

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

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KATHLEEN McHUGH and  
DEANNA SCHNEIDER, individually  
and on behalf of all persons similarly situated,  
Plaintiffs,

v.

Case No: 11-CV-724-BBC

MADISON-KIPP CORPORATION,  
CONTINENTAL CASUALTY COMPANY,  
COLUMBIA CASUALTY COMPANY,  
UNITED STATES FIRE INSURANCE  
COMPANY and ABC INSURANCE  
COMPANIES 1 – 50,

Defendants,

and

MADISON-KIPP CORPORATION,  
Cross-Claimant,

v.

CONTINENTAL CASUALTY COMPANY,  
COLUMBIA CASUALTY COMPANY, and  
UNITED STATES FIRE INSURANCE  
COMPANY,

Cross-Claim Defendant,

and

CONTINENTAL CASUALTY COMPANY and  
COLUMBIA CASUALTY COMPANY,  
Cross-Claimants/Third-Party Plaintiffs,

v.

MADISON-KIPP CORPORATION,  
Cross-Claim Defendants,

and

LUMBERMENS MUTUAL CASUALTY  
COMPANY, AMERICAN MOTORISTS  
INSURANCE COMPANY, and JOHN DOE  
INSURANCE COMPANIES 1-20,  
Third-Party Defendants.

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**UNITED STATES FIRE INSURANCE COMPANY’S SUPPLEMENTAL STATEMENT  
OF PROPOSED FINDINGS OF FACT IN SUPPORT OF UNITED STATES FIRE  
INSURANCE COMPANY’S JOINDER IN CONTINENTAL CASUALTY COMPANY  
AND COLUMBIA CASUALTY COMPANY’S MOTION FOR PARTIAL SUMMARY  
JUDGMENT: STATUTE OF LIMITATIONS**

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Defendant United States Fire Insurance Company (“U.S. Fire”), by its attorneys, Meissner Tierney Fisher & Nichols S.C., submits the following Supplemental Statement of Proposed Findings of Fact in Support of its Joinder in Continental Casualty Company and Columbia Casualty Company’s Motion for Partial Summary Judgment as to the Statute of Limitations.

1. U.S. Fire issued to MKC Policy No. 523-220099 4 for the policy period January 1, 1984 through January 1, 1985. (Declaration of Michael C. Baird dated February 19, 2013 (“Baird Decl.”), ¶3).

2. U.S. Fire issued to MKC Policy No. 523-377264 6 for the policy period January 1, 1985 through January 1, 1986. (Baird Decl., ¶4).

3. MKC allegedly first provided notice of the claim arising from the Responsible Party Letter<sup>1</sup> to U.S. Fire in a letter dated August 1, 2003 from Michael Best & Friedrich LLP (“Michael Best”) (the “2003 U.S. Fire Notice Letter”). (Declaration of Michael C. Cohen dated February 19, 2013 (“Cohen Decl.”), ¶2, Ex. A, at 7-8, Request to Admit Nos. 1-3, 9 and Exhibit 1 thereto; Cohen Decl., ¶3, Ex. B, at 9-11, Responses to Request to Admit Nos. 1-3, 9); Baird Decl., ¶7, Ex. B).

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<sup>1</sup> Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in Continental Casualty Company and Columbia Casualty Company’s Memorandum of Law in Support of Motion for Partial Summary Judgment.

4. U.S. Fire disputes that it received the 2003 U.S. Fire Notice Letter on or about August 1, 2003. (Cohen Decl., ¶3, Ex. B, at 9-11, Responses to Request to Admit Nos. 1-3, 9).

5. The 2003 U.S. Fire Notice Letter provided details regarding the investigation and remedial actions undertaken by MKC and its consultant “Dames & Moore, n.k.a. URS” at the Site and also cited to *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶¶1-5, 264 Wis. 2d 60. (Cohen Decl., ¶2, Ex. A, at 7, Request to Admit No. 1 and Exhibit 1 thereto, at 3-4; Cohen Decl., ¶3, Ex. B, at 9, Response to Request to Admit No. 1).

6. The 2003 U.S. Fire Notice Letter quoted the following passage from *Johnson Controls*:

An insured’s costs of restoring and remediating damaged property, whether the costs are based on remediation efforts by a third-party (including the government) or are incurred directly by the insured, are covered damages under applicable CGL policies, provided that other policy exclusions do not apply. We also conclude that receipt of a potentially responsible party (“PRP”) letter from the EPA or an equivalent state agency, in the CERCLA context, marks the beginning of adversarial administrative legal proceedings that seek to impose liability upon an insured. A PRP letter significantly affects the legal interests of the insured. Therefore, reasonable insure[d]s would expect this letter to trigger its CGL insurers[’] duty to defend.

(Cohen Decl., ¶2, Ex. A, at 7, Request to Admit No. 1 and Exhibit 1 thereto, at 3-4; Cohen Decl., ¶3, Ex. B, at 9, Response to Request to Admit No. 1).

7. The 2003 U.S. Fire Notice Letter stated:

Therefore, we hereby place your company on notice of a claim for defense and indemnity obligations stemming from liabilities that have been and will be incurred by your insured in response to and as a result of WDNR’s demands with respect to this site. We request that your company analyze this matter and accept duties of defense and indemnity owned [sic] under the CGL and/or umbrella policies.

(Cohen Decl., ¶2, Ex. A, at 7, Request to Admit No. 1 and Exhibit 1 thereto, at 4; Cohen Decl., ¶3, Ex. B, at 9, Response to Request to Admit No. 1).

8. There were no communications concerning the Site or MKC's demands for defense and indemnity relating to the DNR's claims against MKC arising out of the Site exchanged between MKC and U.S. Fire between the 2003 U.S. Fire Notice Letter and July 25, 2011. (Baird Decl., ¶5).

9. On or about July 25, 2011, Michael Best sent a notice letter to U.S. Fire on behalf of MKC (the "July 2011 U.S. Fire Notice Letter"). (Baird Decl., ¶6, Ex. A).

10. The July 2011 U.S. Fire Notice Letter states, in part:

On August 1, 2003, we notified your company of a claim for defense and indemnity arising out of the presence of tetrachloroethene ('PCE') detected in the soils and the groundwater beneath the Site. A copy of that prior notice is enclosed. The purpose of this letter is to supplement that prior notice by alerting your company of additional claims for defense and indemnity arising from demands recently made by the Wisconsin Department of Natural Resources ('WDNR') in connection with additional investigation beyond the Site, as well as the July 19, 2011 notice of intent to file legal action by neighboring residents alleging property damage, health risks and diminished home values.

(Baird Decl., ¶6, Ex. A, at 1).

11. The July 2011 U.S. Fire Notice Letter states, in part: "MKC tenders this notice of claim and would like to discuss the potential of defense and indemnification under the above-referenced policies." (Baird Decl., ¶6, Ex. A, at 1).

12. On or about October 21, 2011, Michael Best sent another letter to U.S. Fire on behalf of MKC (the "October 2011 U.S. Fire Notice Letter"). (Baird Decl., ¶7, Ex. B).

13. The October 2011 U.S. Fire Notice Letter states, in part:

On July 25, 2011, we notified your company of potential claims for defense and indemnity arising from demands recently made by the Wisconsin Department of Natural Resources ('WDNR') in connection with additional investigation beyond the Site, as well as the July 19, 2011 notice of intent to file legal action by neighboring residents alleging property damage, health risks and diminished home values. The purpose of this letter is to tender to U.S. Fire Insurance Co./Crum & Forster for defense and indemnification, the previous claim made and now the lawsuit filed against your insured, Madison-Kipp Corporation ('MKC').

(Baird Decl., ¶7, Ex. B, at 1).

14. U.S. Fire, acting through Christina M. Villano of Crum & Forster Latent Claims Division, the then-administrator of MKC's claims for coverage against U.S. Fire, responded to MKC's July 2011 U.S. Fire Notice Letter by letter dated November 28, 2011 (the "November 2011 U.S. Fire Response Letter"). (Baird Decl., ¶8, Ex. C).

15. In the November 2011 U.S. Fire Response Letter, U.S. Fire states that it is "in receipt of your correspondence dated July 25, 2011 and August 26, 2011." (Baird Decl., ¶8, Ex. C, at 1).

16. The November 2011 U.S. Fire Response Letter states, in part, that Crum & Forster, the then-administrator of the claim on behalf of U.S. Fire, will "initiate a search for alleged policies 523-220099 4 and 523 377264 4." (Baird Decl., ¶8, Ex. C, at 2).

17. The November 2011 U.S. Fire Response Letter states, in part, that once there "had [been] sufficient time to review [the policies] along with the facts and allegations associated with this claim, [Crum & Forster, the then-administrator of the claim on behalf of U.S. Fire] will advise Madison-Kipp Corporation of its right to coverage, if any, for this claim under alleged policies 523-220099 4 and 523-377264 6." (Baird Decl., ¶8, Ex. C, at 2).

18. In the November 2011 U.S. Fire Response Letter, U.S. Fire states, in part:

If the referenced policies are umbrella or excess policies, no obligation to defend or indemnify any insured can exist under the policies until the time the applicable limits of the underlying policies and any other insurance applicable to this matter are properly exhausted by the payment of covered claims. Accordingly, if you are in possession of any evidence the primary insurance carriers' limits have been exhausted, please provide documentation as soon as possible.

(Baird Decl., ¶8, Ex. C, at 2).

19. The November 2011 U.S. Fire Response Letter requests that “as you[, *i.e.*, MKC] receive additional information pertaining to this matter, please immediately provide it to Crum & Forster [the then-administrator of MKC’s claim against U.S. Fire for coverage].” (Baird Decl., ¶8, Ex. C, at 2).

20. U.S. Fire, acting through Christina M. Villano of Crum & Forster Latent Claims Division, the then-administrator of MKC’s claims for coverage against U.S. Fire, sent a letter to Michael Best dated December 14, 2011 (the “December 2011 U.S. Fire Response Letter”). (Baird Decl., ¶9, Ex. C).

21. The December 14, 2011 Response Letter states, in part:

This correspondence will communicate U.S. Fire’s coverage analysis concerning the captioned matters, and will explain why policies 523-220099 4 and 523-377264 6 are not potentially applicable at this time to costs sought or recovered from Madison-Kipp Corporation (“MKC”) in these matters, as the policies provide umbrella coverage, which is not yet triggered.

(Baird Decl., ¶9, Ex. D, at 1).

22. The December 2011 U.S. Fire Response Letter states, in part:

Based upon our review of policies 523-220099 4 and 523-377264 4 and the information we have obtained to date, Crum & Forster [the then-administrator of MKC’s claims for coverage against U.S. Fire] has determined that U.S. Fire has no current obligation to defend or indemnify MKC for the damages sought by the WDNR or Plaintiffs with regard to the McHugh, et. al. Complaint, as the underlying insurance and other insurance available to MKC has not yet been properly exhausted by payment of covered claims.

(Baird Decl., ¶9, Ex. D, at 2).

23. The December 2011 U.S. Fire Response Letter states, in part:

If MKC possesses or is aware of any additional information that evidences underlying insurance and all other insurance available to MKC has been properly exhausted by payment of covered claims or that such underlying and other insurance is inapplicable to costs sought or recovered in the captioned matters, please forward any such information to my attention. Upon receipt of any such

information, Crum & Forster, on behalf of U.S. Fire will review it to determine whether its coverage analysis for these matters remains appropriate.

(Baird Decl., ¶9, Ex. D, at 7).

24. The December 2011 U.S. Fire Response Letter states, in part:

We specifically reserve the right to disclaim or limit coverage under the aforementioned policies. We specifically reserve the right to modify our coverage position based on additional information that should become available concerning these matters.

(Baird Decl., ¶9, Ex. D, at 7).

Respectfully submitted this 19th day of February, 2013.

MEISSNER TIERNEY FISHER & NICHOLS S.C.

By: /s/ Michael J. Cohen

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