STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**
BRANCH 32

JOHNSON CONTROLS, INC.,
Plaintiff,

vs.

CENTRAL NATIONAL INS. CO. OF OMAHA, et al.,
Defendants.

Case No. 89-CV-016174

under seal

DECISION AND ORDER ON SUMMARY JUDGMENT
This is a final decision per Wis. Stat. §808.03(1).

With this decision the Court hopes to end the long and tortuous history of this case that has spanned almost a quarter of a century. The history and dynamics of this case rivals in length, contentiousness and scorn the case of *Jarndyce v. Jarndyce*, as featured as the infamous and fictional case in Charles Dickens' novel, "Bleak House." Charles Dickens was attempting to call attention to the abuses of the English court system. One of those abuses was how long it would take for the case to grind through the system, and the collateral effects those delays had on the litigants.

The judicial system must always try to move cases forward in an expeditious way so it can answer the questions of citizens and others when they ask how much longer will this case last. As one of the characters pleaded in "Bleak House," "it can't last forever." This case might last forever if the Court allows continuous litigation and discovery of issues that have previously been determined by the trial and appellate courts. Endless litigation, in which nothing is ever determined, is worse than a miscarriage of justice.

The main issues of the duty to defend, the breach of that duty and the causation of the damages have already been determined. The only issue that remains is how the damages will be

determined and applied as to the two remaining defendants. With this decision the Court will determine that answer and bring finality to this case. In all judicial fairness and equity, the Court sees no good reason for allowing this case to proceed any further.

When I took over this case in August of 2013, I ordered the parties to participate in an effort at mediation. Unfortunately that mediation failed. I then moved the parties toward the completion of the summary judgment motion and heard and denied the defendants' motion to reconsider various rulings by Judge Pocan.

This case will be decided before my retirement in August of 2014. I am determined to not allow this case to be transferred to another circuit judge upon my retirement. If the Court would allow this to happen this case might be extended into 2015, and the successor judge would again have to attempt to review the long history of this case, decipher previous court rulings, and address further motions and supplemental briefings. In 2003, in what appears to be an editorial comment induced by frustration, the Wisconsin Supreme Court stated that "[a]lthough this court would like to end this action after more than 13 years of litigation, we must remand the cause for further proceedings[.]" *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 123, 264 Wis. 2d 60. Now the parties stand before the Court, eleven years after our state's highest court issued the above admonition. The issues in this case have been litigated and re-litigated, and if this Court doesn't end this case they might be re-litigated yet again in front of my successor judge. The Court will not allow this to happen. The public interest in repose and finality dictates that this litigation must come to an end.

I. Background:

In the mid-1980s, Johnson Controls ("JCI") began to receive notification that it had been identified as a potentially responsible party ("PRP") in connection with environmental

contamination at various sites across the United States. Some of the sites were lead smelting plants where JCI delivered lead acid batteries for recycling, and others were contaminated landfills. As a PRP, JCI could have been required to contribute to the environmental restoration and remediation costs at those sites. JCI notified its insurers, seeking defense and indemnification. The underlying insurers refused, asserting that their policies did not cover the costs imposed under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Rather than defending JCI when the other insurers refused to do so, the two remaining defendants unilaterally decided that their policies did not provide coverage. Instead of accepting JCI's defense under a reservation of rights and attempting to obtain a judicial declaration to determine coverage, the two remaining defendants simply denied coverage outright and left JCI to defend itself.

In the meantime, according to the undisputed facts, JCI was faced with potential liability for contamination at sites in which it had recycled spend lead acid batteries, arranged for the treatment or disposal of other potentially hazardous materials, or had operations resulting in environmental contamination. Faced with coercive governmental action and potentially significant penalties, JCI provided its own defense, which consisted of a three pronged strategy: (1) procure a favorable allocation of relative culpability among all PRP's; (2) assure that response costs incurred at the site were reasonable and necessary; and (3) minimize unnecessary transaction costs, particularly litigation costs likely to exceed the amount at stake.

JCI filed this case in 1989. It has been administered by a number of Milwaukee County circuit judges, most of whom are now either deceased or retired. In 1994, now deceased Judge George Burns dismissed this action with prejudice against Central National and Westchester in light of the Wisconsin Supreme Court decision in *City of Edgerton v. General Casualty*

Company of Wisconsin, 184 Wis. 2d 750 (1994). That appellate case held that the receipt of a PRP letter issued by the Environmental Protection Agency ("EPA") did not trigger a duty to defend.

After this ruling the circuit court case drifted into a dormant period in relationship with the insurance companies' duty to defend. Of course during this dormant period JCI had to forge forward with its obligation to comply with environmental remediations at the numerous sites stated in the PRP letters. The circuit court action was awakened in 2003, when the Wisconsin Supreme Court overruled *Edgerton*, and held that the receipt of a PRP letter triggered the insurance companies' duty to defend. *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, 264 Wis. 2d 60. At this point any doubts about coverage were resolved by the highest court of this state. Also at this point the defendants had a renewed opportunity to rise to the occasion and provide JCI with a defense. If they had any doubts about their ultimate duty to indemnify, they could have, and should have, defended under a reservation of rights pursuant to well-established case law. *See, e.g., Liebovich v. Minnesota Ins. Co.*, 2007 WI App 28, ¶ 4, 299 Wis.2d 331. Instead, while JCI continued to delve through the complexities of environmental remediation, and later while JCI endeavored to establish coverage and bring finality to this case, the defendants hid in the shadows, biding their time.

Meanwhile, in an attempt to move this case forward, Judge Patricia D. McMahon issued an Initial Case Management Order in 2004. Unfortunately, the activities in the circuit court continued to move at a relative slow pace until approximately 2012, when Judge William S. Pocan appointed retired Judge Michael Skwierawski as Special Master and started setting the matter for hearings on discovery and summary judgment. With Judge Pocan's efforts and the assistance of the Special Master, the case finally moved out of the doldrums. It is evident that

the Court's actions spurred twenty-one of the insurance companies to settle with JCI. As a result, only these two defendants remain.

It should be reiterated that throughout the entire time from 1989 until the present the two remaining defendants have never petitioned the Court to handle or manage the defense on behalf of JCI. They have simply waited in the background while JCI, in what appears to be a herculean legal and company effort, provided its own remediation defense and settled with all the other insurance companies. Thus at this time there only remains a determination of damages suffered by JCI based on the defendants' wrongful refusal to defend. After reviewing the parties' submissions, the Court finds no genuine issues of material fact with respect to damages.

II. Public Policy Mitigates Strongly in JCI's favor

The history of this case and the arguments of the parties revolve around the competing public policies that this Court must weigh in making a just and fair determination. In JCI's favor is Wisconsin's long-standing policy in favor of settlements. On January 17, 2014, the Court reminded the defendants that by allowing the court to make a decision they have lost control of their destiny and have not found the peace of mind that a settlement provides.

> "And I have always said to people in settlement, every insurance company, every defendant, every plaintiff has to look at the benefits and risks of pursuing the case and not settling. We favor settlements because I think then the parties have control of their destiny, don't they?

The defendants had every opportunity to defend JCI, and they had every opportunity to settle with JCI after the Court found them in breach of their duty to defend. They could have "bought their peace" as the other twenty-one insurers did when they settled.

Settlement agreements are highly favored as productive of good will in the community, and they reduce the expense and persistency of litigation. They are to be encouraged. *See*

Schulte v. Frazin, 176 Wis. 2d 622, 634 (1993) ("Wisconsin has a long-standing policy in favor of settlements.") In this case, however, the defendants "hung back," while JCI entered into settlement agreements with the other insurers. They did so despite the overriding public interest in settling and quieting litigation that has now been ongoing for nearly a quarter century. They did so despite rulings by the Wisconsin Supreme Court and Judge Pocan that pointed out numerous weaknesses in their various legal positions, making their liability even more pronounced. In light of the harsh consequences associated with breaching the duty to defend, the defendants should have realized that it was not in their best interest to be the last insurers to settle their liability.

In weighing the various public policies at play, the Court believes that the overriding public policy involves the harsh consequences that naturally flow from a breach of the duty to defend. In this case, as stated by Judge Pocan's decision and reaffirmed by this Court, the breach of the duty to defend has severe outcomes. Once a breach is established, issues involving coverage, policy limits, exclusionary clauses, primary versus excess provisions, and attachment points become irrelevant. The insurers essentially lose the right to "nitpick." The defendants have continuously made attempts to relitigate these issues, and their attempts have repeatedly been rejected by the Court.

Potentially competing with these public policies are the "made whole" doctrine and the prohibition of double recovery of damages. Indeed, Wisconsin courts recognize a plaintiff should be made whole, but no more than whole. *See Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis.2d 263, 272 (1982). It makes sense that a wronged party should only be allowed to recover damages once. Notably, JCI has settled with twenty-one insurers for over $159 million. To grant JCI's request for an additional $75 million from the defendants might seem to lead to an

impermissible double recovery, especially in light of JCI's claimed damages of approximately $75 million before interest. The Court has given serious thought to this potential outcome and the competing public policy issues mentioned above. After reviewing the unique facts of this case, however, the Court finds that public policy mitigates more strongly in favor of JCI. From day one JCI has been forced to provide its own defense to environmental claims at thirty-two sites. This defense included the coordination and supervision of investigations, interfacing with the EPA, preparing reports, and pursuing other defaulting PRP's. JCI was forced to mitigate its damages and manage its responsibilities under the various agreements and federal laws. The defendants had every opportunity to perform these activities but failed to do so. They breached their duties and must now face the consequences. Any doubt about whether an insured has been made whole should be resolved in favor of the stronger policy involving the harsh consequences for breaching the duty to defend. While it may appear that JCI will receive a windfall, such a result would be better than giving the windfall to the breaching parties.

Moreover, any argument involving a potential double recovery is weakened in light of the broad, global language in the settlement agreements with the other insurance companies, as it is impossible to determine with any level of precision whether JCI was made whole.[1] The settlements are broad, complex, unquantifiable agreements dealing with past, present, and future claims, as well as known and unknown claims, for the sites at issue, as well as for other sites. JCI has released the other insurance companies from potentially infinite liability for any and all potential claims. The Special Master has reviewed these documents. In his recommendations on summary judgment, he stated as follows:

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[1] It is important to note that JCI, for purposes of summary judgment, has withdrawn claims for certain damages. It is entirely possible that JCI could receive more than its requested amount if this case were to proceed to a trial on damages.

> Again, there is nothing in the settlement documents from which it could be determined how much of the settlement payment was related to or paid to release future claims. It cannot be determined with any mathematical precision or reasonable certainty.

Given the silence of the settlement agreements regarding allocation, any testimony as to the allocation of settlement amounts would be far too speculative to be admissible. *Friedland v. The Indus. Co.*, 2008 WL 185693, at *2 n. 4 (D.Colo.2008). Consequently, such testimony would not create a genuine issue of material fact for trial.

It is clear that the defendants could have defended under a reservation of rights when the PRP letters were submitted or when they otherwise had notice of suit. They could have provided a temporary defense while simultaneously retaining their ability to evaluate, or even disclaim, coverage for some or all of JCI's claims and file any appeals they believed to be necessary. They could have avoided the harsh consequences of immediately and continuously denying coverage. They had a chance to step up to the plate, and by failing to do so they forfeited the right to criticize many aspects of JCI's claimed damages.

III. JCI has established, as a matter of law and equity, that it is entitled to $67,788,764.67 in settlement costs and attorney fees associated with environmental remediation.

In its motion for summary judgment, JCI claims damages amounting to $66,855,859.81 in "settlement costs" and $8,210,402 in attorney fees, for a total of $75,066,262.63. For the purpose of summary judgment, JCI made a number of adjustments to its damages that reduce the defendants' overall liability. For example, JCI adopted uniform dates for notices of claims, even

though an earlier date may have been provided.[2] In addition, JCI has withdrawn claims for the following damages:

- $349.85 in damages at the Ace Battery site
- $2,757.11 in legal fees and costs at the Delaware Sand & Gravel site
- $42,000 site cleanup bill at the Goshen site
- $85,237.15 in remediation costs at the NL Portland site

Moreover, JCI concedes that the defendants are entitled to a credit of $7,147,153.85, which represents the settlement amount with Employers of Wausau for defense costs that predated the defendants' notice of the underlying claims. Thus, for the purposes of this motion, the total damage amount sought by JCI is $67,788,764.67.[3]

The question becomes whether the defendants are responsible for these costs as consequential damages. Given that the defendants breached their duties to defend, the Court answers this in the affirmative. JCI's response costs are consequential damages flowing from the direct damage caused to the environment, and the defendants are responsible for all remediation payments to settle its liability at all of the sites. Stated differently, all of JCI's response costs were foreseeable consequences, which naturally flowed from the breaches of the defendants' duties to defend.

Notably, some of JCI's claimed damages are based on PRP letters or notices of suit that covered the period between *Edgerton* and the Supreme Court's decision in *Johnson Controls III*.

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[2] It is important to note that during previous summary judgment proceedings, neither Central National nor Westchester disputed the voluminous records that JCI provided that detailed the communications related to placing these insurers on notice of the claims.

[3] JCI now seeks additional damages that were allegedly incurred since the filing of its summary judgment motion. These damage amounts will not be considered by the Court, and JCI's requested amount will be fixed at the amount claimed at the start of these motions. If the Court were to conclude otherwise, this case could go on indefinitely, and the purpose of summary judgment – which is designed to dispense with certain issues and avoid unnecessary trials – would be defeated .

As Judge Pocan ruled in this case, when addressing the issue of breach, the 1994 *Edgerton* decision was never the law. Ultimately, the issue is whether or not *Johnson Controls III* can be given retroactive application. Generally, courts adhere to the "Blackstonian doctrine," which holds that a new rule of law applies retroactively. *Heritage Farms, Inc. v. Markel Insurance Co.*, 2012 WI 26, ¶ 44, 339 Wis. 2d 125. The doctrine is based on the theory that "courts declare but do not make the law…, when a decision is overruled, it does not merely become bad law, – it never was the law, and the later pronouncement is regarded as the law from the beginning." *Id.* Under the unique facts of this case, the Court sees no good reason to stray from the general rule. Therefore, the defendants are responsible for damages based on notices of suit that were given before and after *Edgerton*. The defendants are responsible for damages that were incurred from the time the notices of suit were submitted until June 4, 2013, when JCI filed its summary judgment motion on the issue of damages.

In order to facilitate the interests of judicial economy, the Court enlisted the Special Master to assist with reviewing JCI's claimed damages. To date, the Special Master has personally reviewed 25,000 to 30,000 pages of records, legal documents, scientific reports, allocation meeting records, settlement agreement records and reports. The Special Master found that JCI's claimed damage amount was related to the defense of claims and lawsuits at the 32 sites. The Special Master's finding is consistent with the facts in the record and this Court's independent review of the records submitted by JCI.

In addition to reviewing the Special Master's findings, the Court has taken an independent review of the fourteen boxes and affidavits filed with the Court. With 38 years of experience as a trial judge and 45 years as an attorney and judge, the Court is more than able to determine whether the fees and costs are reasonable. After spending numerous hours reviewing

samples of the invoices, check payments and accounts payable data, the Court is satisfied that JCI's documented remediation costs are accurate. The Court has used its best judgment to finally put and end to this "sea of litigation."

On the issue of attorney fees, it is important to note that by breaching their duty to defend, the defendants forfeited their ability to question the propriety of any strategic legal decisions. If they would have taken on the defense of these claims, they could have avoided any added fees related to claims that were arguably "offensive" in nature. In any event, after reviewing the parties' submissions, the Court finds that JCI's offensive and defensive claims are inextricably intertwined; there is a direct and substantial correlation between JCI's defensive efforts in pursuing others and the goal of minimizing damages. JCI identified and pursued other defaulting PRP's, which significantly reduced JCI's liability for response costs. Stated differently, all of the attorney fees submitted by JCI are related to JCI's overall defensive strategy and are therefore recoverable. Besides, after breaching their duties to defend, the defendants are not entitled to further retrospective litigation about allocation of JCI's voluminous bills and invoices. After reviewing the defendants' submissions, the Court finds no genuine issue of material fact with respect to environmental remediation and settlement costs.

The Court has reviewed the affidavits submitted by Dennis Reis, Edward Witte and Theodore Jankowski in order to determine whether their fees were reasonable. In *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 30, 275 Wis.2d 1, the Wisconsin Supreme Court adopted the lodestar method of calculating reasonable attorney fees. *Id.*, ¶ 30. Under this method, the court first determines the number of hours reasonably expended on the representation and then multiplies by a reasonable hourly rate. *Id.*, ¶ 28. The court may adjust this lodestar figure up or down based on various factors. *Id.*, ¶ 29. The Court is familiar with the fees customarily

charged for similar legal services, and the Court finds nothing in the record to support the conclusion that JCI's claimed fees were in any way excessive, especially in light of the results obtained. A sampling of their affidavits shows that they are experienced attorneys with excellent credentials, and that they were involved with litigating complicated matters in which significant amounts of money were at stake. Their experience was revealed in the admirable job they performed in minimizing JCI's damages and managing JCI's legal responsibilities. The Court has reviewed the defendants' submissions and finds no genuine issues of material fact on the issue of attorney fees. Therefore, with the exception of the aforementioned adjustments and credit for the Wausau settlement, JCI is entitled to $8,210,402 in attorney fees.

IV. JCI has not met its burden of establishing that it is entitled to recover its contingency fee pursuant to *Elliott v. Donahue.*

JCI argues that the defendants are responsible for the 20% contingency fee pursuant to *Elliott v. Donahue*, 169 Wis. 2d 310 (1992). In *Elliott,* the court recognized a limited exception to the "American Rule" because a provision of the Wisconsin Declaratory Judgment Act, under which the action was brought, permitted such an award as a matter of equity. Under the holding of *Elliott*, an insurer that wrongfully denies coverage may be "liable for the expenses, including reasonable attorney fees, incurred by the insured in successfully establishing coverage." The holding of *Elliott* has since been limited to the unique facts and circumstances of the case. *See, e.g., DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 569 (1996).

After reviewing the parties' submissions, the Court finds that the facts of this case do not fall within the ambit of *Elliott*. Coverage has already been established, and since JCI filed its summary judgment motion, damages have been the focus of this litigation. Notably, the contingency fee at issue does not merely reflect the costs that were incurred to establish

coverage; it also reflects the costs that were incurred to prove damages. As a result, it is impossible for the Court to determine what fees are attributable to coverage as opposed to damages. Therefore, the inequities of this case are not as compelling as they were in *Elliott*.

More importantly, JCI has not established, and cannot establish, that the contingency fees at issue are reasonable. In *Meyer v. Michigan Mut. Ins. Co.*, 2000 WI App 53, 233 Wis. 2d 493, the court considered the reasonableness of a contingent fee agreement as a part of the reasonable costs of collection under the worker's compensation law. *Id.*, ¶¶ 11-12. In holding that the agreement was reasonable, the *Meyer* court held that not all of the lodestar factors had to be considered when a court reviews a contingent fee agreement as long as the court reviews "all the circumstances of the case to determine whether the contingency fee amount is a just and reasonable figure." *Meyer,* 233 Wis.2d 493, ¶ 22 (citation omitted). Under the *Meyer* framework, a trial court is to consider, besides the existence of the contingent fee contract, only (1) the time and labor involved, (2) the amount of money involved, and (3) the attendant risks involved. *Id.*

In this case, it would be speculative at best to conclude that a 20% contingency fee on $67,788,764.67, or $13,557,752.93, is reasonable. It is undisputed that Cannon & Dunphy did not maintain any time records and/or have any mechanisms in place to identify what work was to be done on what tasks, for what purposes, for how much time, and by whom. In other words, JCI has not established under *Meyer* that the amount is reasonable based on the time and labor involved. JCI placed itself in this predicament when it agreed to a retainer stating that "there shall be no timekeeping required in [C&D] in the performance of these services." While JCI may have believed the agreement to be fair when it contracted with Cannon & Dunphy, the Court is unwilling to give the contract a "rubber stamp" based on JCI's subjective belief.

The situation is similar to the situation involving the broad, global language in the settlement agreements with the other insurance companies, albeit with different results. As stated above, the settlement agreements contain very broad language. In light of this language, it cannot be determined with any reasonable certainty whether the settlement payments from the other insurers were directly related to the underlying remediation costs, or whether they were related to future, perhaps unknown costs at different sites. By signing these settlement agreements, JCI agreed to language that essentially protected itself from potentially significant offsets. By signing the retainer with Cannon & Dunphy, however, JCI agreed to language that left it exposed and vulnerable to the possibility that it might not be able to prove and recover all of its claimed damages. If JCI's counsel had submitted hourly fees or documented its work, the result would have been different.

Moreover, JCI does not appear to dispute that Cannon & Dunphy has already recovered a significant amount of money pursuant to its contingency fee agreement when JCI settled with the other insurance companies. If so, it would be even more questionable as to whether the award of an additional $13,557,752.93 would be reasonable, especially if some of Cannon & Dunphy's fees are for work that had already been performed in defending coverage against the other insurance companies. Again, the language in the retainer prevents this Court from making a determination on the reasonableness of the $13,557,752.93 amount. Under the unique facts of this case, an award of the contingency fee is not supported by principles of law or equity. Accordingly, JCI has not met its burden of establishing that it is entitled to a reimbursement for Cannon & Dunphy's contingency fee.

V. JCI is not entitled to statutory prejudgment interest.

JCI requests statutory prejudgment interest pursuant to either Wis. Stat. §138.04 or §628.46. The Court is not persuaded. Wis. Stat § 138.04 provides that "[t]he rate of interest upon the loan or forbearance of any money, goods or things in action shall be $5 upon the $100 for one year." Prejudgment interest under §138.04 is not appropriate because JCI's damages were neither liquidated nor liquidable by reference to some objective standard. *See, e.g., Teff v. Unity Health Plans, Inc.*, 265 Wis. 2d 703 (Ct. App. 2003). The damages sought by JCI have been adding up since day one, and with multiple defendants the amount payable as to each defendant has never been readily determinable. *See, e.g., Wyandotte Chems. Corp. v. Royal Elec. Mfg. Co.*, 66 Wis. 2d 577, 584 (1975). Moreover, it is implicit from JCI's withdrawals of certain damage amounts that factual disputes needed to be resolved to decide the proper method of calculating damages. *See Teff.*, 265 Wis. 2d 703, 736-37 (Ct. App. 2003).

For similar reasons, JCI is not entitled to interest under Wis. Stat. §628.46, which requires insurers to pay 12% interest on overdue payments. Prejudgment interest under this statute did not accrue under this statute because the insurers had "reasonable proof" that they were not responsible for the payment demanded by JCI. In fact, Judge Pocan previously held that it was "fairly debatable" whether the claims were covered. To the extent the allowance of interest involves equitable considerations, the Court declines to exercise its discretion to award statutory prejudgment interest.

With that said, JCI is entitled to post-judgment interest pursuant to Wis. Stat. §805.05(8). Such interest would sufficiently compensate JCI and, at the same time, would help motivate the defendants to make a timely payment for damages that could have been paid a long time ago.

VI. The defendants have shared responsibility for $67,788,764.67.

After ruling on the defendants' motions to reconsider Judge Pocan's discovery rulings, this Court called upon the litigants to propose equitable ways of calculating damages. The Court also asked the Special Master to provide recommendations on the issue of apportioning damages. The Special Master recommended an equal share approach, whereby JCI's damages would be divided by either: (1) twenty-three (the number of "similarly situated" insurers; (2) twenty-one (the number of settling insurers); or (3) two (the number of nonsettling insurers). In their response to the Special Master's recommendations, the defendants agree that an equitable resolution is appropriate in this case. They request the Court to adopt the first option, such that they would be liable for an equal 1/23 share of JCI's damages, subject to various proposed reductions and eliminations.

The Court is unwilling to grant their request. If the Court were to do so, insurers in future cases would likely be hesitant to pay upfront defense costs if such costs were likely to exceed their equal share portion. If the "automatic consequences" that follow from a wrongful refusal to defend is merely an equal share portion of the damages, breaching insurers could ultimately be rewarded for engaging in a game of "litigation chicken." Adopting the defendants position would in many cases encourage recalcitrance and undermine the policy goal of encouraging settlements. It would also change the well-established case law dealing with the harsh consequences that are associated with breaching the duty to defend. These results must be avoided.

To date, the defendants have never attempted to assume JCI's defense. Requiring the two remaining defendants to split the entirety of JCI's established damages is the fairest and most reasonable approach to this very complicated case. While the defendants may have had a

"several" obligation to defend JCI, that is not to say that there should not or will not be an apportionment among the insurers under an appropriate allocation method. The defendants concede that equitable considerations are at play. Requiring the defendants to split JCI's claimed damages combines fairness to all parties with an appropriate balance of individual incentives to settle. It recognizes that the defendants are similarly situated because they have been stripped of contract rights, positions and defenses. Under an equal apportionment, each defendant has shared responsibility for $67,788,764.67, or $33,894,382.34 each. This amount is supported by principles of both law and equity. If it turns out that one of the insurers is insolvent or is otherwise unable to pay its share, JCI is entitled to recover the full amount from the other insurer.

CONCLUSION AND ORDER

For the above reasons, JCI's motion for summary judgment with respect to damages is GRANTED in part and DENIED in part. As a matter of both law and equity, each defendant is responsible for $33,894,382.34, made payable to JCI. No triable issues remain in this case.

SO ORDERED.

Dated this 18th day of June, 2014, at Milwaukee, Wisconsin.

CIRCUIT COURT MILWUAKEE CO. WISCONSIN SEAL

BY THE COURT:

Michael Gudlee

Michael Gudlee
Circuit Court Judge
Branch 32