REDACTED
(ORIGINAL FILED UNDER SEAL)

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MINE SAFETY APPLIANCES COMPANY	)	
Plaintiff,	)	
v.	)	C.A. No. N10C-07-241 MMJ CCLD
AIU INSURANCE COMPANY, *et al.*,	)	
Defendants.	)	

Submitted: October 18, 2013
Decided: January 21, 2014

Upon Defendants AIU Insurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania, Lexington Insurance Company, National Union Insurance Company of Pittsburgh, Pennsylvania, and Chartis Property Casualty Company f/k/a Birmingham Fire Insurance Company's Motion for Summary Judgment and Partial Summary Judgment on the Ground that the Plaintiff's Claims are not Justiciable Under the Delaware Declaratory Judgment Act
DENIED

OPINION

Jennifer Wasson, Esquire, Michael B. Rush, Esquire, Potter Anderson & Corroon LLP, Mark A. Packman, Esquire (Argued), Jenna A. Hudson, Esquire, Katrina F. Johnson, Esquire, João Santa-Rita, Esquire, Gilbert LLP, Attorneys for Plaintiff

Michael F. Duggan, Esquire, Brian S. Kasprzak, Esquire, Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., Ellen G. Margolis, Esquire, Jan C. Walker, Esquire (Argued), Mound Cotton Wollan & Greengrass, Attorneys for Defendants

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiff Mine Safety Appliances Company ("MSA"), a Pennsylvania corporation licensed to do business in Delaware, manufactures and sells safety equipment, including heat protection clothing and respirators. Allegedly, at one time, MSA's respirators were defective and its heat protection clothing contained asbestos. Users of MSA's safety products have filed thousands of actions against MSA, claiming that, as a result of using MSA's products, they were exposed to asbestos, silica, and coal dust, and suffered injuries.

MSA purchased liability insurance coverage to protect itself from a variety of risks, including potential tort liability. MSA purchased insurance in layers with an escalation in policy limits, in an effort to ensure that it would have sufficient coverage should any policy be exhausted or otherwise become unavailable. MSA contends that it is covered for personal injury damages under its excess coverage policies.

Defendant insurance companies dispute their obligations to MSA to cover tort claims against MSA ("Underlying Claims"). The Underlying Claims arose out of harm suffered by the users of MSA's products. MSA has incurred significant financial expense in defending and settling the Underlying Claims. MSA filed the Delaware action on July 26, 2010, against 31 insurance companies concerning 125 insurance policies. MSA seeks: (1) declaratory judgment that the Defendant

insurance companies are obligated to defend and/or indemnify MSA; and (2) an award of monetary damages incurred by MSA relating to MSA's entitlement to coverage.

In response, Defendant insurance companies filed Motions for Summary Judgment and Motions for Partial Summary Judgment, individually and collectively, challenging their payment and defense obligations.

This Motion was filed on May 10, 2013, by a subset of the 31 defendants involved in the litigation. Defendant insurance companies AIU Insurance Company ("AIU"), Granite State Insurance Company ("Granite"), Insurance Company of the State of Pennsylvania ("ICSOP"), Lexington Insurance Company ("Lexington"), National Union Insurance Company of Pittsburgh, Pennsylvania ("National Union"), and Chartis Property Casualty Company f/k/a Birmingham Fire Insurance Company ("Chartis") (collectively "Movants") filed this Motion for Summary Judgment and Partial Summary Judgment on the ground that MSA's claims are not justiciable under the Delaware Declaratory Judgment Act. Defendants Granite, ICSOP, Lexington, and Chartis seek an order granting summary judgment. Defendants AIU and National Union seek an order granting partial summary judgment.

The following insurance policies ("Policies") are at issue in this Motion:

AIU:	75-100631	(4/1/78-4/1/79)
	75-101017	(4/1/79-4/1/80)[1]
Granite:	80-93014	(4/1/76-4/1/77)
	80-93219	(4/1/77-4/1/78)
	6278-0106	(4/1/78-4/1/79)
ICSOP:	4276-2204	(5/1/76-4/1/77)
	4277-2297	(4/1/77-4/1/78)
Lexington:	GC 403475	(4/1/73-4/1/76)
	GC 5501378	(4/1/76-4/1/77)
	GC5505569	(4/1/77-4/1/78)
	5510588	(4/1/78-4/1/79)
	5514176	(4/1/81-4/1/82)
	5522049	(4/1/82-4/1/83)
	5524816	(4/1/83-4/1/84)
	5524866	(4/1/84-4/1/85)
National Union:	9608254	(4/1/85-4/1/86)[2]
	652-48-81	(4/1/79-4/1/80)
Chartis:	SE 6073490	(4/1/79-4/1/80)[3]

All of these Policies are excess of at least $26,500,000 of underlying insurance coverage.

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[1] AIU Excess Policy No. 75-104415 (4/1/85-4/1/86) is not part of this motion.

[2] National Union Policy No. CE 115-68-94 (4/1/78-79), and the lower level National Union Policy No. 9608254 (4/1/85-4/1/86) that attaches at $23 million, are not part of this motion.

[3] Walker Aff. ¶¶ 7-12.

STANDARD OF REVIEW

Summary Judgment

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[4] All facts are viewed in a light most favorable to the non-moving party.[5] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[6] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[7] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[8]

Declaratory Relief

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[4] Super. Ct. Civ. R. 56(c).

[5] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

[6] Super. Ct. Civ. R. 56(c).

[7] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[8] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Delaware Courts are empowered to render declaratory judgments pursuant to the Declaratory Judgments Act.[9] The availability of declaratory relief involves the exercise of judicial discretion.[10] "The presence of an actual controversy is a prerequisite for declaratory relief. Lack of an actual controversy acts as a bar to a party proceeding with a case requesting only declaratory judgment as a remedy."[11] An actual controversy must satisfy four requirements:

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[12]

Delaware courts conduct the following balancing test to determine the fourth factor—ripeness for adjudication:[13]

> (1) A practical evaluation of the plaintiff's legitimate interest in prompt resolution of the question presented; (2) the hardship that further delay may threaten; (3) the possibility of future factual development that might affect the determination made; (4) the need to conserve scarce judicial resources; and (5) a due respect for

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[9] 10 *Del. C.* § 6501.

[10] 10 *Del.C.* §§ 6506, 6512; *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1238 (Del. Ch. 1987).

[11] *WMI Liquidating Trust v. XL Specialty Ins. Co.*, 2013 WL 4046600, at *6 (Del. Super.).

[12] *Stroud v. Milliken Enter., Inc.*, 552 A.2d 476, 479-80 (Del. 1989) (citing *Rollins Int'l., Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973)).

[13] *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 565 A.2d 268, 274 (Del. Super. 1989).

identifiable policies of the law touching upon the subject matter of the dispute.[14]

[14] *Schick*, 533 A.2d at 1239.

ANALYSIS

Movants' Contentions

Movants argue that MSA is not entitled to declaratory relief for two reasons: (1) any declaratory relief MSA seeks under Movants' Policies is either moot or cannot be obtained absent speculation; and (2) the requirements of an "actual controversy" are not met. Movants contend that MSA has not established the existence of a material issue of fact sufficient to withstand summary judgment and/or partial summary judgment.

Movants contend that there is no actual and imminent controversy between MSA and Movants concerning the Policies because declaratory relief would be moot or speculative. To the extent MSA seeks declaratory relief for defense and indemnification with respect to the Underlying Claims, MSA has admitted that Defendants' Policies have no defense duty.[15] MSA does not seek a damages judgment against any of the Movants.[16] Movants conclude that these issues are moot with respect to the Policies. Movants argue that no claim has been, or will

[15] Walker Aff. ¶ 6.

[16] Walker Aff. ¶ 15.

be, tendered under the Policies and that MSA does not know when, if ever, a claim will be tendered under the Policies.[17]

Movants assert that the issues here do not meet two prongs of the actual controversy prerequisite for declaratory relief: (1) the parties' interests are not real and adverse; and (2) the issues are not ripe for judicial determination.

In support of their position that the parties' interests are not real and adverse, Movants note that MSA does not seek monetary damages against any of the Movants.[18] The Policies only have an indemnity duty.[19] Movants argue that courts have declined to issue declaratory relief when only the insurers' duty to indemnify is at issue.[20] Movants argue that MSA's general contention that the parties will have adverse interests at some point in the future is insufficient to raise any material issue of disputed fact. Movants conclude that because no underlying claim has been or will be tendered under the Policies, no indemnification duty exists.

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[17] Walker Aff. ¶¶ 24-25.

[18] Walker Aff. ¶ 15.

[19] Walker Aff. ¶ 6.

[20] *See, e.g.*, *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 117-18 (Del. 2006); *Evanston Ins. Co. v. Layne Thomas Builders Inc.*, 635 F. Supp. 2d 348, 353 (D. Del. 2006); *Charter Oak Fire Ins. Co. v. Lazenby*, 2012 WL 2958246, at *6 (W.D. Pa.).

Movants further contend the issues are not ripe for judicial determination. MSA's damages are speculative.[21] MSA does not contend that the insurance underlying the Movants' Policies has been exhausted or substantially impaired.[22] MSA cannot estimate the volume of future Underlying Claims, nor the future expenditures necessary to defend or settle the claims.[23] Movants argue that a declaratory ruling from this Court would neither obviate future litigation nor end MSA's uncertainty.

Mine Safety Appliance Company's Contentions

MSA contends that Movants have failed to meet their burden of showing that no genuine issues of material fact exist. MSA argues that it meets the standard for ripeness because it has demonstrated a "sufficient likelihood" that at least some of its higher level excess coverage might be implicated.

MSA asserts that the issues are ripe for adjudication in accordance with case law developed in *Monsanto Company v. Aetna Casualty & Surety Company*,[24] *North American Phillips Corporation v. Aetna Casualty & Surety Company*,[25] and *Hoechst Celanese Corporation v. National Union Fire Insurance Corporation of*

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[21] Walker Aff. ¶ 23.

[22] Walker Aff. ¶ 20.

[23] Walker Aff. ¶ 24.

[24] 565 A.2d 268 (Del. Super. 1989).

[25] 565 A.2d 956 (Del. Super. 1989).

Pittsburgh, Pennsylvania.[26] MSA interprets these cases as establishing that a comprehensive insurance coverage action is ripe when the policyholder demonstrates "sufficient likelihood" that at least some of its higher level excess coverage might be implicated. MSA contends that it meets this standard.

MSA has faced and anticipates that it will continue to face high-value mass tort claims.[27] Since 1914, MSA has produced and sold over 100 million respirators and related products, some of which are still in use.[28] [REDACTED] In 2001, MSA incurred [REDACTED] in indemnity, in comparison with 2011 and 2012, when MSA incurred [REDACTED] and [REDACTED] in indemnity, respectively.[29] Specifically, a coal mine claim in 2006 through 2008 cost [REDACTED] on average to settle.[30] In the last two years, [REDACTED].[31]

MSA's primary insurers and certain umbrella insurers have paid some of the defense and settlement costs.[32] According to MSA, those policies are now exhausted.[33] MSA's excess insurers have refused to pay defense or indemnity

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[26] 623 A.2d 1133 (Del. Super. 1992).

[27] Berner Aff. ¶ 10.

[28] *Id*.

[29] Berner Aff. ¶ 6.

[30] Berner Aff. ¶ 7.

[31] *Id*.

[32] Berner Aff. ¶ 8.

[33] *Id*.; Berner Aff. Ex. 5.

costs for the Underlying Claims.[34] As of July 31, 2013, MSA's insurance receivable was [REDACTED].[35] MSA contends this is sufficient to reach the [REDACTED].

Discussion

Relevant Precedent

In *Hoechst Celanese Corporation v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania*,[36] the defendants filed a motion to dismiss certain high level excess insurers for lack of justiciability, on the basis that the claims were not ripe.[37] In support of their motion, the defendants offered an affidavit summarizing the claims that had been provided to the insurers.[38] The defendants argued that because the total liabilities were less than one-tenth of the coverage available for a single year, the plaintiff had failed to show any likelihood that the high level excess insurance policies would ever be implicated.[39]

Plaintiff offered a responsive affidavit, outlining the projections of future claims, settlements and judgments against it. The Court ordered additional discovery to aid in determining the bases for Plaintiff's projections. The Court

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[34] *Id*.

[35] *Id*.

[36] 623 A.2d 1133 (Del. Super. 1992).

[37] *Id*. at 1135.

[38] *Id*. at 1136.

[39] *Id*.

noted that it was "immensely displeased by the manner in which the affidavit was prepared and executed."[40] The Court found that the affidavit was not based on personal knowledge, was not supported by adequate data or methodology, and was "rife with speculation. If the affidavit were the sole basis for this Court's decision, the motion to dismiss would be granted."[41] Nevertheless, the Court found that there were "strong indications, apart from [the] speculative projections, that at least some of the excess coverage will be reached. Although the Court has little confidence in the plaintiffs' projections about what will happen in the future, it cannot ignore the history of the factual developments in this litigation."[42]

The *Hoechst* Court concluded that the plaintiff had allegedly incurred damages in an amount which, if assigned to a single policy year would implicate some of the high level excess coverage. The Court held that plaintiff had:

> demonstrated a sufficient likelihood that at least some of the higher level excess coverage might be implicated so as to warrant the inclusion of the moving defendants in this litigation. The Court is unable to draw a line above which it can be said with any precision or certainty that coverage is unlikely to be implicated. Such demarcation being impracticable, the principles of judicial economy and comprehensive, final resolution require that all of the excess insurers potentially implicated remain in this action.[43]

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[40] *Id*. at 1138.

[41] *Id*.

[42] *Id*. at 1138-39.

[43] *Id*. at 1140.

The defendants had argued that dismissal would not prejudice the plaintiffs because they could be brought back into the litigation should it appear likely that their coverage would be implicated. The Court rejected this argument as "specious," because it ignored the "obvious prejudice" of having to relitigate issues arising during the plaintiffs' absence. Such duplicative efforts were deemed to ignore the need to "conserve this Court's scarce resources."[44]

The Court suggested that there was one method by which an excess insurer could address the Court's concern for judicial economy.

> The excess insurers could agree to be bound by the conduct of the case by the remaining defendants and to abide by the law of the case in every respect as it is composed. In this fashion, an excess insurer could be dismissed and avoid the legal expenses associated with the defense of this action. In the event that an excess insurer was later brought back into this action, there would be no need to relitigate matters resolved in its absence. If the excess insurers are truly as certain as they claim to be that their levels of coverage will never be implicated, this prospect should not be unattractive, as they would have nothing to lose.[45]

The motions in *Hoechst*, to dismiss for lack of justiciability, were denied.

In *Monsanto Company v. Aetna Casualty and Surety Company*,[46] the excess carriers moved to dismiss, in part on the grounds of justiciability. The carriers argued that Monsanto was seeking a declaratory judgment to determine legal

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[44] *Id*.

[45] *Id*.

[46] 565 A.2d 268 (Del. Super. 1989).

obligations that might never mature. The carriers contended that because Monsanto had not offered proof that the underlying policies would be exhausted in any given year, the high level excess policies would not be triggered. Further, the potential for triggering the excess level policies was so remote, that the Court should exercise its discretionary power and refuse to decide the action.[47]

Monsanto alleged that for the relevant policy period, it had paid damages in an amount that the Court determined "probably reaches the threshold of some of the excess policies."[48] The Court found:

> Although absolute proof that the Excess Carriers policies will be triggered is by no means required by this Court before jurisdiction under the Declaratory Judgment Act [], Monsanto has provided a sufficient basis for this Court to conclude that the Excess Carriers' policies will probably be triggered in this lawsuit.[49]

Holding that the case was ripe for adjudication under Delaware's Declaratory Judgment Act, the Court considered that dismissal of the excess carriers would result in harm to Monsanto, because Monsanto could not seek immediate compensation for money that it already had expended.[50]

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[47] *Id*. at 274.

[48] *Id*. at 275.

[49] *Id*.

[50] *Id*. at 275-76.

In *North American Phillips Corporation v. Aetna Casualty and Surety Company*,[51] the excess carriers alleged that there was no actual controversy because the possibility of triggering the primary and excess coverage underlying their policies in any given policy year was remote.[52] Additionally, the carriers argued that requiring them to remain in the action unjustly exposed them to litigation expenses, when only a remote possibility existed that they ever would be called upon to indemnify the insured.[53]

North American alleged that its present liability exceeded $49 million and that its future liability would be at least $36 million more over the following two years.[54] The excess coverage was triggered by general insurance policy limits of $50 million.[55] The excess carriers argued that the possibility of a future controversy would not suffice for purposes of a declaratory judgment.[56]

The *North American Phillips* Court found that absolute proof that excess policies will be triggered was not required for jurisdiction under Delaware's Declaratory Judgment Act. North American's liability was present and did not involve a remote issue. The Court held that disputes as to the rights and

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[51] 565 A.2d 956 (Del. Super. 1989).

[52] *Id*. at 958.

[53] *Id*. at 959.

[54] *Id*.

[55] *Id*. at 957.

[56] *Id*. at 960.

obligations under the excess insurance contracts were "highly likely to arise in the near future."[57]

> [P]laintiff has made a sufficient showing that due to its current and future liability and considering the magnitude of this case it is likely that the excess carriers coverage will be triggered. In weighing the concerns of judicial economy and legal stability, the best interests of justice are served if plaintiff's claims surrounding its current liability and future liabilities are all resolved uniformly by this Court. Therefore, the Court finds that a ripe case in controversy exists and thus denies the excess carriers motions to dismiss on justiciability grounds.[58]

Significant Likelihood of Triggering Excess Coverage

The Declaratory Judgment Act does not create substantive rights. The act simply "provides a procedural means for securing judicial relief in an expeditious and comprehensive manner."[59] Determining ripeness is largely a matter of common sense. The *Schick* balancing factors[60] assist the Court in assessing whether the interests of those seeking relief outweigh postponing review until the question arises in an indisputably concrete and final form.[61]

MSA has submitted factual allegations through the Affidavit of William J. Berner, MSA's Director of Litigation/Risk Management. The Affidavit states:

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[57] *Id*. at 962.

[58] *Id*.

[59] *Hoechst,* 623 A.2d at 1136; *see Stabler v. Ramsay*, 88 A.2d 546 (Del. 1952).

[60] *Schick*, 533 A.2d at 1239.

[61] *Hoechst*, 623 A.2d at 1137.

4. Thus far, MSA has faced over [REDACTED] Underlying Claims [REDACTED]. On December 31, 2012, MSA was named as a defendant in 2,609 tort lawsuits, which were filed by more than [REDACTED] tort claimants.

5. As of December 31, 2012, MSA and/or its insurers had paid over [REDACTED] to defend and settle the Underlying Claims. [REDACTED] of this amount was paid to settle Underlying Claims; at least [REDACTED] of this amount was paid for defense costs. MSA does not have complete records regarding defense costs that certain of its insurers paid on its behalf under the cost-sharing agreements that were in place from the 1970s and 1980s through the mid-2000s. Thus, the defense costs that MSA had incurred as of December 31, 2012 likely is higher than the [REDACTED] reflected in MSA's records. Of this amount, MSA paid approximately [REDACTED] out of its own pocket for amounts that its insurers should have reimbursed. As of July 31, 2013, MSA had paid [REDACTED] out of pocket for amounts that its insurers should have reimbursed.

6. [REDACTED]. For example, in 2001, certain of MSA's insurers paid [REDACTED] to settle MSA's claims – all of which alleged asbestos and silica exposure. By contrast, in 2011, MSA paid a total of [REDACTED] to settle Underlying Claims. In 2012, MSA paid over [REDACTED] to settle Underlying Claims. Further, MSA must pay substantial amounts to defend these claims. For example, in both 2011 and 2012, MSA paid over [REDACTED] to defend the underlying Claims. Thus, in just 2011 and 2012, MSA's total losses from the Underlying Claims (including indemnity and defense) exceeded [REDACTED].

7. [REDACTED]. From 2006 to 2008, the average amount paid in a coal-mine dust claims was approximately [REDACTED]. In the last two years, however, the average settlement [REDACTED]. In 2008, the average defense costs per closed claim were [REDACTED] per claim in the last two years.

8. MSA's primary insurers and certain of its umbrella insurers have paid some of the approximately [REDACTED] in defense and settlement costs that MSA had incurred from the

> Underlying Claims as of December 31, 2012. Those policies are now exhausted. MSA therefore now must turn to its excess insurance policies to cover the Underlying Claims. These insurers have refused to pay defense or indemnity costs for Underlying Claims, leaving MSA with an insurance receivable of approximately [REDACTED] as of December 31, 2012 and [REDACTED] as of July 31, 2013.

MSA has provided documentary support for these assertions.

The trilogy of cases (*Hoechst*, *Monsanto*, and *North American Phillips*) are not "on all fours" with the facts in this action. Nevertheless, these cases are not significantly distinguishable. The Court finds that MSA had demonstrated a significant likelihood that at least some of the higher level excess coverage will be triggered by the underlying claims. the reasons analogous to those analyzed in the trilogy of cases, the *Schick* balancing factors weigh in favor of a determination that MSA's claims are ripe for adjudication.

MSA has established that it is entitled to have this Court exercise its discretionary jurisdiction to consider whether MSA is entitled to relief under the Delaware Declaratory Judgment Act. In order to obtain summary judgment (or partial summary judgment), the moving party must demonstrate that there are no genuine issues of material fact. All facts must be viewed in the light most favorable to the nonmoving party, in this case, MSA. The Court finds that there are at least two basic genuine issues of material fact: (1) whether MSA's existing liability reaches the attachment point of the excess insurance policies; and (2) whether MSA will continue to face high-value mass tort claims in the future.

CONCLUSION

The Court finds that Plaintiff has established that this case presents an actual controversy ripe for judicial determination. Genuine issues of material fact exist.

THEREFORE, Defendants' Motion for Summary Judgment and Partial Summary Judgment is hereby **DENIED.**

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston