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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Nucor Corporation,

No. CV-12-678-PHX-SMM

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Plaintiff,

**MEMORANDUM OF DECISION AND
ORDER**

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v.

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Employers Insurance Company of
Wausau,

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Defendant.

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Employers Insurance Company of
Wausau,

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Counter-claimant,

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v.

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Nucor Corporation, Hartford Accident &
Indemnity Company, and Travelers
Casualty & Surety Company,

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Counter-defendants.

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Before the Court are several related motions:

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(1) Counter-defendant Travelers Casualty and Surety Company's Motion for
Summary Judgment Re: Equitable Contribution (Doc. 80);

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(2) Defendant/Counter-claimant Employers Insurance Company of Wausau's Motion
for Partial Summary Judgment (Doc. 83);

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(3) Counter-defendant Hartford Accident and Indemnity Company's Motion for

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1 Summary Judgment Re: Equitable Contribution (Doc. 85);

2 (4) Plaintiff/Counter-defendant Nucor Corporation’s Cross Motion for Partial
3 Summary Judgment (Doc. 124); and

4 (5) Defendant/Counter-claimant Employers Insurance Company of Wausau’s Motion
5 to Strike (Doc. 125).

6 The motions are fully briefed. (Docs. 115, 118, 120, 127, 129, 132, 135, 136.) After
7 considering the parties’ briefing, and having determined that oral argument is unnecessary,¹
8 the Court issues the following ruling.

9 **BACKGROUND**

10 This insurance coverage dispute arose from a federal environmental liability lawsuit
11 filed against Plaintiff/Counter-defendant Nucor Corporation (“Nucor”). In 2010, the
12 Roosevelt Irrigation District (“RID”) filed suit against Nucor alleging that Nucor and dozens
13 of other potentially responsible parties (“PRPs”) are responsible for releasing pollutants into
14 Phoenix groundwater from the 1960s to the 1980s, resulting in contamination to wells owned
15 and operated by RID. The underlying suit (hereafter referred to as the “RID action” or “RID
16 suit”) seeks recovery of the costs associated with remediation of the groundwater
17 contamination and damage to RID’s real property.

18 **A. Previous related litigation against Nucor.**

19 For slightly over four years in the 1960s, Nucor owned and operated a manufacturing
20 facility located on West Osborn Road in Phoenix, Arizona (hereafter “the Site” or “the WOR
21 facility”), where it manufactured electronic components. (Doc. 1-1 at 2-3.) As part of its
22 manufacturing process, Nucor used a solvent called trichloroethylene (“TCE”) to clean and
23 degrease parts, tools, and machines. (*Id.* at 3.) During the 1980s, TCE was discovered in the
24 groundwater in the west-central area of Phoenix. (*Id.*) As a result, Nucor has been sued in

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26 ¹ The parties’ request for oral argument is denied because the parties have had an
27 adequate opportunity to present their written arguments, and oral argument will not aid the
28 Court’s decision. See Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev., 933 F.2d
724, 729 (9th Cir. 1991).

1 four separate lawsuits, including most recently the RID action. (Id.) The four lawsuits are:

- 2 (1) An enforcement action brought by the Arizona Department of
- 3 (2) the Baker v. Motorola, et al., class action lawsuit (hereafter
- 4 “Baker”) alleging property damage and medical surveillance
- 5 (3) the consolidated lawsuit Lofgren v. Motorola, et al. (hereafter
- 6 “Lofgren”), which consisted of individuals alleging personal
- 7 injury; and
- 8 (4) the RID action.

7 (Id.) Nucor retained the law firm of Fennemore Craig to defend it in connection with all four
8 lawsuits. (Id. ¶ 16.)

9 Defendant Employers Insurance Company of Wausau (hereafter “Wausau”) issued
10 four primary liability insurance policies to Nucor for the period from January 1, 1968 to
11 January 1, 1972. (Doc. 84 ¶ 1.) Each of the Wausau policies at issue in this case included
12 the following provision:

13 [T]he company [Wausau] shall have the right and duty to defend
14 any suit against the insured seeking damages on account of such
15 bodily injury or property damage, even if any of the allegations
16 of the suit are groundless, false or fraudulent, and may make
17 such investigation and settlement of any claim or suit as it
18 deems expedient, but the company shall not be obligated to pay
19 any claim or judgment or to defend any suit after the applicable
20 limit of the company’s liability has been exhausted by payment
21 of judgments or settlements.

18 (Id.)

19 Defendant Travelers Casualty & Surety Company (hereafter “Travelers”) issued five
20 primary liability insurance policies to Nucor for the period from January 1, 1961 to January
21 1, 1966, and ten primary liability insurance policies for the period from January 1, 1975 to
22 January 1, 1985. (Id. ¶ 2.) Defendant Hartford Accident and Indemnity Company (hereafter
23 “Hartford”) issued three primary liability insurance policies to Nucor for the period from
24 January 1, 1972 to January 1, 1975. (Id. ¶ 3.)

25 In 1997, Nucor filed a coverage action in Maricopa County Superior Court against
26 insurers who provided liability insurance to Nucor in the 1960s to 1980s (hereafter referred
27 to as “Nucor I”). (Doc. 84 ¶ 25.) In Nucor I, which was litigated over the course of 13 years,
28 Nucor argued that the environmental claims arising out of the alleged contamination at the

1 WOR facility involved a continuous trigger of coverage and thus involved their insurers from
2 1961 to 1984. (Id.) The state court issued final judgments in Nucor I in 2010; the judgments
3 were subsequently appealed to the Arizona Court of Appeals, which issued a published
4 opinion and an unpublished memorandum decision on November 23, 2010. (Id.) Nucor filed
5 a petition for review with the Arizona Supreme Court as to two rulings of the appellate court,
6 but neither of the issues Nucor appealed are relevant to the issues presented by the motions
7 currently before this Court. (Id.)

8 One of the central issues of dispute in Nucor I was the extent of Nucor’s primary
9 insurers’ obligation to contribute to the payment of Nucor’s defense costs in the various
10 environmental actions that had been brought against Nucor. (Id. ¶ 26.) In 2005, During the
11 pendency of Nucor I, but prior to the entry of judgment, Nucor entered into settlement
12 agreements with both Travelers and Hartford. (Id.) The settlement between Nucor and
13 Travelers provided that Travelers’ payment to Nucor would “exhaust all coverage potentially
14 available to Nucor under the Policies for Environmental Contamination Claims Arising out
15 of the [WOR] Site.” (Doc. 81 ¶ 11.)

16 The settlement between Nucor and Hartford provided that in exchange for the
17 payment by Hartford, Nucor “fully and forever releases and discharges Hartford from Claims
18 . . . that Nucor has or may have against Hartford with respect to . . . the Nucor Policies. . . .
19 Furthermore, by virtue of the foregoing releases, Hartford shall have no duty to defend or
20 indemnify Nucor with respect to any Claim.” (Doc. 87 ¶ 9.) The Hartford settlement also
21 stated that “[t]he Parties agree that the Settlement Sum will exhaust any and all potentially
22 applicable limits of all Hartford Accident and Indemnity Company primary policies issued
23 to Nucor.” (Id. ¶ 10.)

24 **B. The RID Action**

25 On September 11, 2009, Nucor notified Wausau that it had received a demand letter
26 and a draft complaint from RID alleging that Nucor was a PRP for groundwater pollution that
27 impacted wells owned and operated by RID. (Id. ¶ 5.) On November 2, 2009, Wausau sent
28 a reservation of rights letter to Nucor, reserving its rights to assert possible coverage defenses

1 as to whether the RID suit constituted a claim for “damages” for “property damages” and
2 whether there was an “occurrence” as defined by the policies. (Id. ¶ 7.) In the letter, Wausau
3 also wrote that if Nucor were served with a lawsuit, it should notify Wausau “so that if
4 appropriate [Wausau] may appoint counsel to defend Nucor’s interests.” (Id.)

5 RID filed its complaint in the underlying action against Nucor and other defendants
6 in February 2010, and thereafter filed and served a First Amended Complaint in July 2010.
7 (Id. ¶¶ 8-9.) RID’s complaint describes the nature of the action as follows:

8 “This is a civil action brought against the Defendants under the
9 Comprehensive Environmental Response, Compensation, and
10 Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*
11 (“CERCLA”), for the recovery of costs incurred by RID in
12 responding to the Defendants’ release or threatened release of
hazardous substances into groundwater that impacts or threatens
to impact wells owned and operated by RID, as well as for
damages to property owned by RID.”

13 (Id. ¶ 9.) On November 11, 2011, Wausau withdrew its right to deny coverage to the extent
14 Nucor’s liability arose from intentional acts or it expected or intended any property damage.
15 (Id. ¶ 10.)

16 As stated above, Nucor retained Fennemore Craig to handle its defense in the RID
17 action. (Id. ¶ 13.) Fennemore Craig was simultaneously retained by three other defendants
18 to represent them in the RID action – Kinder Morgan G.P., Inc., BP West Coast Products,
19 LLC, and BNSF Railway Company. (Id. ¶ 14.) Wausau expressed to Nucor its concerns
20 with Fennemore Craig’s representation of multiple defendants in the RID action. (Id. ¶ 15.)

21 For the period from the hiring of Fennemore Craig for the RID action through June
22 2011, Nucor sought from Wausau reimbursement of defense costs totaling \$601,462, which
23 included “Nucor only” attorneys’ fees of \$461,326, and additional fees of \$140,136
24 representing Nucor’s 25% share of additional amounts billed by Fennemore Craig for work
25 the firm performed jointly on behalf of Nucor and the three other RID action defendants. (Id.
26 ¶ 17.) Wausau has to-date paid for a portion of the defense bills submitted by Nucor, but has
27 not paid amounts it deems excessive or unreasonable, nor paid amounts for Nucor’s share of
28 fees billed by Fennemore Craig for work performed jointly on behalf of Nucor and the three

1 other RID defendants. (Id. ¶ 18.)

2 On November 11, 2011, Wausau informed Nucor that it wished to exercise its right
3 under the policies to appoint defense counsel for Nucor in the RID action, and informed
4 Nucor that it had retained attorney Kevin Neal of the firm Jones, Skelton & Hochuli, P.L.C.
5 to handle Nucor's defense. (Id. ¶ 19.) Wausau informed Nucor that it would pay the
6 necessary and reasonable fees of the Fennemore Craig firm through November 30, 2011, and
7 also informed Nucor that Wausau would not object if it wished to continue to retain
8 Fennemore Craig as associate defense counsel in the RID action at Nucor's own expense.
9 (Id. 19.) Nucor objected to Wausau's attempt to appoint defense counsel. (Id. ¶ 20.)

10 Wausau also requested that Nucor tender the defense of the RID suit to its other
11 insurers, including Hartford and Travelers. (Id. ¶ 21.) On March 17, 2010, Nucor notified
12 Wausau that it had not tendered the RID suit to any other insurers and that it refused to do
13 so in light of settlement agreements Nucor had entered into with Hartford and Travelers.
14 (Id.) Subsequently, Wausau notified Hartford and Travelers about the RID action and
15 requested that they pay a share of Nucor's defense costs. (Id.) Hartford and Travelers have
16 refused to pay any of Nucor's defense costs in the RID action, on the grounds that they have
17 no obligation to contribute to Nucor's defense costs based upon the settlement agreements
18 they reached with Nucor in connection with previous environmental claims. (Id. ¶ 22.)

19 Nucor brought this case against Wausau asserting claims for declaratory relief, breach
20 of contract, and breach of the covenant of good faith and fair dealing. (Doc. 1-1 at 20-26.)
21 For its claim of declaratory relief, Nucor seeks declaration that, *inter alia*: Wausau has a duty
22 to defend Nucor in the RID suit; Wausau is obligated to provide Nucor with a complete
23 defense to every claim in the RID suit; Nucor has the right to designate counsel of its
24 choosing to defend the RID suit; and Wausau must reimburse Nucor for all reasonable and
25 necessary defense costs. (Id. at 22-23.)

26 Wausau answered Nucor's complaint, and asserted four counterclaims: (1) for
27 declaratory relief against Nucor regarding Wausau's right to appoint defense counsel in the
28 RID suit; (2) for declaratory judgment that Nucor breached the cooperation provision of the

1 insurance policies issued by Wausau; (3) for equitable contribution against Hartford and
2 Travelers; and (4) for declaratory relief against Nucor, Hartford, and Travelers regarding the
3 rights and responsibilities of Hartford, Travelers, and Nucor to pay for defense costs incurred
4 in the RID action. (Doc. 5 at 15-17.)

5 **LEGAL STANDARD**

6 **I. Motions for Partial Summary Judgment**

7 Upon motion at any time, a party defending against a claim may move for “partial
8 summary judgment,” that is, “summary judgment in the party’s favor as to . . . any part
9 thereof.” Fed. R. Civ. P. 56(b). A court must grant summary judgment if the pleadings and
10 supporting documents, viewed in the light most favorable to the nonmoving party, “show that
11 there is no genuine issue as to any material fact and that the moving party is entitled to
12 judgment as a matter of law.” Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S.
13 317, 322-23 (1986); Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir.
14 1994). Substantive law determines which facts are material. See Anderson v. Liberty
15 Lobby, 477 U.S. 242, 248 (1986); see also Jesinger, 24 F.3d at 1130. “Only disputes over
16 facts that might affect the outcome of the suit under the governing law will properly preclude
17 the entry of summary judgment.” Anderson, 477 U.S. at 248. The dispute must also be
18 genuine, that is, the evidence must be “such that a reasonable jury could return a verdict for
19 the nonmoving party.” Id.; see Jesinger, 24 F.3d at 1130.

20 A principal purpose of summary judgment is “to isolate and dispose of factually
21 unsupported claims.” Celotex, 477 U.S. at 323-24. Summary judgment is appropriate
22 against a party who “fails to make a showing sufficient to establish the existence of an
23 element essential to that party's case, and on which that party will bear the burden of proof
24 at trial.” Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir.
25 1994). The moving party need not disprove matters on which the opponent has the burden
26 of proof at trial. See Celotex, 477 U.S. at 317. The party opposing summary judgment “may
27 not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth
28 specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e); see

1 Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-88 (1986); Brinson v. Linda
2 Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995).

3 **II. Equitable Contribution**

4 A federal court sitting in diversity applies state substantive law. See Hambleton Bros.
5 Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1227 (9th Cir. 2005). Thus, this
6 Court applies Arizona law to the interpretation of the insurance contracts at issue. See
7 Benevides v. Arizona Prop. & Cas. Ins. Guar. Fund, 184 Ariz. 610, 613, 911 P.2d 616, 619
8 (App. 1995).

9 Under Arizona law, an insurer has a duty to “defend the insured against any claim
10 ‘potentially covered by the policy.’” Pueblo Santa Fe Townhomes Owners’ Ass’n v.
11 Transcon. Ins. Co., 218 Ariz. 13, 19, 178 P.3d 485, 491 (App. 2008). The language of the
12 insurance policy controls the scope and extent of the insurer’s duty to defend. Cal. Cas. Ins.
13 Co. v. State Farm Mut. Auto. Ins. Co., 185 Ariz. 165, 168, 913 P.2d 505, 508 (App. 1996).
14 The duty to defend arises “at the earliest stages of the litigation and generally exists
15 regardless of whether the insured is ultimately found liable.” Regal Homes, Inc. v. CNA Ins.,
16 217 Ariz. 159, 164, 171 P.3d 610, 615 (App. 2007). The duty to defend focuses on the facts
17 alleged rather than the legal characterization of the causes of actions alleged in the complaint
18 against the insured. Kepner v. Western Fire Ins. Co., 109 Ariz. 329, 331, 509 P.2d 222, 224
19 (1973).

20 Generally, an insurer must contribute to the defense costs borne by another insurer in
21 defending their mutual insured. Nat’l Indem. Co. v. St. Paul Ins. Co., 150 Ariz. 458, 459,
22 724 P.2d 544, 545 (1986). To determine whether an insurer will be required to contribute
23 to another insurer’s payment of costs on behalf of an insured, Arizona courts apply a four-
24 part test: “the policies must cover (1) the same parties, (2) in the same interest, (3) in the
25 same property, [and] (4) against the same casualty.” Granite State Ins. Co. v. Emp’rs Mut.
26 Ins. Co., 125 Ariz. 275, 278, 609 P.2d 90, 93 (App. 1980).

1 **DISCUSSION**

2 **I. Wausau’s Motion to Strike Nucor’s Cross-Motion**

3 On May 25, 2013, Nucor filed its “Opposition to Employers Insurance Company of
4 Wausau’s Motion for Partial Summary Judgment Concerning Right to Select Independent
5 Counsel and Cross-motion for Partial Summary Judgment.” (Doc. 124.) On April 8, 2013,
6 Wausau filed its Reply in support of its motion for partial summary judgment, and its motion
7 to strike Nucor’s cross-motion. (Doc. 125.) Wausau moves to strike Nucor’s cross-motion
8 on grounds that it violates the Court’s case management order that all motions for summary
9 judgment on defense-related issues and Wausau’s right to equitable contribution be filed no
10 later than February 25, 2013. (*Id.* at 6.)

11 Although Rule 16(f), FED.R.CIV.P., authorizes sanction against a party for failure to
12 obey a scheduling order, the Court will deny Wausau’s motion to strike. Nucor’s cross-
13 motion, filed simultaneously with its Response to Wausau’s motion for partial summary
14 judgment, concerns the same issue as that raised in Wausau’s motion – whether Wausau has
15 the right to appoint Nucor’s defense counsel in the RID action. Wausau has responded to
16 Nucor’s cross-motion, the parties rely on the same factual evidence in support of their
17 respective motions, and Wausau has alleged no injury to any substantial right. (*See* Rule 61,
18 FED.R.CIV.P.) Thus, there is no prejudice to Wausau in allowing the issue to be fully briefed
19 before the Court, and Nucor’s technical delay in filing the cross-motion was harmless. Thus,
20 the motion to strike will be denied.

21 **II. Wausau and Nucor’s Cross-motions for Partial Summary Judgment Re:
22 Wausau’s Right to Select Defense Counsel**

23 Wausau moves for partial summary judgment in its favor on the issue of whether
24 Wausau has the right to appoint its own counsel to defend Nucor in the RID action. (Doc.
25 83 at 7.) Nucor moves for partial summary judgment in its favor on the same issue. (Doc.
26 124.)

27 Wausau argues that summary judgment in its favor on this issue is appropriate on the
28 grounds that Arizona law confers upon an insurer the right to appoint defense counsel for the

1 insured, even where the insurer is defending under a reservation of rights. (Doc. 83 at 12-
2 15.) Nucor argues that summary judgment should be entered in its favor, on three
3 independent grounds: (1) that Arizona law provides no such absolute right to an insurer; (2)
4 that even if such a right existed, Wausau has waived that right by its use and reliance upon
5 Fennemore Craig in the RID action for an extended period of time and by its lengthy delay
6 in seeking to compel Nucor’s use of different counsel; and (3) that Wausau is estopped from
7 belatedly attempting to exercise a right to appoint counsel because of the prejudice to Nucor
8 that would result. (Doc. 124 at 7-17.)

9 Typically, when a defense is provided by a liability insurer, “as part of the insurer’s
10 obligation to provide for the insured’s defense, the policy grants the insurer the right to
11 control that defense – which includes the power to select the lawyer that will defend the
12 claim.” Paradigm Ins. Co. v. The Langerman Law Offices, P.A., 200 Ariz. 146, 149, 24 P.3d
13 593, 596 (2001) (citations omitted). However, where an insurer accepts the duty to defend
14 under a reservation of rights, it “relinquishes to the insured control of the litigation.” United
15 Services Auto. Ass’n v. Morris, 154 Ariz. 113, 119, 741 P.2d 246, 252 (1987). “An insured
16 that is notified of its insurer’s reservation of rights is on notice of the conflict of interest and
17 is free, upon proper notice to the insurer, to act to protect its rights in the litigation with the
18 claimant.” Pueblo Santa Fe Townhomes Owners’ Ass’n v. Transcontinental Ins. Co., 218
19 Ariz. 13, 19, 178 P.3d 485, 491 (App. 2008).

20 The Court agrees with Wausau that there is no support in Arizona case for the blanket
21 proposition that an insurer defending under a reservation of rights loses its right to appoint
22 defense counsel for its insured. Although the courts in Morris and Pueblo Sante Fe indicated
23 that an insurer defending under a reservation of rights loses some of its contractual rights to
24 control the defense of an insured, neither of those opinions, nor any other Arizona case that
25 the Court has found, addressed the specific issue of whether an insurer loses its right to
26 appoint defense counsel.

27 Thus, in the absence of any authority in support of Nucor’s claim that it has a right to
28 appoint its own defense counsel, the Court finds that Wausau has a contractual right under

1 the insurance policies to appoint defense counsel in the underlying RID action.

2 Nucor argues, however, that even if Wausau does have this right, it has waived the
3 right by failing to attempt to select independent counsel in a timely manner. (Doc. 124 at
4 13.) In support of this argument Nucor notes the following undisputed facts. Nucor first
5 tendered the RID claim to Wausau in September 2009, after receiving a demand letter and
6 draft complaint. (Doc. 84 ¶ 5.) On July 16, 2010, Fennemore Craig provided Wausau with
7 an update on recent developments in the RID litigation. (Doc. 124-1 at 23.) Wausau
8 responded to this communication from Fennemore Craig by requesting “an outline as to
9 defense strategy,” and stating that it should “include identification of the defense team and
10 corresponding responsibilities, as well as a budget. We’d like to get a handle on the direction
11 and projected costs of this litigation.” (*Id.*)

12 The RID complaint was filed against Nucor on July 29, 2010; On August 13, 2010,
13 Fennemore Craig provided to Wausau some of the information requested in the July 16
14 communication, gave further update on the RID suit, and tendered the official RID
15 complaint. (*Id.*) On October 19, 2010, Wausau thanked Fennemore Craig for the August 13
16 letter, noted that Fennemore Craig had “significant background and knowledge of the [WOR]
17 site, particularly with regards to the Nucor plume,” and requested additional information
18 from Fennemore. (*Id.* at 24.) Fennemore Craig provided to Wausau the requested additional
19 information on December 6, 2010. (*Id.*) It was not until November 11, 2011, that Wausau
20 informed Nucor that it had decided to exercise its right under the policies to appoint defense
21 counsel for Nucor in the RID action. (Doc. 84 ¶ 19.)

22 Waiver is the voluntary relinquishment of a known right or conduct warranting an
23 inference that such a right has been relinquished. Services Holding Co., Inc. v. Transamerica
24 Occidental Life Ins. Co., 180 Ariz. 198, 207, 883 P.2d 435, 444 (App. 1994). “Waiver of
25 right requires a clear showing of an intent to waive that right. Intent to waive, however, may
26 be inferred from conduct.” *Id.* at 206, 883 P.2d at 444 (internal citations omitted). Waiver
27 is a question of fact to be determined by the trier of fact. Chaney Bldg. Co., Inc. v.
28 Sunnyside School Dist. No. 12, 147 Ariz. 270, 273, 709 P.2d 904, 907 (App. 1985).

1 Wausau argues that the facts do not establish that it waived its right to appoint defense
2 counsel for Nucor in the RID action. (Doc. 125 at 11.) However, Wausau neglects to
3 address the settled legal reality that whether Nucor could infer waiver from Wausau’s
4 conduct is a question of fact for the trier of fact. The Court finds that Nucor has raised
5 sufficient evidence to establish a genuine dispute of material fact by which waiver could be
6 found. It is undisputed that Wausau had multiple communications with Fennemore Craig
7 concerning Nucor’s defense in the RID action, spanning a time period of over a year. It is
8 further undisputed that Nucor did not attempt to assert its right to appoint counsel at any time
9 prior to November 11, 2011, nearly two years after Wausau first received notice of the RID
10 demand letter and draft complaint against Nucor. These facts, viewed in the light most
11 favorable to the nonmoving party, are sufficient to raise a genuine dispute, and thus summary
12 judgment against Nucor’s claim of waiver is inappropriate.

13 The Court also finds, however, that summary judgment in Nucor’s favor is similarly
14 inappropriate, because Wausau disputes Nucor’s inferences from the facts, and raises facts
15 by which a reasonable trier of fact could find that it did not waive its right to appoint counsel.
16 As Wausau notes, after it received notice of the potential RID suit in September 2009, it sent
17 a reservation of rights letter to Nucor on November 2, 2009 confirming that if Nucor were
18 served with a lawsuit, it should notify Wausau “so that if appropriate, we may appoint
19 counsel to defend Nucor’s interest.” (Doc. 84 ¶ 7.) Further, Wausau notes that the RID
20 action was not officially filed or tendered to Wausau until July, 2010, and that up to the
21 present very little litigation has been conducted in the RID action. (Doc. 84¶ 9; Doc. 125 at
22 9.) Thus, Wausau argues, Nucor could not reasonably have inferred that the delay between
23 tender of the RID suit and Wausau’s attempt to appoint counsel amounts to a showing of
24 intentional waiver.

25 The Court agrees that a reasonable jury could find that waiver cannot be inferred from
26 Wausau’s conduct. Accordingly, this remains a factual question for the trier of fact, and may
27 not be disposed of on summary judgment.

28 Nucor argues next, however, that summary judgment is appropriate because Wausau

1 is estopped from exercising its right to appoint counsel. (Doc. 124 at 15.) According to
2 Nucor, Wausau is estopped because it previously consented to Nucor's retention of
3 Fennemore Craig in previous suits brought against Nucor for pollution at the WOR site, and
4 by the same conduct Nucor points to above in support of its argument that Wausau has
5 waived its right to appoint counsel. (Id.)

6 Estoppel occurs when one party, by its conduct, induces another to believe and have
7 confidence in certain material facts, which inducement results in justifiable reliance thereon,
8 resulting in injury to the person thus relying. Pueblo Santa Fe, 218 Ariz. at 21, 178 P.3d at
9 493. Nucor asserts that it relied on Wausau's conduct in approving the retention of
10 Fennemore Craig, and will be prejudiced if Nucor is now allowed to substitute new,
11 inexperienced counsel in place of Fennemore Craig, which has been defending Nucor in suits
12 concerning its operation of the WOR facility for more than 20 years. Wausau argues that it
13 is not estopped from appointing counsel because the undisputed facts do not support a
14 showing of prejudice – according to Wausau, Nucor cannot demonstrate that it will suffer
15 any prejudice if Jones Skelton is appointed to handle the RID action because there is no
16 reason to assume that Jones Skelton will be unable to assimilate and use the information and
17 work product Nucor and Fennemore Craig have developed to assist in the defense of the RID
18 action. (Doc. 125 at 13.)

19 The Court finds that the undisputed facts, viewed in the light most favorable to the
20 non-moving party (which in the case of cross-motions for summary judgment, as here, is both
21 parties), could reasonably support a finding in either party's favor. The question of whether
22 Nucor will be prejudiced by Wausau's attempt to substitute counsel at this stage in the RID
23 action is a question for the jury, and the undisputed facts can reasonably be interpreted either
24 way. Thus, a genuine issue of material fact exists for the trier of fact.

25 For these reasons, the Court will deny both the cross-motions for partial summary
26 judgment on the issue of whether Wausau maintains the right to appoint Nucor's defense
27 counsel in the RID action. Although the Court agrees with Wausau that it has a contractual
28 right to appoint defense counsel for Nucor, the Court finds that Nucor has raised sufficient

1 facts by which a reasonable trier of fact could conclude that Nucor has waived that right or
2 is estopped from asserting that right.

3 **III. Wausau and Counter-Defendants' Cross-motions for Summary Judgment**
4 **Re: Equitable Contribution**

5 Wausau moves for partial summary judgment in favor of its counterclaim for
6 equitable contribution from Travelers and Hartford for Wausau's defense of Nucor in the
7 RID action. (Doc. 83 at 16.) Travelers and Hartford simultaneously move for summary
8 judgment against Wausau's counterclaim. (Docs. 80, 85.)

9 Travelers and Hartford both argue that summary judgment in their favor is appropriate
10 because Wausau's claim for equitable contribution from them fails as a matter of law.
11 According to Travelers and Hartford, the settlement agreements they each entered into with
12 Nucor in Nucor I fully exhausted any liability they may have had under the insurance policies
13 for any future claims against Nucor arising from environmental contamination at the WOR
14 facility. Thus, they argue that they have no obligation, real or potential, to defend Nucor in
15 the RID suit, and thus that Wausau has no claim for equitable contribution.

16 Wausau argues next that the settlement agreements do not operate to preclude
17 equitable contribution from Hartford and Travelers for Nucor's defense in the RID action
18 because even where an insurer tenders its full policy limits to the insured, its obligation to
19 contribute to the defense of the insured is not extinguished. (Doc. 83 at 18.) In support of
20 this claim, Wausau cites to California Cas. Ins. Co. v. St. Farm Mut. Auto. Ins. Co., 185 Ariz.
21 165, 913 P.2d 505 (App. 1996.)

22 Wausau's reliance on this case is misplaced, however; there, the Arizona Court of
23 Appeals was considering whether the insurer was immune from a claim for equitable
24 contribution after the insurer had made a full payment under its insured's liability policy. Id.
25 The insurer in that case did not, however, obtain a settlement agreement with its insured
26 discharging its duty to defend. Id. Indeed, in finding that the insurer was still exposed to
27 potential claims for equitable contribution from other insurers of their mutual insured, the
28 court noted that "most decisions from other jurisdictions that have construed language similar

1 to that on which [the insurer] relies have held that a liability insurer’s payment of its full
2 policy limits discharges its duty to defend a claim against the insured *only* if made pursuant
3 to a settlement or in full or partial satisfaction of a judgment entered on the claim against the
4 insured.” Id. at 168, 913 P.2d at 508 (emphasis in original); see also Anderson v. United
5 States Fidelity & Guar. Co., 177 Ga.App. 520, 339 S.E.2d 660, 661 (1986) (term “exhaust”
6 does not mean paying policy limits into court without insured’s consent, but rather paying
7 settlement or judgment that entirely depletes policy limits); Samplly v. Integrity Ins. Co., 476
8 So.2d 79, 83-84 (Ala. 1985) (insurer could not avoid duty to defend by tendering payment
9 of policy limits without settlement or insured’s consent).

10 The Court agrees with Travelers and Hartford that the settlement agreements they
11 entered into with Nucor in 2005 extinguished their duty to defend or indemnify Nucor for
12 any and all claims relating to groundwater contamination at the WOR facility. This is not
13 a case where Travelers and Hartford seek to avoid their duty to contribute to Nucor’s defense
14 by unilaterally paying policy limits to the insured and then disavowing the duty to defend.
15 Rather, this is a case where after years of litigation over Travelers’ and Hartford’s coverage
16 obligations to Nucor, those parties entered into a settlement agreement whereby those
17 insurers made settlement payments to Nucor in exchange for Nucor’s agreement to discharge
18 those insurers from any and all further liability or defense obligation toward Nucor in relation
19 to environmental contamination claims in connection with Nucor’s operation of the WOR
20 facility.

21 The plain language of the specific settlement between Nucor and Travelers provided
22 that the agreement would “exhaust all coverage potentially available to Nucor under the
23 Policies for Environmental Contamination Claims Arising out of the [WOR] Site.” (Doc. 81
24 ¶ 11.) The agreement between Nucor and Hartford, as well, provided that Nucor “fully and
25 forever releases and discharges Hartford from Claims . . . that Nucor has or may have against
26 Hartford with respect to . . . the Nucor Policies. . . . Furthermore, by virtue of the foregoing
27 releases, Hartford shall have no duty to defend or indemnify Nucor with respect to any
28 Claim.” (Doc. 87 ¶ 9.) The Hartford settlement also stated that “[t]he Parties agree that the

1 Settlement Sum will exhaust any and all potentially applicable limits of all Hartford Accident
2 and Indemnity Company primary policies issued to Nucor.” (Id. ¶ 10.)

3 As such, these two insurers have no liability to Nucor under the policies in connection
4 with the RID action, which did not arise until 2009, and was not filed until 2010.
5 Accordingly, Nucor has no right to a defense from Travelers or Hartford in the RID action,
6 and Wausau, in turn, has no right to equitable contribution from Hartford or Travelers for
7 Wausau’s costs defending Nucor in the RID action.

8 The Court thus finds that this issue is appropriate for summary judgment: the Court
9 will deny Wausau’s motion for partial summary judgment of its counterclaims against
10 Travelers’ and Hartford for equitable contribution, and the Court will grant Travelers’ and
11 Hartford’s cross-motions for summary judgment against Wausau’s counterclaims.

12 **CONCLUSION**

13 Accordingly, for the foregoing reasons,

14 **IT IS HEREBY ORDERED denying** Wausau’s Motion for Partial Summary
15 Judgment. (Doc. 83.)

16 **IT IS FURTHER ORDERED denying** Wausau’s Motion to Strike. (Doc. 125.)

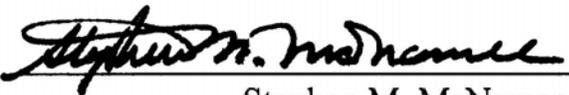
17 **IT IS FURTHER ORDERED denying** Nucor’s Cross-Motion for Partial Summary
18 Judgment. (Doc. 124.)

19 **IT IS FURTHER ORDERED granting** Travelers’ Motion for Summary Judgment
20 Re: Equitable Contribution. (Doc. 80.)

21 **IT IS FURTHER ORDERED granting** Hartford’s Motion for Summary Judgment
22 Re: Equitable Contribution. (Doc. 85.)

23 **IT IS FURTHER ORDERED** pursuant to the Court’s case management order of
24 November 19, 2012 (Doc. 78), that the deadline for completing fact discovery shall be 180
25 days from the date of entry of this Order.

26 DATED this 27th day of September, 2013.

27 

28 Stephen M. McNamee
Senior United States District Judge