

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

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WISCONSIN ELECTRIC POWER COMPANY,

Plaintiff,

v.

ORDER

07-C-277-S

THE NORTHERN ASSURANCE COMPANY OF AMERICA  
as successor to EMPLOYERS SURPLUS LINES INSURANCE COMPANY,

Defendants.

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WISCONSIN ELECTRIC POWER COMPANY,

Plaintiff,

v.

07-C-299-S

CENTURY INDEMNITY COMPANY as successor to  
CALIFORNIA UNION INSURANCE COMPANY, INDEMNITY  
INSURANCE COMPANY OF NORTH AMERICA and INSURANCE  
COMPANY OF NORTH AMERICA, CONTINENTAL INSURANCE  
COMPANY as successor to HARBOR INSURANCE COMPANY  
and GENERAL REINSURANCE COMPANY,

Defendants.

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Plaintiff Wisconsin Electric Power Company commenced this action against various insurers who issued liability policies between 1960 and 1981, seeking insurance coverage for environmental contamination associated with manufactured gas plant and ash disposal from coal-fired power plants. Jurisdiction is based on

diversity of citizenship, 28 U.S.C. § 1332. The matter is presently before the Court on plaintiff's motion for partial summary judgment against defendant Continental Insurance Company on the basis of issue preclusion. The relevant facts are undisputed.

#### FACTS

In 2002 plaintiff sued a number of insurers, including Continental, for coverage of environmental damages caused by disposal of manufactured gas plant waste ("2002 action"). In the 2002 action cross motions for summary judgment were filed by plaintiff and another defendant, Ranger Insurance Company. Continental joined Ranger's opposition and cross-motion. Following extensive argument on the motion the Court ruled, among other things, that "[o]nce a policy in effect for part of an exposed period is triggered by an 'occurrence,' the insurer is jointly and severally liable up to its policy limit for the full amount of WEPCO's loss regardless of when property damage took place." The Court also stated that its ruling applied to other similarly situated insurers, including Continental.

Continental and Ranger filed a petition for leave to file an interlocutory appeal on the ruling, which was denied. Subsequently, a special discovery master in the case ruled that Continental was similarly situated to Ranger, and also ruled against Continental on its summary judgment motion raising several

other contract defenses. The decision of the special master became a decision of the trial court when it was not appealed. Thereafter plaintiff and Continental settled the 2002 action and Continental was dismissed with prejudice from the action pursuant to the settlement.

Plaintiff presently seeks to recover from Continental under the same policy that was at issue in the 2002 action and Continental seeks to raise the defenses on which it lost at summary judgment in the 2002 action.

#### MEMORANDUM

The issue before the Court is whether issue preclusion bars Continental from asserting the defenses it raised on summary judgment in the 2002 action. The relevant facts are undisputed and the motion presents a single issue of law properly resolved on summary judgment. Issue preclusion serves the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same person or his privy and promoting judicial economy by preventing needless litigation." Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979).

The parties agree that the proper standard for issue preclusion is stated in the Restatement (Second) of Judgments §27:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is

conclusive in a subsequent action between the parties, whether on the same or a different claim.

The present case poses the issue of how to apply the rule when an issue is actually litigated and resolved by the court in an interlocutory summary judgment order, but final judgment is based on settlement and stipulation. Plaintiff correctly notes that a summary judgment order that disposes of claims and is incorporated into a final judgment can be the basis for issue preclusion. Landess v. Schmdt, 115 Wis. 2d, 186, 340 N.W.2d 213, 219 (Wis. App. 1983). However, the elements required for issue preclusion are generally not present when judgment is entered pursuant to settlement because the court's determination is not essential to the consent judgment. Id., Talmadge v. Harris, 486 F.3d 968, 974 (7th Cir. 2007). Because the judgment dismissing Continental with prejudice was based on settlement, the summary judgment decision on the coverage issue was not essential to the final judgment. Meyer v. Rigdon, 36 F.3d 1375, 1379 (7th Cir. 1994).

Settlement agreements are contracts for the entry of judgment and, as contracts, are enforced in accord with the intentions of the parties. United States v. ITT Continental Baking Co., 95 S. Ct. 926, 934 (1975). Ordinarily, judgments based on settlement are intended to preclude litigation on the particular claims at issue, but are not intended to preclude future litigation on the issues presented. That is, such judgments typically support claim

preclusion, but not issue preclusion. See United States v. International Building Co., 345 U.S. 502, 505-06 (1953); 18A C. Wright, A. Miller & E. Cooper Federal Practice & Procedure, § 4443, at 265. When judgment is entered based on settlement, issue preclusion will attach if it is clearly shown that the parties intended that the issue be foreclosed in other litigation. Meyer v. Riddon, 36 F.3d at 1379 (quoting C. Wright, A. Miller & E. Cooper, § 4443 with approval).

The question of intent is more complex where, as here, the earlier court adjudicated a particular legal issue prior to settlement. The presence of an interlocutory resolution of a legal issue certainly influences the parties' settlement. However, the intent of the settlement may be to support or reduce the preclusive effect of the prior judicial determination. For example, defendant Continental might have agreed to pay a larger amount in settlement in order to preserve its right to argue for a different ruling on the scope of liability under the terms of the contract in future cases. Alternatively, defendant may have negotiated away the potential for reversal on appeal or in a subsequent action, paying less and agreeing to be bound by the decision for all future claims.

Viewing all the facts and circumstances surrounding this settlement, it seems most likely that the parties did not intend the interlocutory determination to have issue preclusive effect on

future claims. The agreement provided only for the dismissal with prejudice of all claims against the insurer. Defendant sought, but was denied the right to bring an immediate interlocutory appeal of the ruling. The potential for future application of the ruling was unknown, but of potentially great consequence. Under these circumstances it seems more likely that the ordinary expectation - that claim preclusion but not issue preclusion would apply - was the result intended by the parties.

Even if issue preclusion were deemed applicable, fundamental fairness and policy considerations would prevent application of issue preclusion.

A rule of law declared in an action between two parties should not be binding on them for all time, especially as to claims arising after the first proceeding has been concluded, when other litigants are free to urge that the rule should be rejected. Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position.

Reuter v. Murphy, 2000 WI App 276, ¶ 10, 240 Wis.2d 110, 622 N.W.2d 464 (quoting Restatement (Second) of Judgments, § 28, cmt. b.) This precise situation is present because other insurer defendants are free to argue for a contrary construction of the insurance contract language at issue, thereby creating the potential for varying legal determinations between different parties to the action on the identical issue.

Viewed more broadly, none of the policies supporting issue preclusion would be furthered in this instance. Application would permit the possibility of conflicting determinations between litigants in this action. The burden on plaintiff will not be reduced because the identical legal issues will be relitigated as to other parties, nor will judicial economy be promoted because the court will likely be required to independently address the issue advanced by other insurers.

The doctrine of issue preclusion does not apply to prevent defendant from arguing for a different determination of the scope of its coverage obligation under the insurance policy at issue.

ORDER

IT IS ORDERED that plaintiff's motion for partial summary judgment on the basis of issue preclusion against defendant Continental is DENIED.

Entered this 17th day of December, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge