It relies on Indiana precedent holding that, although the common meaning of "damages" is broad enough to include environmental response costs, it is not broad enough to include fines and penalties. *Hartford Accident & Indemnity Co. v. Dana Corp.*, 690 N.E.2d 285, 297 (Ind. App. 1997).

The fault in National Union's argument is that its policy does not limit coverage to "damages". In fact, the word "damages" does not appear in the operative sentence defining the scope of coverage: "We will pay on behalf of the **Insured** those sums . . . that the **Insured** becomes legally obligated to pay by reason of liability imposed by law . . . because of . . . **Property Damage** . . . that . . . is caused by an **Occurrence** . . . ." National Union Policy, § I. This is a "sums", not a "damages," policy, defining coverage by legal liability imposed on the insured because of property damage, not by the type of either liability or judgment that is imposed. There is no limitation of coverage in this plain language to compensatory damages. Likewise, the plain meaning of this language does not exclude fines and penalties as long as the

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AISLIC's policy does not cover criminal fines and penalties on independent coverage-definition grounds.

fines and penalties are imposed by law on the insured because of property damage.

The word "damages" appears only in the next and concluding sentence of this coverage definition: "The amount we will pay for damages is limited as described in Insuring Agreement III, Limits of Insurance." *Id.* The ordinary and plain meaning of this sentence is that it introduces limitations to the coverage just defined in the preceding sentence and does not introduce limitations applicable to only a subset — called "damages" — of the coverage just defined. Insisting on a meaning of "damages" that is limited to compensatory awards, as National Union does, ignores the entire first sentence's definition of a much broader scope of coverage. Contract terms must be defined by reference to the entire agreement. Because National Union's policy does not include a definition of "damages", a definition must be discerned from the context.

Two alternatives are evident, both of which lead to the same result. The first alternative is that the detailed definition of coverage in the first sentence constitutes the policy's definition of "damages" in the second sentence and, thereby, for the remainder of the policy. "Damages", then, is the policy's shorthand or abbreviation for the defined coverage in the first sentence. This is the most natural and plain interpretation of the language and the context and the one that best and most simply harmonizes the coverage paragraph. The second alternative is that the broad definition of coverage in the first sentence clashes with the narrow proposed meaning of "damages" in the second and thereby introduces an ambiguity in the language regarding the scope of coverage which must be resolved against the drafter, National Union, and in favor of the broader "sums" scope.

Therefore, the court finds and concludes that coverage under National Union's policy is not restricted to compensatory damages but extends to the limits of the "sums" defined in the first sentence of the coverage provision. Fines, penalties, and forfeitures, whether civil or criminal, can constitute "sums . . . that the **Insured** becomes legally obligated to pay by reason of liability imposed by law . . . because of . . . **Property Damage** . . . that is caused by an **Occurrence** . . . ." The court's interpretation is buttressed by the fact that fines and penalties were explicitly excluded from the extra Named Peril and Time Element Pollution Endorsement (Endorsement # 6) that Guide purchased (and the court voided). It is a reasonable inference that the exclusionary language in the endorsement would not have been necessary or useful if the main coverage provision already excluded fines and penalties.

National Union next argues that Guide's fine, penalty, and asset forfeiture were not paid because of "property damage", meaning "physical injury to tangible property;" instead, the fines and penalties were imposed on Guide "because it violated the law, not because it caused physical injury to tangible property." (AISLIC's and National Union's Memorandum of Law in Support of Their Motion for Partial Summary Judgment as to Fines and Penalties (doc. no. 602) ("Insurer's Brief"), p. 12).[5] But National Union posits a false choice between fines and penalties imposed because of property damage and because of violations of law, and it asserts a too-narrow interpretation of "physical injury to tangible property."

[5] Although it is not entirely clear, the court assumes that National Union is arguing alternatively: that the fish kill incident was not physical injury to tangible property and, if it was, the fines and penalties were imposed not for the property damage but for the violations of environmental laws and regulations.

Regarding the second argument first, National Union does not explain why the alleged releases by Guide into the White River did not constitute physical injury to tangible property. Nonetheless, the court finds persuasive those decisions that have found that contamination or pollution of property constitutes "physical injury to tangible property." *See, e.g., Eljer Mfg., Inc. v. Liberty Mutual Ins. Co.*, 972 F.2d 805 (7th Cir. 1992) (asbestos contamination), *cert. denied*, 507 U.S. 1005, 113 S.Ct. 1646, 123 L.Ed.2d 267 (1993); *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162, 1191 n. 57 (3rd Cir. 1991) (reimbursement EPA sought for investigation and clean up constituted "damages because of . . . property damage" and insured's liability was "because of . . . property damage"); *American National Bank and Trust Co. of Chicago v. Harcros Chemicals, Inc.*, No. 95 C 3750, 1997 WL 281295, *19, Memorandum Opinion and Order (N.D. Ill., May 20, 1997) ("contamination of soil by hazardous substances is a physical injury and thus constitutes property damage"); *Matter of Celotex Corp.*, 196 B.R. 973, 1014-15 (Bkrtcy M.D. Fla. 1996) (asbestos contamination of building); *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (Cal. App. 1st Dist. 1996) (same); *GATX Leasing Corp. v. National Union Fire Ins. Co.*, No. 94 C 431, 1994 WL 383909, *4 Memorandum Opinion and Order, (N.D. Ill., July 19, 1994) (contamination of petroleum products is property damage), *affirmed*, 64 F.3d 1112 (7th Cir. 1995); *United States v. Conservation Chemical Co.*, 653 F.Supp. 152, 193 (W.D. Mo. 1986) ("discharge, dispersal, release or escape of toxic chemicals, waste materials or other irritants, contaminates or pollutants into or upon land, the atmosphere or any water course or body of water is 'property damage' for purposes of coverage"). The White River and the fish and other wildlife that were in it are tangible property and they were physically injured by the pollutant

releases. Government has the authority to punish and to redress such injury and damage. *See, Hanley v. State of Indiana*, 126 N.E.2d 879, 882 (Ind. 1955) ("Title to wild game and fish is in the state in its sovereign capacity as the trustee of all the citizens in common").

Although it is true that liability for fines and penalties was imposed on Guide for violations of law, it is also clear that it was sanctioned "because of" the physical injury Guide's pollutant releases caused to the tangible property of the White River and the wildlife therein. Sanctions imposed for violations of law and for property damage are not mutually exclusive. The policy does not further define or limit the "because of" relationship that must exist between legal liability imposed and property damage and the court has already rejected a compensatory relationship. There is also no basis in the policy for concluding that property damage must be the only determinant of the liability imposed. It is reasonable to assume in this case that the extent of injury to the White River caused by Guide's releases was a determining factor in the fine, penalty, and forfeiture that were eventually imposed on Guide. The scope of property damage resulting from the releases certainly affected the results of the governments' discretionary decisions regarding whether and which civil and criminal claims to pursue; the mix of fines, penalties, forfeitures, and other remedies to seek; and the calculation of the actual amounts of those fines, penalties, and forfeitures. The terms of the policy encompass this type of "because of" relationship between the liability imposed and property damages; it clearly does not exclude it.

The consent decree imposing the civil penalty states quite clearly that one of the bases for the liability imposed against Guide was the damage that its releases caused to property:

> CERCLA Section 107 provides that liability shall be to the United States and to the State for damages for injury to, destruction of, or loss of natural resources belonging to, managed by, held in trust by, controlled by or appertaining to the United States or the State resulting from the release of hazardous substances. The U.S. Department of the Interior, IDEM, and IDNR are the federal and state trustees (collectively the "Trustees") for natural resources at and near the White River, and have assessed the injuries to natural resources resulting from the release of hazardous substances from the Facility to the White River in December 1999. The categories of losses assessed by the Trustees include, but are not limited to, loss of fish and other aquatic and riparian organisms, lost fishing recreation, and lost non-fishing recreation.

Consent Decree, § I. D. In addition, the criminal information charges Guide with, and it admitted to, violations of law by "negligently contributing to the Anderson POTW a substance containing pollutants, that being, GUIDE's industrial wastewater, at a pollutant concentration which, either singly or by interaction with other pollutants, will cause an interference with the Anderson POTW, or any wastewater or sludge process, or will constitute a hazard to animals . . . ." Information, p. 6. Considered in conjunction with the precedent cited above holding that pollution and contamination of land and waterways constitutes physical injury to tangible property, the civil and criminal sanctions imposed against Guide are fairly interpreted, for purposes of the present policy interpretation, as having been imposed "because of" the property damage to the White River.

Therefore, according to its terms, National Union's policy provides coverage for civil and criminal fines and penalties. Further, Guide's civil penalty, criminal fine, and forfeiture constitute, according to the policy language, sums that Guide became legally obligated to pay by reason of liability imposed by law because of property damage. Consequently, Guide's penalty, fine, and forfeiture are covered under the terms of National Union's policy.

However, the enforceability of the policy does not depend solely on its terms. The same public policy limitations that limit AISLIC's policy also apply to National Union's policy. Consequently, National Union's policy does not provide coverage for Guide's civil penalty to the extent that the jury attributes the alleged wrongdoing directly to management.[6] In addition, National Union's policy does not provide coverage for Guide's one million, nine hundred and fifty-six thousand dollars ($1,956,000) of asset forfeiture. That leaves Guide's criminal fine of one million, nine hundred and fifty-six thousand dollars ($1,956,000).

No authority was submitted addressing whether Indiana's public policy prohibits insuring against criminal fines and penalties. Guide was charged with, pled to, and was convicted of only negligent misdemeanors and it is not against the public policies of some states to insure against criminal conduct that is only negligent or reckless. *See, e.g.*, *Allstate Ins. Co. v. Patterson*, 904 F.Supp. 1270, 1287 (D. Utah 1995) (coverage for negligent offenses is not against public policy where it does not reasonably encourage or incentivize the offenses). In the absence of advice to the contrary from the parties, the court applies Indiana's public policy regarding punitive awards generally: coverage under National Union's policy for Guide's criminal fine is barred only if the jury finds that Guide's management was responsible for negligently or intentionally causing the charged violations.

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[6] National Union's policy contains an exclusion for "**Bodily Injury** or **Property Damage** expected or intended from the standpoint of the **Insured**." National Union Policy, § V. O. "Insured" is defined as the named insured, Guide, and "any of [Guide's] partners, executive officers, directors, stockholders or employees but only while acting within their duties." *Id.*, § IV. E. 1. and 5. If the jury finds that Guide or any of its partners, executive officers, directors, stockholders, or employees, while acting within their duties, expected or intended the property damage, then this provision might exclude coverage. As an exclusion, it would be subject to estoppel.

Conclusion

The cross motions for summary judgment are granted in part and denied in part. The court finds and concludes that there is no genuine issue of material fact and judgment is due as a matter of law on the following propositions. Guide's civil penalty of two million dollars ($2,000,000) is covered under both AISLIC's and National Union's policies to the extent that the jury finds that Guide's management was not directly responsible for causing the alleged pollution conditions. Guide's criminal fine of one million, nine hundred and fifty-six thousand dollars ($1,956,000) is covered under National Union's policy to the extent that the jury finds that Guide's management was not directly responsible for causing the alleged property damage.

Guide's criminal asset forfeiture of one million, nine hundred and fifty-six thousand dollars ($1,956,000) is not covered under either policy and is barred by public policy.

SO ORDERED this _____ day of February, 2005.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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