COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2005AP426 **Cir. Ct. No. 1996CV612**

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

APPLETON PAPERS, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

AGRICULTURAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN NATIONAL FIRE INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, CIGNA SPECIALTY INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, THE INSURANCE COMPANY OF NORTH AMERICA, PHILADELPHIA, PENNSYLVANIA, THE HARTFORD CASUALTY INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, AGRICULTURAL EXCESS AND SURPLUS INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY AND LEXINGTON INSURANCE COMPANY,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: BRADLEY J. PRIEBE, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 LUNDSTEN, P.J. This case involves an insurance coverage dispute between Appleton Papers and Agricultural Insurance Company, one of Appleton Papers' insurers. Appleton Papers sought a declaratory judgment against Agricultural and its other insurers, alleging that they breached their duty to defend. Appleton Papers sought to recover expenses it incurred in defending a lawsuit brought by the 3M Company. After Appleton Papers settled the lawsuit with 3M and also settled with all of its insurers except Agricultural, the circuit court dismissed Appleton Papers' claims against Agricultural. Appleton Papers appeals, and Agricultural cross-appeals, from the resulting judgment.

¶2 Appleton Papers argues that Agricultural should be estopped by its breach of its duty to defend from contesting liability for the portion of the 3M settlement not reimbursed by Appleton Papers' settlement with its other insurers. We agree with Appleton Papers, reverse the circuit court's judgment dismissing Appleton Papers' claims against Agricultural, and remand to the circuit court to reinstate those claims.[1]

[1] Our resolution of Appleton Papers' appeal makes it unnecessary to reach the issues presented in Agricultural's cross-appeal.

Background

¶3 In 1995, 3M brought suit against Appleton Papers in Minnesota, alleging claims that included patent infringement, antitrust violations, and common law tort claims. None of Appleton Papers' numerous insurers assumed its defense and, in 1996, Appleton Papers sued those insurers in a separate action, the subject of this appeal, in Wisconsin. Appleton Papers sought a declaratory judgment against Agricultural and the other insurers, alleging that they breached their contracts by failing to defend or reimburse Appleton Papers for expenses it was incurring in defending the underlying litigation with 3M.

¶4 While the 3M litigation was pending, Appleton Papers entered into a partial settlement in 1997 with two of its insurers, Royal Surplus Lines Insurance Company and The Home Insurance Company.[2] Royal and Home agreed to jointly pay 100% of Appleton Papers' reasonable past and future defense costs. In return, Appleton Papers agreed not to assert that Royal and Home were estopped from further litigating their duty to indemnify Appleton Papers for claims made in the 3M litigation.

¶5 In 1999, Appleton Papers entered into a confidential agreement with 3M, agreeing to pay 3M an amount of money to settle the 3M lawsuit. Appleton Papers also settled its coverage claims against all of its insurers except

[2] Appleton Papers' defense costs in the 3M litigation were substantial. A footnote in Appleton Papers' brief-in-chief suggests that its defense costs had already exceeded $5,000,000 by the time of the partial settlement with Royal and Home.

Agricultural.[3] However, Appleton Papers did not recoup the total amount it paid to 3M from its settlement with the other insurers, and Appleton Papers continued to pursue Agricultural for the unreimbursed portion of the 3M settlement.[4] A series of summary judgment motions and corresponding circuit court rulings ultimately resulted in a circuit court judgment that dismissed Appleton Papers' claims against Agricultural.

Discussion

¶6 The parties' arguments in the appeal and cross-appeal raise several issues, including a threshold issue pertaining to Appleton Papers' argument that Agricultural should be estopped from contesting liability for the portion of the 3M settlement not reimbursed by Appleton Papers' settlement with its other insurers. If Appleton Papers is correct, and we conclude that it is, then the remaining issues are moot. We therefore do not reach the remaining issues.[5]

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[3] Appleton Papers explains that it did not settle with Agricultural's sister company either. Neither Appleton Papers nor Agricultural suggests that a distinction between Agricultural and its sister company is pertinent to this appeal or cross-appeal. Accordingly, we simply refer to "Agricultural" throughout our opinion.

[4] As indicated above, the terms of the settlement are confidential. There is no dispute, however, that Appleton Papers paid an amount of money to 3M to settle the 3M lawsuit and that Appleton Papers did not recoup the total amount of the 3M settlement from the insurers with which it settled.

[5] Appleton Papers' arguments in its appeal raise the following two primary issues in addition to the indemnity by estoppel issue: (1) whether the "other insurance" clauses in Agricultural's umbrella policies can extinguish Appleton Papers' right to indemnity coverage owed under those policies; and (2) whether Appleton Papers' "***Loy*/*Teigen*** settlement" with Home, which is now insolvent, released Agricultural from liability.

Agricultural's arguments in its cross-appeal raise two primary issues: (1) whether Agricultural has a duty to indemnify Appleton Papers given that the 3M case involved a claim for disparagement, which is not covered under the Agricultural umbrella policies; and (2) to the extent the circuit court fully ruled on Agricultural's duty to indemnify, whether that ruling was (continued)

A. The Nature Of The Duty To Defend And Indemnity By Estoppel

¶7 Appleton Papers' primary argument is that Agricultural is estopped by its breach of its duty to defend from contesting liability for the portion of the 3M settlement not reimbursed by Appleton Papers' settlement with its other insurers. Following the lead of the parties, we will often characterize this estoppel theory as "indemnity by estoppel," although an alternative and possibly more accurate term might be "waiver."

¶8 The existence of the duty to defend depends solely on the nature of the claim being asserted against the insured and does not depend on the merits of the claim. ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis. 2d 39, 43, 577 N.W.2d 366 (Ct. App. 1998). The duty to defend is "broader than the separate duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage." ***Id.*** at 44.

¶9 An insurer that declines to defend does so at its peril. ***Production Stamping Corp. v. Maryland Cas. Co.***, 199 Wis. 2d 322, 327, 544 N.W.2d 584 (Ct. App. 1996). This is where indemnity by estoppel comes into play: "When an insurer wrongfully refuses to defend on the grounds that a claim against its insured is not within the coverage of the policy, the insurer cannot later contest coverage, but is liable to the insured." ***Radke***, 217 Wis. 2d at 48; *see also* ***Grube v. Daun***, 173 Wis. 2d 30, 74-75, 496 N.W.2d 106 (Ct. App. 1992) (insurer that breached its duty to defend was "liable … for the costs of defending the suit, the amount recovered … either by judgment or settlement, and any additional damages caused

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error because outstanding issues remain as to additional coverage defenses and application of the "larger settlement rule."

by [the insurer]'s breach of contract"); ***Professional Office Bldgs., Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 586, 427 N.W.2d 427 (Ct. App. 1988) (insurer that breached its duty to defend could not "challenge or otherwise litigate the coverage issue. It is liable for the policy limits ….").[6]

¶10 In ***Radke***, we summarized the procedural alternatives that an insurer may follow if it believes it has no duty to defend yet wishes to protect itself from losing the right to further litigate coverage should a court ultimately disagree:

> Courts have outlined procedures that insurers can use to raise the coverage issue and still retain their right to challenge coverage: (1) the insurer and the insured can enter into a nonwaiver agreement in which the insurer would agree to defend, and the insured would acknowledge the right of the insurer to contest coverage; (2) the insurer can request a bifurcated trial or a declaratory judgment so

[6] The supreme court has explained liability for breach of the duty to defend as follows:

> The general rule is that where an insurer wrongfully refuses to defend on the grounds that the claim against the insured is not within the coverage of the policy, the insurer is guilty of a breach of contract which renders it liable to the insured for all damages that naturally flow from the breach. Damages which naturally flow from an insurer's breach of its duty to defend include: (1) the amount of the judgment or settlement against the insured plus interest; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show naturally resulted from the breach.
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> ….
>
> … The insurance company must pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract. Policy limits do not restrict the damages recoverable by an insured for a breach of the contract by the insurer.

Newhouse v. Citizens Sec. Mut. Ins. Co., 176 Wis. 2d 824, 837-38, 501 N.W.2d 1 (1993) (citations omitted); *accord* ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis. 2d 39, 48-49, 577 N.W.2d 366 (Ct. App. 1998).

> that the coverage issue can be resolved before the liability and damage issues; or (3) the insurer can file a reservation of rights which allows the insured to pursue his or her own defense not subject to the insurer's control, but the insurer agrees to pay for the legal fees incurred. *See* ***Grube***, 173 Wis. 2d at 75, 496 N.W.2d at 123. A more risky version of the third alternative is for the insurer to not file a reservation of rights, but to simply reject the tender of defense and allow the insured to pursue his or her own defense. *See* ***Production Stamping***, 199 Wis. 2d at 331 n.4, 544 N.W.2d at 588.

Radke, 217 Wis. 2d at 44-45.[7]

¶11 Restructured in a more logical order, we discern that an insurer generally has the following four options:

1) request and obtain a bifurcated proceeding or seek a declaratory judgment in which the issue of coverage—and therefore duty to defend—is resolved before liability and damage issues;

2) agree to provide a defense to the insured while entering into a non-waiver agreement in which the insured acknowledges the right of the insurer to contest coverage;

3) agree to pay the insured's legal fees while filing a reservation of rights which allows the insurer to later contest coverage; and

4) do nothing—i.e., refuse to defend or pay for the defense and enter into no agreement and file no reservation of rights—thereby forfeiting the right to contest coverage if it is later determined that the insurer failed to comply with its duty to defend.

[7] We recognize that ***Radke***, 217 Wis. 2d 39, was decided after some of the relevant events in this case. However, the quoted portion of ***Radke*** is nothing more than a synthesis of existing case law. Thus, Agricultural has no basis to complain that it is being unfairly held to the dictates of ***Radke***. In any event, Agricultural does not argue that it is not subject to ***Radke***. Rather, Agricultural attempts to distinguish ***Radke*** on its facts and also notes in its brief that it reserves the right to argue to the supreme court that ***Radke*** wrongly rejected what Agricultural views as "the more limited rule" of a Seventh Circuit Court of Appeals decision, ***Hamlin Inc. v. Hartford Accident & Indemnity Co.***, 86 F.3d 93, 94-95 (7th Cir. 1996).

We stress that simply informing a court of a desire to preserve any rights an insurer has is not a means of preserving the insurer's right to contest coverage.

¶12 Appleton Papers argues that Agricultural effectively chose the fourth option above. As explained below, we agree.

B. Additional Facts Relevant To Our Decision

¶13 A more detailed recitation of portions of the procedural history of this case is necessary for our decision.

¶14 In December 1996, Appleton Papers moved for partial summary judgment against several of its insurers, including Royal, Home, and Agricultural. Appleton Papers sought a declaratory ruling that each of the insurers breached its duty to defend Appleton Papers in the 3M action. Agricultural opposed the motion and filed a cross-motion for summary judgment, seeking a determination that it had no duty to defend. Other insurers also filed motions for summary judgment.

¶15 At the beginning of the May 1997 hearing on the various motions, counsel for Appleton Papers announced that, late the previous night, Appleton Papers had reached a partial settlement with Royal and Home, "one of the terms of which calls for the withdrawal of our pending motion without prejudice, and my belief is that that will moot the issues presently before the Court on all of the sets of motions."

¶16 Counsel for Royal recited the terms of the settlement into the record with Agricultural present.[8] Royal and Home agreed to jointly pay 100% of Appleton Papers' reasonable defense costs in the underlying 3M litigation, with Royal and Home to each make an initial payment of $1.7 million, representing part of the costs. Neither Royal nor Home, however, admitted a duty to defend, and both insurers were to submit a reservation of rights letter.

¶17 Appleton Papers, Royal, and Home also agreed that the issue of indemnity was not ripe for adjudication at that time; however, Appleton Papers further agreed that it would not argue indemnity by estoppel against Royal or Home at any time in the future.[9] Counsel for Royal additionally stated the following terms of the agreement, in which Appleton Papers expressly reserved all of its rights against the non-settling insurers, including Agricultural:

> [T]he parties [Appleton Papers, Royal, and Home] agree that this issue moots the issues presented for today's hearing on plaintiff's motion for summary judgment, and Appleton would withdraw that motion without prejudice. It's Appleton's right to bring the motion *against other carriers* at a later date.
>
> Finally, Judge, *with regard to any rights Appleton may have against any other carriers* in this action beyond Home and Royal and any rights Home and Royal may have with regard to other carriers, or equitable contribution or other contributions to the monies Home and Royal are now

[8] The partial settlement between Appleton Papers, Royal, and Home was reduced to a written stipulation and order. A separate appeal followed a dispute arising out of the settlement agreement. *See* ***Appleton Papers, Inc. v. Home Indem. Co.***, 2000 WI App 104, 235 Wis. 2d 39, 612 N.W.2d 760.

[9] To be more precise, Appleton Papers agreed not to argue indemnity by estoppel against Royal or Home based on the conduct of Royal or Home up to that point. Appleton Papers remained free to argue indemnity by estoppel based on future conduct by Royal or Home.

> agreeing to pay, remain as they lay in the policies and in the law. *None of those rights are extinguished.*

(Emphasis added.)

¶18 Before the hearing concluded, counsel for Agricultural seemingly sought to preserve any and all rights Agricultural may have had:

> There are other people who were going to be arguing today, Agricultural Insurance is one, … we're not yet parties to this agreement. We found out about it this morning and last night. *We want to retain whatever rights we have*, Judge, to put before your Honor the fact that we still think we're right on the duty to defend, because obviously, Appleton and Home and Royal, they're not binding us in terms of the motions that we were going to be arguing about today.
>
> … [W]e would like to reserve the right to, at some point, come back in and say, well, now, we didn't argue this on May 13[, 1997] for obvious reasons, for good, practical reasons, this is important to get this done today. *We would like to be able to, of course, put our issues back to the Court at another time*…. It may be moot as to Royal and Appleton Papers as of today, but we want to reserve the rights to have a hearing at some point. Today isn't the day.

(Emphasis added.)

¶19 At the conclusion of the hearing, counsel for Appleton Papers said: "I think it makes good sense to postpone all of the hearings on all of the motions today to take some time to have all the various insurance companies have a chance to figure out their positions. I do think that what will ultimately be the result is all of the motions that are pending today are moot …."

¶20 Agricultural did not subsequently press its cross-motion for summary judgment or otherwise seek a determination from the court on whether it had a duty to defend. Perhaps more to the point, Agricultural did not exercise any

of the first three options we set forth in ¶11, but instead effectively put itself in the position of choosing option 4, that is, it did nothing.

¶21 After Appleton Papers settled the underlying 3M litigation and settled its remaining claims with all of its insurers except Agricultural, Appleton Papers again moved for partial summary judgment against Agricultural, renewing its argument that Agricultural breached its duty to defend. Appleton Papers further argued that, as a consequence of that breach, Agricultural was estopped from asserting coverage defenses and, therefore, Agricultural was liable for the entire amount of the 3M settlement less the sums already covered by Appleton Papers' other insurers. Agricultural contended, however, that any duty to defend was "rendered moot and cured" once Appleton Papers settled with Royal and Home for 100% of Appleton Papers' defense costs.

¶22 In February 2000, the court held a hearing on Appleton Papers' motion. Appleton Papers asserted that its rights against Agricultural were preserved and unaffected by its partial settlement with Royal and Home. The circuit court disagreed, reasoning that, at the time of the May 1997 hearing and settlement, there was an understanding between the parties that Royal and Home had accepted the obligation to provide 100% of Appleton Papers' defense costs and, therefore, that Agricultural would not be responsible as an excess carrier. The court denied Appleton Papers' motion, and Appleton Papers and Agricultural continued to litigate whether Agricultural was required to indemnify Appleton Papers.

C. Agricultural's Duty To Defend

¶23 The parties have a preliminary dispute regarding whether or what the circuit court ruled with respect to Agricultural's duty to defend and whether this

affects our scope of review. Agricultural argues that the circuit court concluded that Agricultural had no duty to defend and, therefore, did not reach the indemnity by estoppel issue. Agricultural further argues that, because the court did not reach this issue, there is no adverse ruling from which Appleton Papers may appeal. Agricultural is suggesting that we are barred from reviewing the issue. Appleton Papers disagrees, and argues that the circuit court concluded that Agricultural owed Appleton Papers a duty to defend and that Agricultural breached that duty.

¶24 In denying Appleton Papers' second motion for partial summary judgment, the court set forth its reasoning in full in its oral decision at the February 2000 hearing:

> [T]he Court will find that, I think, going back to the May 13, 1997 hearing that occurred, the Court is satisfied that there was an understanding at that time between the parties that Royal and Home had accepted the obligation to provide 100 percent of the legal defense at that time and, therefore, that Agricultural would not be responsible as the excess carrier.

The circuit court's decision leaves unclear whether the court was ruling that Agricultural had a duty to defend, and this ambiguity is largely the source of the parties' preliminary dispute.[10]

¶25 Despite this ambiguity, what is clear is that the court necessarily, if implicitly, concluded that Agricultural was not estopped from further litigating coverage. For Agricultural to now suggest otherwise rings hollow. If the circuit court had concluded Agricultural was estopped, then the case would not have

[10] The circuit court may have been concluding, for example, that Agricultural had a duty to defend but was not in breach of that duty once Royal and Home assumed Appleton Papers' defense costs.

proceeded the way it did with the parties continuing to litigate coverage. Regardless of its rationale, the court's denial of Appleton Papers' second motion for partial summary judgment resolved the estoppel issue in a manner adverse to Appleton Papers. Thus, Agricultural provides no valid reason for why we should not address the issue.

¶26 This brings us to the question of whether Agricultural owed Appleton Papers a duty to defend. If Agricultural did not have a duty to defend, then it could not have breached any such duty and there could be no estoppel. If, instead, Agricultural had a duty to defend, then the question becomes whether it breached that duty and, therefore, waived its right to contest coverage.

¶27 Although the circuit court's February 2000 ruling left unclear whether it was ruling that Agricultural had a duty to defend Appleton Papers, the court concluded that Agricultural had such a duty in a subsequent decision. Specifically, the court, in a November 2003 decision, concluded that "because 3M's complaint alleges defamation and those allegations are integral to the antitrust and tortious interference claims, Agricultural owed a duty to defend and indemnify Appleton Papers in the 3M action."

¶28 Appleton Papers relies on this November 2003 ruling in its appeal. Yet, in its responsive brief, Agricultural does not argue that Appleton Papers cannot rely on this ruling and does not make any express argument that it did not have a duty to defend Appleton Papers. Rather, Agricultural's argument seems to be limited to whether it *breached* any such duty. If at all, it is in its cross-appeal that Agricultural seems to argue, in a footnote, that it had no duty to defend. But, in the same cross-appeal brief, Agricultural asserts: "Whether Agricultural had a duty to defend Appleton is in no way relevant to this cross-appeal."

¶29 If Agricultural intended to argue on appeal that it had no duty to defend Appleton Papers, Agricultural's responsive brief in Appleton Papers' appeal was the place to do so. Because Agricultural makes no developed duty-to-defend argument, we deem the argument conceded. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (arguments ignored may be deemed conceded). Similarly, Agricultural's duty-to-defend argument in its cross-appeal is undeveloped and, for that reason, does not merit our attention. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (an appellate court need not address "amorphous and insufficiently developed" arguments).

¶30 Agricultural does argue in its responsive brief that its "other insurance" clause placed it "last-in-line" among Appleton Papers' umbrella carriers, such that Agricultural had no liability to Appleton Papers. This, however, is not on its face a duty-to-defend argument. Rather, Agricultural's last-in-line argument appears directed solely at Agricultural's duty to indemnify. And, as stated earlier in this opinion, the duty to defend is "broader than the separate duty to indemnify." ***Radke***, 217 Wis. 2d at 44.[11]

¶31 In sum, we conclude that Agricultural has waived its right to contest whether it had a duty to defend Appleton Papers in the 3M litigation.

[11] We question whether a duty-to-defend argument was preserved for appeal. Our review of the trial court briefing relating to Appleton Papers' second motion for partial summary judgment reveals no distinct and developed duty-to-defend argument by Agricultural. The failure of Agricultural to present a fully developed duty-to-defend argument is no small matter. Our limited research on the topic indicates that there are situations in which duty to defend, as distinct from duty to indemnify, is a question not easily resolved. Indeed, this may be an area of law in need of further development. But even assuming that the law is clear and fully developed, Agricultural has not presented that law or applied it here.

D. Whether The Indemnity By Estoppel Doctrine Applies To Agricultural

¶32 We turn to the merits of the parties' remaining arguments with respect to indemnity by estoppel. These arguments pertain to whether Agricultural *breached* its duty to defend. The facts necessary to our decision, which we have now recited, are undisputed. Accordingly, this issue presents a question of law that we review *de novo*. *See* ***Barber v. Nylund***, 158 Wis. 2d 192, 195, 461 N.W.2d 809 (Ct. App. 1990) ("Whether the remedy of waiver of an insurer's right to contest coverage is available under particular circumstances is a question of law.").

¶33 Agricultural argues that it should not be estopped from asserting its substantive defenses because it sought a court ruling on its duty to defend prior to settlement of the underlying litigation, and it failed to obtain a ruling only because of Appleton Papers' assertion at the May 1997 hearing that the issue was moot. Thus, according to Agricultural, it took the steps necessary to preserve its right to contest coverage. We disagree.

¶34 Specifically, Agricultural argues that "it was because the issue was declared 'moot' by Appleton's counsel" that there was no court decision on Agricultural's duty to defend prior to settlement of the underlying litigation. Agricultural is referring to the following two comments by Appleton Papers' counsel at the May 1997 hearing: first, that "my belief is that [Appleton Papers' settlement with Royal and Home] will moot the issues presently before the Court on all of the sets of motions" and, second, that "I do think that what will ultimately be the result is all of the motions that are pending today are moot."

¶35 According to Agricultural, Appleton Papers is therefore the one that should be "estopped," either judicially or equitably. Agricultural asserts that

Appleton Papers took inconsistent positions and that Agricultural relied on Appleton Papers' mootness comments. Agricultural explains in its brief:

> [H]ad Agricultural known that almost three years later Appleton would reverse its position and assert that the issue of Agricultural's duty to defend was **not** moot and would argue that Agricultural therefore was estopped from raising any indemnity defenses, Agricultural would have chosen to have its cross-motion for summary judgment decided by the court prior to Appleton's settlement with 3M.

¶36 We are not persuaded. Regardless what was in the mind of Agricultural's trial counsel, it was not reasonable to interpret Appleton Papers' mootness comments as relieving Agricultural of the need to pick among the options set forth in ***Radke***.

¶37 The thrust of the partial settlement agreement Appleton Papers reached with Royal and Home was that Royal and Home would pay Appleton Papers' substantial and continuing defense costs in exchange for Appleton Papers' agreement not to assert indemnity by estoppel against Royal and Home. To recap, the key terms of the settlement agreement were as follows:

- Royal and Home agreed to jointly pay 100% of Appleton Papers' reasonable defense costs, including an initial payment of $1.7 million by each Royal and Home.

- Appleton Papers withdrew its motion for partial summary judgment, seeking a determination on the insurers' duty to defend, *without* prejudice.

- Appleton Papers, Royal, and Home agreed that the issue of indemnity was not ripe for adjudication; however, Appleton Papers agreed not to argue indemnity by estoppel against Royal or Home.

- Appleton Papers reserved the right to bring its motion against the non-settling insurers at a later date, and the settlement was not to affect any rights Appleton Papers may have had against any of those insurers.

¶38 Given the terms of the partial settlement between Appleton Papers, Royal, and Home, it is unreasonable to interpret Appleton Papers' counsel's mootness comments as a concession by Appleton Papers that non-settling insurers, such as Agricultural, were relieved of the consequences for breaching any duty to defend they had. Such an interpretation would mean that all of the non-settling insurers were meant to receive the benefit of Royal and Home's agreement without participating in that agreement or making any promises whatsoever.

¶39 A far more reasonable interpretation of Appleton Papers' mootness comments, when read in context, is that, from Appleton Papers' perspective, there was no need to pursue the duty to defend issue *at that time* because Appleton Papers had achieved its immediate goal of reimbursement for its ongoing defense costs.

¶40 Furthermore, as the insured rather than the insurer, Appleton Papers was under no immediate obligation to press the duty to defend issue. Rather, ***Radke*** and the cases it follows impose on the insurer the obligation to act to avoid waiving its right to contest coverage. *See* ***Radke***, 217 Wis. 2d at 45 (summarizing the "procedures that insurers can use to raise the coverage issue and still retain their right to challenge coverage"). The imposition of this obligation is in keeping with the rule that insurers are responsible for clarifying any ambiguity as to whether an insured has requested a defense. *See* ***Towne Realty, Inc. v. Zurich Ins. Co.***, 201 Wis. 2d 260, 269, 548 N.W.2d 64 (1996) ("[I]f it is unclear or ambiguous whether the insured wishes the insurer to defend the suit, it becomes the responsibility of the insurer to communicate with the insured before the insurer unilaterally forgoes the defense.").

¶41 Agricultural did not follow any of the options for preserving the issue of coverage we list above in ¶11. Agricultural did not request a bifurcated trial or a declaratory judgment in order to resolve the coverage issue before the liability issues were resolved in the underlying 3M litigation;[12] Agricultural did not enter into a non-waiver agreement with Appleton Papers in which Agricultural agreed to defend Appleton Papers and in which Appleton Papers acknowledged Agricultural's right to contest coverage; and Agricultural did not file a reservation of rights allowing Appleton Papers to pursue its own defense while Agricultural paid for the defense. *See* ***Radke***, 217 Wis. 2d at 44-45. Rather, Agricultural effectively chose the fourth option, that is, it chose the "do nothing" option. *See* ***id.*** at 45. Consequently, Agricultural proceeded at its own peril, assuming the risk that it could be estopped from further litigating coverage if a court ultimately determined that it had a duty to defend Appleton Papers.[13]

[12] Because the 3M litigation was a separate action, the procedural alternative of requesting a bifurcated trial was not a relevant option.

[13] Agricultural relies on a Seventh Circuit Court of Appeals decision, ***Carney v. Village of Darien***, 60 F.3d 1273 (7th Cir. 1995), in arguing that it took the steps necessary to preserve its right to contest coverage. In ***Carney***, much like the instant case, the insurer first pursued a court determination on the issue by cross-motion for summary judgment. *See* ***id.*** at 1276. In ***Carney***, however, the insurer's cross-motion for summary judgment was resolved before the liability portion of the case was tried. ***Id.***; *see also* ***id.*** at 1277. The court held that the insurer "complied with its duty to defend by seeking a declaratory judgment from the district court on the issue of insurance coverage prior to the trial on the liability issue." ***Id.*** at 1277. The court also stated: "All that is required of the insurer is to seek a court's determination on the coverage issue, instead of refusing to defend based solely upon its own determination of coverage." ***Id.***

We question whether some of the language in ***Carney*** is consistent with Wisconsin law. But we need not resolve whether ***Carney*** is consistent or inconsistent with Wisconsin law because we conclude that, even if we applied ***Carney***, Agricultural would not prevail. Agricultural did not follow through in its effort to obtain resolution of the coverage issue, as did the insurer in ***Carney***, because Agricultural dropped its effort to have the issue resolved before Appleton Papers and 3M resolved their underlying litigation.

¶42 Moreover, at best, the mootness comments made by Appleton Papers' counsel were ambiguous. An insurer does not comply with its obligation to pursue its non-waiver options under ***Radke*** by relying on ambiguous statements made by an insured.

Conclusion

¶43 In sum, we conclude that the indemnity by estoppel doctrine applies to Agricultural and that Agricultural is therefore barred from contesting liability for the portion of the 3M settlement not reimbursed by Appleton Papers' settlement with its other insurers. We reverse the circuit court's judgment dismissing Appleton Papers' claims against Agricultural, and remand to the circuit court to reinstate those claims.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.