2021 WL 5548103
Only the Westlaw citation is currently available.
United States District Court, W.D. Michigan, Southern Division.

WOLVERINE WORLD WIDE, INC., Plaintiff,
v.
The AMERICAN INSURANCE COMPANY, et al, Defendants.

Case No. 1:19-cv-00010-JTN-ESC
|
Signed 06/15/2021

Attorneys and Law Firms

Anthony C. Sallah, Charles M. Denton, Erika P. Weiss, Barnes & Thornburg LLP, Gand Rapids, MI, Kevin Bernard Dreher, Barnes & Thornburg LLP, Chicago, IL, for Plaintiff.

Bradford S. Moyer, Plunkett Cooney, Grand Rapids, MI, Sara D. Corbello, Dykema Gossett PLLC, Stephanie M. Brochert, Plunkett Cooney, Bloomfield Hills, MI, William Gerald McElroy, Jr., Zelle LLP, Framingham, MA, for Defendant American Insurance Company, The, Century Indemnity Company.

Jason T. Newman, Anthony F. Caffrey, III, Cardelli Lanfear PC , Royal Oak, MI, Wayne S. Karbal, Karbal Cohen Economou Silk & Dunne, LLC, Chicago, IL, William Gerald McElroy, Jr., Zelle LLP, Framingham, MA, for Defendant First State Insurance Company.

Richard McDermott, Brent J. Graber, Jonathan R. Puskar, Seth M. Jaffe, Hinkhouse Williams Walsh LLP, Chicago, IL, for Defendant SPARTA Insurance Company, North River Insurance Company.

Drew Louis Block, Olivia M. Paglia, Patrick E. Winters, Charles W. Browning, Plunkett Cooney, Bloomfield Hills, MI, William Gerald McElroy, Jr., Zelle LLP, Framingham, MA, for Defendant The Travelers Indemnity Company.

David W. Centner, Clark Hill PLC, Grand Rapids, MI, Kristin Ann Heres, William Gerald McElroy, Jr., Zelle LLP, Framingham, MA, for Defendant Employers Insurance Company of Wausau.

Bradley K. Glazier, Carole D. Bos, Bos & Glazier PLC, Grand Rapids, MI, Brian C. Coffey, Cohn Baughman & Martin, Chicago, IL, Daniel F. Gourash, Seeley Savidge Ebert & Gourash Co. LPA, Cleveland, OH, Robert D. Anderle, Seeley, Savidge & Ebert Co., LPA, Westlake, OH, William Gerald McElroy, Jr., Zelle LLP, Framingham, MA, for Defendant Pacific Employers Insurance Company, Federal Insurance Company.

OPINION GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING CERTAIN DEFENDANTS' BREACH OF DEFENSE DUTIES

Janet T. Neff, Magistrate Judge Sally J. Berens

***1** Pending before the Special Master is Wolverine World Wide, Inc.'s ("Wolverine") Motion for Partial Summary Judgment Regarding Certain Defendants' Breaches of Their Defense Duties (ECF No. 497 and 498).[1]

This Special Master has reviewed Wolverine's Brief in Support of Motion and appended exhibits. Certain Defendants were granted permission to supplement the summary judgment record, ECF No. 749, and the Special Master has reviewed and considered the supplementary materials as well as Certain Defendants' Response in Opposition to the pending motion, ECF No. 611, with appended exhibits and Wolverine's Reply Brief, ECF No. 749. Oral argument was heard on February 25, 2021.

After thorough review of the briefs and extensive exhibits, and having heard oral argument, for the reasons stated herein the Special Master GRANTS the Motion.

I. Background of Case

Wolverine has been named as a defendant in hundreds of individual tort actions in Kent County Circuit Court, three consolidated class actions in U.S. District Court, for the Western District of Michigan, an individual landowner action ("Boulder Creek") and two governmental enforcement actions (the "Underlying Actions"[2]) alleging injuries and damages arising out of Wolverine's historic operations and disposal of wastes from its former tannery located in Rockford, Michigan.

On November 2, 2017, Wolverine first provided notice to all its Insurers, including Certain Defendants, of imminent lawsuits alleging bodily injury, property damage and personal injuries and requested "defense and indemnity" in connection with the discovery of including per-and polyfluoroalkyl substances ("PFAS") in groundwater near Wolverine sites. (ECF No. 557-1, Ex. C-1) The 3M Company manufactured Scotchgard containing PFAS chemicals and sold it to Wolverine who incorporated it into its manufactured products beginning in 1958 until production using PFAS was phased out in 2002, when an updated formula was used. (ECF No. 498, PageID.11808 and 11812-11815).

As the Underlying Actions continued to be filed, Wolverine continued to notify its insurers, including Certain Defendants, and continued to forward to them copies of the filed complaints in the Underlying Actions, specifically, on January 8, 2018, February 13, March 6, April 10, June 20, October 12, December 6 and 7, 2018 (notice of the *Henry* class action). (ECF Nos. 557-2 to 557-9, Exs. C2-C9) This action was filed on December 14, 2018. On December 20, 2018 notice of the filing of Wolverine's Third-Party Complaint against the 3M Company was given and together with notice that Wolverine was retaining Quinn Emanuel Urquhart & Sullivan, LLP and Hollingsworth LLP law firms. During 2019, Wolverine sent 5 notice letters of additionally filed individual actions. (ECF No. Ex. G, B11- B16) In 2020, Wolverine sent 8 notice letters of additional lawsuits. (ECF Nos. B17-B24)

***2** Wolverine alleges that Wausau, Century, Travelers, and Liberty[3] (collectively "Insurers") breached their defense duties pursuant to certain commercial general liability ("CGL") insurance policies which provided primary coverage from February 28, 1971, to January 1, 1986.

The Insurers to date have not filed appearances in any of the Underlying Actions but rather have "participated" in the defense of these actions, each with a full reservation of rights.

Wolverine moves for partial summary judgment on two issues: 1) whether Insurers have an ongoing duty to defend Wolverine in the Underlying Actions; and 2) whether Insurers have breached their duty to defend Wolverine in the Underlying Actions and are therefore jointly and severally liable for all of Wolverine's reasonable past and future defense costs incurred in those Actions.

II. Standard of Review

Fed. R. Civ. P. 56 provides that "[s]ummary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." A party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses...." *Id.* In determining whether there is a question of material fact, a court must view the evidence "in the light most favorable to the opposing party." *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861 (2014).

If the moving party carries the burden of showing that there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by admissible evidence that there is a genuine issue of material fact for trial and cannot rest on its pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325 (1986); *George v. Youngstown State Univ.*, 966 F.3d 446, 458 (6th Cir. 2020). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986).

III. Duty to Defend

The parties agree that Michigan law governs this action. Under Michigan law, the duty to defend is broader than the duty to indemnify and requires comparison of the underlying complaints with the language of the insurance policy. *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980). A duty to defend arises in instances in which coverage is even arguable, though the claim may be groundless or frivolous. *Polkow v. Citizens Insurance Co of America*, 438 Mich. 175, 178 (1991). *Upjohn Co. v. Aetna Cas. & Sur. Co.*, 768 F.Supp. 1186, 1195 (W.D. Mich. 1990). If coverage

is not possible, then the insurer is not obligated to offer a defense. *Auto Owners Co. v. City of Clare*, 446 Mich. 1, 15-16 (1994). Where the allegations potentially state a claim that arguably is covered by the policy, the insurer must defend. *Upjohn Co. v. Aetna Cas. & Sur. Co.768 F. Supp. (W.D. Mich. 1990).*

***3** The resolution of whether the sudden and accidental exclusion applies requires an examination of whether the discharge of pollutants was sudden and accidental. *Polkow v. Citizens Ins. Co. of America*, 438 Mich. 174, 476 N.W.2d 382 (1991). "Fairness requires that there be a duty to defend at least until there is sufficient factual development to determine what caused the pollution so that a determination can be made regarding whether the discharge was sudden and accidental." *Id.* at 384. Because the insurer's duty to defend is expansive and the rules favor the insured, Michigan law requires that the insurer must bear the burden of showing that a lawsuit tendered for coverage does not trigger the insurer's duty to defend. *Cincinnati Ins. Co. v. Zen Design Grp., Ltd.*, 329 F.3d 546, 553 (6th Cir. 2003) (applying Michigan law). *Century Sur. Co. v. Charron*, 230 Mich. App. 79, 83 (1998) ("[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured."). Under Michigan law, an insurer is required to defend the entirety of a lawsuit unless and until a court determines that the release of a pollutant is intentional, and the exclusion conclusively applies. *See Am. Bumper & Mfg. Co.*, 207 Mich. App. at 67 (Mich. 1996) ("the insurer has a duty to defend until there is at least sufficient factual development to determine what caused the pollution so that a determination can be made regarding whether the discharge was sudden and accidental").

This burden is especially heavy when the insurer relies on an exclusion to deny coverage because "[e]xclusionary clauses are ... strictly construed against the insurer." *Fire Ins. Exch. v. Diehl*, 545 N.W.2d 602, 606 (Mich. 1996), overruled on other grounds; see also *Travelers Prop. Cas. Co. of Am. v. Peaker Servs., Inc.*, 855 N.W.2d 523, 527 (Mich. Ct. App. 2014). Until that time, the allegations must be seen as 'arguably' within the comprehensive liability policy, resulting in a duty to defend." *Id.* at 180. Here, the Underlying Actions remain pending, and the factual record remains open. The underlying Actions involve multiple sites and hundreds of complaints, which are silent, uncertain, and or unclear as to whether any of the alleged polluting events were "sudden or accidental" or "unexpected or unintended." This case is distinguishable from those cited by Insurers such as *Auto Owners Insur. Co. v. City of Clare*, 521 N.W. 2d 480 (Mich. 1991). In *City of Clare* there was a thorough record that included stipulated facts.

A. ***Allegations in the Underlying Actions***

The Underlying Actions assert bodily injury, property damage, and/or personal injury, such as mental suffering, anxiety, stress, anguish, and decreased property values, and include counts for private and public nuisance, and nuisance per se, negligence and negligence per se and battery allegedly arising out of Wolverine's historic use of various chemicals, including PFAS, beginning in 1958. More particularly, the *MDEQ Action* alleges that Wolverine is responsible for PFAS at several sites where PFAS is alleged to have been found in surface water and groundwater in concentrations exceeding state limits. (ECF No. 510-2, Ex. B, PageID.12915-12936.) The *MDEQ Action* alleges that Wolverine used and disposed of 3M's Scotchgard containing PFAS beginning in 1958 and continuing at least through the 1970's. *Id*.

In 2018, the *U.S. EPA Action* was filed, alleging property damage potentially occurring between 1971 and 1986. Id. at Ex. B283. The class actions (*Zimmerman, Johns,* and *Henry)* were consolidated, and each allege property damage, bodily injury, personal injury in the form of mental harm, including severe emotional distress, and trespass potentially occurring between 1971 and 1986. *Zimmerman Complaint*, (ECF No. 510-3, Ex. B2-B4, PageID.12939-12992) *Johns Class Action Complaint,* (ECF No. 510-4, Ex B3, PageID.12995-13029), and *Henry Class Action Complaint,* (ECF No. 510-5, Ex B4, PageID.13030-13090). Similarly, the *Boulder Creek Action* alleges property damage, personal injury and substantial interference with Boulder Creek's use and enjoyment of its property arising out of Wolverine's historic operations beginning "in or around 1958." (ECF No. 556-3, Ex. B282, at PageID.44600-PageID.44626).

B. ***Insurance Policy Language***

***4** The policies contain substantially similar language as follows:

> "(a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof...shall be given by or for the Insured to the Company or any of its authorized agents as soon as practicable.

> (b) If the claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative."

ECF No. 504-3, at PageID. 11964-11965; ECF No. 508-3, at PageID.12531; ECF No. 508-4, at PageID.12567.

> "... will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... bodily injury or ... property damage ... 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, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient ...

Lorden Decl., ECF No. 499, Exs. A3, A8, A12; Upton Decl., Exs. A1-A2, A4-A7, A9-A11, A13-A16.

The policies define "property damage" as both "physical injury to or destruction of tangible property," and "loss of use of tangible property which has not been physically injured...provided such loss of use is caused by an occurrence during the policy period." *Id.* "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom. *Id.* "Occurrence" is defined 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. *Id.*

Each policy includes a separate insuring agreement for personal injury, which is defined as "any injury to the feelings.... of a natural person, including mental anguish," (Liberty Policies) (*Id.* at Exs. A1-A2 and A16); "any injury to the feelings...of a natural person, including mental anguish" and "any injury to intangible property as a result of wrongful entry or eviction," (Wausau Policies) (*Id.* at Exs. A3-A6); and wrongful entry or eviction, or other invasion of the right of private occupancy if such offense is committed during the policy period... (INA and Travelers Policies) (*Id.* at Exs. A7-A15).

Upon comparing the language of the applicable insurance policies with the claims made in the Underlying Actions, it is clear that coverage is possible, notwithstanding the addition of a narrow pollution exclusion in the policies. Accordingly, the Special Master finds that as a matter of law, there is no genuine issue of a material fact and that a duty to defend has arisen with respect to the Underlying Actions and that duty is ongoing.

IV. Breach of Defense Duty

In determining whether there is a breach of the duty to defend, the Special Master will examine the factual timelines and arguments surrounding Wolverine's notice(s), and communication(s) with each Insurer and their responses. Wolverine's Insurer Correspondence Timeline is found at ECF No. 561-16, Ex. J and Responding Defendants Response to Wolverine's Exhibit J is at ECF No. 611-2.

A. Wolverine's Timeline and Argument

***5** Wolverine paints a picture of the Insurers abandoning it after giving the Insurers multiple notices starting on November 2, 2017 (ECF No. 557-1, PageID.44704 Ex C1) when it was facing an enormous liability because of the looming PFAS litigation after receiving the Notice of Intent letter from The Varnum Law Firm. Notice letters were sent to all Insurers again on January 8, 2018 (after 43 individual actions and the *Zimmerman Class Action* were filed), February 13, 2018 (50 individual actions filed), February 13, 2018 (MDEQ and U.S. EPA UAO filed), March 6, 2018 (28 individual actions filed), April 10, 2018 (31 individual actions and the *Johns Class Action* were filed), June 20, 2018 (35 individual actions filed), and more letters throughout 2018 and thereafter as new cases were filed. (ECF No. 557-2-9, Exs. C2-C9). Defendants dispute Wolverine's characterization of the Insurer timeline and presented its own response to Wolverine's timeline. ECF No. 611-2.

On February 13, 2018, Wolverine provided notice of additional lawsuits, and by separate letter dated that same day, gave notice of two governmental actions. *Id.* at Exs. 4 and 5. In both letters, Wolverine did not ask that attorneys be appointed, instead advised the insurers that "Wolverine is currently working with its long-time attorneys, Warner Norcross & Judd, in actively defending the PFAS lawsuits". (ECF No. 557-2-9, Exs. C2-C9, ECF No. 615, Exhibit 10). Similar letters were sent on March 6, 2018, and April 10, 2018. *Id.* at Exs. 6-8.

At the time this opinion is written, none of the Insurers have filed an appearance on behalf of Wolverine in the Underlying Actions. Insurers contend they are participating in Wolverine's defense as this is what

Wolverine requested in the notice letters.

At the time this coverage action was filed on December 14, 2018, Century had agreed to participate in the defense of 12 of the 220 underlying lawsuits (ECF No. 498 Ex. O); Travelers had agreed to participate in the defense of 130 of the 220 lawsuits noticed; and Wausau had agreed to participate in the defense of the MDEQ action, the U.S. EPA UAO, the *Johns* and *Zimmerman class actions* and two of the individual Underlying Actions subject to a full reservation of all rights.

B. Century (INA) Timeline

Wolverine submits that Century acknowledged in a January 31, 2018, letter that Wolverine was requesting the company to defend and indemnify and in support points to language in this letter: "Notice of this matter indicates Wolverine's business records have identified the above-cited policies and alleged policies. To the extent that the Varnum Letter, Notice of Intent, and the circumstances described in the notice constitute a claim under the policies and alleged policies, Wolverine is requesting that the company defend and indemnify it in connection with this matter." (ECF No. 560-2 Ex. F1.) Century declined to take a coverage position, reserved all its rights, and is conducting a coverage review. *Id.* (ECF No. 557-2, Ex. C1 and ECF No. 560-2 Ex. F1)

Wolverine continued to apprise Century of the new filings with several more notice letters. Century responded to each with a reservation of rights letter, refusing to commit to any coverage position. (ECF No. 499, Lorden Decl., Exs. F11– F12; ECF No. 557-2-7, Exs. C2–C7, ECF No. 557-2, Ex. 2, ECF No. 557-3, Ex. 3, ECF No. 557-4, Ex. 4, ECF No. 557-5, Ex. 5, ECF No. 557-6, Ex. 6, ECF No. 557-7, Ex. 7).

On May 9, 2018 Century states in a letter "At this time, we do not have copies of the policies, and therefore, we are not in a position to either accept or deny coverage for any claim asserted under these policies." (ECF 560-3, Ex F2.)

On May 11, 2018, Wolverine wrote Century again requesting that Century provide its coverage position "so Wolverine can plan its defense strategy in the underlying cases accordingly." Century did not respond. (ECF No. 560-4, Ex. F3.)

In an email and letter on June 13, 2018, Wolverine again requested that Century share its coverage position. (ECF No. 560-5, Ex. F4.)

> ***6** "As you know, our firm serves as insurance coverage counsel for Wolverine World Wide, Inc. ("Wolverine"). On November 2, 2017, our office put The Insurance Company of North America ("INA") on notice of circumstances that may constitute an Occurrence, a Claim, and/or a Potential Claim by Wolverine relating to the existence of Perfluoroalkyl Substances ("PFAS") contamination in groundwater (the "Contamination"). On January 8, 2018, our office put INA on further notice of several Claims relating to the Contamination and requested defense and coverage under any and all general liability and/or excess policies Wolverine has with INA, including those listed in Exhibit B of that letter (the "Policies"). On February 13, 2018, March 6, 2018, and April 10, 2018, our office put INA on supplemental notice of several additional Claims ... We request that INA respond with its coverage regarding whether it will participate in the defense of the Claims by May 25, 2018, so Wolverine can plan its defense strategy in the underlying cases accordingly."
>
> "Please note that this letter is not a demand that INA take a position on the amount it may contribute to defense or indemnity, but merely a request that INA provide its position on whether it will participate in the defense. Wolverine anticipates holding an in-person meeting with all participating primary insurance carriers in June 2018 to answer questions regarding the Claims, address defense strategy and further discuss an interim cost sharing arrangement.
>
> (ECF No. 560-4, Ex. F3, PageID.45268)

On July 13, 2018, Century indicated that it would "participate" in Wolverine's defense and would clarify the conditions of its participation in a follow-up letter. (ECF No. 560-4, Ex. F5).

On July 26, 2018, Wolverine arranged a meeting with its primary carriers, held in Chicago. Representatives from Century, Liberty Mutual, Travelers and Wausau attended. Notes from that meeting reflect that Wolverine advised insurers that its stated goal of this meeting was "to work toward an interim cost share, establish process for info sharing and submittal of defense invoices." Wolverine informed defendants at this meeting that it had retained the Arnold and Porter law firm and planned to hire Quinn Emmanuel law firm as it needed more defense attorneys, that PFAS was an emerging area, and no Michigan attorneys were experienced in this. Wolverine further advised that Arnold & Porter was driving the defense of 300 lawsuits and was adept in environmental law and in

handling class actions. Wolverine states that after July of 2018, the defense strategy changed. (Coffey Affidavit, ECF No. 615, Ex. 1).

On October 17, 2018, Century sent a follow up letter stating that "Subject to a reservation of rights, Century agrees to defend 'Wolverine in the regulatory investigation initiated by the Michigan Department of Environmental Quality and Kent County Health Department. Century will also defend Wolverine on certain claims listed below. Century denies any duty to defend on the other claims submitted by Wolverine based on allegations in the complaints. Century agreed to defend Wolverine in 11 of the then 230 individual Underlying Actions and in the MDEQ action. Century also stated that "[t]o the extent Wolverine is already being defended, [Century] will coordinate with the insurers who are defending regarding a cost sharing arrangement." (ECF No. 560-7 Ex. F6).

On December 14, 2018, Wolverine sent heavily redacted defense cost invoices to Century and a separate letter requesting that Century amend its coverage position. (ECF No. 560-8, Ex. 7, and ECF No. 560-9 Ex. 8). At the time this coverage action was filed, Century had agreed to participate in the defense of the *MDEQ Action*, and 11 individual Underlying Actions.

On April 4, 2019, Century updated its coverage position regarding the Underlying Actions, stating:

> "...that while they are completely reserving all their rights, they will "participate with the other relevant parties in defending Wolverine" in the *MDEQ Action, U.S. EPA Action*, *Boulder Creek Action*, the three *Class Actions* and all individual actions except four cases.
>
> ***7** ...reserve(ed) the right to participate in the selection and management of counsel to represent Wolverine." INA further says Century has a long history of handling environmental claims filed in multi-party litigation similar to the present litigation. It is Century's practice to hire highly experienced counsel who we are confident will obtain the best possible results for our policyholders. (ECF No. 560-10, Ex. F9.)

In a July 30, 2019, letter from Century counsel states:

> "Century has years of experience defending its policyholders against claims Wolverine faces and has identified leading, national counsel with substantial experience litigating groundwater cases, that can defend Wolverine against the underlying claims for rates in the range of $400-500/hour (for the sr. litigating partner) (Coffey Affidavit, ECF No. 615, Ex. 8).

The Special Master notes that this offer was extended 17 months after the date that Century acknowledged Wolverine's initial notice letter on January 31, 2018, and seven months after this litigation commenced. At this point, all counsel defending Wolverine had been in place for many months.

Century argues that Wolverine had already retained counsel to defend it, did not want the Insurers to appoint attorneys, failed to request that the Insurers appoint attorneys, and argues that "These documents confirm that before Wolverine gave notice to any of its insurers, it had assembled a team of in-house and outside attorneys, was 'currently vetting' additional outside counsel on its own and was controlling its own defense – even to the point of conducting 'confidential settlement discussions.' " (Coffey Decl., ECF No. 615, Ex. C8). Century points to information that was shared by counsel at Wolverine's Board of Directors meeting in November 2017.

The confidential settlement discussions disclosed to Wolverine's Board of Directors involved a potential lawsuit by Plainfield Township in 2017. To this Special Master's knowledge, Plainfield Township is not a party in the underlying actions, nor did a settlement result from those discussions. Thus, that argument is not relevant to this motion.

C. Travelers Timeline

After receiving Wolverine's November 2, 2017, letter to Insurers, Travelers responded on November 10, 2017, acknowledged the notice, and advised Wolverine "to act in a manner that best protects its interests," and "reserves all of its rights and defenses in these matters." (ECF No. 557-1, Ex. C1, ECF No. 558-1 Ex, D2). After the January 8 to April 10, 2018, notice letters were received, Travelers responded to each notice by again advising Wolverine "to continue to act in a manner that best protects its interest," meanwhile "reserving all of its rights and defenses in these matters." (ECF No. 558-2, Exs. D2-D8.) In a May 4, 2018, letter Wolverine requested that Travelers reach a coverage position. (ECF No. 558-7, Ex. D7.)

On May 25, 2018, and June 6, 2018, Travelers informed Wolverine that it will "participate in Wolverine's defense" of the *MDEQ Action. (ECF Nos.558-9, 558-10 and 558-12).*

On June 8, 2018, Travelers informed Wolverine that it

will participate in the defense of the *Zimmerman Class Action* tendered to Travelers on January 8, 2018, and the *Johns Class Action* tendered to Travelers on April 10, 2018 and 124 of the individual Underlying Actions, and stated that Travelers would "contribute to the reasonable and necessary defense-related counsel fees and expenses incurred by Wolverine." (ECF No. 558-9 to 558-12, Exs. D9-D12.)

***8** On July 25, 2018, Travelers advised Wolverine that it was only responsible for 5.5% of Wolverine's defense costs in the Underlying Actions and calculated this based on waste disposal starting in 1908 and continuing to date for a total of 110 years. Travelers pointed out that the six years of Travelers' policies provided coverage for 5.5% of the time Wolverine disposed of waste products. In the following months, Travelers agreed to "participate" in Wolverine's defense, and to do so in 130 of the then 220 Underlying Actions tendered at that time. (Garrison Decl., ECF No. 558-13, Exs. D9-13.)

On December 14, 2018, Wolverine provided Travelers with heavily redacted defense cost invoices. Wolverine sent a separate letter to Travelers asking it to reconsider its coverage positions. (Garrison Decl., ECF No. 558, Exs. D14-D15).

At the time this coverage action was filed, on December 14, 2018, Travelers had agreed to participate in the defense of the *MDEQ* Action, *Zimmerman,* and *Johns Class Action* and 130 of the 220 individual Underlying Actions. (ECF No. 558-9, 12, 14, Exs. D9, D12, D14)

From December 2018 to June 2019, Travelers revised its coverage position for several of the Underlying Actions in a series of letters. By June 2019, Travelers had agreed to participate in in all of the Underlying Individual Actions except for four cases. (ECF Nos. 558-16-20, Exs. D16-D20 and ECF Nos. 559-1-6, Exs. D-21-D26.)

On March 25, 2020, Travelers offered payment in the amount of $1,797,659.35, approximately 3% of the amount incurred by Wolverine as of that date and subject to a full and complete reservation of rights including the right to recoup such payment in the event of a finding of non-coverage. (ECF558-27, Ex. D27.)

It should be noted that Wolverine did not begin producing, on a rolling basis, unredacted defense invoices until December of 2019, after this Court ordered it to do so. Wolverine explanation for this is that as Defendants refused to defend Wolverine in the Underlying Actions, there is no "common interest" between Wolverine and its Insurers and cites in support *U.S. Fire Ins. Co. v. City of Warren,* 2012 WL 2190747, *6 (E.D. Mich. June 14, 2012) which states "[the common interest] doctrine is based on the alliance of interests between an insured and its insurer, and because such an alliance of interests does not exist where coverage is disputed, this doctrine is not applicable, and this [sic] insured-attorney communications remain privileged with respect to the insurer, whereas here there remains a dispute as to coverage.". Id. at *6.Wolverine thus originally provided the Insurers with its defense costs invoices in redacted format and claimed attorney client privilege as the basis for its redactions. However, Wolverine did provide unredacted vendor invoices at the same time. (ECF No. 500, Upton Decl. Exs. D14 and D15).

D. Wausau Timeline

Wausau's timeline varies dependent on whether the Court grants Wausau's Objection to the Special Master's Opinion and Order Regarding Pre-Tender Defense Costs (ECF No. 1056). This Special Master previously found that all Insurers received notice of lawsuits invoking defense obligations on January 8, 2018, and Wausau was given notice through its parent company, Liberty Mutual on that date. Wausau objected to this part of the opinion (See Special Master's Opinion and Order Regarding Pre-Tender Defense Costs, ECF Nos. 1050 and 1053.), and contends it was not provided actual notice until Wausau received notice of the Underlying Actions on June 7, 2018 and Wausau responded promptly to that notice four days later, on June 11, 2018. Wausau responded to Wolverine's November 2, 2017, notice when a Nationwide representative indicated that they would forward Wolverine's notice letters to the environmental claim unit. (ECF No. 559-11, Ex. E4). In Wausau's initial undated letter from Mr. Harold Moore to Ms. Araya at Warner Norcross + Judd, Mr. Moore informed Ms. Araya that there was no coverage for 160 underlying cases (ECF No. 559-12, Ex. 5).

***9** On June 26, 2018, Mr. Moore informed Ms. Araya that Nationwide on behalf of Wausau, agreed to participate in the defense of the *MDEQ* Action, the *U.S. EPA UAO*, and the *Johns* and *Zimmerman* class actions subject to a "full reservation of all rights." (ECF No. 559-11, Ex. E4). Mr. Moore stated in a letter on July 12, 2018

> "Further, Wausau will not pay in excess of $275/hr. for attorney time because competent and qualified counsel can be retained in your area for this rate or below. Enclosed please find a copy of the applicable billing guidelines. Again, please have counsel forward a

> defense budget to our attention. Should you require assistance retaining defense counsel for this matter, please contact the undersigned immediately."
>
> ... Nationwide was still processing its position letter with respect to the individual suits and that this had taken longer than expected due to the number of suits involved. [ECF No. 559-11, Ex. E4] Nationwide's review suggests all but two of the individual suits fail to aver property damage or bodily injury during the Wausau policies. As such, we will not agree to defend or indemnify those matters.... individual position letters would be sent with respect to the *Witte* and *Kemperman* suits which Wausau agreed to defend. [Id.]
>
> (ECF No. 559-8, Ex. 1) (coverage letter regarding the *MDEQ* Action),
>
> (ECF No. 559-9, Ex. 2) (coverage letter regarding the *EPA UAO*), and
>
> (ECF No. 559-10, Ex. 3) (coverage letter regarding the *Johns* and *Zimmerman* class actions)].

From July to November 2018 Wausau responded with a series of reservation of rights letters in response to further notice letters from Wolverine, indicating that it was "willing to participate" in certain Underlying Actions, subject to several conditions, and declining to defend or indemnify Wolverine in other Underlying Actions. (ECF No. 559-9-20, Exs. E2-E13.) Wausau points out that it also requested information from Wolverine that Wolverine ignored. (ECF No. 559-11, Ex. E4).

On December 14, 2018, Wolverine sent two letters to Wausau. The first letter included the redacted defense cost invoices and the second letter urged Wausau to modify its coverage position regarding certain Underlying Actions and demanded that Wausau "agree to provide Wolverine with a full and complete defense in connection with each of the Underlying Actions." (ECF No. 559-23, Ex. E16 PageID.45197-45198 and 559-22, Ex. E15 PageID.45190-45194). Wausau points out that Wolverine fails to note that the position taken by Mr. Dreher in the letter differed significantly from earlier letters from Kristina Araya on behalf of Wolverine requesting that the insurers participate in the defense of the Underlying Environmental Matters.

This coverage action was filed on December 14, 2018, and at that time Wausau had agreed to participate in the defense of the *MDEQ Action, U.S. EPA Action, Johns* and *Zimmerman Class Actions* and two of the individual Underlying Actions.

From January to May 2019 Wausau declined to change its coverage position or to pay the invoices. Wausau continued to respond to Wolverine's requests for a defense in the Underlying Actions by either indicating that it was "willing to participate" or "respectfully declining to defend or indemnify Wolverine." Wausau asserts that Wolverine continued to ignore the offer to assist in retaining defense counsel (ECF No. 559, Exs. E16-E23.) and that Wolverine continued to ignore the billing guidelines and did not pass them on to defense counsel retained by Wolverine. (McElroy Dec., ECF No. 614, Ex. G, Deposition of Bradley Lorden, 240:2-241:2, 242:1-4, 243:15-25, 252:15-253:10, 253:19-254:11). Wausau states that Wolverine fails to note that Wausau agreed to participate in the defense of all of the Underlying Environmental Matters with the exception of individual suits where the plaintiffs alleged that they purchased their properties or first resided in their properties after the expiration of the Subject Wausau Policies. (ECF. No. 559-24, Ex. E-17, ECF. No. 559-25, Ex. E-18, ECF. No. 559-26, Ex. E-19, ECF No. 559-29, Ex. E-22, ECF. No. 559-30, Ex. E-23).

***10** On August 14, 2019, Wausau offered to pay one million dollars toward Wolverine's defense subject to a full and complete reservation of rights. (ECF No. 559-31, Ex. E24.) Wausau contends that Wolverine ignored Nationwide's offer to pay for nine months and that Wausau's offer to pay one million dollars was made before receiving any unredacted invoices for defense costs. On June 23, 2020, Wolverine and Nationwide on behalf of Wausau entered into an Interim Agreement for Payment of Certain Defense Costs pursuant to which Nationwide made the one-million-dollar payment for defense costs with all parties reserving their respective rights. (McElroy Dec., ECF No. 614, Ex. 11)

On January 15, 2020, Wausau changed its coverage position by agreeing to participate in the defense of approximately 254 of the Underlying Actions, some of which it initially denied coverage entirely. (ECF No. 559-32, Ex. E25.)

Ultimately, Wolverine requested a defense and indemnity on November 2, 2017, which was acknowledged by letter from INA and Travelers.

E. Analysis of Breach of Defense Duties

Michigan law recognizes that insurers must fulfill their defense duties promptly, at the outset of any lawsuit. *Aetna Cas. & Sur. Co. v. Dow Chem. Co.,* 44 F. Supp. 2d

847, 854 (E.D. Mich. 1997). The insurer's duty to defend arises "when the underlying claim is brought against the insured." *Id.* at 854. The duty to defend constitutes the provision of a service, not the payment of money. *Ray Industries, Inc. v. Liberty Mutual Insurance Co.*, 974 F.2d 754,770 (6th Cir. 1992). *Aetna Cas. & Sur. Co., v. Dow Chem.* 933 F. Supp. 675, 679 (E.D. Mich. 1997) holds that an insurer's duty to defend arises "when the underlying claim is brought against the insured."

In a federal action based upon diversity jurisdiction, like this one, " ... the court must apply the law of the state's highest court." *Central Michigan University's Board of Trustees v. Employer's Reinsurance Group*, 117 F. Supp. 2d 627, 632 (E.D. MI, 2000), citing *Erie R.R. v. Tompkins*, 304 U.S. 64; 58 S.C. 817; 82 L.Ed. 1188 (1938). Where Michigan's highest court has not yet decided an issue, the " ... federal court must ascertain the state law from 'all relevant data,' " which includes a "state's intermediate appellate court decisions ... as well as the state supreme court's relevant *dicta,* 'restatements of law, law review commentaries and the 'majority rule' among other states." *Id (*citations omitted).

The Michigan Supreme Court has not expressly addressed whether there is a specific amount of time within which an insurer must respond to its insured's request for a defense and whether its failure to do so results in a breach of the insurer's duty to defend. The Court in *Central Michigan University's Board of Trustees, supra,* approvingly cited *Meirthew v. Last*, 376 Mich. 33; 135 N.W. 2d 353 (1965) for the proposition that an insurer "...must give timely notice to its insured" if the "...insurer contests its obligation to provide coverage...." 117 F. Supp. 2d at 632. The insurer may then either "...undertake the defense with notice to the insured that it is reserving the right to challenge its liability on the policy" or "repudiate (its) liability (on the policy), refuse to defend and take its chances..." that it can show a lack of coverage. 117 F. Supp. 2d at 633 and cases cited therein.

The Court in *Meirthew, supra,* found that the insurer therein had failed to timely repudiate its coverage after it had received notice of the lawsuit against its insured in October of 1959, defended the action as described below and in February of 1962 asserted that a policy exclusion precluded its obligation to indemnify the insured while the lawsuit was pending. 373 Mich. at 36-37. The *Meirthew* Court said that an insurer "...must act promptly and openly" to avoid being estopped from denying its liability on the policy. 373 Mich. at 38.

***11** Likewise, the Court of Appeals in *Moore v. First Security Casualty Co.*, 224 Mich. App. 370, 379; 568 N.W. 2d 841 (1997), recited the general rule that an insurer must respond to its insured's inquiries "...in a timely manner...." Although *Moore, supra,* arose within a factual context unlike the instant one, its statement that "...the inaction of an insurer must continue over a sufficient period to be significant," citing *9 Couch Insurance (2d Ed.)*, § 37B:45, p. 56, is relevant to the instant Insurers' delayed responses to Wolverine's various communications described above.

Unlike the insurer in *Meirthew, supra*, 373 Mich. at 36, which retained legal counsel to defend the insured in the underlying lawsuit who then participated in the usual series of events associated with defending a party in a civil action (answered the complaint, took and attended discovery depositions, prepared the pretrial statement, engaged in settlement negotiations, tried the lawsuit), the instant Insurers failed to retain counsel, timely or otherwise, to defend Wolverine in any of the Underlying Actions.

Although Michigan case law, including the cases cited above, does not identify what period of delay constitutes a breach of defense duties, other jurisdictions have addressed this specifically. In *Yowell v. Seneca Specialty Ins. Co.*, 117 F. Supp. 3d 904, 907–08 (E.D. Tex. 2015) the court held that an insurer's 140-day delay in acknowledging a duty to defend constituted a policy breach. Other jurisdictions are in similar accord.

In *Travelers Indemnity Company of Connecticut and St. Paul Fire and Marine Insurance Company v. Centex Homes* and *Centex Real Estate Corporation,* Case No. 11-CV-03638-SC 2015 WL 5836947 (N.D. Ca. 2015), Travelers' response took 131 and 135 days, respectively, during which time Centex hired its own counsel and incurred legal expenses. The issue in that case was whether the delay constituted a breach of Travelers' duty to defend such that Travelers lost its right to control Centex's defense. "However, [t]his should not be understood literally to mean the instant the insurer receives the complaint filed against its insured and before any investigation is made. Rather, it probably means the point in time a liability insurer is required to act on the insured's behalf" (e.g., when an answer to the complaint is due), citing to *Croskey, et al.*, *Cal. Prac. Guide Ins. Lit. Ch. 7B-C* (Rutter 2013). At that point, the insurer has an immediate duty to defend until it can show conclusively that the damages sought in the third party lawsuit are not covered under the policy." See *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 295 (1993). In *Centex,* the court held that Travelers breached its duty to defend by failing to provide Centex with a defense at least 30 days after the complaints were filed in the Acupan and Conner

actions. Upon breaching its duty to defend, Travelers also lost its right to control Centex's defense. See *J.R. Mktg., L.L.C.*, 216 Cal. App. at 1457.

In *Marathon Ashland Pipe Line LLC v. Maryland Casualty Co.*, 243 F.3d 1232, 1243 (10th Cir. 2001) the 10th Circuit held that an "insurer's four-month delay in responding to [its] insured's notice of claim breached the insurer's duty and was not cured by its untimely offer to defend under a reservation of rights." The State of Wyoming has a statute which proscribes that an insurer must act within 45 days and decide whether it will defend or indemnify an insured. *Wyo.Stat.Ann.* § 26–15–124. The *Marathon* court held that when an insurer fails to decide a claim within Wyoming's 45–day statutory time limit, "its failure to do so constitute[s] a refusal to pay," even if the insurer later attempts to cure that breach. *Smith v. Equitable Life Assurance Soc'y,* 614 F.2d 720, 722 (10th Cir.1980). Since *Marathon* notified *Maryland Casualty* of the litigation on April 15, 1997, Maryland Casualty's response was due to Marathon by June 1. That limit was far exceeded by *Maryland Casualty,* who did not respond until 125 days had passed. *Marathon Ashland Pipe Line LLC v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001, applying Wyoming law).

***12** Insurers argue they were participating in Wolverine's defense, which is what Wolverine asked them to do in its notice letters. However, that position ignores the initial notice letter of November 2, 2017, which was incorporated into the January 8, 2018 notice letter: "This is a follow up to the November 2, 2017 letter." (ECF No. 611, Ex. 3 at pg. 5.) Clearly, Wolverine initially requested that the Insurers provide it a defense and indemnity for the forthcoming Underlying Actions in its November letter. Century specifically acknowledged this fact in its first letter to Wolverine. The fact that Wolverine's attorney from WNJ, in later notice letters, requested to know whether the Insurers will participate in the defense does not excuse an Insurer's duty to defend under the terms in the insurance policy which states: "... 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, even if any of the allegations of the suit are groundless, false, or fraudulent..." (Lorden Decl., ECF No. 499, Exs. A3, A8, A12; Upton Decl., Exs. A1-A2, A4-A7, A9-A11, A13-A16.)

"[T]he terms of an insurance contract are interpreted according to the definitions set forth therein or, if none are provided, are given a meaning in accordance with their common usage." *Cavalier Mfg. Co. v. Employers Ins. of Wausau*, 211 Mich. App. 330, 334, 535 N.W.2d 583 (1995) (citing *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 664-65, 443 N.W.2d 734 (1989)). As the word defend is not defined in the insurance policies, and the parties have failed to cite a case that defines the word defend, one must look at the ordinary common usage of the word. Westlaw's Black's Legal Dictionary defines it as:

> **defend** *.vb.* **1.** To do something to protect someone or something from attack. **2.**To use arguments to protect someone or something from criticism or to prove that something is right. **3.**To do something to stop something from being taken away or to make it possible for something to continue. **4.** To deny, contest, or oppose (an allegation or claim) <the corporation vigorously defended against the shareholder's lawsuit>. **5.** To represent (someone) as an attorney; to act as legal counsel for someone who has been sued or prosecuted <the accused retained a well-known lawyer to defend him>. (DEFEND, Black's Law Dictionary (11th ed. 2019).

Clearly, Defendants did not defend Wolverine as the dictionary defines the word defend.

What does the phrase "participate in defense" mean? Again, the phrase is neither defined in the insurance policies nor does this phrase even appear in any of the insurance policies. The parties have not pointed to a case that defines what it means to "participate in the defense." The word participate is defined as 'to take part in or become involved in an activity.' (Cambridge Online Dictionary). The policies provide that the insurers have the right and duty to defend the insured, not participate in its defense.

Although Defendants made overtures regarding identifying attorneys that could defend Wolverine, these efforts were belated, six months after the cases were filed by Wausau, and seventeen months for Century (INA). The *Henry Class Action* was not filed until December 4, 2018, such that the Insurers certainly had an opportunity to hire attorneys for that action if that was their intent. New cases were filed throughout 2018 and 2019. The policies state that the insurer has a right and duty to defend any suit even if groundless or false. This Special

Master believes in this case, defense means hiring an attorney for Wolverine, have that attorney file an appearance for Wolverine and arrange to execute a substitution of attorneys as necessary. It appears that the Insurers did not want to hire counsel for Wolverine. Instead, Insurers decided to let the cases play out while Wolverine paid its own defense costs, then argue that they are only responsible for their pro rata share of defense costs based on their own interpretation of what that pro rata share is.

Wausau argues they informed Wolverine they would not pay more than $275/hour on July 10, 2018. Wausau's instruction came after the *MDEQ Action, U.S. EPA Action*, two *Class Actions* and approximately 200 individual Underlying Actions had been filed and were being defended on Wolverine's dime. Century says it had identified national experienced attorneys who would defend Wolverine for rates of $400-500/hour. This offer was extended on July 30, 2019, 17 months after the date that Century acknowledged Wolverine's initial notice letter on January 31, 2018, which Century acknowledged was a request by Wolverine for a defense and indemnity. (Coffey Affidavit, ECF No. 615, Ex. 8). By that time, all counsel defending Wolverine had been in place for months. None of the Insurers suggested that they would hire attorneys and substitute them for the attorneys Wolverine previously engaged. Travelers continued to advise Wolverine to continue to act in its best interests for many months and that is how Wolverine appears to have acted. This Special Master notes that after this coverage action was initiated, all three primary Insurers changed their coverage position substantially.

***13** Under Michigan law an Insurer with a duty to defend must defend its Insured within a reasonable time after receiving notice. *Moore, supra, 224 Mich App at 378*. It is not reasonable for an Insurer to wait six or twelve months to defend its Insured. Wolverine was left little choice but to handle the defense of the underlying actions on its own and acted in a manner to protect its best interests. *City Poultry & Egg Co. v. Hawkeye Cas. Co., 298 N.W. 114, 115-16 (Mich. 1941)*. In *Aetna Cas. & Sur. Co. v. Dow Chem. Co., 44 F. Supp. 2d 847* (E.D. Mich. 1997) the court held that an insurer's duty to defend arises "when the underlying claim is brought against the insurer". Id. at 854. This Special Master finds that there was a duty to defend and that duty arose on January 8, 2018 when Defendants were first notified of the actions that were filed. Consistent with Michigan caselaw and the ordinary definition of the word defend, there is no genuine issue of any material fact that Defendants have failed to defend Wolverine and are in breach of the insurance policies.

To date, the Insurers have reimbursed Wolverine approximately $9,770,000 million dollars of defense costs out of submitted invoices totaling approximately eighty million dollars, subject to a full reservation of rights.

F. Damages for Breach of an Insurance Contract, Allocation, Pro Rata Time on the Risk, and Collateral Estoppel Issues

While Wolverine asks this Court to find Defendants jointly and severally liable for all of Wolverine's reasonable past and future defense costs incurred, the Special Master notes that Defendants' opposition to Wolverine's motion includes the following issues:

1. Whether the pro rata, time on the risk method of allocation applies to claims and policies at issue;

2. Whether Wolverine is precluded by collateral estoppel from arguing that pro rata, time on the risk allocations does not apply;

3. Whether pro rata, time on the risk allocation percentage for defense costs is calculated by dividing the period of time that an insurer provided applicable coverage by the period of time during which property damage and/or bodily injury allegedly occurred; and

4. Whether the pro rata, time on the risk allocation percentage for indemnity costs is calculated by dividing the period of time that an insurer provided applicable coverage by the period of time during which property damage and/or bodily injury occurred in fact.

Defendants have also filed a separate Motion for Partial Summary Judgment on Allocation which addresses the same four issues. [ECF Nos. 503, 505 and 748 (Reply)]. The Special Master's opinion on that motion will address these issues in that opinion.

V. Conclusion and Order

For the reasons set forth above and considering the evidence in the light most favorable to the non-moving parties, the Special Master finds that the Defendants have an ongoing duty to defend Wolverine in the underlying matters. The Special Master further finds that there is no genuine issue of any material fact that Defendants have breached its duty to defend under its respective insurance

policy.

IT IS HEREBY ORDERED that the motion for partial summary judgment regarding certain defendants' breaches of their defense duties is GRANTED for the reasons set forth above.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 5548103

Footnotes

[1] Certain Defendants are defined as Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America ("INA"), ("Century"), Liberty Mutual Insurance Company ("Liberty Mutual"), The Travelers Indemnity Company ("Travelers") and Employers Insurance Company of Wausau ("Wausau").

[2] Underlying Actions are defined as: (1) multiple individual actions (estimated at 286 tort actions) filed in Kent County Circuit Court, consolidated as *In re Nylaan Litigation*, Case No. 17-10716-CZ (2) the *Beverley Zimmerman, et al. v. 3M Company*, et al. class action, (3) the *Megan Johns, et al. v. Wolverine* class action, (4) *Susan Henry v. Wolverine World Wide* class action, (4) *Michigan Department of Environmental Quality v. Wolverine World Wide* (5) the Unilateral Administrative Order served on Plaintiff by the US EPA; and (6) *Boulder Creek Development Co, LLC v. Wolverine action*. (ECF No. 498, PageID.11808, ECF No. 499, Lorden Decl.)

[3] Liberty Mutual was dismissed from this action by stipulated order after Plaintiff filed the present Motion. Liberty's policies provided coverage for several years before Wausau, Century, and Traveler's policies.

End of Document