COURT OF APPEALS DECISION DATED AND RELEASED

August 20, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2210

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT II**

HERITAGE MUTUAL INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

BECKART ENVIRONMENTAL, INC.,

DEFENDANT-APPELLANT,

WISCONSIN PLATING WORKS,

DEFENDANT.

APPEAL from an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Beckart Environmental, Inc., appeals from an order declaring that Heritage Mutual Insurance Company had no duty to defend or indemnify Beckart in a suit brought by an unsatisfied customer. The issues are

whether under the terms of the policy Heritage Mutual had a duty to defend and because it breached that duty it waived its right to contest coverage and acted in bad faith. We conclude that under the "impaired property" exclusion, coverage does not exist. We affirm the order.

In late 1988, Beckart agreed to design, purchase and supervise installation of an effluent treatment system for an electroplating plant operated by Wisconsin Plating Works of Racine, Inc. The system was installed in April 1989 and never functioned properly. Eventually the plant was closed down because it was unable to maintain compliance with its pretreatment permit. In July 1994, Wisconsin Plating filed suit against Beckart for negligence, misrepresentation, breach of contract and breach of warranty and sought damages for loss of goods, loss of past and future profits, and loss of goodwill.

Beckart was insured by Heritage Mutual from May 1989 to May 1996 under a primary general liability policy. Beckart tendered the defense of the Wisconsin Plating claim to Heritage Mutual before and after the suit was commenced. Heritage Mutual rejected the tender of defense and asserted that there was no coverage. A year later Beckart tendered the defense again. Heritage Mutual maintained that there was no coverage but agreed to provide a defense under a reservation of rights. Just before trial, Heritage Mutual sought to intervene in the action brought by Wisconsin Plating for the purpose of obtaining a coverage determination. Heritage Mutual's motion to intervene was denied.

A jury verdict in favor of Wisconsin Plating resulted in a $1,130,798.84 judgment against Beckart. That judgment was affirmed on appeal. ***Wisconsin Plating Works of Racine, Inc. v. Beckart Envtl., Inc.***, No. 96-1043, unpublished slip op. (Wis. Ct. App. Mar. 26, 1997). After the verdict, Heritage

Mutual commenced this action for declaratory judgment. Both parties moved for summary judgment on the interpretation of the insurance contract.

Where each party has moved for summary judgment regarding the interpretation of an insurance policy, a question of law is presented. *See* ***Shorewood Sch. Dist. v. Wausau Ins. Cos.***, 170 Wis.2d 347, 363, 488 N.W.2d 82, 87 (1992). Similarly, the question of whether insurance coverage exists for the particular claims in a lawsuit is a question of law we review de novo. *See* ***Elliott v. Donahue***, 169 Wis.2d 310, 316, 485 N.W.2d 403, 405 (1992). "An insurer's duty to defend the insured in a third-party suit is predicated on allegations in a complaint which, if proven, would give rise to the possibility of recovery that falls under the terms and conditions of the insurance policy." ***Shorewood School***, 170 Wis.2d at 364, 488 N.W.2d at 87.

The Heritage Mutual policy covers property damage caused by an occurrence that takes place in the coverage territory. The definition of property damage includes "[l]oss of use of tangible property that is not physically injured." There is no doubt that Wisconsin Plating sought to recover damages occasioned by the loss of use of the electroplating plant and that the plant itself was not physically injured. We assume that the complaint states a claim for property damage caused by an occurrence as defined by the policy.

We turn to consider whether coverage is excluded under the terms of the policy. We singularly examine the impaired property exclusion in subsection "m" of the exclusions provision. Subsection "m" provides that insurance does not apply to:

> 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 contract 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.

Beckart contends that this exclusion is circular and inherently ambiguous.[1] We discern redundancy but not genuine ambiguity in the provision.[2] Focusing on the language excluding coverage for damage caused by a defect, deficiency or inadequacy in Beckart's work, it is clear that the provision is a form of a business risk exclusion. *See* ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 261-62, 371 N.W.2d 392, 393 (Ct. App. 1985) ("'business risk' refers to the expenses of repair or replacement incurred by the contractor in the event his work does not live up to its warranties" as contrasted with the risk for injury to people and damage to property caused by the contractor's faulty workmanship). Thus, "coverage is 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 that for which the damaged person bargained." ***Id.*** at 265, 371 N.W.2d at 394 (quoted source omitted).

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[1] Beckart points out that the policy defines "property damage" to include the loss of use of tangible property and defines "impaired property" as tangible property which cannot be used. By combining the policy's definition of property damage and impaired property, Beckart suggests that the exclusion subsection "m" is circular because one cannot lose the use of tangible property that already cannot be used.

[2] Whether a written contract is ambiguous is a question of law which we review independently of the circuit court. *See* ***Erickson v. Gundersen***, 183 Wis.2d 106, 115, 515 N.W.2d 293, 298 (Ct. App. 1994). "A genuine ambiguity arises when the phrasing of a policy is so confusing that the average policyholder cannot make out the boundaries of the coverage." ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 264, 371 N.W.2d 392, 394 (Ct. App. 1985).

Wisconsin Plating sought damages for Beckart's poor workmanship in the treatment system incorporated in the plant which did not perform as warranted. Damages from this type of liability is excluded under the impaired property exclusion. Further, in light of the business risk exclusion, coverage is not even "fairly debatable."[3] We need not discuss any of the other potentially applicable policy exclusions.[4]

Beckart maintains that Heritage Mutual should have immediately sought a determination of coverage under the dictates of ***Grube v. Daun***, 173 Wis.2d 30, 75, 496 N.W.2d 106, 123 (Ct. App. 1992), and that the failure to do so is bad faith and waives the right to contest coverage.[5] Although the procedures outlined in ***Grube*** seek to prompt an early determination of the insurer's duty to defend, an insurer may still reject the tender of defense and permit the insured to

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[3] An insurer may breach the duty to defend if the coverage issues are fairly debatable and the coverage determination does not precede the underlying action for which a tender of defense is made. *See* ***United States Fire Ins. Co. v. Good Humor Corp.***, 173 Wis.2d 804, 820, 496 N.W.2d 730, 735 (Ct. App. 1993). Review of the policy language in light of the "fairly debatable" standard is distinct from a review determining whether a duty to indemnify exists. *See* ***id.*** The policy language is tested "not by what the insurer intended the words to mean, but by what a reasonable person in the position of the insured would have understood the words to mean." ***Id.***

[4] The trial court's decision is a textbook example of insurance coverage analysis. The court first examined the allegations of the complaint, then determined if coverage existed, and then looked at each of the exclusions to see if coverage was negated. We adopt the trial court's decision as to the application of the other exclusions which we do not address here. *See* WIS. CT. APP. IOP VI(5)(a)(1994) (court of appeals may adopt trial court opinion).

[5] Beckart argues that ***Delta Group, Inc. v. DBI, Inc.***, 204 Wis.2d 515, 524, 555 N.W.2d 162, 166 (Ct. App. 1996), requires an insurer to immediately seek a determination of coverage when there is notice of suit. Relying on ***Delta Group,*** Beckart contends that Heritage Mutual's failure to communicate either a denial or acceptance of the tender of defense before the time to answer the complaint was bad faith in and of itself. Beckart's reliance on ***Delta Group*** is misplaced. ***Delta Group*** did not address the immediacy of action required when an adequate tender of defense is made. Rather, it held that once the tender is made, the insurer had an obligation to act in some regard and could not assume that the insured did not need a defense. *See* ***id.*** The insurer's obligation to resolve coverage existed also because it was named as a party in the suit. Here, Heritage Mutual affirmatively denied coverage.

pursue its own defense not subject to the insurer's control. *See* ***Production Stamping Corp. v. Maryland Cas. Co.***, 199 Wis.2d 322, 331-32 n.4, 544 N.W.2d 584, 588 (Ct. App. 1996). This course of action is the most risky of available options, but in the end the insurer "is not liable to the insured unless there is, in fact, coverage under the policy or coverage is determined to be 'fairly debatable.'" ***Id.*** at 327, 544 N.W.2d at 586 (citation and quoted source omitted).

We have determined that under the policy language, coverage does not in fact exist and is not even fairly debatable. That Beckart believed coverage to be fairly debatable or that it viewed Heritage Mutual's denial of the tender of defense and subsequent payment of defense costs equivocal does not change the result under the policy. *See* ***id.*** at 331-32 n.4, 544 N.W.2d at 588. There was no breach of the duty of defense and Heritage Mutual need not indemnify Beckart for the judgment.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.