IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KATHLEEN McHUGH and DEANNA SCHNEIDER, individually and on behalf of all Persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No.: 11-cv-724
MADISON-KIPP CORPORATION, CONTINENTAL CASUALTY COMPANY, COLUMBIA CASUALTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY and ABC INSURANCE COMPANIES 1-50,	)	Hon. Barbara B. Crabb, Judge Hon. Stephen L. Crocker, Magistrate Judge
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.)

MADISON-KIPP CORPORATION'S BRIEF IN OPPOSITION TO THE INSURERS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Continental Casualty Company ("Continental") and Columbia Casualty Company ("Columbia") (collectively, "CNA") have moved the court for partial summary judgment on three separate grounds. First, CNA argues that the statute of limitations bars Madison-Kipp Corporation's ("Madison-Kipp") cross-claim for defense and indemnity relating to the underlying claims of the Wisconsin Department of Natural Resources ("DNR").[1] United States Fire Insurance Company ("U.S. Fire") has joined CNA on this ground. ("Insurers" will refer to Continental, Columbia, and U.S. Fire, collectively). Second, Continental argues that the pollution exclusion in the 1986-87 primary policy Continental issued to Madison-Kipp excludes coverage for any of the underlying claims. Third, Columbia argues that the primary policies that underlie the Columbia umbrella policies must be exhausted on a pro rata allocation basis before the

[1] Although the Insurers argue the statute of limitations has run on the DNR Action (defined below), the Insurers do not argue that the statute of limitations has run with respect to the Insurers' obligations for Plaintiffs' Resource Conservation and Recovery Act, 42 U.S.C. § 6921, *et seq*. ("RCRA") claim or Plaintiffs' negligence, private nuisance, trespass, and willful and wanton misconduct claims ("Property Damage Claims"). The Insurers have not moved with their respect to Madison-Kipp's cross-claims regarding the Insurers' duties to defend and indemnify Madison-Kipp in an enforcement action brought by the State of Wisconsin related to alleged environmental contamination. In addition, with respect to the Maintenance of Underlying Insurance provision, Columbia has only moved for summary judgment on Coverage A (Columbia's excess policy) and not Coverage B (Columbia's umbrella policy). Finally, the Insurers have not moved with respect to their obligations in the *Sorensen v. Madison-Kipp Corporation*, Dane County Case No. 12-CV-4386. In *Sorensen*, owners of property adjacent to Plaintiffs brought property damage claims against Madison-Kipp for which Madison-Kipp is seeking defense and indemnification from the Insurers.

Columbia umbrella policies themselves are triggered. Each of these arguments lacks merit.

In its deliberations, the Court should keep in mind three things: First, in their ever-evolving attempt to avoid their obligations, the Insurers have again changed course and abandoned the very positions they previously advocated before this Court. Second, the Insurers seek to capitalize on their own inequitable conduct. Third, the arguments the Insurers now advance run counter to well-established law.

FACTS

I. SUBSTANTIVE FACTS.

On July 7, 1994, the DNR sent Madison-Kipp a notification letter related to the alleged release of chlorinated volatile organic compounds ("VOCs"). (CNA PFOF # 38, Ex. B.)[2] The DNR required Madison-Kipp to investigate and remediate the release of VOCs on and near its property. (CNA PFOF # 38, Ex. B at 1.) The DNR assigned the project Bureau of Remediation and Redevelopment Tracking System ("BRRTS") number 02-13-001569 ("DNR Action"). (M-K PFOF # 1.) Madison-Kipp has investigated and remediated pursuant to the DNR Action since 1994 through the present day. (M-K PFOF # 2.) The DNR Action remains open. (CNA PFOF # 68) (M-K PFOF # 3.) As recently as March 15, 2013 Madison-Kipp's expert, ARCADIS, at the DNR's insistence, filed with the DNR a Site Investigation and Interim Action Report, which details the

[2] "CNA PFOF # __" refers to CNA's proposed findings of fact (Dkt. # 153). "U.S. Fire PFOF # __" refers to U.S. Fire's supplemental proposed findings of fact (Dkt. # 157). The documents referred to in those citations are exhibits attached to various declarations already filed with the Court.

investigation and remediation actions Madison-Kipp has taken and still intends to take with respect to the DNR Action. (M-K PFOF # 4.)

Prior to 2003, Commercial General Liability ("CGL") policies were not interpreted to cover claims such as the DNR Action. *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 3, 264 Wis. 2d 60, 665 N.W.2d 257. That changed in 2003 with *Johnson Controls*. Under *Johnson Controls*, the "costs of restoring and remediating damaged property . . . are covered damages under applicable CGL policies" once the Environmental Protection Agency or an "equivalent state agency" issues a notice to a party of potential liability for contamination. *Id.*, ¶ 5.

On August 1, 2003, pursuant to *Johnson Controls* and the applicable policies, Madison-Kipp notified its Insurers of the DNR Action. (CNA PFOF # 47 (Dkt. # 165-2 at 5–8.); U.S. Fire PFOF # 3 (Dkt. # 158-1 at 4–7).) Madison-Kipp's notice specifically stated: "We look forward to your acknowledgment of receipt of this notice of claim. If you have any questions or require further information, please do not hesitate to contact me." (Dkt. # 165-2 at 8; Dkt. # 158-1 at 7.)

The Insurers chose not to respond to Madison-Kipp's notice.[3] (CNA PFOF # 57; U.S. Fire PFOF # 8.) As a result, until 2011, Madison-Kipp was forced to defend itself and pay investigation and remediation costs at the DNR's insistence, including

[3] Continental and Columbia admit that they received Madison-Kipp's notice. (CNA PFOF # 47.) U.S. Fire disputes that it received the August 1, 2003 notice letter because, according to U.S. Fire, its claim file does not contain a copy of the letter. (U.S. Fire PFOF # 4 (Dkt. 159-2, at 9).) However, counsel for Madison-Kipp sent the 2003 notice letter to U.S. Fire via certified mail, return receipt requested, and the return receipt indicates U.S. Fire's representative received the letter on August 5, 2003. (M-K PFOF # 6.)

numerous soil, groundwater, and vapor samplings as well as various remedial actions. (CNA PFOF # 56; M-K PFOF # 7.)

On July 25, 2011, after having been served with an Intent to File Suit letter under RCRA, Madison-Kipp reminded the Insurers of the still-pending DNR Action and also gave them notice of the neighbors' Intent to File Suit Letter. (CNA PFOF # 58 (Dkt. # 165-2); U.S. Fire PFOF # 6 (Dkt. # 158-1).) On August 26, 2011, Madison-Kipp reminded the Insurers of the issues raised in the July 25, 2011 letter and noted that "we have not received a response from you." (CNA PFOF # 64 (Dkt. # 165-4).) After a series of communications, Continental agreed to defend Madison-Kipp with respect to Plaintiffs' RCRA and Property Damage Claims and the DNR Action under a reservation of rights. (CNA PFOF # 68 (Dkt. # 165-6).)

II. PROCEDURAL FACTS.

A. The Insurers' Motion to Bifurcate.

Ever since the Insurers acknowledged receipt of the notice in 2011, they have vigorously and desperately attempted to get out of their obligations to Madison-Kipp.

They even changed their arguments here to suit their needs. Early on, the Insurers moved to bifurcate and stay Madison-Kipp's declaratory judgment action on coverage issues from the underlying environmental contamination claims. (*See* Dkt. #62.) The Insurers argued it would serve everyone's best interest to wait until the underlying environmental issues were decided before litigating *any* insurance coverage issues:

- "the superior approach here would be for the underlying environmental claims to be resolved first, and then for the parties to litigate the insurance coverage issues in light of the factual findings on those environmental issues." (Dkt. #62 at 6.)

- "resolution of any claims relating to the Insurers' potential duty to indemnify Madison-Kipp for the Plaintiffs' claims *must await* any establishment of liability for those claims." (Dkt. # 71 at 7 (emphasis added).)

- "It will be far more efficient to defer resolution of all of the insurance coverage issues, *including those relating to the WDNR's claims to the extent those claims may become ripe*, until after the resolution of the environmental issues." (*Id.* at 7 (emphasis added).)

- "*With respect to the claims by the WDNR*, Madison-Kipp seeks a declaration both with respect to demands that the WDNR has already made and those it may make in the future. *There is plainly no ripe dispute with respect to the Insurers' indemnity obligations for future demands by the WDNR, because those demands have not yet even been made*. Madison-Kipp does not allege that there is any current dispute with the Insurer concerning payment for any particular demand by the WDNR." (*Id*. at 6 (emphasis added).)

The Insurers staked out a clear position: *no* insurance coverage claims[4] were ripe for adjudication. By arguing that the coverage claims should not be resolved until the underlying environmental litigation was completed, the Insurers admitted that Madison-Kipp's claims for defense and indemnity had not yet accrued.

The Court initially agreed with the Insurers and granted their motion to bifurcate and stay insurance coverage issues. (*See* Dkt. #72.) The Insurers then changed their position and sought to fully participate in depositions involving Plaintiffs and Madison-Kipp. (*See* Dkt. #82 at 3-4.) The Insurers wanted the best of both worlds: on the one hand they wanted the coverage issues stayed so that they did not have to submit or

[4] This includes Madison-Kipp's claim for coverage relating to the DNR Action.

respond to discovery or dispositive motions, but on the other hand, they wanted to be permitted to participate in depositions. In light of the Insurers' changed position, the Court reconsidered lifting the stay. (*See* Dkt. #83.)

The Insurers immediately began back-pedaling and retreated to their position that because Continental had agreed to defend Madison-Kipp in all actions, including the DNR Action, Madison-Kipp's declaratory judgment action was not yet ripe. Rather than risk a finding on coverage issues, the Insurers sought solace in a stay. But the Court rejected the Insurers' arguments, lifted the stay, and set the coverage issues to proceed together with the underlying environmental claims. (*See* Dkt. #92.)

B. The Insurers' Motion to Dismiss.

The Insurers' next tactic was to seek dismissal of the insurance coverage claims. (*See* Dkt. #94.) The Insurers again argued that Madison-Kipp's cross-claims for a declaration as to the Insurers' defense and indemnity obligations (including for the DNR Action) were not ripe for adjudication. (*See* Dkt. #94 at 8-10.) The Insurers stated their position with the utmost clarity: "There is currently *no ripe dispute* regarding Continental's or Columbia's coverage obligations for the Plaintiffs' claims." (Dkt. #94 at 7.)

According to the Insurers, Madison-Kipp's cross-claims would not rise to the level of an actual case or controversy until the Insurers exercised their reserved rights to deny defending Madison-Kipp against Plaintiffs' claims or the DNR Action. Indeed, the Insurers explained:

> There are certainly potential coverage disputes that may arise, and Continental and Columbia have reserved their rights to deny or limit coverage in the future. But those potential disputes can only ripen into an actual "case or controversy" if, after the environmental claims have been resolved, the insurers exercise rights they have reserved.

(*Id.* at 10.) The Insurers' explanation makes clear their position that Madison-Kipp's cross-claims seeking a declaration that the Insurers have a duty to defend and indemnify Madison-Kipp with respect to the DNR Action had not progressed to the point where they could even be brought before a court.

The Insurers emphasized their ripeness argument in reply, noting that "[n]either the Plaintiffs nor Madison-Kipp have identified a live dispute involving Continental and Columbia." (Dkt. #102 at 8.) Moreover, the Insurers specifically argued that there was no ripe dispute as of August 2012 with respect to Madison-Kipp's cross-claim regarding the Insurers' duty to defend against Plaintiffs' claims or the DNR Action:

> There is certainly the *potential for a ripe dispute to emerge at some point*, if Continental or Columbia eventually exercise the rights they have reserved. But at the moment, *all* coverage disputes are merely hypothetical.

(*Id.* (emphasis added).)

The Insurers went on to explain "[t]hat Continental and Columbia have asserted cross-claims does not mean there is a live dispute regarding Continental's duty to defend." As they had advocated in their motion to bifurcate and stay, the Insurers were again arguing that they should not be part of the lawsuit until after the underlying environmental claims were resolved because Madison-Kipp's cross-claims regarding

the Insurers' duties to defend and indemnify Madison-Kipp were "hypothetical," "not live," and "not ripe."

C. The Court Denies Insurers' Motion to Dismiss.

The Court held that Madison-Kipp's cross-claims for a declaratory relief are ripe. (*See* Dkt. #108.) To the Court, there was undoubtedly a live case or controversy, because "the pending harm to Madison-Kipp is sufficiently immediate and real to justify determining whether the insurance companies are obligated to defend and indemnify Madison-Kipp." (*Id.* at 5.) The Court, however, did not hold that Madison-Kipp was *required* to bring its cross-claims for a declaratory judgment. Instead, the Court cited cases holding that while the injury suffered by an insured may be contingent on future liability, the dispute with the insurance company regarding the insurer's obligations to the insured were ripe. (*Id.* at 6.) The Court recognized that the actual amount of money that the Insurers may be required to pay was indeed contingent on a finding that Madison-Kipp was ultimately liable for the environmental contamination claims asserted against it. (*Id.* at 5-6.) Thus, although Madison-Kipp's cross-claims for a declaratory judgment as to coverage issues are ripe for adjudication, the Court will not be in a position to enter a final monetary judgment against the Insurers, if necessary, until *after* resolution of the underlying liability claims.

ARGUMENT

I. THE STATUTE OF LIMITATIONS DOES NOT BAR MADISON-KIPP'S CROSS-CLAIM FOR A DECLARATORY JUDGMENT.

As the Court is aware, there is a difference between whether a claim is ripe for

purposes of a declaratory judgment action and whether the statute of limitations has run on a claim for monetary damages. This distinction is particularly relevant in the insurance context. "Although an insured might [be] able to file suit against an insurer earlier based on the insurer's refusal to defend . . . the statute of limitations [does] not begin to run . . . until the Court of Appeals affirm[s] judgment on the underlying case." Couch on Insurance, § 236:103 (3d ed. 2005). Indeed, this distinction is well-recognized. *See W. Alliance Ins. Co. v. N. Ins. Co.*, 176 F.3d 825, 828 (5th Cir. 1999) (noting that the there is a difference between determining whether a controversy is justiciable in a declaratory judgment action regarding indemnification and when the statute of limitations begins to run).

While it may be possible to file a declaratory judgment action, it is not required because declaratory judgment actions are necessarily forward-looking. As the Seventh Circuit has consistently held, "[t]he goal of the Declaratory Judgment Act is to allow for the efficient resolution of disputes by an early adjudication of the rights of the parties." *Medical Assur. Co. v. Hellman*, 610 F.3d 371, 377 (7th Cir. 2010); *see* Dkt. # 108 at 5–8. As a result, filing a declaratory judgment action may benefit the party seeking to establish its rights, but it is not *necessary* to establish those rights before damages accrue. Such is the case here.

The Insurers fail to appreciate the fundamental distinction between being able to file a declaratory judgment action and the statute of limitations barring a claim for monetary damages. Now that their ripeness arguments have failed to persuade the Court, they argue that Wisconsin's six-year statute of limitations bars Madison-Kipp's

ability to demand coverage for the payments Madison-Kipp has made and will make related to the DNR Action.[5] The Insurers incorrectly focus their argument on Madison-Kipp's August 2003 notice letter and incorrectly argue that the statute of limitations began to run from that date. The Insurers are wrong. Madison-Kipp's August 2003 letter did not trigger the running of the statute of limitations in 2003.[6] This is where the distinction between ripeness and the statute of limitations dooms the Insurers' argument. Although Madison-Kipp *could have* brought a declaratory judgment action against the Insurers around 2003, Madison-Kipp was *not required* to bring its claim in 2003 or risk the statute of limitations barring such a claim.

To give context to the argument below, Madison-Kipp is seeking a declaration regarding the Insurers' duties to indemnify and defend Madison-Kipp. These duties are separate contractual obligations. *Johnson Controls*, 325 Wis. 2d 176, ¶¶ 28-29.

With respect to these separate duties, the applicable policies state:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property

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[5] Again, although the Insurers argue the statute of limitations has run on the DNR Action, the Insurers do not argue that the statute of limitations has run with respect to the Insurers' obligations for either Plaintiffs' RCRA claim or Property Damage Claims. Nor do the Insurers argue that the statute of limitations has run on Madison-Kipp's cross-claims in the *Sorensen* case.

[6] Had Madison-Kipp brought such an action in 2003, the Insurers would have argued the action was premature, just as they previously did here.

damage . . . .[7]

(M-K PFOF # 8.)

The statute of limitations has not begun to run on Madison-Kipp's claims against the Insurers with respect to either of these duties.

A. The Statute of Limitations Does Not Bar Madison-Kipp's Cross-Claim for A Declaration Regarding the Insurers' Duty to Indemnify.

The Insurers argue that the statute of limitations bars Madison-Kipp's cross-claims for a declaration regarding the Insurers' duty to indemnify. Wisconsin law says otherwise. Wisconsin law is well-established and clear that with respect to indemnification claims, the statute of limitations begins to run when the liability is legally imposed, meaning that judgment has been entered or when liability has been fixed in the underlying action. *Chernin v. International Oil Co.*, 261 Wis. 543, 545, 53 N.W.2d 425 (1952) (holding that an indemnity claim arises when the liability on the underlying action becomes fixed). This makes sense because "the duty to indemnify is supported by fully developed facts." *Acuity v. Bagadia*, 2008 WI 62, ¶ 52, 310 Wis. 2d 197, 750 N.W.2d 817 (2008); *Hoffman, LLC v. Cmty. Living Solutions, LLC*, 2011 WI App 19, ¶ 24, 331 Wis. 2d 487, 795 N.W.2d 62 ("To determine whether an insurer has a duty to indemnify, we look beyond the four corners of the complaint and consider whether the fully developed facts of the case establish that covered claims occurred.") As a

7 This language comes from the underlying Continental policies. The 1980-81 Kemper primary policy contains substantially identical language (M-K PFOF #9.) This language also applies to the Columbia excess policies because they follow the form of the underlying policies: "The provisions of the immediate underlying policy are, with respect to Coverage A, incorporated as part of this policy . . . ." (CNA PFOF # 33.) While not incorporating the underlying policy, the U.S. Fire policy contains substantially similar coverage language. (M-K PFOF # 5.)

matter of law, the statute of limitations must necessarily run once all the facts have been "fully developed," including "fixing" the amount of liability in the underlying action.

Here, the statute of limitations has not commenced running because there has been no resolution of the DNR Action and monetary liability, if any, has not been finally fixed. Until the DNR issues a "closure letter," the total amount of payments Madison-Kipp will have made and or will have to make in the DNR Action will not be fixed and, thus, the Insurers' total payment obligation cannot be finally determined.

B. The Statute of Limitations Does Not Bar Madison-Kipp's Cross-Claim Regarding the Insurers' Duty to Defend.

The Insurers also argue that the statute of limitations bars Madison-Kipp's claims regarding the Insurers' duty to defend the DNR Action.[8] Again, the Insurers are wrong. Because there is no Wisconsin precedent directly on point about when the statute of limitations begins to run on a duty to defend claim where the insurer fails to respond to its insured's notice, this Court must predict how the Wisconsin Supreme Court would decide the issue. *See Stephan v. Rocky Mt. Chocolate Factory, Inc.*, 129 F.3d 414, 417 (7th Cir. 1997). In determining how the Wisconsin Supreme Court would decide an issue, the Court may look to, among other sources, the decisions of other courts and legal treatises. *George v. Tonjes*, 414 F. Supp. 1199, 1199 (W.D. Wis. 1976); *Miller v. General Motors Corp.*, No. 98 C 7386, 2003 U.S. Dist. LEXIS 971, *7 (N.D. Ill. Jan. 26, 2003). Courts outside of Wisconsin generally have adopted one of three rules to determine when the statute of limitations begins to run on an insured's claim against its insurer

[8] The Insurers are not contesting Madison-Kipp's cross-claims with respect to Plaintiffs' RCRA and Property Damage Claims in this motion.

regarding the duty to defend. Each of these rules dictates that the statute of limitations does not bar Madison-Kipp's claim regarding the Insurers' duty to defend.

1. The Statute of Limitations Does Not Bar Madison-Kipp's Duty to Defend Claim Under the Majority Rule.

The "clear majority" of courts follow the rule that the statute of limitations for a claim against a liability insurer for breach of its duty to defend does not begin to run until the completion of the underlying action. *See, e.g., Vigilant Ins. Co. v. Luppino*, 723 A.2d 14, 18–19 (Md. Ct. App. 1999) (noting "[m]any other courts have reached the same conclusion" that the statute of limitation begins to run when the underlying action is terminated); *West Haven v. Commercial Union Ins. Co.*, 894 F.2d 540, 545 (2d Cir. 1990) ("[t]he duty to defend 'lasts until the state of proceedings is reached when it is clear that no element of the subject matter of the suit is within the scope of the policy'" . . . which means that "the limitations period does not begin to run, or is tolled, until that conduct terminates") (quoting 7 C J. Appleman, Insurance Law and Practice, § 4684.01 at 100 (1979)); *Home Savings Assoc. v. Aetna Casualty & Surety Co.*, 854 P.2d 851, 855 (Nev. 1993) ("The statute of limitations on a claim against an insurer for breach of its duty to defend commences when a final judgment in the underlying litigation against the insured is entered."). Notably, in these cases the insurers actually responded to their insured's notice. Nevertheless, the courts held that the statute of limitations did not commence until after the underlying action terminated.

Insurance treatises agree: the statute of limitations begins to run when the underlying litigation is terminated. *See, e.g.,* Couch on Insurance, § 236:103. ("the duty

to defend is necessarily a continuing one that commences upon notice of the claim and extends at least until judgment is entered and all appeals from it have been resolved."). Appleman on Insurance Law ("Appleman") similarly agrees that the statute of limitations runs from the time the underlying action is terminated. 1-7 New Appleman on Insurance Law Library Edition, § 7.06(2)(B) (2013). Appleman acknowledges that a claim against an insurer may accrue when a claim is denied; however, Appleman advocates the position that the statute of limitations should nevertheless run from "when the defense obligation has ended." *Id*. The reason for running the statute of limitations from when the underlying action terminates is that "it is more sensible, and equitable, that the policyholder have the option of suing immediately or waiting until the underlying suit and defense duty is concluded." *Id*. Thus, as explained above, even though an insured could file a declaratory judgment action against its insurer when the insurer denies coverage, the statute of limitations begins to run only when the underlying action is complete, *e.g.*, after all appeals have been exhausted. *Id*.

Wiseman Oil Co. v. TIG Ins. Co., No. 011-1011, 2012 U.S. Dist. LEXIS 71138 (W.D. Pa. May 22, 2012) demonstrates this rule and is directly on point. In *Wiseman*, plaintiffs sued their insurer for breaching its duty to defend with respect to a Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") claim. *Wiseman Oil Co.*, 2012 U.S. Dist. LEXIS 71138 at *2. The United States brought its CERCLA claim against plaintiffs in 1997. *Id*. Plaintiffs tendered their claim to their insurer in 2004. *Id*. In 2005 the insurer responded, stating that it was unable to provide a coverage determination. *Id*. The CERCLA action was administratively closed in 2009.

Id. In 2010, the insurer indicated that it would take no further action unless it received further information from the plaintiffs. *Id*. at *3. A consent decree was entered in the CERCLA action in April, 2011, and plaintiffs filed suit against the insurer in August, 2011 for breaching its duty to defend. *Id*. at *4.

The insurer moved for judgment on the pleadings, arguing that Pennsylvania's four-year statute of limitations barred plaintiffs' duty to defend claim. *Id*. The *Wiseman* Court rejected the insurer's argument that the statute of limitations began to run when all the elements of a claim exist or when the right to institute suit arises, *i.e.*, when the insured tendered its notice of the underlying action to its insurer. *Id*. at *9–10. The *Wiseman* Court analyzed numerous cases that hold the statute of limitations on a claim for breach of an insurer's duty to defend does not begin until the termination of the underlying action and not the date of the insurer's coverage denial. *Id*. at *5–7. The Court noted that "'the right of action is complete' only after there is a final judgment against the insured has become the *clear majority rule*." *Id*. at *6–7 (emphasis added). The court held "an insurer's duty to defend is a continuing contractual obligation which may yet be performed so long as the underlying action continues and, accordingly, the cause of action is not complete until the underlying action is over." *Id*. at *11–12. Because the plaintiffs' right of action was complete only when the CERCLA action was terminated, the statute of limitations did not bar plaintiffs' claims. *Id*. at *15–16.

The majority rule makes sense. It would be illogical to bar a claim against an insurer for the insurer's failure to perform its duty to defend before the duty to defend expires, *i.e.*, the underlying action for which the insured seeks defense terminates.

Moreover, it is not until an underlying action is terminated that one can determine the full amount of damages sustained by an insured as a result of an insurer's breach of its duty to defend.

In Madison-Kipp's case, the majority rule is particularly applicable given the timetable of events. The DNR first notified Madison-Kipp of potential contamination in 1994. (CNA PFOF # 38, Ex. B.) Madison-Kipp has been continuously investigating and remediating the site from 1994 through the present. (M-K PFOF # 2.) The DNR Action will not be complete until the DNR issues Madison-Kipp a closure letter similar to the EPA's consent decree in *Wiseman*. (M-K PFOF # 10.) The Insurers currently have a duty to defend Madison-Kipp in the DNR Action under *Johnson Controls* because the DNR Action is ongoing; therefore, under the majority rule, the statute of limitations cannot begin to run until the DNR Action terminates.

2. *Yocherer* Supports the Majority Rule and the Other Cases the Insurers Cite are Distinguishable.

The authority the Insurers cite does not overcome the majority rule. The Insurers' primary support for their argument is an underinsured motorist case, *Yocherer v. Farmers Insurance Exchange*, 2002 WI 41, 252 Wis. 2d 114, 643 N.W.2d 457. The *Yocherer* Court held "that the date of loss for actions seeking coverage for underinsured motorist coverage is *the date on which there has been a final resolution of the underlying claim* with the tortfeasor, be it through denial of the claim, settlement, judgment, execution of releases, or other form of resolution." *Yocherer*, 252 Wis. 2d 114, ¶ 22 (emphasis added). In *Yocherer*, though the underlying car accident occurred in 1987 and the lawsuit against

the insurance company was not filed until 1997, the Wisconsin Supreme Court held that the lawsuit was timely, as the statute of limitations did not begin to run until 1995, after the plaintiff had settled the underlying tort case. *Id*.

While the *Yocherer* Court's holding was limited to the question of the date of loss for an action seeking underinsured motorist coverage, *Yocherer* actually reinforces the majority rule set forth above. *Yocherer* recognized that statute of limitations for an underinsured motorist claim did not run simply because the insured "*could have* taken immediate action on their policy . . . " *Id*., ¶ 18. Thus, just as the majority rule holds that the statute of limitations for a duty to defend claim begins to run when the underlying claim is terminated, the Wisconsin Supreme Court has recognized that the statute of limitations for an underinsured motorist claim commences when there has been a final resolution of the underlying claim.

The other cases the Insurers cite also do not support their statute of limitations argument. *Gamma Tau Educational Foundation v. Ohio Casualty Company*, 41 Wis. 2d 675, 165 N.W.2d 135 (1969), dealt with embezzlements by an employee, and the Court focused on whether the statute of limitations ran from the date funds were embezzled (a discrete date of loss) or when the insured discovered the embezzlement. *Gamma Tau*, 41 Wis. 2d at 680–81. *Abraham v. General Casualty Company*, 217 Wis. 2d 294, 576 N.W.2d 46 (1998), like *Yocherer*, involved an underinsured motorist policy, which implicates a discrete event—a car accident—and not the continuing duty to defend. *Abraham*, 217 Wis. 2d at 313. Notably, the claim in *Abraham* was timely because the statute of limitations did not start to run until the date of denial by the insurer, which the Insurers

did not do in the present case until 2011. *Id*. Finally, *CLL Assocs Ltd. P'ship v. Arrowhead Pacific Corp*, 174 Wis. 2d 604, 497 N.W.2d 115 (1993), merely states that the discovery rule does not apply to breach of contract claims. *CLL Assocs*, 174 Wis. 2d at 607. Here, the continuing nature of the duty to defend is a notably distinguishing factor, which renders the discovery rule inapplicable.

3. The Statute of Limitations Also Does Not Bar Madison-Kipp's Duty to Defend Claim Even If the Court Follows the Minority Rule.

A minority of courts have held that an insurer breaches its duty to defend when it refuses to defend its insured, and the statute of limitations then begins to run from the date of this breach. *See e.g.*, *Land O'Lakes, Inc. v. Emp'rs Mut. Liab. Ins. Co.*, 846 F. Supp. 2d 1007, 1026 (D. Minn. 2012) (holding that insurers breached their duty to defend when they refused to defend their insured against an EPA claim). Even if the Court accepts this minority approach, the statute of limitations has not run on Madison-Kipp's claim because the Insurers' never told Madison-Kipp that they would *not* defend it. Instead, the Insurers simply never responded to Madison-Kipp's request, which is not the same as a denial. (CNA PFOF # 57; U.S. Fire PFOF # 8.) This is particularly true in the context of an insured-insurer relationship, where the insurer bears the burden of communicating clearly with the insured. *Towne Realty, Inc. v. Zurich Ins. Co.*, 201 Wis. 2d 260, 268, 548 N.W.2d 64 (1996).

The Insurers acknowledge that they failed to communicate with Madison-Kipp regarding Madison-Kipp's 2003 Notice. (CNA PFOF # 57; U.S. Fire PFOF # 8.) Having abdicated their duty to communicate with Madison-Kipp by failing to respond to

Madison-Kipp's notice for eight years, they cannot now seek to benefit from their breach of their duty by relying on the statute of limitations.

C. Alternatively, and at a Minimum, the Insurers Have a Continuing Duty to Defend and Indemnify and Madison-Kipp is Entitled to its Defense and Indemnification Costs During the Limitations Period.

To the extent the Court rejects the above positions, Madison-Kipp is still entitled to recover defense and indemnification costs because of the continuing nature of the Insurers' duties to defend and indemnify.

Wisconsin law recognizes that when a party has a continuing duty to perform an obligation, a new claim accrues for each breach of that obligation. This is true even in the context of insurance. *See Noonan v. Northwestern Mut. Life Ins. Co.*, 2004 WI App 154, ¶ 32, 276 Wis. 2d 33, 687 N.W.2d 254. In *Noonan,* the plaintiffs sued Northwestern Mutual Life Insurance Company ("NML") for, among other things, breach of an insurance policy related to unilateral changes that NML allegedly made to the way it distributed surplus profit to annuity policy holders. *See Noonan*, 276 Wis. 2d 33, ¶ 1. NML argued that the statute of limitations barred any claim the plaintiffs had for breach of the policy because any breach occurred when NML first made the unilateral change at issue, which was more than six years prior to the filing of the plaintiffs' complaint. *Id.*, ¶ 31. The *Noonan* Court rejected NML's argument, holding that under Wisconsin's continuing violation rule, "if the promisor has a continuing duty to perform, generally a new claim accrues for each separate breach. The injured party may assert a claim for damages from the date of the first breach within the period of limitation." *Id.*, ¶ 32. Thus, the plaintiffs in *Noonan* were allowed to pursue claims for

breach of contract based on damages that occurred within the six year limitations period. *Id*.

Similarly, in *Jensen v. Janesville Sand & Gravel Co.*, 141 Wis. 2d 521, 415 N.W.2d 559 (Ct. App. 1984), relied upon in *Noonan*, the Wisconsin Court of Appeals applied the continuing violation doctrine to lifetime pension payments. In *Jensen*, plaintiff retired in 1970 and his employer agreed to pay him a lifetime annual pension. *Jensen*, 141 Wis. 2d at 525. The employer made pension payments until 1974 but, due to financial troubles, ceased payments after 1975. *Id*. When the employer returned to profitability, plaintiff demanded the company resume pension payments. *Id*. In 1983, plaintiff filed a breach of contract claim for the employer's failure to make pension payments after 1975. *Id*. at 527.

The employer argued that the six-year statute of limitations barred the plaintiff's claim because the breach occurred in 1976, when plaintiff did not receive a pension payment, and plaintiff filed suit more than six years later in 1983. *Id*. at 526. The court rejected the argument, holding that the plaintiff had a "continuing right" to the pension payments. *Id*. at 527. As a result, the statute of limitations ran each time an installment was due under the lifetime pension agreement. *Id*. at 527–529. Therefore, the plaintiff was allowed to recover for the company's breaches, *i.e.*, missed payments, which fell within the six-year statutory period preceding the lawsuit. *Id*. at 533.

The Wisconsin Court of Appeals has also recognized that the statute of limitations runs from separate breaches of a continuing duty in a dispute over a covenant not to compete. In *Segall v. Hurwitz*, 114 Wis. 2d 471, 339 N.W.2d 333 (Ct.

App. 1983), the plaintiff sued two defendants for violating a covenant not to compete. *Segall*, 114 Wis. 2d at 475. The trial court held that because the plaintiff knew of the alleged breaches more than six years prior to filing the lawsuit, the six-year statute of limitations barred plaintiff's claim. *Id*. at 476. The court of appeals reversed. *Id*. The covenant not to compete imposed a continuing duty of performance on the defendants. *Id*. at 491. As such, a new claim accrued for each separate breach of the continuing duty not to compete. *Id*. The court concluded that the statute of limitations did not bar plaintiff's claims related to breaching the continuing duty not to compete that fell within the six-year statutory period preceding the lawsuit. *Id*. at 491–92.

Cases from other jurisdictions are instructive in the insurance context and, specifically, where environmental cleanup costs were at issue. For example, in *Paul Holt Drilling, Inc. v. Paul Holt*, 664 F.2d 252 (10th Cir. 1981), the insured was sued by a third party for allegedly damaging an oil well while performing drilling services. *Paul Holt*, 664 F.2d at 253. The insured tendered its defense and indemnity to its insurer, Liberty Mutual. *Id*. Liberty Mutual expressly denied any duty to defend or indemnify its insured. *Id*. The insured then defended the underlying lawsuit, and eventually sued Liberty Mutual for breach of its duty to defend. *Id*. Liberty Mutual argued that the statute of limitations barred the insured's breach of contract claim because more than five years had passed from the time Liberty Mutual denied the insured's tender of defense, and the time the insured filed its lawsuit against Liberty Mutual. *Id*. at 255.

Although the *Paul Holt* Court held that the statute of limitations for the insured's action began to run when Liberty Mutual first denied its duty to defend,[9] the Court nonetheless declined to rule that the statute of limitations barred the insured's entire claim. *Id*. Instead, the court held that the duty to defend is a continuing duty and that "the insurer's continued refusal to defend the insureds constitute[s] a series of breaches of its contractual obligations. As the limitations period runs with each breach, the insureds are only precluded from recovering those litigation expenses incurred prior to the statutory period . . . ." *Id*. at 256.

Other courts have taken a similar approach regarding the duty to indemnify. In *State v. Speonk Fuel, Inc.*, 307 A.D.2d 59 (N.Y. App. Div. 2003), plaintiff sought indemnification for payments made to clean up contamination from a leaking fuel storage tank. *Id.* at 60. There, plaintiff made some of those cleanup payments more than six years (which was the applicable statute of limitations) prior to filing its suit to be indemnified for those costs. *Id*. at 61. The issue before the court was "when the cause of action for indemnification accrues and when the limitations period begins to run where [Plaintiff] made payments over an extended period of years, some of which expenditures occurred more than six years before plaintiff commenced this action." *Id*. The court held that the indemnification claim accrued and the statute of limitations began to run from each discrete cleanup payment the plaintiff made. *Id*. at 62–63.

[9] Again, the Insurers first responded to Madison-Kipp's tender of defense and indemnity in 2011—eight years after Madison-Kipp sent it. (CNA PFOF # 57; U.S. Fire PFOF # 8.)

Therefore, the plaintiff was entitled to indemnification for the payments made during the six-year statutory period preceding the lawsuit. *Id*.

The reasoning and conclusions in *Paul Holt* and *Speonk Fuel* are consistent with Wisconsin law as articulated in *Noonan*, *Jensen*, and *Segall*. Where there is a continuing duty, there are also continuing breaches which allow for the recovery of damages within the statute of limitations period. Madison-Kipp has been incurring costs related to the DNR Action from 1994 through the present. The Insurers were obligated to cover each loss pursuant to their duties to defend and indemnify. The Insurers did not cover any of Madison Kipp's losses, including Madison Kipp's losses from six years prior to the suit. (CNA PFOF # 56.) Each time the Insurers failed to cover Madison-Kipp's loss, the Insurer's breached their duties. Under the alternative *Paul Holt* analysis, the Insurers are liable to Madison Kipp for each time they failed to cover Madison-Kipp's losses during the six-year limitations period preceding this lawsuit.

D. The Statute of Limitations Could Not Have Expired with Respect to U.S. Fire's and Columbia's Excess Policies Because U.S. Fire and Columbia Have Failed to Show That the Limits of the Underlying Policies Have Been Exhausted.

Even if the Court were to reject all of Madison-Kipp's arguments above regarding when the statute of limitations begins to run on its claims for defense and indemnity relating to the DNR Action, the Court should still deny the Insurers' motion for summary judgment with respect to the excess policies. Columbia issued four excess polices to Madison-Kipp for policy years spanning from 1/1/80 through 1/1/84. (CNA PFOF # 28–31.) Each of these policies is excess of an underlying policy with policy

limits of $100,000. (CNA PFOF # 32 (*e.g.*, Dkt. 150-2 at 5).) U.S. Fire issued two excess policies to Madison-Kipp, with policy periods of 1/1/84 through 1/1/85, and 1/1/85 through 1/1/86. (U.S. Fire PFOF # 1, 2). Each of these policies is excess of an underlying policy with limits of $500,000.00. (U.S. Fire PFOF # 21– 23 (Dkt. #158-4 at 2).)

The evidence on summary judgment shows that Columbia and U.S. Fire denied any obligation to defend or indemnify Madison-Kipp because the limits of the policies underlying the excess policies had not been exhausted. (Dkt. #158-4 at 2; Dkt. # 165-6 at 1.) As a result, the statute of limitations on Madison-Kipp's DNR claim could not have begun to run against U.S. Fire and Columbia in 2003. *Eaton Hydraulics, Inc. v. Continental Casualty Co.*, 132 Cal. App. 4th 966, 975 (Cal. Ct. App. 2005) (holding that statute of limitations did not run on a claim against excess insurer because underlying insurance had not been exhausted and excess insurer's defense obligations had not been triggered); 2 Allan D. Windt, *Insurance Claims and Disputes*, § 9.1 at 9-5 (5th ed 2007) ("If the policy is an excess policy, the insured also has the burden of proving that the loss exceeds the primary coverage").[10] This is another example of where an insured *may* file a claim for declaratory relief, but is not *required* to file such a claim. U.S. Fire and Columbia cannot claim that Madison-Kipp was obligated to sue U.S. Fire or Columbia even before they were obligated to defend and indemnify Madison-Kipp. As a result,

[10] As the court has already observed, it is entirely appropriate in a declaratory judgment action to determine whether an excess carrier will be liable to the extent the underlying policies are exhausted.

the statute of limitations does not bar Madison-Kipp's claims regarding the excess policies.

II. EVEN IF THE STATUTE OF LIMITATIONS BARS MADISON-KIPP'S CROSS-CLAIMS BASED ON THE DNR ACTION, THE INSURERS MUST PAY THE SAME INVESTIGATION AND REMEDIATION COSTS TO MADISON-KIPP BASED ON PLAINTIFFS' RCRA AND PROPERTY DAMAGE CLAIMS.

As noted above, the Insurers do not argue that statute of limitations bars Madison-Kipp's claims regarding Plaintiffs' RCRA and Property Damages Claims—and for good reason. Assuming *arguendo* that Madison-Kipp's DNR claim is somehow time-barred, the Insurers must still reimburse Madison-Kipp for investigation and remediation costs that stem from Plaintiffs' RCRA and Property Damage Claims. Multiple claims can arise from a single series of transactions and the viability of a given claim is not affected by the inability to pursue a time-barred claim arising from the same series of events. *See, e.g.*, *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶¶38–39, 249 Wis. 2d 623, 638 N.W.2d 575 (finding that the running of a one-year statute of limitation on a breach of contract claim did not preclude the plaintiff from recovering the same damages on a different claim).

In *Jones*, the insureds submitted a claim to their property insurer, Secura, for damage to their residence. *Jones*, 249 Wis. 2d 623, ¶ 5. Secura denied the claim, stating that the damage was the result of an ongoing situation, and therefore not covered. *Id*. More than a year after Secura's denial, the insureds filed claims for breach of contract and bad faith against Secura. *Id*., ¶ 6. Secura successfully argued that the one-year statute of limitations applicable to claims on a property policy barred the breach of

contract claim. *Id*. Secura then convinced the circuit court to dismiss the insureds' bad faith claims as well, arguing that the insureds could not use a bad faith claim to recover the same damages as their breach of contract claim which had already been dismissed on statute of limitation grounds. *Id*., ¶ 8.

But the Wisconsin Supreme Court reversed the circuit court, holding that the insureds were not barred from recovering lost-use-of-property and lost-business damages on their bad faith claim just because the statute of limitations would have precluded them from recovering those same damages pursuant to a breach of contract claim. *Id*., ¶ 39; *accord In re Cendant Corp. Sec. Litig*., 166 F. Supp. 2d 1, 12 (D. N.J. 2001) ("It is obvious that a plaintiff could recover similar types of damages under contract and tort theories" and noting that "it is not uncommon for two different causes of action to provide the same recovery"); *Taylor v. State Farm Fire and Casualty Co.*, 981 P.2d 1253 (Okla. 1999) (upholding a trial court's decision to allow a jury to award bad faith damages and damages which flowed from the "insurer's bad faith breach" despite the breach of contract claim being barred by the statute of limitation); *Speer v. Brown*, 26 Cal. App. 2d 283, 292 (Cal. App. 1893) ("Two or more causes of action may arise out of the same transaction with different statutes of limitation and although one may be barred the other may be good.") (citations omitted).

Here, Madison-Kipp seeks defense and indemnification from the Insurers on two different claims for which there are overlapping damages. (Dkt. # 24 at 5, 7–9.) Nothing in Wisconsin law would prevent Madison-Kipp from recovering defense and indemnity costs for the Plaintiffs' RCRA and Property Damage Claims in this case

merely because some of the damages overlap with a claim that (assuming the Court rejects Madison-Kipp's arguments set forth in this brief) is barred by the statute of limitations.

III. THE POLLUTION EXCLUSION IN CONTINENTAL'S POLICY DOES NOT BAR COVERAGE.

Continental claims that the pollution exclusion in its 1986–87 policy bars coverage under that policy.[11] There are at least two problems with Continental's argument. First, it ignores the limited scope of its pollution exclusion, which does not apply to personal injury coverage. And second, it ignores that the Plaintiffs' RCRA and Property Damage Claims fall within the personal injury coverage of its policy.

In regards to the breadth of Continental's 1986–87 pollution exclusion, there is a conflict in the Wisconsin Courts of Appeals regarding whether a pollution exclusion applies to all claims arising out of environmental contamination even where the exclusion itself only mentions bodily injury and property damage. *Compare Production Stamping Corp. v. Maryland Cas. Co.*, 199 Wis. 2d 322, 330–31, 544 N.W.2d 584 (Ct. App. 1996) *with Robert E. Lee & Assoc., Inc. v. Peters*, 206 Wis. 2d 509, 526 n.8, 557 N.W.2d 457 (Ct. App. 1996). There is also a conflict in the Wisconsin Court of Appeals regarding whether claims arising out of environmental contamination can give rise to personal injury coverage under a CGL policy. *Compare City of Edgerton v. General Cas. Co.,* 172 Wis. 2d 518, 549–50, 493 N.W.2d 518 (Ct. App. 1992), reversed on other grounds by *City of Edgerton v. General Cas. Co.,* 184 Wis. 2d 750, 517 N.W.2d 463 (1994), overruled by

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[11] Continental calls its exclusion an "absolute" pollution exclusion, but the exclusion itself does not contain the word absolute. (Dkt. # 165-1 at 21.) Continental's motion is limited to its 1986–87 policy. (Dkt. # 154 at 18.)

Johnson Controls v. Employers Ins. of Wausau, 264 Wis.2d 60, *with Robert E. Lee,* 206 Wis.2d at 524.

Given the conflict between the Wisconsin Court of Appeals' decisions, it is the role of this Court to predict how Wisconsin's Supreme Court would decide the issue. *See Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 637 (7th Cir. 2002). The Seventh Circuit, however, has already predicted how the Wisconsin Supreme Court would decide both of the issues in question here. In *Pipefitters Welfare Educ. Fund v. Westchester Fire ins. Co.*, 976 F.2d 1037, 1039–42 (7th Cir. 1992) the Seventh Circuit held that a pollution exclusion did not exclude coverage for personal injury claims arising out of environmental contamination when the exclusion itself (like Continental's exclusion here) did not mention personal injury coverage. And in both *Scottish Guaranty Ins. Co. v. Dwyer*, 19 F.3d 307, 308 (7th Cir. 1994), and *Pipefitters,* 976 F.2d at 1039–42,[12] the Seventh Circuit held that claims arising out of environmental contamination did fall within the coverage provided by a personal injury provision. Under the controlling law, Continental's pollution exclusion does not bar coverage.

IV. COLUMBIA MISINTERPRETS THE "MAINTENANCE OF UNDERLYING INSURANCE" CONDITION IN ITS POLICY.

[12] Continental states in a footnote that *Scottish Guaranty* is inconsistent with *Production Stamping* and *Robert E. Lee*. (Dkt. # 154 at 25.) Continental does not mention that *Scottish Guarantee* is entirely consistent with *City of Edgerton.*

Columbia argues that the standard "Maintenance of Underlying Insurance" condition in the form excess policy it issued to Madison-Kipp somehow precludes Madison-Kipp from accessing that policy here.[13] This standard condition provides:

> Maintenance of Underlying Insurance
>
> Coverage A: The insured agrees that the policies listed in the schedule of underlying insurance and renewals and replacements thereof not more restrictive thereof shall be maintained without alteration of terms or conditions in full effect during the currency of this policy except for any reduction or exhaustion of the aggregate limits of liability in the **underlying insurance** provided such reduction or exhaustion is solely the result of injury or destruction occurring during this policy period, and not before.
>
> Failure of the insured to comply with this condition shall not invalidate this policy, but, in the event of such failure, the company shall only be liable under Coverage A and only to the same extent as if the insured had complied with this condition.

(CNA PFOF # 34.)

This condition imposed two obligations upon Madison-Kipp. First, it required that Madison-Kipp maintain the underlying policies (a/k/a primary policies) identified in the referenced "schedule." That is, Madison-Kipp could not allow these policies to lapse. Second, Madison-Kipp could not alter the terms of these underlying policies during the "currency" of Columbia's excess policy. The condition expressly contemplates that the "aggregate limits of liability" in the underlying policies could be

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[13] Insurance policies are either "manuscript" or "form." *See* Mathew Bender & Co., Inc., 2-16 Drug Product Liability §16.02(1)(a). "Manuscript" policies, which are exceedingly uncommon, are negotiated and developed from scratch. *Id.* These one-off policies address unique and highly specialized risks. *Id.* "Form" policies, on the other hand, are preprinted and use standardized terms and conditions often developed by the Insurance Services Office (http://www.iso.com/), an industry-wide policy drafting and rate-making organization. *Id.* Courts treat such form policies as contracts of adhesion. *Id.; see also Wis. Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶53, 290 Wis. 2d 514, 714 N.W.2d 155.

reduced or exhausted by claims for "injury or destruction" so long as the "injury or destruction" occurred during the policy period of Columbia's excess policy. Injury or destruction that occurred solely prior to the commencement of Columbia's excess policy, however, could not be used to reduce or exhaust the "aggregate limits of liability" in the underlying primary policies.

According to Columbia, if Madison-Kipp allocates its damages in this case to the underlying policies on an "all sums" basis, it must be denied access to the excess policies by operation of the "Maintenance of Underlying Insurance" condition. Columbia appears to be saying that its "Maintenance of Underlying Insurance" condition is the functional equivalent of an excess policy provision that limits its obligation to pay only a pro-rata share of damages within its policy period. The Wisconsin Supreme Court rejected such arguments in *Plastics Engineering Co. v. Liberty Mutual Ins. Co.,* 2009 WI 13, 315 Wis.2d 556, 759 N.W.2d 613, and held that an insurer has no right to limit its exposure to a pro-rata allocation of damages unless its insurance policy expressly contains a pro-rata allocation clause. *Plastics Engineering*, 315 Wis.2d 556, ¶ 56. Columbia's policies here do not even contain the words "pro rata". Moreover, Columbia's "Maintenance of Underlying Insurance" provision is not an express pro rata allocation clause that *Plastics Engineering* requires to avoid an all sums allocation. (M-K PFOF # 12.)

Columbia's argument misconstrues the purpose, intent, and plain language of the "Maintenance of Underlying Insurance" condition. This Court should reject

Columbia's attempt to circumvent the continuous trigger theory and all sums allocation method, both of which are well-established principles of Wisconsin law.

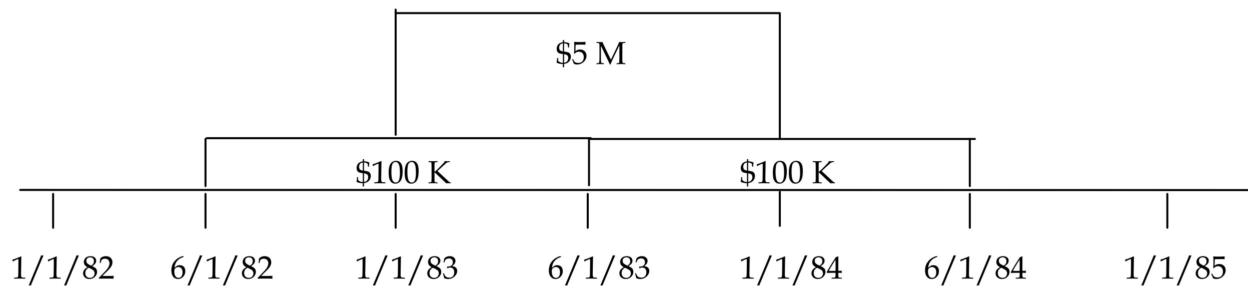
A. The "Maintenance of Underlying Insurance" Condition is Inapplicable to the Present Facts.

At the outset, it is important to recognize that the fact pattern that the "Maintenance of Underlying Insurance" condition is intended to address is not present here. Maintenance of underlying insurance conditions like that found in Columbia's excess policy are designed to protect an excess insurer from exhaustion of underlying limits based on discrete injuries (in contrast to the continuous injury as alleged in this case) that occur prior to the excess policy period, but within the policy period of the underlying policy. *See CBS Inc. v. Continental Cas. Co.*, 753 F. Supp. 525, 528 (S.D.N.Y. 1991).

CBS illustrates the problem that can arise when the policy period of an excess policy does not run concurrently with the policy period of the underlying policy. In *CBS,* the underlying policy had a 13-month policy period, and the excess policy had a one-month policy period. *CBS*, 753 F. Supp. at 527-28. Only the last month of the primary policy period overlapped with the excess policy period. *Id.* The policyholder, *CBS*, eventually tendered a claim to its excess insurer, Continental, and argued that the underlying policy had been properly exhausted by prior claims. *Id*. at 528. Continental denied coverage, however, because the underlying policy had been exhausted by claims that occurred within the underlying policy period, but not within the Continental policy

period. *Id*. The Continental policy had not yet been triggered because there had been no exhaustion of the underlying limits as required by Continental's policy. *Id*.

To further illustrate the holding in *CBS,* assume that an excess policy of $5 million has a policy period of 01/01/83 through 01/01/84, and that one of the underlying policies of $100,000 has a policy period of 06/01/82 through 06/01/83. The policies would stack up as follows:



If the underlying policy was exhausted as a result of a building collapse that took place on 10/01/82, the incident would clearly be within the policy period of the primary policy, but clearly not within the policy period of the umbrella policy. If there was a crane collapse on 04/01/83 for which the insured sought coverage, the underlying policy would not be considered exhausted for purposes of triggering the excess limits, but instead the 04/01/83 incident would need to be used to exhaust the primary policy. It is for precisely this reason that when a careful risk management consultant reviews the policies of her client, one of the first things she does is try to make sure that the underlying policy periods run concurrently with any excess or umbrella policy periods. (M-K PFOF # 13.)

But the facts at issue in *CBS,* along with the hypothetical fact pattern above, are far different from the facts at issue here. Here, the policy periods of the underlying policies are concurrent with the policy period in the Columbia excess policies. As a result, there is no issue of an underlying policy being exhausted by injury or destruction that takes place within an underlying policy period, but not within the policy period of a Columbia excess policy. The holding and reasoning in *CBS* simply do not apply.

Moreover, the property damage here did not occur at a specific, discrete time, but instead occurred continuously over the course of multiple, successive policy periods. From the standpoint of a reasonable insured, Columbia's Maintenance of Underlying Insurance condition was never intended to deny exhaustion of the limits of an underlying policy merely because the injury or destruction at issue spans more than one policy period. (M-K PFOF # 14.) It is telling that Columbia failed to cite a single case in which a Court applied Columbia's Maintenance of Underlying Insurance condition in the manner that Columbia advances here.

B. Columbia Remains Responsible For That Portion Of Any Loss Occurring During Its Policy Period That Is Greater Than The "Aggregate Limits of Liability" In The Underlying Primary Policies.

Even if Columbia's interpretation of the "Maintenance of Underlying Insurance" condition were somehow correct, the condition does not get Columbia off the hook altogether. The "Maintenance of Underlying Insurance Condition" itself plainly provides that "[f]ailure of the insured to comply with this [Maintenance of Underlying Insurance] condition shall not invalidate this policy, but, in the event of such failure, ***the company shall only be liable under Coverage A and only to the same extent as if the***

insured had complied with this condition." (CNA PFOF # 34 (emphasis added).) Likewise, the Coverage section of Columbia's excess policy reiterates and reinforces that "[w]ith respect to Coverage A, if the applicable limit of liability of the underlying insurance is less than as stated in the schedule of underlying insurance because the aggregate limits of liability of the underlying insurance have been reduced or exhausted, ***this policy*** [i.e. Columbia's excess policy] ***becomes excess of such reduced limit of liability provided such reduction or exhaustion is solely the result of injury or destruction occurring during this policy period*** [i.e. Columbia's excess policy period]***, and not before.***" (Dkt. # 150, ¶ 2, Ex. 1 at 17.)

This quoted language from Columbia's excess policy makes Columbia responsible for that portion of any loss occurring during its policy period that is greater than the "aggregate limits of liability" in the underlying primary policies ***regardless*** of how the "aggregate limits of liability" in the underling primary policies are reduced or exhausted. *See* 2 Alan D. Windt, *Insurance Claims and Disputes*, § 6:45 (5th ed. 2007) ("In the event an insured breaches its obligation under an excess policy to maintain primary insurance, the excess insurer's duty to indemnify should encompass those damages in excess of what the primary limits were supposed to have been.").

C. Columbia's Interpretation of its "Maintenance of Underlying Insurance" Condition Misconstrues the Very Nature of Wisconsin's All Sums Allocation Law.

Contrary to Columbia's argument regarding the "Maintenance of Underlying Insurance" condition, Madison-Kipp does not have to time-stamp and segregate the continuous injuries at issue here. Wisconsin law makes clear that these continuing

injuries "occurred," as a matter of law, within the policy periods of both Columbia's excess policies and the underlying primary policies. Indeed, under Wisconsin law, the continuing injuries here are treated as if they all had in fact occurred entirely within the policy periods of Columbia's excess policies and the underlying primary policies. And because of the continuing nature of these injuries, the primary policies underlying Columbia's excess policies may be exhausted by the payment of losses arising from *any* injury occurring during that continuum.

The underlying primary policies to which the Columbia policies follow form (*see* footnote 7, *supra*) define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." (M-K PFOF # 11.) In environmental contamination cases (such as this one), the harm or injury that triggers liability often occurs over several policy periods.

To deal with the question of which insurance policies are triggered in these environmental contamination cases, courts have developed four different theories. *Society Ins. v. Town of Franklin*, 2000 WI App 35, ¶ 8, 233 Wis. 2d 207, 607 N.W.2d 342. These include the exposure, injury-in-fact, manifestation, and continuous trigger theories. *Id.*

> The "exposure" theory fixes the date of injury as the date on which the injury-producing agent first contacted the body or the date on which pollution began. The "manifestation" theory holds that the compensable injury does not occur until it manifests itself in the form of a diagnosable disease or ascertainable property damage. The "continuous trigger" theory, also known as the "triple trigger" theory, provides that the injury occurs continuously from exposure until manifestation. Finally, the

> "injury-in-fact" theory allows the finder of fact to place the injury at any point in time that the effects of exposure resulted in actual and compensable injury.

Id.

The Wisconsin Court of Appeals in *Society Insurance* adopted the continuous trigger theory as the law of this State in cases involving environmental contamination. The Court held:

> [A]ll policies in effect while the occurrence was ongoing are triggered. The policy language mandates this result. In each policy, [the insurer] agreed to pay sums the insured becomes legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence. The policy's definition of occurrence includes 'continuous or repeated exposure to conditions, which results in . . . property damage.' [This language is identical to the Continental and Columbia policies]. The policy defines property damage as physical injury to property that occurs during the policy period. Here, while there was only one ongoing occurrence, there was continual, recurring damage to property. Contamination took place during each policy period over the years 1972 to 1987 because during that time pollutants were seeping into the ground. *Thus, each policy is available.*

Id., ¶ 9.

Moreover, once a continuous injury touches a policy period, all policy limits from that policy are available to the insured as well as all sums from any other policies also touched by the injury. *See Plastics Engineering Co. v. Liberty Mutual Insurance Co.*, 2009 WI 13, ¶¶ 52, 60, 315 Wis. 2d 556, 759 N.W.2d 613. This is known as an "all sums" allocation method. *Plastics Engineering,* Wis. 2d 556, ¶ 52. The "all sums" method applies whether the policy is primary or excess. *See id.* Under the "all sums" method, the insured does not have to assign liability on a pro rata basis amongst the implicated insurance policies. *Id.*

Madison-Kipp is entitled to allocate its damages based on the "all sums" method. In *Plastics Engineering*, the Court held that the underlying policy's language, which is identical to the underlying policies' language here (M-K PFOF # 8, 11), mandated the "all sums" method. *Id.*, ¶ 55. The underlying policy required the insurer to pay "all sums" caused by an "occurrence." *Id.*, ¶ 54. The definition of occurrence included "continuous or repeated exposure." *Id.*, ¶ 56. This definition of occurrence "contemplated a long-lasting occurrence that could give rise to bodily injury over an extended period of time." *Id.* Taken as a whole, the insurer was obligated to pay "all sums" resulting from injuries that happen over an extended period of time. *Id.* Because the underlying policies contain the same language as the policy at issue in *Plastics Engineering*, Columbia cannot escape the "all sums" method.

In *Plastics Engineering*, the insurer, Liberty Mutual, argued, among other things, that the Court should reject all sums allocation because it would allow the insured to recover for bodily injury that occurred outside Liberty Mutual's policy period. *Id.*, ¶ 57. Liberty Mutual argued that its definition of bodily injury restricted coverage to bodily injury that occurred during its policy period and not before, and that adoption of the all sums allocation method would violate that restriction. *Id.*, ¶¶ 57–58. But the Court specifically rejected Liberty Mutual's argument, noting that bodily injury during the policy period is what triggers a policy, and that once a policy is triggered by injury within the policy period, the insurer is responsible for "all sums" that arise out of the injury, up to the policy's limits. *Id.*

Applying the holdings of *Plastics Engineering* and *Society Insurance* to the

allegations in this matter; to wit: that injury from contamination has continued from a time before and through the 1980's to the present day (CNA PFOF # 73, 74), demonstrates that Columbia cannot require Madison-Kipp to exhaust its underlying polices with damages time stamped to any particular policy period. The policy language in question requires that the underlying policy exhaustion be "solely the result of injury or destruction occurring during this policy period, and not before." And that is exactly what will happen here when Madison-Kipp applies the continuous trigger theory and all sums allocation method to its damages as the law permits. It is "injury or destruction during the underlying policy period" (here, of a continuing nature) that will trigger the underlying policy, such that the underlying insurer is responsible for all sums "that arise out of the [property damage or personal injury], up to that policy's limits." *Plastics Engineering,* 315 Wis. 2d 556, ¶ 58. And since the underlying policies here run concurrently with Columbia's policies, any injury or destruction that is sufficient to trigger an underlying policy will, necessarily, also fall directly within a Columbia excess policy period. Quite simply, there is no way for the underlying policies here to be exhausted except by injury or destruction that occurs during Columbia's policy periods.

CONCLUSION

For the foregoing reasons, the Court should deny the Insurers' Motion for Summary Judgment.

Dated this 19th day of March, 2013.

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