

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE NEBRASKA PROPERTY AND LIABILITY
INSURANCE GUARANTY ASSOCIATION,

Plaintiff,

vs.

LYMAN-RICHEY CORPORATION and GARY
MONTGOMERY,

Defendants.

Doc.

No.

**COMPLAINT
(Equity)**

COMES NOW Plaintiff, The Nebraska Property and Liability Insurance Guaranty Association ("the Guaranty Fund"), and for its cause of action against Defendant, Lyman-Richey Corporation ("Lyman-Richey"), and Defendant Gary Montgomery, states as follows:

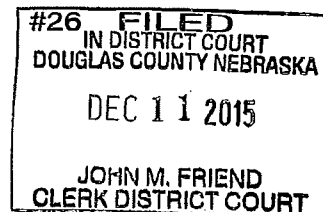
1. At all times relevant herein, the Guaranty Fund was and is an entity created by the Nebraska legislature to conduct business in the state of Nebraska in circumstances in which state-regulated insurance entities become insolvent.

2. At all times relevant herein, Lyman-Richey was and is corporation organized and existing under the laws of the State of Nebraska, doing business in Omaha, Douglas County, Nebraska, and a wholly owned subsidiary of Ash Grove Cement Co. ("Ash Grove"), and a named insured under ENDORSEMENT #1 D of an excess policy of liability insurance issued by Reliance National Indemnity Company as policy NXCO110899-06 to Ash Grove, all as described below.

3. At all times relevant herein, Gary Montgomery was and is a resident of Omaha, Douglas County, Nebraska, and was on August 10, 2000, an employee of Lyman-Richey. This



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Defendant is named herein only as a necessary party for reasons described below, though Plaintiff seeks no recovery from such Defendant.

4. At all times relevant prior to August 10, 2000, Lyman-Richey was a self-insured employer acting as such with the express approval of the Nebraska Workers' Compensation Court ("NWCC"), having satisfied all requirements of Neb. Rev. Stat. §§48-145, 48-145.04, 48-1,114 (Reissue 2010), and having also satisfied Rules 70-76 of the Rules of Procedure of the NWCC. As a certified self-insured employer, Lyman-Richey could not and cannot delegate the ultimate responsibility for complying with the Nebraska Workers' Compensation Act or the Rules of the NWCC to any other party, pursuant to Neb. Rev. Stat. §48-145 (Reissue 2010) and Rule 70 of the Rules of Procedure of the NWCC.

5. In certifying Lyman-Richey as a self-insured employer in the state of Nebraska, the NWCC determined that Lyman-Richey had provided it with satisfactory proof of financial strength and liquidity to meet all of its obligations under the Nebraska Workers' Compensation Act ("NWCA"). The NWCC required Lyman-Richey, as a condition of its request for certification as a self-insured employer, to post security guaranteeing payment of all benefits due to or on behalf of its employees, and Lyman-Richey filed a surety bond in an amount required by the NWCC in compliance with this requirement.

6. Lyman-Richey, through its parent company, Ash Grove, also purchased excess liability insurance, as required by Neb. Rev. Stat. §48-145 (Reissue 2010), and Rule 72 of the Rules of Procedure of the NWCC. This excess liability insurance was issued by Reliance National Indemnity Company as policy NXCO110899-06 (hereinafter, "the Policy").

7. Under the Policy, Reliance agreed to indemnify Lyman-Richey for payments which Lyman-Richey made to its employees under the NWCA; however, the policy did *not* require Reliance to make direct payment of benefits to persons or entities entitled to same under the NWCA. The only circumstance in which Reliance had any obligation to pay workers' compensation benefits under the NWCA was "in the event of bankruptcy, insolvency or other financial inability *of the insured* [Lyman-Richey] to pay its employees or their dependents the benefits provided in the Nebraska Workers' Compensation Act." (Emphasis added.) Lyman-Richey has never become bankrupt, insolvent, or unable to pay its financial obligations under the NWCA at any time relevant to this proceeding. As such, the Policy is strictly one of indemnification from Reliance or its successors in interest to Lyman-Richey, and does not call for direct payment of benefits due under the NWCA. In this regard, the Policy was a policy of liability insurance, defined by Black's Law Dictionary (6th ed. 1990) as follows:

Liability insurance. Contract by which one party promises on consideration to compensate or reimburse other if he shall suffer loss from specified cause or to guaranty or indemnify or secure him against loss from that cause. [Citations omitted.] That type of protection which indemnifies one from liability to third persons as contrasted with insurance coverage for losses sustained by the insured.

In contrast, the same source defines workers' compensation insurance as follows:

Workers' compensation insurance. Insurance coverage purchased by employers to cover risks under workers' compensation laws. Such is usually mandated by state acts, unless the employer is self-insured.

8. Effective November 2, 2000, the Policy was novated from Reliance to Lumbermens Mutual Casualty Company ("Lumbermens"), an Illinois insurance company, and its insurance company affiliates. As a result, Lumbermens stood in the shoes of Reliance in all respects relative to the Policy at all times relevant herein.

9. On May 10, 2013, Lumbermens was liquidated in an Illinois proceeding. Pursuant to the terms of Neb. Rev. Stat. §§44-2401-2418 (Reissue 2010), the Guaranty Fund became liable for continuing Lumbermens' duty to indemnify Lyman-Richey, subject to its maximum liability under the Nebraska Property and Liability Insurance Guaranty Association Act ("NPLIGAA").

10. The Guaranty Fund's maximum liability under NPLIGAA is \$299,900.00, as set forth in Neb. Rev. Stat. §44-2406(1) (Reissue 2010), for the reason that the Policy was an excess policy calling for indemnification of the employer, rather than for direct payment of workers' compensation benefits. As such, the Policy was a liability policy, and not a workers' compensation policy. As a liability policy, once Lumbermens was declared insolvent, the terms of NPLIGAA provided that the Guaranty Fund was obligated to pay covered claims up to a maximum of \$299,900.00.

11. On August 10, 2000, Defendant Gary Montgomery ("Montgomery") suffered serious injuries in an accident arising out of and in the course of his employment with Lyman-Richey, when he was crushed by a central mixer drum on a cement truck. Montgomery suffered injuries to his abdomen, pelvis, hip, sciatic nerve, and body as a whole. As of this filing, Montgomery has incurred medical expenses exceeding \$870,964.79, and has accrued total disability entitlements of \$388,626.00 under the NWCA in relation to the accident of August 10, 2000.

12. Based upon information and belief, Plaintiff understands that, as a result of Montgomery's accident and injuries of August 10, 2000, in addition to other claims for which Lyman-Richey was liable at relevant times when the Policy was in force and effect, Lyman-Richey paid amounts satisfying its "retention" requirement under the Policy sufficient to trigger excess coverage under the Policy. However, by virtue of its status as a self-insured employer in the state of Nebraska, Lyman-Richey had and still has a continuing legal obligation to make payments to or on behalf of Montgomery pursuant to the Nebraska Workers' Compensation Act. Following the insolvency of Lumbermens, once Lyman-Richey made such statutorily required payments, it was entitled to indemnification from the Guaranty Fund, up to the Guaranty Fund's statutory maximum liability set forth above. Pursuant to the terms of the Policy, neither Reliance nor Lumbermen's nor the Guaranty Fund had any direct obligation for payment of benefits under the NWCA to Montgomery or to persons or entities on Montgomery's behalf, as the sole obligation under the Policy was to indemnify Lyman-Richey. As a self-insured employer, Lyman-Richey was and still is also obligated to administer Montgomery's workers' compensation claim.


13. Lyman-Richey denies that the Guaranty Fund's liability is limited to the \$299,900.00, as set forth in Neb. Rev. Stat. §44-2406 (Reissue 2010), as it contends that the Policy is "a workers' compensation policy."

14. Plaintiff, the Guaranty Fund, seeks a declaratory judgment of this Court to establish that its liability under the Policy is one of indemnification only, and runs only to Lyman-Richey, rather than to Montgomery or persons or entities on Montgomery's behalf and, as such, does not constitute "workers' compensation insurance" as that term is intended under NPLIGAA. Plaintiff further seeks a declaration by this Court that its duty to indemnify Lyman-Richey is

capped at \$299,900.00, as set forth in Neb. Rev. Stat. §44-2406 (Reissue 2010). Plaintiff further seeks an order of this Court requiring Lyman-Richey, as a certified self-insured employer in the state of Nebraska, to fulfill its obligations to make all payments due to or on behalf of Montgomery required by the Nebraska Workers' Compensation Act in relation to the accident of August 10, 2000, and to satisfy its statutory obligation to administer Montgomery's workers' compensation claim.

WHEREFORE, Plaintiff, the Guaranty Fund, prays for the entry of an order against Defendant Lyman-Richey for the relief set forth herein, and for such other and further relief as may be equitable and warranted in the circumstances.

**THE NEBRASKA PROPERTY AND LIABILITY
INSURANCE GUARANTY ASSOCIATION, Plaintiff**



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