STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY



SECURA INSURANCE, A MUTUAL COMPANY,

Plaintiff,

v.

Case No. 2019-CV-746

ACE STAMPING & MACHINE COMPANY, INC.,

OPTIMAS OE SOLUTIONS, LLC,

ILLINOIS NATIONAL INSURANCE COMPANY,

ZURICH AMERICAN INSURANCE COMPANY,

Defendants,

DECISION AND ORDER GRANTING DECLARATORY AND SUMMARY JUDGMENT

The above-styled matter is before this court on a motion for summary/declaratory judgment brought by the Plaintiff, Secura Insurance, A Mutual Company, and a competing motion brought by the defendants challenging the ripeness of Secura's motion or in the alternative seeking summary judgment in favor of finding insurance coverage, duty to defend and indemnification.

The present motions have been briefed and oral argument was heard by this court via remote videoconferencing on June 16, 2020. Secura Insurance, A Mutual Company (Secura) was represented by Attorneys James T. Murray, Jr. and Kevin Fetherston. Attorney Scott Schmookler represented Optimas OE Solutions, LLC (Optimas) Illinois National Insurance Company (Illinois National) and Zurich American Insurance Company (Zurich) Attorney Patrick F. Moran represented Ace Stamping & Machine Company, Inc. (Ace)(collectively referred to as defendants).

This action arises out of a dispute between Plaintiff Secura, its insured, Ace, Optimas, Illinois National and Zurich. The claim arises over insurance coverage between Secura and Ace for the cost of removal and replacement of defective washers that General Electric Transportation (GET) were provided by Optimas but were manufactured by Ace pursuant to a contract with Optimas. The washers were found to be defective by GET during GET's manufacturing process of their train alternators and locomotive engines (machines). General Electric determined that the washers were not properly heat treated and "flat" pursuant to demand specifications made upon Optimas. GET determined to remove and replace the washers prior to failure and demanded a little over $1.7 million from Optimas for removal and replacement costs of the defective washers. It is important to note that the defective washers themselves did not cause any physical damage to any property. Optimas paid, was partially reimbursed by Zurich and Illinois National, now subrogated parties, and brought suit against Ace in federal court in the Northern District of Illinois to recover their payment to GET. Three causes of action exist against Ace in the Illinois case: (1) breach of warranty; (2) duty to indemnify; and (3) negligence. All of these allegations are based on allegations that Ace's washers were defective and failed to conform to contractual requirements and specifications existing between Optimas and Ace.

Secura, who had a Commercial General Liability (CGL) policy with Ace, has brought this action for declaratory and summary judgment asserting that its policy does not cover the claims made collectively by Ace, Optimas, Illinois National or Zurich. Secura seeks an order finding that under the policy with Ace they have no duty to defend or indemnify Ace in the action pending in Illinois or to indemnify Ace for any judgment rendered against them in that case. Ace, Optimas, Illinois National and Zurich, have responded asserting a "Ripeness" issue and in the alternative for summary judgment in their favor finding insurance coverage, a duty to defend Ace and for Secura to pay any

judgment rendered against Ace in the pending Illinois action. For the reasons that follow, Secura's motion will be granted.

## BACKGROUND

Optimas and subrogated parties Zurich and Illinois National seek recovery from Ace for the amount Optimas paid to settle with GET. Optimas supplied washers manufactured by Ace to GET and GET then installed them into their assembly of alternators and train locomotives. During assembly, some washers cracked and GET then determined that they were defective. The washers did not cause any property damage, but GET chose to remove and replace the washers and incurred costs to remove and replace the defective washers and demanded those costs be paid by Optimas. Optimas paid the claim and settled with GET and brought the underlying action in Illinois to collect from Ace what they paid to GET.

The underlying complaint in Illinois alleges the following:

- Optimas entered into a contract with GET to supply washers.
- Optimas slected Ace as its sole supplier of the washers.
- The washers were subject to specific manufacturing criteria including flatness and heat treatment.
- Optimas entered into purchase orders with Ace including indemnification and a hold harmless agreement whereby Ace assumed the liability of Optimas regarding the washers.
- Ace manufactured and shipped the washers in question to Optimas.
- Optimas supplied the Ace manufactured washers to GET.
- In March 2016, some washers installed by GET cracked during installation, GET determined that the washers were defective, and GET took steps to replace the washers that had been installed.
- GET incurred over $1.7 million replacing the defective washers which represented costs to restore, repair and/ or replace Ace manufactured defective parts.
- Optimas paid the GET claim following testing of the washers and determination that they did not meet the required specifications regarding heat treatment (tempered) and flatness.
- Optimas notified Ace of the defective product and demanded indemnification from Ace.
- Ace refused to indemnify Optimas.
- Both Illinois National and Zurich reimbursed Optimas $600,000 each against the payment to GET.

Discovery in the Illinois case did not reveal any physical injury to other property by the alleged defective washers. GET's claim was for costs incurred to remedy labor and replacement costs of the defective washers. During discovery no GET representative testified that the washers caused any other damage to any other property or parts of GET's machines.

## SECURA'S POLICIES WITH ACE

Secura issued a commercial general liability policy (CGL) and a commercial umbrella policy (Umbrella Policy) to Ace for the policy period August 1, 2015 through August 1, 2016. There is no dispute that the policies existed and if coverage exists, are applicable to this case. The umbrella policy contains essentially, if not literally, the same provisions as those contained in the CGL policy. Therefore, reference will be made to the policy language

contained in the CGL policy in determining if there is or is not coverage for the claims asserted against Ace in the Illinois action.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION I-COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply…

b. This insurance applies to "bodily injury " and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "covered territory";

2. Exclusions

This insurance does not apply to:

k. "Property damage" to "your product" arising out of it or any part of it.

m. Damage to Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contact or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";
(2) "Your work"; or
(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

SECTION V-DEFINITIONS

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. In incorporates "your product" or "your work" that is known or is thought to be defective, deficient, inadequate or dangerous; or
b. You have failed to fulfill the terms of a contract or agreement;

If such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
b. Your fulfilling the terms of the contract or agreement.

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

21. "Your Product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;
(b) Others trading under your name; or
(c) A person or organization whose business or assets you have acquired; and

(2) Containers ( other than vehicles), materials, parts or Equipment furnished in connection with such goods or products.

b. Includes

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

LEGAL STANDARDS

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08. Summary judgment procedure is designed to eliminate unnecessary trials. The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment.

In analyzing whether a question of fact exists, the court construes the evidence in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,255 (1986). In order to defeat summary judgment there must be a genuine issue of material fact in existence. *Id.* The existence of a genuine issue of material fact requires specific and sufficient evidence that, if believed by a jury would result in a verdict favoring the party opposing summary judgment. When both sides seek summary judgment, as is the case here, there is a concession that there exists no material issue of material fact and summary judgment for either the plaintiff or the defendant is appropriate.

Declaratory judgment is governed by Wisconsin Statute § 806.04(1). The statute allows this court to declare rights between parties in justiciable controversies and is often utilized in determining the existence of insurance coverage between an insurer and its insured.

Ripeness is a judicially created term requiring withholding of a decision regarding rights of parties until after certain events have occurred—here the completion of the underlying Illinois case. Wisconsin law however encourages resolution of coverage issues before reaching liability issues. Indeed it is routinely utilized by insurers to determine the existence of their duty to defend and their broader duty to indemnify. Wis. Stat. § 803.04(2)(b).

Insurance policies are contracts and are governed by the same rules of construction as apply to contracts. The interpretation of terms and clauses in an insurance contract are questions of law to be determined by the court. *Olson v. Farrar,* 2012 WI 3, ¶3, 338 Wis.2d 215. Coverage under an insurance policy is generally a question of law. *Kremers-Urban Co. v. Amer. Employers Ins. Co.,* 119 Wis.2d 722, 351 N.W.2d 156, 163 (1984). The objective is to ascertain the parties' intent. Insurance policies are interpreted from the perspective of a reasonable insured. *Acuity v. Bagadia,* 2008 WI 62, ¶13, 310 Wis.2d 197. When terms of the policy are unambiguous and plain on their face, policies should not be rewritten to include insurance coverage not agreed to by the parties and for which the insured has not paid. *Smith v. Katz* ,226 Wis.2d 798, 595 N.W.2d 345,350 (1999); see also *Preisler v. Gen. Ca. Ins. Co.,* 2014 WI 135, 360 Wis.2d 129.

If terms of an insurance contract are "fairly susceptible to more than one reasonable interpretation," the policy is ambiguous. *Id.* Policy language is not ambiguous merely because more than one dictionary definition exists or the parties disagree about its meaning. Similarly, policy language is not ambiguous merely because courts have come to different interpretations. *Peace v. Nw. Nat'l Ins. Co.,* 228 Wis.2d 106, 596 N.W.2d 429 (1999).

Wisconsin has set forth a three step procedure in determining the existence of insurance coverage:

- Examine the facts of the insured's claim to determine whether the policy's insuring agreement supports an initial grant of coverage. If it is clear that the policy was not intended to cover the claim asserted, the analysis ends there.
- If the claim triggers the initial grant of coverage then the various exclusions must be reviewed to determine if any of them preclude coverage. Exclusions are narrowly and strictly construed against an insurer.

- If a specific exclusion applies then the court must see if any exception to the exclusion exists which reinstates coverage. Exceptions pertain only to the exclusion clause within which they appear and will not create coverage if the insuring agreement precludes it or if a separate exclusion applies.

*American family Mutual Ins. Co v. American Girl, Inc.,* 2010 WI App 5,¶14, 323 Wis.2d 226, 779 N.W.2d 1. If it is found that any exclusion clearly bars coverage then an insurer is entitled to judgment declaring it has no duty to defend or indemnify. *Wisconsin v. GE-Milwaukee, LLC,* 2012 WI App 5, ¶ 7. It is the burden of the party seeking coverage to prove that a loss falls within a policy's grant of coverage. *Brown v. Sandeen Agency, Inc.,* 2009WI App 11,¶ 9,316 Wis.2d 253, 762 N.W.2d 850.

Although not briefed by the defendants or argued by them on June 16, 2020, Wisconsin does have criteria regarding choice of law applicable in cases such as this in which the parties are from different states. Optimas is an Illinois corporation and Ace is a Wisconsin corporation. Suffice it to say, Secura, a Wisconsin mutual company, issued to Ace, a Wisconsin corporation, through Ace's agent, located in Wisconsin the at-issue commercial general liability (CGL) and Umbrella policies containing Wisconsin-specific endorsements. The place of negotiating, contracting, performance and incorporation of Ace are all tied to Wisconsin. Wisconsin law is applicable to the interpretation of this dispute.

DISCUSSION

The defendants, Optimas, Illinois National and Zurich, seek to recover from Ace the settlement payment made by Optimas to GET for the costs incurred to remove and replace Ace's defective washers. Ace seeks summary judgment finding coverage under its CGL policy for the claimed losses, duty to defend the Illinois action and indemnification for any judgment rendered against it in the Illinois action.

A CGL policy's sole purpose is to cover the risk that the insured's goods, products, or work will cause bodily injury or damage to property other than the product or the completed work of the insured. A CGL policy is not a performance bond. *Vogel v. Russo,* 2000 WI 85, 236 Wis.2d 504, 613 N.W.2d 177 *abrogated, in part, on other grounds by Ins. Co. of N. Am. V. Cease Elec. Inc.,* 2004 WI 139, 276 Wis.2d 361, 688 N.W.2d 462.

The risk insured by the CGL policy "is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable" and not "to make good on products or work which is defective." *Bulen v. West Bend Mut. Ins. Co.,* 125 Wis.2d 259, 371 N.W.2d 392 (Ct. App.1985). Costs flowing from or caused by the repair or replacement of an insured's defective product are not covered by a CGL policy. *Vogel v. Russo,* 2000 WI 85,¶ 17-28, *Jacob v. Russo Builders,* 224 Wis.2d 436, 592 N.W.2d 271 (Ct.App.1999); *St. John's Home of Milwaukee v. Continental Cas. Co.,* 147 Wis.2d 764, 434 N.W.2d 112 (Ct.App.1988). CGL coverages are designed to protect for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not what the damaged person bargained for. *Vogel* ¶ 17

PROPERTY DAMAGE

Secura asserts that there is no coverage as there has been no "property damage" caused by an "occurrence" under the Secura Policies. This Court will reference the CGL policy rather than policies relying upon the uncontested representation that the umbrella policy issued by Secura "contains essentially, if not literally", the same provisions contained in the CGL. In order for "property damage" coverage to exist, there must be "property damage" and it must be caused by an "occurrence" as defined by the CGL policy.

The policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While faulty workmanship can give rise to property damage caused by an occurrence, it does not follow that faulty workmanship itself constitutes an occurrence. *Glendenning's Limestone & Ready-Mix Co. v. Reimer,* 2006 WI App 161,¶ 30, 295 Wis.2d 556 quoting *American Girl, Inc.,* 268 Wis.2d 16,¶48. Although a breach of contract may give rise to property damage caused by an "occurrence," a breach of contract, standing alone, without causing property damage, does not equate to an "occurrence." A very similar conclusion was reached by Judge Griesbach in the United States District Court, Eastern Division, Wisconsin in *Tweet/Garot-August Winter LLC v. Liberty Mutual Fire Insurance Co.,* 2007 WL 445988.( rejecting physical and injury by mere incorporation of a defective product). Judge Griesbach cited with approval other courts' similar conclusions. *See, e.g., F&H Const. v. ITT Hartford Ins. Co. of Midwest,* 118 Cal.App 4th 364,372 (2004) ("the prevailing view is that the incorporation of a defective component or product into a larger structure does not constitute property damage unless and until the defective component causes physical injury to tangible property"); *Esicorp, Inc. v. Liberty Mut. Ins. Co.,* 266 F.3d 859,862 (8th Cir.2001) (defective steel pipe sections welded into pipe system not physical injury); *Federated Mut. Ins. Co. v. Concrete Unites, Inc.* 363 N.W.2d 751 (1985 Minn.) (defective concrete used in construction of grain elevator not physical injury); *Aetna Cas. & Sur. Co. v. McIbs, Inc.,* 684 F. Supp. 246 (D.Nev.1988) (improperly sized concrete blocks used in building construction not property damage).

Judge Griesbach further cited a similar Seventh Circuit decision of *Sokol & Co. v. Atlantic Mut. Ins. Co.,* 430 F.3d 417, 422 (7th Cir.2005) (costs to replace spoiled peanut butter packets included in cookie mix boxes held not to be property damage under CGL policy).

*Eljer Mfg. Co. v. Liberty Mut. Ins. Co.,* 952 F.2d 805 (7th Cir.1992) is a case of interest. *Eljer* involved a company that manufactured and sold a defective plumbing system to contractors in the United States. Repair or replacement of the system required breaking into walls, floors, or ceilings. Eljer brought suit seeking a declaration that it was covered under a GCL policy issue by Liberty Mutual. The Seventh Circuit noted that there was no controlling Illinois Supreme Court precedent and made an "*Erie* guess," prediction holding that "physical injury to tangible property" existed when Eljer's defective plumbing system was incorporated into a larger structure, even if the system had never leaked or manifested defects. The Illinois Supreme Court later rejected the majority decision by the Seventh Circuit in *Travelers Ins. Co. v.Eljer Mfg. Inc.,*197 Ill.2d 278, 757 N.E.2d 481 (2001). Eljer was decided based on Illinois law,not Wisconsin law.

The Wisconsin Supreme Court did discuss *Eljer* in *Wisconsin Label Corp. v. Northbrook Property & Casualty Ins. Co.,* 2000 WI 26, 233 Wis.2d 314, 607 N.W.2d 276. In *Wisconsin Label,* the plaintiff sought indemnification from its insurer for losses incurred when it mislabeled a customer's promotional products. The insured cited *Eljer* in support of its argument that the mislabeling constituted "property damage" within the meaning of the CGL policy. The Wisconsin Supreme Court concluded that the mislabeling did not constitute property damage within the meaning of the CGL policy but it did not explicitly reject the Seventh Circuit's majority decision in *Eljer.* The court indicated that the mislabeling in *Wisconsin Label "*could never be expected to cause 'physical injury.'" Although it is argued that retention of the defective washers could be expected to cause physical injury in the locomotives,no such injury is claimed to have occurred. Rather, in an effort to prevent such injury,GET chose to replace the defective washers before distibution of their product to their customers.

This Court finds that the plain unambiguous meaning of the policy in question requires a determination that "physical injury " does not occur until it is "caused" by a defective component. Only when (if ever) the component fails does the property of which it is a part suffer "physical injury." As Judge Griesbach's decision noted "Until then, the most that can be said is that the value of the property containing the component is diminished as a result of the likelihood of failure and resulting damage." This is clearly asserted by the defendants by citing to testimony of GET representatives that the locomotives were essentially worthless while containing the defective washers. *Wisconsin Label* clearly holds that such a diminution in value does not constitute physical damage to tangible property. The court further stated in *Wisconsin Label*: "We agree with these courts that diminution in value

caused by incorporation of a defective product does not constitute "property damage" under post-1973 policies unless it is the result of "physical injury" or "loss of use." Any suggestion in *Sola Basic* [*Sola Basic Indus. Inc., v. United States Fidelity & Guaranty Co.,* 90 Wis.2d 641, 280 N.W.2d 211 (1979)] that CGL policies provide coverage for diminution in value that is not caused by physical injury or loss of use is inconsistent with the definition of "property damage" in post-1973 policies. We therefore conclude that the Policy provides no coverage for diminution in value in the absence of physical injury or loss of use." 233 Wis.2d at 339.

*Wisconsin Label* also stands for the proposition that the phrase "physical injury to tangible property" in a CGL policy is unambiguous, and that the inclusion of the word "physical" must be given meaning. Insertion of "physical" before "damage" limits its meaning to physical damage. I therefore conclude that under the plain and ordinary meaning of the terms, the replacement costs of the defective washers in the GET alternators and locomotives does not constitute "property damage" within the meaning of Secura's policies. The plaintiffs' claims in the Illinois case only allege, as do subsequent discovery, claims for work done to repair or replace the defective washers and do not include any costs to repair physical damage to GET property caused by the failure of the washers.

The only physical injury to tangible property asserted by defendants is damage caused by the intentional work of GET to remove and replace the defective washers. There are no allegations or evidence revealed from discovery that the washers failed and caused any damage to any other property. See: *Wisconsin Label.* Removal and replacement costs are precisely the damages defendants seek from Ace in the Illinois action. While it is true that GET claims loss of use of their locomotives until repair and replacement washers were installed, no such claim exists in the Illinois case, nor were any amounts paid to GET for such claimed loss. Again, *Wisconsin Label* held that there was no coverage for "property damage" for "loss of use" where there was no claim or liability for the same. No evidence exists in this record to support a claim for "loss of use" in the Illinois case or presented before this court requiring consideration.

I therefore conclude that the replacement costs for defective washers do not constitute property damage under Secura's policies issued to Ace.

OCCURRENCE

Secura's policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While faulty workmanship "can give rise to property damage caused by an 'occurrence," it does not follow that faulty workmanship itself constitutes an occurrence." *Glendenning's Limestone & Ready-Mix Co. v. Reimer,* 2006 WI App 161, ¶30, 295 Wis.2d 556, 721 N.W.2d 704. An accident may be caused by faulty workmanship, but every failure to adequately perform a job, even if the failure is by negligence, is not an "accident" and thus not an "occurrence" under the insuring policy.

The Wisconsin Supreme Court has stated in *Preisler v. General Cas. Ins. Co.,* 2014 WI 135, 360 Wis.2d 129. 857 N.W.2d 136 that "property damage" must be caused by an "occurrence." In the present case the failure in manufacturing the washers was not an "occurrence" because the incorporation of the defective washers did not cause any "property damage." IN the present case, the defective washers did not cause damage to any property; instead GET informed Optimas that the locomotive engines manufactured with inclusion of the washers could not be sold unless the washers were replaced due to the defect. The washers did not fail and cause any damage. Accordingly, since the incorporation of the defective washers in GET's product did not cause any "property damage," the defective manufacture of the washers was not an "occurrence" under the policies.

Any disassembling of the GET product to remove or replace the defective washers was not an "occurrence" under the policy as it was not accidential. It appears there was damage done to GET property in their intentional efforts to access the sites to replace the defective washers. See *Estate of Sustache v. Am. Fam. Ins. Co.,*2008 WI 87, 311 Wis.2d 548, ¶¶ 52-53, 751 N.W.2d 845 ( holding that one cannot "accidentially" intentionally cause damage). Here

there was a deliberate decision by GET to intentionally remove and replace the washers from its product. Accordingly, because there was no "occurrence" under the Secura policies, Secura has no duty to indemnity Ace.

Wisconsin has determined that the costs flowing from the repair or replacement of an insured's defective product are not covered by a CGL policy. *Vogel v. Russo,* 2000 WI 85, ¶¶ 17-28, 236 Wis.2d 504, 613 N.W.2d 177, overruled in part on other grounds, *Insurance Co. of N. Am. V. Cease Elec. Inc.,* 2004 WI 139.

EXCLUSIONS

Under the provisions of *American Girl,* having found no coverage under the policy issued by Secura the inquiry might well end here, however this court would point out that even if the pleaded events would be considered "property damage" and an "occurrence" under the policies at issue, several exclusions would eliminate any such coverage.

Coverage is barred by the "your product" exclusion. The purpose of the your product exclusion is to prevent an insured from using its product liability coverage to cover the cost of repairing and replacing its own defective products. See: *Holsum Foods Division of Harvest States Coop. v. Homes Ins. Co.,* 162 Wis. 2d 563, 469 N.W.2d 918 (Ct.App.1991). Clearly, Optimas seeks reimbursement for amounts it paid to GET for repair and replacement of defective products provided by Optimas to GET produced under contract between Optimas and Ace. Giving this exclusion, its plain meaning it is applicable here defeating coverage. See also: *Nu-Pak, Inc. v. Wine Specialties, Intern., Ltd.,* 2002 WU App 92, *Hamli Inc v. Hartford Acc. & Indemn. Co.,* 86 F.3d 93 (7th Cir.1996).

Coverage is barred by the "impaired property" exclusion. Impaired property is at the core of the defendant's claim. They claim GET's machines could not be sold or were less useful when they incorporated the defective washers. The GET machines became unimpaired once removal and replacement of the washers was completed. The defective washers did not cause any physical injury as the facts bear out the washers did not physically injury anything. Here the problem is that GET observed the defective washers during installation and not after the washers were put to their intended use. It was during installation that GET determined that the washers were defective and made the deliberate decision to incur the costs to remove and replace washers that had already been installed in its machines. The exclusion bars coverage and no fact exists restoring it even if you assume initial coverage exists. See *Tweet/Garot-Aug. Winter,LLC v. Liberty Mut. Fire Ins. Co.,* 2007 WL 445988 (E.D.Wis. Feb.7,2007).

Finally, coverage is barred by the "recall" exclusion. The case squarely falls within the policy language. The language is unambiguous and is applicable here. See *Paper Machinery Corp, v. Nelson Foundry Co.,* 108 Wis.2d 614, 323 N.W.2d 160 (Ct.App.1982).

LOSS MITIGATION

The defendant's primary argument in favor of coverage, at least at oral argument, was based not on the language of the Secura policies, but on the principle of loss mitigation. Indeed, Attorney Schmookler spent a considerable amount of time discussing this very issue on June 16, 2020. His argument is exactly the same as made in the *Tweet/Garot* case. Like Tweet/Garot GET made a decision to replace defective washers in its machines before they actually failed avoiding a catastrophic loss on the part of GET. GET asserts that by replacing the washers when they did, they avoided a potentially larger loss which may have well been covered under the terms of the Secura policies. No authority supported that position in *Tweet/Garot* and no additional authority has been provided to this court to accept such action as providing coverage. This Court adopts the quoted language found in *Tweet/Garot:* "Noting that '[c]osts incurred strictly for prophylactic purposes are neither incurred because of

property damage nor covered by CGL policies.'" See: *Watts Industries, Inc. v. Zurich American Ins. Co.*, 18 Cal. Rpt.3d 61, 68 (Cal.App.Dist.2d 2004).

Like *Tweet/Garot* the Secura policies contain no initial coverage and contain "impaired property" and "recall" exclusions preventing coverage. To construe Secura's policy to provide loss mitigation coverage in the face of express language excluding replacement costs for deficient or defective work would contradict the fundamental rule that a court must not rewrite an insurance policy so as to provide coverage for a risk that the insurer did not contemplate and for which it has not been paid. *American Girl.*

As stated in *Tweet/Garot* the important public policy arguments advanced there and here are better addressed by a legislative or administrative body with the resources and mandate to enact law or promulgate regulations in the public interest upon consideration of all potential consequences of such a rule, including the unintended consequences that inevitably arise.

Upon all the files, pleadings and proceedings heretofore had in this matter;

IT IS ORDERED that based on the undisputed facts and the plain terms of the insurance policies summary and declaratory judgment is granted to Secura ;

IT IS FURTHER ORDERED, that the defendants' request for stay of proceedings regarding ripeness is denied;

IT IS FURTHER ORDERED, that the defendants' alternative motion for summary judgment is denied:

IT IS FURTHER ORDERED that based on this decision, Secura owes no duty to indemnify, and therefore no duty to defend Ace for claims asserted in the underlying action pending in Illinois.

Dated this 6th Day of July, 2020

Hon. Eugene A. Gasiorkiewicz