

of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give the party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed facts are adequately supported in the summary judgment record. In 1981 Down East Energy Corp. (“Down East”) purchased land and a gasoline service station in Raymond, Maine. Affidavit of John Peters (Docket No. 23) ¶ 2. The station is known as the Jordan Bay Mobil Station (“Station”). *Id.* Continental issued insurance policy No. CBP 55253 to Down

East (“1983 policy”) and policy number CBP 55246 to Brunswick Coal & Lumber Company, a related corporation. Affidavit of Celine M. Jannarone (“Jannarone Aff.”) (Docket No. 24) ¶ 5. These policies were obtained through Morse, Payson & Noyes, an insurance agency that has been an agent for Niagara and Continental for many years. *Id.* ¶¶ 2-3. Both policies covered the period from June 15, 1983 to June 15, 1986. *Id.* ¶ 5. A change endorsement, effective June 15, 1983, changed the insuring company from Continental to Niagara. Exh. A to Defendants’ Motion for Summary Judgment (“Motion”) (Docket No. 13) at [15].

Niagara issued policy number CBP 55343 (“1985 policy”) to Brunswick Coal & Lumber. Exh. B to Motion, at PL-1. The term of this policy was from June 15, 1985 to June 15, 1986. *Id.* This policy replaced the first two policies and combined them. Jannarone Aff. ¶ 5. Niagara issued policy number CBP 55423 (“1986 policy”) to Brunswick Coal & Lumber as a renewal of policy number CBP 55343. Exh. C to Motion & Jannarone Aff. ¶ 7. The term of this policy was from June 15, 1986 to June 15, 1987. Exh. C to Motion at PL-1. Both of these policies were obtained through Morse, Payson & Noyes, and both covered the Station. Jannarone Aff. ¶¶ 3 & 5.

Down East canceled the 1986 policy effective December 23, 1986. *Id.* ¶ 8. At that time Down East purchased from Niagara a so-called extended reporting endorsement for the 1986 policy, extending the reporting period to December 23, 1987. Exh. E to Motion.

In the fall of 1983 Down East arranged for the removal of four underground storage tanks from the Station and the installation of three new tanks for storage of gasoline, along with piping and pumps. Exh. I to Motion at [4]. In August 1987 the owners of property adjacent to the Station filed a claim with the Maine Department of Environmental Protection (“DEP”) alleging that the water in their well began to taste and smell strange in the fall of 1986. Exh. J to Motion at 3, 10. The claim

stated that the water was tested in the winter of 1987 and found to be contaminated with petroleum. *Id.* at 3. The claim alleged that Down East was responsible for the contamination. *Id.* at 2. Down East was informed of this claim by a letter from the DEP dated September 25, 1987. Exh. K to Motion. On October 13, 1987 Down East notified Morse, Payson & Noyes of the notice from the DEP. Affidavit of Alan Quinlan (“Quinlan Aff.”) (Docket No. 26) ¶ 4.

Down East began supplying bottled water to the adjacent property in 1987. Affidavit of John Peters (“Peters Aff.”) (Docket No. 23) ¶ 10. Down East took the position that the contamination of the adjacent property did not come from the Station, but it participated in a series of meetings with the DEP over the eighteen months following its receipt of notice of the claim to discuss the issue. Affidavit of James Morrell (“J. Morrell Aff.”) (Docket No. 19) ¶ 4. In February 1989 the DEP provided Down East with a copy of a study conducted by BCI Geonetics, Inc. which concluded that the Station was the source of gasoline contamination of the adjacent property. Exh. M to Motion. The DEP informed Down East that, unless Down East voluntarily cleaned up the contaminated groundwater originating from the Station and replaced the contaminated water supply, the DEP would issue an administrative order requiring Down East to do so. *Id.* Down East provided copies of the DEP letter and the BCI Geonetics study to Morse, Payson & Noyes. J. Morrell Aff. ¶ 6 & Exh. 3. By letter dated March 29, 1989 Niagara and Continental declined coverage for “this claim.” Exh. 4 to J. Morrell Aff.

Down East undertook the clean-up of the Station without a formal order from the DEP. Deposition of Thomas Schwarm, Exh. R to Motion (“Schwarm Dep.”), at 17-18. In the spring of 1989 Down East retained Groundwater Technology, Inc. (“GTI”), to advise it on the clean-up. Affidavit of Stephen H. Hall (“Hall Aff.”) (Docket No. 20) ¶ 4. In the summer of 1989 Down East

performed pressure tests and discovered that the piping installed in 1983 was leaking. Plaintiff's Supplemental Answers to Defendants' First Set of Interrogatories, Exh. P to Motion, at 2. In the fall of 1989 Down East removed and replaced all of the underground gasoline storage tanks and piping at the Station, as well as the gasoline pump islands and soil contaminated with gasoline. J. Morrell Aff. ¶¶ 9-10. Over the next few years Down East installed a soil vapor extraction system, a groundwater extraction and treatment system and an air sparge system at the Station. Hall Aff. ¶ 4. The source of the contamination was an underground gasoline leak at the Station that occurred between the fall of 1983 and the fall of 1986. Affidavit of Thomas E. Schwarm ("Schwarm Aff.") (Docket No. 21) ¶ 7.

In December 1989 Niagara sent a check to Down East under the 1986 policy in the amount of \$14,335.43 to reimburse Down East for "ENGINEERING EXPENSES AND WATER SUPPLY EXPENSES." Plaintiff's First Request for Admissions (submitted with Plaintiff's Opposition to Defendant's [sic] Motion for Summary Judgment (Docket No. 18) ("Plaintiff's Opp.")), Exh. 29. In May 1990 an attorney for Down East submitted an itemized statement of Down East's expenses related to the gasoline contamination at the Station to Deborah Coleman at Continental. Affidavit of Martin L. Wilk (Docket No. 25) ¶ 5 & Exh. 1. Niagara sent a check dated June 16, 1990 to Down East in the amount of \$95,928.63 under the 1986 policy to reimburse Down East for "ENGINEERING EXPENSES AND WATER SUPPLY, 8/89-5/90." Plaintiff's Opp., Exh. 28. Niagara sent a check dated October 9, 1990 to the law firm then representing Down East in the amount of \$6,939 under the 1986 policy for "LEGAL FEES — RE: JORDAN BAY MOBIL BILLING: FOR PERIOD 2/1/89 - 7/20/90." *Id.* Exh. 30. Niagara sent a check dated January 16, 1992 to Down East in the amount of \$9,245.15 under the 1986 policy for "REIMB. FOR

GRNDWATER TECHNOLOGIES, WATERS ELECTRIC - SUNDANCE RSTR. & L. & S. ANDREWS.” *Id.* Exh. 31.

On January 17, 1992 Janet Owens of Continental wrote to James Morrell of Down East with respect to the 1985 policy, identifying the “claimant” as the owners of the adjacent property and allowing the third-party claim, while stating that coverage was precluded for “costs incurred as a result of property damage or environmental damage to your own property.” Exh. 7 to J. Morrell Aff. at 1-2. The letter identifies the January 16, 1992 check as being for “the costs associated with replacement of water to the Sundancer Restaurant, the electric bill for running the soil venting system and Groundwater Technologies’ services.” *Id.* at 3. Niagara sent a check dated July 14, 1992 to Down East in the amount of \$1,305.76 under the 1986 policy for “REIMBURSEMENT FOR ENGINEERING EXPENSES, WATER & ELECTRIC SUPPLY — MAY-JUNE 1992.” Plaintiff’s Opp., Exh. 32. By letter dated September 16, 1992 Janet Owens returned certain bills that had been submitted, noting that the insurance “responds to third party claims.” *Id.* Exh. 19. She asked that Down East “remove the bills associated with Jordan Bay.” *Id.* In December 1992 Niagara sent a check to Down East in the amount of \$9,249.81 under the 1986 policy to reimburse Down East for “MONIES EXPENDED TO PROVIDE ALTERNATE WATER SUPPLY” to the adjacent property. Plaintiff’s Opp., Exh. 33.

Copies of Groundwater Technologies’ reports concerning the work at the Station were provided to Continental and Niagara. Defendants’ Supplemental Response to Plaintiff’s Request for Admissions (submitted with Plaintiff’s Opposition), Requests 21, 23, 25, 32, 34, and 35; Plaintiff’s Opp., Exhs. 10, 12, 13, 20, 22 and 23. In January 1992 James Morrell provided Janet Owens with a groundwater monitoring schedule for the coming year and a summary of the expected costs for the

ongoing remediation. J. Morrell Aff. ¶ 13 & Exh. 6. In October 1992 Stephen Hall of Down East sent Janet Owens a copy of its pollution remediation workplan for the site, with an estimate of future costs. Hall Aff. ¶ 11. He never received a response either approving or disapproving the plan. *Id.*

On December 11, 1995 an attorney for Continental wrote to James Morrell stating that the 1986 policy did not cover costs of clean-up at the Station as a first-party claim. Plaintiff's Opp., Exh. 24. On December 11, 1996 Alison Barrelli of CNA Insurance Companies wrote to John Paterson, current attorney for Down East, stating that none of the three policies provided coverage for costs of clean-up of Down East's own property. *Id.*, Exh. 26. To date, Down East has incurred \$568,045.79 in costs of clean-up of the Station and provision of clean water to the adjacent property and to the operator of the Station. Hall Aff. ¶ 8. Down East must continue to run the groundwater monitoring system through 1998 at an estimated annual cost of \$45,000. Schwarm Aff. ¶12.

All of the clean-up activities undertaken by Down East at the Station were required by the DEP. Schwarm Dep. at 28. All of these activities were undertaken in the most cost-effective manner possible. Deposition of John Peters, Exh. S to Motion, at 49.

III. Analysis

A. Breach of Contract (Count I)

The defendants offer several reasons why they believe that they are entitled to summary judgment. Each of the policies offers two types of pollution liability coverage, described in sections 1.A and 1.B. Section 1.A of each policy reads as follows:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as compensatory damages because of bodily injury or property damage to which this insurance applies, provided

that:

(1) such bodily injury or property damage is caused by a pollution incident which commences subsequent to the retroactive date shown in the declarations of this policy; and

(2) the claim for such damages is first made against the insured during the policy period and reported to the company during the policy period or within fifteen days after its termination.

Policy number CBP 55253 (“1983 policy”), Exh. A to Motion, at PL-2; Policy number CBP 55343 (“1985 policy”), Exh. B to Motion, at PL-2; Policy number CBP 55423 (“1986 policy”), Exh. C to Motion, at PL-2.

Section 1.B of each policy provides:

The company will reimburse the insured for reasonable and necessary clean-up costs incurred by the insured in the discharge of a legal obligation validly imposed through governmental action which is initiated during the policy period, provided that:

(1) such clean-up costs are incurred because of environmental damage to which this insurance applies; and

(2) the environmental damage is caused by a pollution incident which commences subsequent to the retroactive date shown in the declarations of this policy.

* * *

The company will also reimburse the insured for other clean-up costs which the insured incurs, provided that:

(1) the clean-up costs are reasonable and necessary; and

(2) during the policy period, the company grants the insured prior written consent to undertake the clean-up. The company will grant its consent when, in its sole discretion, a pollution incident which commences subsequent to the retroactive date shown in the declarations of this policy or the threat of a pollution incident presents an imminent and substantial danger of bodily injury, property damage, or environmental damage to which this insurance applies.

1983 policy at PL-2; 1985 policy at PL-2; 1986 policy at PL-2. The 1985 and 1986 policies include a “Pollution Liability Insurance Amendment” which modifies the second subparagraph (2) of section 1.B so that it reads in its entirety as follows:

(2) during the policy:

(a) the company grants the insured prior written consent to undertake the clean-up. The company will grant its consent when, in its sole discretion, a pollution incident which commences subsequent to the retroactive date shown in the declarations of this policy or the threat of a pollution incident presents an imminent and substantial danger of bodily injury, property damage, or environmental damage to which this insurance applies.

(b) the company does not grant the insured prior written consent to undertake the clean-up but the insured demonstrates to the company’s satisfaction that the clean-up will reduce his losses and there is a pollution incident which commences subsequent to the retroactive date shown in the declarations of this policy or the threat of a pollution incident presents an imminent and substantial danger of bodily injury, property damage, or environmental damage to which this insurance applies.

1985 policy at [11]; 1986 policy at [11].

The defendants’ first argument is based on *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990). They assert that section 1.A of the three policies does not provide coverage for clean-up of Down East’s own property, because such clean-up does not constitute “property damage.” In *Marois*, no claims had been made against the insured for damages arising from holes discovered in two underground gasoline storage tanks on the insured’s property. *Id.* at 17. The insurance contract provided that the insurer would pay on behalf of the insured “all sums which the insured shall become legally obligated to pay as damages because of . . . property damage.” *Id.* at 18. The Law Court construed this language, which is identical for all practical purposes to that present in section 1.A of the policies at issue here, to include only damages the insured would have to pay to other

property owners for damages to their property. *Id.* at 18-19. Money spent by the insured “to meet the State’s demands . . . first for a remedial plan, and then . . . for measures satisfactory to the DEP to prevent contaminated ground water from migrating, restore ground water quality and restore or replace contaminated ground water supplies” is not “sums which the insured [is] legally obligated to pay as damages.” *Id.* at 18.

Marois appears to be dispositive as to section 1.A of the policies. However, the plaintiff asserts that *Marois* does not apply, for two reasons: first, the fact that a third party’s property had been damaged before the clean-up began means that all costs incurred in cleaning up the plaintiff’s property, the source of that damage, are covered under the policy language; and second, a majority of courts¹ have concluded that environmental clean-up costs are “damages” within the meaning of the standard insurance policy language that is included in section 1.A of the policies at issue.

Addressing the second argument first, the fact remains that *Marois*, which is the law in Maine, holds to the contrary. The plaintiff’s request that this court certify “these questions” to the Law Court, because some of the authority from other jurisdictions on which the *Marois* opinion relies has been overruled in those jurisdictions, Plaintiff’s Opp. at 17, is inappropriate. The applicable rule, M. R. Civ. P. 76B(a), provides for certification

[w]hen it shall appear to . . . any of the . . . District Courts of the United States that there are involved in any proceeding before it one or more questions of law of this state which may be determinative of the cause and that there are no clear controlling precedents in the decisions of the Supreme Judicial Court, such federal court may . . . certify such questions of law of this state to the Supreme Judicial Court sitting as the Law Court for instructions concerning such questions of state law.

¹ The plaintiff includes the First Circuit among these courts, citing *Hays v. Mobil Oil Corp.*, 930 F.2d 96 (1st Cir. 1991). In that case, the First Circuit dealt with a claim under an indemnification agreement, not an insurance policy, and applied Massachusetts law.

Here, *Marois* is a clear controlling precedent, at least as to the language in section 1.A of the policies.

The plaintiff's first argument is based on case law from other jurisdictions. The general thrust of this authority is that an insured should recover from its insurer if any of the incurred costs are curative of damages caused to a third party or aimed at preventing such damages. *E.g.*, *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023, 1029-30 (2d Cir. 1991) (applying Vermont law)²; *In re Texas E. Transmission Corp.*, 870 F. Supp. 1293, 1334 (E. D. Pa. 1992) (applying Texas law), *aff'd* 995 F.2d 219 (3d Cir. 1993). *Marois* is also dispositive on this point. While the Law Court's holding in that case is not based directly on a rejection of this theory, the decision does differentiate between money, however substantial in amount, spent to "effectively alleviate or prevent property damage to others" and "sums which the insured [is] legally obligated to pay as damages." 573 A.2d at 18. Under *Marois*, it is only the latter expenditure that is covered by the language of section 1.A of the policies.

The defendants next argue that there is no coverage under section 1.B of the policies because no legal obligation was imposed upon the plaintiff through governmental action that was initiated during any of the policy periods; the defendants did not grant the plaintiff prior written consent to undertake the clean-up, nor did the plaintiff demonstrate to the defendants that a clean-up would reduce losses; and no pollution incident commenced subsequent to the retroactive date shown in the declarations of the 1986 policy.

The earliest evidence of governmental action that might have imposed a legal obligation

² While the Second Circuit in *Gerrish* based its decision on the exclusion in the policy language of coverage for damages to the insured's own property, the United States District Court for the District of Vermont found, in the underlying action, contrary to Maine law, that under Vermont law all clean-up costs constitute damages within the meaning of the policy language. *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 754 F. Supp. 358, 366-68 (D. Vt. 1990).

upon the plaintiff is the letter from the DEP dated September 25, 1987. Motion, Exh K. The plaintiff contends that governmental action sufficient to invoke section 1.B was initiated in 1983, when the DEP “was involved in supervising” the removal of the gasoline storage tanks that were already on the premises when the plaintiff bought the Station. Plaintiff’s Opp. at 11. There is no indication in the summary judgment record that the DEP required the plaintiff to remove the tanks at that time or that the removal was in any way in response to a legal obligation. In addition, the fact that the DEP had no contact with the plaintiff for four years after the removal of the tanks demonstrates that the action taken by the DEP in 1987 or 1988 was not the same action in which it was engaged in 1983 when the tanks were removed.

The 1986 policy was canceled by the plaintiff effective December 23, 1986. While the DEP action clearly was not initiated before that date, the plaintiff asserts that the one-year extended reporting period endorsement that it purchased at that time extended the deadline for initiation of government action to December 23, 1987. The defendants respond that this endorsement applied only to coverage under section 1.A of the policy, citing *Alan Corp. v. International Surplus Lines Ins. Co.*, 823 F. Supp. 33, 36-37 (D. Mass. 1993), *aff’d* 22 F.3d 339 (1st Cir. 1994). The “extended reporting period option” in the 1986 policy that was triggered by the “extended reporting period endorsement,” Motion, Exh. E, provides in pertinent part:

If, for any reason other than non-payment of premium, the company cancels or refuses to renew this policy, the named insured may:

(1) by giving written notice to the company on or before the effective date of the cancellation, or no later than ten days after the effective date of non-renewal; and

(2) by paying promptly when due an additional premium of not more than 50% of the annual premium developed under this policy;

have an endorsement issued providing an extended reporting period of one year following the effective date of the cancellation or non-renewal. Any claims for damages because of bodily injury or property damage first made against the insured and reported to the company during that extended reporting period shall be deemed to be so made and reported during the policy period, but only if the bodily injury or property damage occurred prior to the effective date of the cancellation or non-renewal. All other provisions of this policy, including those relating to the company's limit of liability, shall be unchanged by this provision.

Motion, Exh. C, at PL-6. Only section 1.A of the policies refers to coverage of claims for bodily injury and property damage. The identical language was construed in *Alan Corp.* to apply only to section 1.A. 823 F. Supp. at 40.

The plaintiff argues that section 1.B is not limited to "claims made" coverage as is section 1.A, despite the heading preceding section 1 in capital letters in all three policies: "THIS IS A CLAIMS MADE POLICY." Even if the plaintiff is correct, there is no coverage under section 1.B, as noted above, because the earliest possible governmental action that might trigger the coverage of that section occurred after the date upon which the policy was canceled and therefore was not "initiated during the policy period."

Finally, the plaintiff appears to argue that it is entitled to coverage under the alternative provided in section 1.B of the policies which provides coverage for "other clean-up costs" because the language of that provision is ambiguous and must therefore be construed against the insurer. Plaintiff's Opp. at 13-14. The defendants do not contend that the clean-up costs incurred by the plaintiff were not reasonable and necessary. There is no suggestion in the summary judgment record that the defendants gave written consent to the clean-up. The parties therefore concentrate their attention on subsection (2)(b) of the alternative portion of section 1.B, the defendants claiming both that the plaintiff did not demonstrate to their satisfaction that the clean-up would reduce its losses

and that the pollution incident began before the retroactive date of the 1986 policy, which is stated in the policy as June 15, 1986. The plaintiff does not address the first of these contentions but offers the affidavit of Celine Jannarone to suggest that the retroactive date of the 1986 policy should have been June 15, 1983. The language of subsection (2)(b) concerning the threat of a pollution incident is not implicated by the facts in the summary judgment record.

The language of subsection (2)(b) is not ambiguous. While it should be self-evident that cleaning up the contamination at the Station would reduce the plaintiff's ultimate losses, the plaintiff has submitted nothing in its statement of material facts even to suggest that it made such a showing to the defendants *during the policy period*. The plaintiff states that it notified Morse, Payson & Noyes of the September notice from the DEP on October 13, 1987. Quinlan Aff. ¶ 4 & Exh. 1.³ Construed favorably to the plaintiff, the content of that oral notice does not indicate any plan to undertake a clean-up at all, but only that the plaintiff had received a letter from the DEP concerning a third party claim at the "Raymond loc . . . for damages against gas contamination to private drinking water supply & asking for a new well — ~\$8,100." *Id.* Exh. 1. This lapse in the summary judgment record makes it unnecessary to address the plaintiff's contention that, while the pollution incident at the Station occurred before the retroactive date stated in the 1986 policy, that date should have been June 15, 1983, a date which could have preceded the commencement of the pollution incident that necessitated the clean-up.

³ The defendants state the "Mr. Quinlan's affidavit is hearsay and his notes are not admissible." Defendants' Reply Memorandum of Law in Further Support of Motion for Summary Judgment (Docket No. 29) at 6. However, Mr. Quinlan states, based on his own knowledge, that Sandra Morrell-Rooney of Down East informed him by telephone that day that Down East had received the DEP notice. Quinlan Aff. ¶ 4. Mr. Quinlan was an agent of the defendants and his statement is not hearsay. Fed. R. Evid. 801(d)(2).

The defendants are entitled to summary judgment on count I. Based on the summary judgment record, as a matter of law, they have not breached the contract of insurance between the parties.

B. Estoppel (Counts II and VI)

Count II of the amended complaint alleges that the defendants are estopped to deny coverage by their own conduct. Count VI alleges that they are estopped by the representations of Morse, Payson & Noyes as their agent that the coverage sought by Down East had in fact been obtained from the defendants, relying in part on 24-A M.R.S.A. § 2422.

Under Maine law,

[a]n insurer may be estopped from denying coverage when the party claiming coverage has demonstrated (1) unreasonable conduct of the insurer that misleads the insured concerning the scope of his coverage and (2) justifiable and detrimental reliance by the insured upon the insurer's conduct.

Maine Mut. Fire Ins. Co. v. Grant, 674 A.2d 503, 504 (Me. 1996). In Count II, the plaintiff asserts that estoppel applies because the defendants “have already acknowledged the claim, determined that it was timely, and paid substantial amounts in satisfaction of their obligations.” Plaintiff’s Opp. at 17. However, the plaintiff offers no evidence in its statement of material facts to demonstrate that it relied to its detriment on the payments made by the defendants. Like the record in *Grant*, this record is “devoid of any evidence that [the plaintiff] took any action or failed to take any action in reliance on” these actions of the defendants. 674 A.2d at 505.

In addition, the plaintiff could not demonstrate, based on the material in the summary judgment record, that the “acknowledgment” of the claim and the payments by the defendants were

misleading, because the defendants took care to inform the plaintiff that the claim which they “acknowledged” and upon which they were making payment was the third-party claim of the owners of the property adjacent to the Station, under section 1.A of the policies, a section under which the plaintiff could not recover for damage to its own property or for costs of clean-up by virtue of *Marois*. The documents upon which the plaintiff relies to support its argument that a claim was “acknowledged” and payment made are a letter dated January 17, 1992 from Janet Owens of Continental to James Morrell of Down East, J. Morrell Aff., Exh. 7, and a letter dated September 16, 1992 from Ms. Owens to Brunswick Coal & Lumber, Plaintiff’s Request for Admissions, Exh. 19. The former letter quotes from section 1 of the 1985 policy and concludes that a report of the neighbors’ claim was made to Continental during the extended reporting period established for section 1.A claims by the extended reporting endorsement purchased by the plaintiff when it canceled the 1986 policy. Morrell Aff., Exh. 7 at 1-2. The letter further states that

this portion of your Comprehensive Business Policy responds to a third party claim for damages and to a governmental directive to conduct a clean-up. However, the Pollution Liability Policy contains exclusions which preclude coverage for costs incurred as a result of property damage or environmental damage to your own property.

* * *

Consequently, those costs associated with replacement of the Jordan Bay Mobil Station water supply or the drilling of a new well to service Jordan Bay Mobil are not covered under the Pollution Liability Policy.

Id. at 2-3. Similarly, the second letter, after noting the enclosure of a copy of the first letter, states:

Please note that general liability insurance responds to third party claims. Consequently, costs associated with the replacement of the Jordan Bay Mobil Station water supply or the drilling of a new well to service Jordan Bay are not covered under the pollution liability policy. Please remove the bills associated with Jordan Bay.

Plaintiff’s Request for Admissions, Exh. 19. There is no sense in which either letter can be construed

to mislead the recipient into a belief that all costs incurred by the insured in cleaning up environmental contamination on its own property are covered by the policies and that reimbursement for such costs will be forthcoming. The plaintiff makes no argument that the costs still unreimbursed by the defendants under the policies were incurred solely to address the claim of the neighbors, which asked for a new well, at a total cost of \$8,100. Exh. J to Motion at 8.

The defendants are entitled to summary judgment on Count II of the amended complaint.

The analysis differs for Count VI. While the elements of the claim of estoppel remain the same, *Kraul v. Maine Bonding & Cas. Co.*, 600 A.2d 389, 391 (Me. 1991), Count VI asserts a misrepresentation by the agents through whom the policies were obtained that the policies provided “complete coverage for pollution liability.” Plaintiff’s Opp. at 18; Amended Complaint (Docket No. 8) ¶¶ 44-45. The amended complaint refers to 24-A M.R.S.A. § 2422, which provides:

1. An agent authorized by an insurer, if the name of such agent is borne on the policy, is the insurer’s agent in all matters of insurance. Any notice required to be given by the insured to the insurer or any of its officers may be given in writing to such agent.
2. The authorized agent of an insurer shall be regarded as in the place of the insurer in all respects regarding any insurance effected by him. The insurer is bound by his knowledge of the risk and all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known to the insurer and waived by it as if noted in the policy.

The defendants do not dispute that Morse, Payson & Noyes was their agent within the meaning of this statute. They argue, however, that the plaintiff was not misled by the conduct of the agent because the exclusions were apparent on the face of the policies and that any reliance by the plaintiff on the representations of the agent was unreasonable as a matter of law. Motion at 19-20.

The plaintiff has provided evidence of a disputed material fact on the first element of this

claim. Peters Aff. ¶¶ 4-6 (desired coverage was explained to Morse, Payson & Noyes; exclusions were not explained; policies usually not provided until premium had been paid). The defendants' argument concerning the second element of the claim, that the plaintiff's officers "have not offered any coherent explanation as to why they believed" that the policies did not contain exclusions, Motion at 19-20, both misrepresents the plaintiff's argument and goes to the weight of the evidence rather than the reasonableness of the plaintiff's reliance as a matter of law. The defendants also assert that a party that "has not bothered to read its own policy . . . is barred, as a matter of law, from claiming that it was misled as to the contents of that policy." *Id.* at 20. The authority cited by the defendants does not support this broad assertion, and, in any event, the defendants' statement of undisputed facts provides no support for the factual assertion that the plaintiff's officers did not read the policies. The defendants do not argue that the plaintiff has not presented any evidence of detrimental reliance.

Accordingly, based on the summary judgment record, I conclude that the defendants are not entitled to summary judgment on Count VI of the amended complaint.

C. Implied Duty of Good Faith and Fair Dealing

Count III of the amended complaint asserts that the defendants breached a duty of good faith and fair dealing running to the plaintiff. The defendants argue that the "dismissal" of Counts I and II mandates the "dismissal" of this count. Motion at 16.

The Law Court has determined that an independent tort based on an insurer's duty to act in good faith and deal fairly with its insured is not recognized in Maine. *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 652 (Me. 1993). The defendants are entitled to summary judgment on Count

III.

D. Statutory Claims

The defendants also argue that the “dismissal” of Counts I and II renders Counts IV and V of the amended complaint “legally insufficient.” Motion at 16. Essentially, the defendants’ position is that, since the plaintiff cannot recover on its claims under the policies, it is precluded from recovery on these counts relating to late payment and failure to act within a reasonable time.

Count IV invokes 24-A M.R.S.A. § 2436, entitled “Late payment,” which provides that a claim for payment of benefits under a policy of insurance is payable within 30 days after proof of loss is received by the insurer (if not disputed by the insurer in writing) that an overdue claim shall bear interest at the rate of 1 1/2 % per month, and that the insurer shall pay a reasonable attorney fee for advising and representing an insured on a claim for an overdue claim. The defendants assert that section 2436 does not establish an independent right of action but merely expands the remedies available when an insured recovers on an overdue claim. However, in *Marquis* the plaintiffs brought a separate count under section 2436, and the Law Court dealt with that count as a separate claim. 628 A.2d at 647, 651. Since Count VI will remain for trial if the court adopts my recommended decision, it is possible that section 2436 may become applicable. The defendants are not entitled to summary judgment on this count.

Count V is based on 24-A M.R.S.A. § 2436-A, entitled “Unfair claims practices.” It specifically provides a cause of action for an insured injured by any of a number of practices by its insurer, including “[k]nowingly misrepresenting to an insured pertinent facts of policy provisions relating to coverage at issue,” “[f]ailing to acknowledge and review claims,” and “[f]ailing to affirm

coverage.” The defendants argue that the plaintiff has not been injured by their conduct because it would have been required to conduct the clean-up of its property in any event and the defendants’ conduct did not cause the plaintiff to do anything in connection with the clean-up that it would not otherwise have done. This interpretation unduly narrows the definition of “injury.” The plaintiff has been injured, if the defendants did not pay all of its claims promptly, whether as a result of knowing misrepresentation, failure to acknowledge claims or failure to affirm coverage, by the need to use its own funds to pay for the clean-up of its property or the loss of use of its own funds when no reimbursement was forthcoming from the defendants for such expenditures.

Because Count VI will remain for trial if the court adopts my recommended decision, the defendants are not entitled to summary judgment on Count V.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants’ motion for summary judgment be **GRANTED** as to Counts I, II, and III of the amended complaint and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated at Portland, Maine this 19th day of December, 1997.

David M. Cohen
United States Magistrate Judge