IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

HAWKINS, ASH, BAPTIE & COMPANY LLP,
R. ROY CAMPBELL,
JUDITH FUCHSTEINER,
DAVID A. SCHLUETER,
LARRY E. VANGEN,
JACK E. WHITE,
JON S. DANFORTH,
GAYLAND H. WAUTIER,
CHARLES R. SCHINDHELM and
ROGER J. SORENSON,

OPINION AND
ORDER

00-C-0756-C

Plaintiffs,

v.

THE CHARTER OAK FIRE
INSURANCE CO., THE TRAVELERS
INDEMNITY COMPANY and
THE NORTH RIVER INSURANCE COMPANY,

Defendants.

- -

In this action for monetary and declaratory relief, plaintiffs Hawkins, Ash, Baptie & Company LLP, R. Roy Campbell, Judith Fuchsteiner, David A. Schlueter, Larry E. Vangen, Jack E. White, Jon S. Danforth, Gayland H. Wautier, Charles R. Schindhelm and Roger J. Sorenson contend that defendants The Charter Oak Fire Insurance Company, The Travelers

Indemnity Company and The North River Insurance Company breached their insurance contracts with plaintiffs by denying indemnification for payments made as the result of a judgment entered against them in a previous lawsuit. In the previous lawsuit, plaintiffs were found liable for infringing Management Computer Services' proprietary rights to use certain computer hardware and software.

In response to plaintiffs' complaint, defendant North River and defendants Charter Oak and Travelers filed motions to dismiss, after which plaintiffs filed an amended complaint. In response, defendant North River and defendants Charter Oak and Travelers moved to dismiss the amended complaint. Most recently, plaintiffs filed a second amended complaint, which constitutes the operative pleading. Defendants filed two motions to dismiss the second amended complaint, which are before the court. Defendant North River contends that the case against it should be dismissed because the complaint fails to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6) and because plaintiffs' claim for indemnification is barred by the statute of limitations. Defendants Charter Oak and Travelers contend that the case against them should be dismissed because the claim is barred by the statute of limitations. Because I find that plaintiffs' claims are barred by the statute of limitations, I will grant both motions to dismiss on this ground, without reaching the merits of the 12(b)(6) motion.

A motion to dismiss will be granted only if "it is clear that no relief could be granted

under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F. 3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). For the purpose of deciding this motion to dismiss, I accept as true the allegations in the second amended complaint.

ALLEGATIONS OF FACT

Plaintiff Hawkins, Ash, Baptie & Company LLP is a regional accounting firm located in La Crosse, Wisconsin, that provides accounting and consulting services. Individual plaintiffs R. Roy Campbell, Judith Fuchsteiner, David A. Schlueter, Larry E. Vangen, Jack E. White, Jon S. Danforth, Gayland H. Wautier, Charles R. Schindhelm and Roger J. Sorenson were partners in Hawkins, Ash at all times relevant to this action. All plaintiffs are insureds under liability insurance policies issued by defendants. Defendant The Charter Oak Fire Insurance Company of Hartford, Connecticut, issued plaintiffs an insurance policy providing general liability coverage that was in effect at all times relevant to this action. Defendant The Travelers Indemnity Company of Hartford, Connecticut, issued plaintiffs a catastrophe umbrella policy that increased the liability coverage provided by defendant Charter Oak and that was in effect at all times relevant to this action. (The relationship between defendants Charter Oak and Travelers is not clear from the complaint. For purposes of deciding this motion, I will assume that defendants Charter Oak and Travelers

are jointly liable to plaintiffs for the policy issued by defendant Charter Oak.) Defendant The North River Insurance Company of Morristown, New Jersey, issued plaintiffs a professional liability insurance policy that was in effect at all times relevant to this action.

In November 1986, Hawkins, Ash and several of its individual partners were sued in federal court by Management Computer Services, Inc., a vendor of computer hardware, software and services. In that suit, Management Computer alleged that plaintiffs had converted certain property belonging to Management Computer and had breached a contract. On December 1, 1986, plaintiffs tendered the lawsuit to defendant North River, which denied coverage and rejected the tender of defense on January 15, 1987. On December 2, 1986, plaintiffs tendered the lawsuit to defendants Charter Oak and Travelers, which denied coverage and refused to defend the suit on January 9, 1987. After defendants denied that their policies provided coverage to plaintiffs for Management Computer's claims, plaintiffs hired their own defense counsel. This court granted Hawkins, Ash's motion for summary judgment and dismissed the case.

Management Computer refiled the suit in state court, alleging the same and similar claims but omitting a Racketeer Influenced and Corrupt Organizations Act claim. Plaintiffs did not notify defendants of the state lawsuit because they relied on defendants' denial of coverage and rejection of the tender of the previous federal lawsuit that contained the same claims. On December 20, 1996, after protracted litigation, including a trial and several

appeals, the Supreme Court of Wisconsin confirmed the trial court's determination that plaintiffs were liable to Management Computer.

On July 9, 1997, the Supreme Court of Wisconsin confirmed the judgment against plaintiffs in the amount of $1,979,860 plus costs. Plaintiffs paid this amount to Management Computer. In December 1998, the Court of Appeals for Wisconsin determined that plaintiffs owed Management Computer $1,276,336 in interest and costs on the judgment entered against them. Plaintiffs paid this amount to Management Computer.

A. Facts Specific to Defendants Charter Oak and Travelers

Defendant Charter Oak issued plaintiffs an insurance policy in which the "personal injury and advertising injury liability coverage" section provides that defendant will:

> pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies, sustained by any person or organization and arising out of the conduct of the Named Insured's business, within the policy territory, and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such injury. . . .

The Charter Oak insurance policy provides that no action may be commenced against defendants Charter Oak or Travelers

> until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by

written agreement of the Insured, the claimant, and The Travelers.

> Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under these sections to the extent of the insurance afforded by these sections. . . .

This policy was in effect at the time Management Computer filed suit against plaintiffs in federal court.

B. Policies Issued by Defendant North River

Defendant North River issued plaintiffs a professional liability policy that states that

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages caused by acts, errors, or omissions in the Insured's performance of professional accounting services for others, provided that claim is first made against the Insured for said acts, errors, or omissions during the policy period and written notice of said claim is received by the Company during the policy period.

This policy was in effect at the time Management Computer filed suit against plaintiffs in federal court.

Defendant North River's policy includes a "no action" clause that provides:

> No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the Insured's obligation to pay shall have been finally determined either by judgement against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

The policy was amended to include the "Wisconsin Amendatory Endorsement,"

which replaces the standard "no action" clause. The endorsement states that

> No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all terms of the policy.
>
> Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the company of any of its obligations hereunder.

When Management Computer filed its federal lawsuit against plaintiffs, the policy issued by defendant North River provided $5,000,000 in liability coverage. When Management Computer filed suit in state court, a different policy had come into effect, providing only $1,000,000 in liability coverage.

OPINION

A. Statute of Limitations

Plaintiffs' claim for indemnification is governed by the statute of limitations set forth in Wis. Stat. § 893.43, which provides that actions on contracts "shall be commenced within 6 years after the cause of action accrues or be barred." Wis. Stat. § 631.83(2); see also Wis. Stat. § 893.43. A cause of action based on a contract accrues at the moment the contract is breached. See CLL Associates v. Arrowhead Pacific Corp., 174 Wis. 2d 604, 607, 497 N.W.2d 115, 117 (1993). In an insurance coverage dispute, the breach of contract occurs when the insurance company denies the insured's request for benefits. See Abraham v. General Casualty Co., 217 Wis. 2d 294, 312-13, 576 N.W.2d 46, 54 (1998).

Defendants Charter Oak and Travelers denied coverage for the federal lawsuit claims on January 9, 1987, and defendant North River denied coverage on January 15, 1987. Plaintiffs did not tender defense of the state lawsuit to defendants. Taking plaintiffs' allegations as true, the claims in the subsequent state lawsuit were the same or similar to those alleged in the federal one, other than the RICO claim. For the purpose of deciding these motions, because the federal and state lawsuits against plaintiffs involved the same claims, I will assume that plaintiffs were entitled to rely on defendants' refusals to defend the federal lawsuit as also applying to the state lawsuit. Accordingly, the statute of limitations began to run on the date that defendants refused to defend the federal lawsuit. Although plaintiffs assert several arguments in an attempt to avoid the effect of the statute of limitations, plaintiffs' arguments do not convince me that the alleged breach of contract occurred later than January 1987, more than thirteen years before this action was filed on November 29, 2000. Therefore, I conclude that plaintiffs' claims are time-barred.

1. Duty to defend vs. duty to indemnify

Plaintiffs try to avoid the application of the statute of limitations by arguing that defendants breached the insurance contract by refusing to indemnify and by not alleging that defendants breached their duty to defend. Despite this careful pleading, plaintiffs cannot escape the fact that it well established in Wisconsin that the duty to defend is broader than

the duty to indemnify. See Elliott v. Donahue, 169 Wis. 2d 310, 320-21, 485 N.W.2d 403, 407 (1992). This is so because allegations in an underlying complaint trigger the duty to defend that raises the potential for indemnity coverage. See Radke v. Fireman's Fund Ins. Co., 217 Wis. 2d 39, 44, 577 N.W.2d 366, 369 (Ct. App. 1998). Although plaintiffs assert correctly that the duties to defend and to indemnify are separate duties, see Hamlin Inc. v. Hartford Accident and Indemnity Co., 86 F.3d 93, 94 (7th Cir. 1996), the duty to indemnify cannot attach if there is no duty to defend. If defendants are obligated to indemnify plaintiffs, then they were necessarily obligated to defend them. Thus, plaintiffs cannot restrict their allegations to a breach of the duty to indemnify (which plaintiffs argue occurred in December 1996 and December 1998) in order to avoid the fact that defendants refused to defend the suit in January of 1987.

2. "No action" clauses

Plaintiffs assert that defendants are equitably estopped from raising a statute of limitations defense because of the "no action" clauses found in both policies at issue. Plaintiffs assert that their obligations to pay Management Computer were not determined until December 1996 and December 1998 and that the language of the policies prohibited plaintiffs from bringing an action against defendants until those determinations were made. According to plaintiffs, both determination dates are within the six-year statute of

limitations so their claims should not be time-barred. Because the policy issued by defendants Charter Oak and Travelers differs from that issued by defendant North River, I will address the policies separately.

a. Policy of defendants Charter Oak and Travelers

Plaintiffs argue that the language of the policy is unambiguous: plaintiffs were barred from bringing this action until after the final determinations in December 1996 and December 1998. Plaintiffs' argument fails because the language of the policy and case law establish that "no action" clauses refer to third party suits against the insurer. In the paragraph following the "final determination" phrase, the policy states that "any person or organization . . . who has secured such a judgment" is entitled to recover under the terms of the policy. The language of the policy indicates that the "no action" clause is intended to bar suits by third parties and not by insureds. The policy addresses securing a judgment against the insured and allows recovery by any person or organization that has secured "such a judgment." Logic dictates that this language does not apply to the insured; an insured cannot secure judgment against itself. Moreover, plaintiffs' reading of the no action clause would prohibit insureds from challenging reluctant insurers until a third-party lawsuit is "finally determined," meaning that all appeals or dates to file notice of appeal had expired. "And yet there is a vast body of case law in which disputes over coverage . . . are adjudicated

in declaratory actions long before final judgment in the third-party damage action and frequently even in advance of a trial." Simon v. Maryland Cas. Co., 353 F.2d 608, 612 (5th Cir. 1965). Plaintiffs' interpretation of the no action clause simply does not add up.

Wisconsin law supports the conclusion that no action clauses apply to third party suits and not to suits by the insured. "A 'no action' clause is valid and is a bar to a suit by a third party before liability is established." Townsend v. Wisconsin Desert Horse Assoc., 42 Wis. 2d 414, 425, 167 N.W.2d 425, 430 (1969); see also Tilidetzke v. Preiss, 611 F. Supp. 275 (E.D. Wis. 1985) (giving effect to no action clause to bar suit by third party against insurer). At the same time, an insurer cannot rely on a no action clause in its policy to bar suit by an insured. "The general rule is that the right of action of the insured accrues against the insurer on the date of loss," Gamma Tau Educational Foundation v. Ohio Cas. Ins. Co., 41 Wis. 2d 675, 680, 165 N.W.2d 135, 137 (1969), and not when judgment has been finally determined. Accordingly, I find that the no action clause found in the policy issued by defendants Charter Oak and Travelers did not bar plaintiffs from bringing suit before a final determination had been made and did not toll the statute of limitations.

b. Policy of defendant North River

Although the policy defendant North River issued to plaintiffs includes a no action clause, the clause was inoperative because the policy was amended by the "Wisconsin

Amendatory Endorsement." The amendment to the policy deletes the "final determination" language found in the main body of the policy, allowing for application of the Wisconsin "direct action" statute. See Wis. Stat. § 632.24. The amended language reads that "no action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all terms of this policy." Although plaintiffs' pleadings do not refer to the amendment, in situations in which the allegations of a pleading are at odds with the terms of a written contract attached as an exhibit, the fairly construed terms of the contract prevail over the contradictory allegation. See Graue Mill Development Corp. v. Colonial Bank & Trust Co., 927 F. 2d 988, 991 (7th Cir. 1991). Plaintiffs fail to respond to defendant North River's argument that the no action clause found in its policy is inoperative, other than to assert an undisputed proposition: the direct action statute "gives injured third parties the right to bring action directly against an insurer." Pltfs.' Resp. Br., dkt. #26, at 14. "Arguments that are not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999); see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG, 165 F.3d 526, 528 (7th Cir. 1998). Because the amendment renders the no action clause of defendant North River's policy inoperative, defendant North River is not equitably estopped from asserting the statute of limitations as a bar to plaintiffs' claims on the basis of the no action clause.

3. Fairly debatable

Plaintiffs argue that defendants did not commit a breach by refusing to defend at the time the federal lawsuit was tendered to them because the coverage was "fairly debatable." Elliott, 169 Wis. 2d at 317, 485 N.W.2d at 406. Instead, according to plaintiffs, defendants did not breach their duty to indemnify until a final determination was made in the underlying case. In the underlying case, the Wisconsin Supreme Court determined that plaintiffs were legally liable to Management Computer for $1,979,860 on December 12, 1996. On December 17, 1998, the Court of Appeals for Wisconsin determined that plaintiffs owed Management Computer an additional $1,276,336 in interest and costs. Plaintiffs assert that the statute of limitations clock did not begin to run on their claims until these two dates, both of which fall within the six-year statute of limitations.

Plaintiffs' argument has a fatal flaw: the "fairly debatable" language in Elliott is not applicable to this case. In Elliott, the statute of limitations was not at issue. Instead, the court was deciding whether an insured could recover attorney fees incurred in successfully defending coverage under an insurance policy. See Elliott, 169 Wis. 2d at 316, 485 N.W.2d at 405. In Elliott, the insurer had a duty to defend, denied coverage for the claims at issue in a lawsuit, asked for a bifurcated trial to determine coverage separately from liability and damages and assumed the insured's defense once coverage was established. See id. The court determined that in those circumstances, "an insurer does not breach its contractual

duty to defend by denying coverage where the issue of coverage is fairly debatable as long as the insurer provides coverage and defense once coverage is established." Id. at 317, 485 N.W.2d at 406.

Here, the allegations do not suggest that defendants pursued a bifurcated trial to determine coverage or the court in the underlying action determined the issue of coverage in plaintiffs' favor. Moreover, because plaintiffs did not give defendants notice of the state lawsuit, it would be unreasonable to expect defendants to have intervened in the lawsuit in order to bifurcate the trial and stay the action while the issue of coverage was determined. Because defendants did not have the option of taking the steps of the insurer in Elliott and because the court in Elliott was not addressing the statute of limitations, the language about "fairly debatable" coverage does not apply to this case.

B. Coverage

Defendant North River asserts that as a matter of law, it does not owe plaintiffs a duty to indemnify because its policy does not provide coverage to plaintiffs for the claims of the underlying lawsuit. Because defendant North River's motion to dismiss will be granted on the ground that the statute of limitations bars plaintiffs' suit, I need not address the issue of coverage.

ORDER

IT IS ORDERED that the motion to dismiss of defendants The Charter Oak Fire Insurance Co. and The Travelers Indemnity Company is GRANTED and the motion to dismiss of defendant The North River Insurance Company is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 13th day of June, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge