

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.)

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)

Case No.: 11-cv-724
Hon. Barbara B. Crabb, Judge

Hon. Stephen L. Crocker,
Magistrate Judge

INSURANCE COMPANY, and JOHN DOE)
INSURANCE COMPANIES 1-20,)
Third-Party Defendants.)

**MADISON-KIPP CORPORATION'S SUPPLEMENTAL
PROPOSED FINDINGS OF FACT**

Pursuant to Federal Rule of Civil Procedure 56 and this Court's standing order on summary judgment motions, Madison-Kipp Corporation ("Madison-Kipp") submits the following supplemental proposed findings of fact in support of its response to the motions for summary judgment filed by Continental Casualty Company ("Continental"), Columbia Casualty Company ("Columbia") and United States Fire Insurance Company ("U.S. Fire") (collectively "Insurers").

1. After requiring Madison-Kipp to investigate and remediate alleged environmental contamination on and near its property at 201 Waubesa Street, Madison, WI (the "Site"), the Wisconsin Department of Natural Resources ("DNR") assigned the project Bureau of Remediation and Redevelopment Tracking System ("BRRTS") number 02-13-001569 ("DNR Action"). (Declaration of Christopher E. Nyenhuis ("Nyenhuis Decl."), ¶ 3, Ex. A).

2. Madison-Kipp has continuously investigated and remediated the Site pursuant to the DNR Action since 1994 through the present day. (Declaration of David A. Crass ("Crass Decl."), ¶ 5, Ex. C at 22-27).

3. The DNR Action remains open. (Nyenhuis Decl. ¶ 3, Ex. A).

4. On 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 investigation and remediation actions Madison-Kipp has taken and still intends to take with respect to the DNR Action. (Crass Decl., ¶ 5, Ex. C).

5. The U.S. Fire excess policies state:

The Company agrees to pay on behalf of the insured the ultimate net loss in excess of the retained limit hereinafter stated, which the insured may sustain by reason of the liability imposed upon the insured by law, or assumed by the insured under contract, for:

- (a) Bodily Injury Liability,
- (b) Personal Injury Liability,
- (c) Property Damage Liability, or
- (d) Advertising Liability,

arising out of an occurrence.

With respect to any occurrence covered by the terms and conditions of this policy, but not covered, as warranted, by the underlying policies listed in Schedule A hereof or not covered by any other underlying insurance collectible by the insured, the company shall:

- (a) defend any suit against the insured alleging such injury or destruction and seeking damages on account thereof

(Nyenhuis Decl., ¶¶ 4-6, Exs. B and C; Dkt. # 158, p. 2, ¶¶ 3-4).

6. Counsel for Madison-Kipp sent U.S. Fire notice of Madison-Kipp's claim regarding U.S. Fire's duties to defend and indemnify Madison-Kipp from the DNR Action letter via certified mail on August 1, 2003. The certified mail receipt indicates U.S. Fire received the letter on August 5, 2003. (Crass Decl., ¶ 3, Ex. A; *id.*, ¶ 4, Ex. B).

7. Madison-Kipp has been forced to defend itself and pay investigation and remediation costs at the DNR's insistence, which includes conducting numerous soil, groundwater, and vapor samplings as well as various remedial actions. (Crass Decl., ¶ 5, Ex. C. at 22-27.)

8. The Continental primary 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 damage

(Stipulation between Continental and Madison-Kipp Regarding Primary Policies ("Stipulation"), ¶ 2, Exs. 1-6).

9. The primary policy underlying the 1/1/80 -1/1/81 Columbia policy is Kemper policy # OYM 398803. This 1/1/80-1/1/81 Kemper primary policy contains language substantially identical to the language quoted above from the Continental primary policies. (CNA PFOF # 35) (Declaration of Arlene Petersen ("Petersen Decl."), ¶¶ 10-11, 14, 15, Ex. C, at 4).

10. The DNR has not issued Madison-Kipp a closure letter for the DNR Action. As such, there has been no resolution of the DNR Action and monetary liability, if any, has not been finally fixed. (See Nyenhuis Decl., ¶ 3, Ex. A).

11. The Continental primary policies and 1/1/80-1/1/81 Kemper primary policies all 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.” (Stipulation, ¶ 2, Exs. 1-6; Petersen Decl., ¶ 15, Ex. E, p. 2).

12. Columbia’s “Maintenance of Underlying Insurance” provision is not an express pro rata allocation clause. (Petersen Decl., ¶ 8).

13. 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 so as to avoid the exhaustion problem that can arise when the policy periods do not line up. (Petersen Decl., ¶ 8).

14. 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. (Petersen Decl., ¶ 8).

