

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 30, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 02-0349**

**Cir. Ct. No. 99-CV-57**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**THE TRAVELERS INSURANCE COMPANIES,**

**PLAINTIFF-APPELLANT,**

**v.**

**JOHN KELLER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Clark County:  
JON M. COUNSELL, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 VERGERONT, P.J. The Travelers Insurance Companies appeal the judgment entered on a jury verdict in favor of John Keller, an employer insured under a worker's compensation policy. Travelers contends the trial court erred in not granting the motion for judgment notwithstanding the verdict on Keller's counterclaim for breach of contract and breach of the implied covenant of good

faith. Travelers asserts that under WIS. ADMIN. CODE § INS 21.01(11) it is immune from liability for reporting Keller's failure to pay insurance premiums to the Wisconsin compensation bureau. We agree with the trial court that this regulation does not provide immunity for any liability arising out of Travelers' auditing and billing practices or its cancellation of Keller's policy. However, we conclude there is no evidence that the damages awarded by the jury for Keller's cessation of his business—\$71,500—were caused by any conduct of Travelers that breached its contract with Keller or that breached the implied covenant of good faith. Accordingly, we reverse the judgment in favor of Keller and remand with directions to dismiss Keller's counterclaim and to enter an amended judgment in favor of Travelers on its complaint. Because of this disposition, it is unnecessary to decide the other issues raised by Travelers.<sup>1</sup>

## BACKGROUND

¶2 Keller operates an industrial painting business, and the primary work is painting water towers and bridges. Because of the high risk classification of his business, he is able to obtain worker's compensation insurance only through the worker's compensation mandatory risk-sharing plan, and Travelers was designated his insurer.<sup>2</sup> Travelers issued its first policy to Keller in 1994, and there is no

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<sup>1</sup> Travelers also argues: (1) the trial court erred in allowing the counterclaims to go to the jury; (2) as a matter of law there is no breach of the duty of good faith implied in every contract because the cancellation and other conduct were specifically authorized by the policy; (3) the trial court erred in declining to instruct the jury on WIS. ADMIN. CODE § INS 21.01(11); and (4) we should exercise our powers of discretionary reversal.

<sup>2</sup> WISCONSIN STAT. § 619.01 provides for the establishment of mandatory risk-sharing plans when the commissioner of insurance determines that insurance, including worker's compensation insurance, is not readily available in the voluntary market and the public interest requires such availability. Insurers who do business in this state providing the particular type of insurance are required to participate. Section 619.01(c)1.

dispute concerning that policy. The dispute concerns the premiums due for the next three policy periods: May 18, 1995 to May 18, 1996; May 18, 1996 to May 18, 1997; and May 18, 1997 to October 2, 1997. This last policy was originally issued for one calendar year, but was canceled by Travelers effective October 2, 1997, for nonpayment of premium.

¶3 Travelers' initial complaint alleged that, as of October 26, 1998, Keller owed \$57,855 in premiums for coverage from May 18, 1995 to October 2, 1997, and he had failed to pay although demand had been made. Keller denied these allegations. After Travelers amended its complaint to allege that Keller owed only \$32,563, Keller counterclaimed for breach of contract. The counterclaim alleged that in the fall of 1997 Travelers began billing him for two and one-half years of insurance coverage; the bills were grossly inaccurate, confusing, and contradictory; Travelers refused to discuss the basis for the bills or work out a reasonable payment plan; and Travelers notified the department of workforce development that Keller was delinquent. According to the counterclaim, this conduct constituted a breach of Travelers' contract with him, and as a result of the breach he was forced to shut down his business.

¶4 The provisions of the three policies at issue were the same, except for the rates which form the basis for the premiums. For the 1995/96 policy, the rate was \$44.44 for every \$100 paid or payable by Keller to employees; for 1996/97 it was \$37.96; and for 1997/98 it was \$40.03. The first page of the "information page" of each policy provided: "The premium for this policy will be determined by our Manuals of Rules, Classifications, Rates and Rating Plans. All required information is subject to verification and change by audit to be made ANNUALLY." Each policy provided that Keller was to pay "all premium when due." Each also provided:

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

The estimated premium shown on the information page of each policy was \$850, and Keller paid that amount at the beginning of each policy period. Keller testified that he chose not to estimate his payroll for his initial application or subsequent renewals, but instead chose to pay the minimum premium of \$850 as an estimate.

¶5 Each policy required that Keller keep records of information needed to compute premium and provide copies when asked. Keller was also required to allow Travelers to audit his records relating to the policy, and each policy provided that Travelers “may conduct the audits ... during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium.” Each policy authorized Travelers to cancel the policy for failure to pay all premium when due, provided that Travelers sent at least thirty-days advance written notice stating when the cancellation was to take effect. Each policy provided that mailing the notice to the address shown on the information page of the policy was sufficient to prove notice.

¶6 At the time of trial, Keller had not paid any premium for the three policy periods at issue beyond the \$850 he paid at the beginning of each policy period. He acknowledged he owed premium, and the primary issue at trial on Travelers’ claim was how much he owed. The dispute concerned whether the

wages Keller paid employees for jobs performed outside Wisconsin were properly included in computing the premium. Travelers contended they were and presented evidence that the earned premiums (before deductions for the \$850 Keller paid at the beginning of each policy period) were: 1995/1996—\$12,982; 1996/1997—\$14,170; 5/18/97 to 10/02/97—\$7,145. The jury agreed with Travelers and found Keller owed Travelers \$32,437 in premiums. Keller has not appealed this award.

¶7 With respect to Keller's counterclaim, the evidence at trial was as follows. For policy period 1995/1996, a premium adjustment notice dated July 19, 1996, was sent to Keller's address as listed on the policy; this notice showed an earned premium of \$160.<sup>3</sup> Under "annual audit" is written "physical," which, a witness for Travelers testified, meant that an audit was performed at the insured's or its accountant's place of business. However, the witness also testified that a reaudit, which was performed either in 1996 or 1997 on the actual payroll, showed an earned premium of \$12,982 for policy period 1995/1996. Keller did not testify whether he received the July 19, 1996 notice.

¶8 For policy period 1996/1997, Travelers sent a premium adjustment notice dated July 18, 1997, that showed an earned premium of \$14,470. The notice showed that this was the product of the rate for that policy year applied to the "exposure basis" of \$36,907, which was the payroll figure reported on a form signed by Keller's accountant and returned to Travelers. On July 21, 1997, Travelers sent a bill for policy period 1996/1997 for \$13,320 (\$14,170 minus the

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<sup>3</sup> It appears from other accounting produced at trial and not disputed that \$690 (the difference between the \$850 Keller paid at the beginning of 1995/1996 and \$160) was returned to Keller.

\$850 Keller had paid at the beginning of that policy period). The bill stated that this amount was due on August 5, 1997.

¶9 On August 1, 1997, Travelers issued an endorsement to Keller's 1997/1998 policy effective May 18, 1997, that showed "additional premium" of \$15,561, "updated to reflect the latest available audit information." The endorsement showed that the rate for the 1997/1998 policy period was applied to a "premium basis" of \$40,958. Travelers also issued a past due premium notice, stating that \$28,881 was due "upon receipt"—\$15,561 for the period beginning 5/18/97 per endorsement and \$13,320 for the period beginning 5/18/96. This notice stated:

Please note that a notice of cancellation for your policy has been filed with the state insurance department and the plan administrator because of your failure to remit the past due amount. **In order to prevent the cancellation of this policy the entire past due amount must be received prior to the cancellation date stated on this notice.** Failure to satisfy this outstanding premium obligation may result in you being ineligible for further coverage under the state's workers compensation insurance plan.

The copy of the notice submitted at trial does not show the date this notice was issued or sent, and evidence at trial did not supply a date. A notice of cancellation for nonpayment of premium in the amount of \$28,881 states that cancellation is effective 10-02-97; this notice shows an issue date of 8/28/97.

¶10 One of the factual issues at trial was whether Keller received these notices and the endorsement. The reporting form returned to Travelers by Keller's accountant in July 1997, as well as all the notices described above and the endorsement, contained the address for Keller that was shown on each of the three policies. Keller testified he did not receive the July 18, 1997 premium adjustment notice, the past due premium notice, or notice of the cancellation date. He had

stopped living at the street address shown on the policies sometime before June 26, 1996, and had his mail sent to a post office box address. His accountant picked up his mail there and opened it. He had given a forwarding address to the post office and to the insurance agent through whom he purchased the Travelers policies. He expected his insurance agent to notify Travelers of his change in address, but he does not know when that was done.

¶11 A witness for Travelers testified that when Travelers is informed in writing of an insured's address change, it issues an endorsement with the new address. An endorsement showing a change of address for Keller was not issued until late September 1997. The witness testified that the fact that Travelers had copies of the notices and documents addressed to Keller meant that they had been put in the mail to him.

¶12 Keller testified he did not learn he had a problem regarding premium payments until late September 1997; apparently his insurance agent had informed his accountant. He had understood that he would owe more than \$850 in premiums each year based on his payroll. His understanding of the policies was that at the end of each policy period an audit would be conducted to determine the amount of premium due for that period above \$850; and Travelers had three years after that to reaudit. When he learned of the amount he owed in late September 1997, he wanted to pay it in three years since they were billing him for three years. However Travelers refused; it wanted payment in full. He had questions about the accuracy of the bills due to the dispute about how to handle employees working in other states. In addition, the bills he received were confusing and contradictory and he did not know what to pay. He conducted his own review and concluded the amount Travelers said was due was not accurate and that was why he refused to pay it.

¶13 The bills Keller was referring to as inaccurate and confusing, besides those already mentioned, were the following. On December 19, 1997, Travelers issued a premium adjustment notice showing an estimate of \$32,563 in earned premium for 5/18/97 to 10/02/97, but a revised premium adjustment for that same period, issued on February 8, 1999, after a physical audit, stated that the earned premium was \$7,145.<sup>4</sup> Also, at some point after October 2, 1997, Keller was notified that the earned premium for the 1995/1996 policy period was \$12,982, not \$160.

¶14 Keller testified that his last payroll was September 29, 1997. He ceased doing business after that because he could not come to an agreement with Travelers, and he knew he was not allowed to operate without worker's compensation insurance. He also knew that he would not be assigned another insurer through the risk-sharing plan after the cancellation by Travelers. He knew there was a state administrative appeal procedure, but on his attorney's advice he did not appeal the cancellation or try to get his insurance reinstated. Keller presented evidence of the loss he sustained in closing his business.

¶15 Travelers did not dispute that it informed the Wisconsin compensation bureau that Keller was delinquent in paying his premium. Its position was that it was required to do so under WIS. ADMIN. CODE § INS 21.01(10).<sup>5</sup> It is not clear from the evidence when Travelers first did report

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<sup>4</sup> The February 8, 1999 revised premium adjustment was the basis for the amendment to the complaint reducing the premiums Travelers claimed.

<sup>5</sup> WISCONSIN ADMIN. CODE § INS 21.01 provides:

(continued)



Keller's nonpayment to the bureau. A letter dated December 23, 1997, from Travelers informed the bureau that Keller had a delinquent premium balance for policy period 5/18/97 to 10/02/97 of \$31,713, and a letter dated January 26, 1998, informed the bureau that he had a delinquent premium balance for policy period 5/18/95 to 5/18/96 of \$12,822. However, the statement on the past due premium notice described in paragraph 9 permits the inference that Travelers informed the bureau in August or September 1997 that premiums were past due for 1996/1997 and 1997/1998.

¶16 The court declined Travelers' request to instruct the jury that Travelers was required under WIS. ADMIN. CODE § INS 21.01(10) to report Keller's failure to pay premiums to the bureau and that § INS 21.01(11) provided Travelers had no liability to Keller for doing so. Over Travelers' objection, the court instructed the jury on the covenant of good faith implied in every contract.<sup>6</sup>

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(10) CANCELLATION FOR NONPAYMENT OF PREMIUM. Subsections (8) and (9) do not apply if the ground for cancellation or nonrenewal is nonpayment of the premium and if the notice so states. No termination of worker's compensation insurance is effective unless such termination complies with s. 102.31(2), Stats., including the entity designated by the department of industry, labor and human relations receiving proper notice at least ... and at least 30 days prior to any cancellation under sub. (4) [authorizing midterm cancellation by the insurer for breach of contractual duties upon 30 days written notice].

WISCONSIN STAT. § 102.31(2)(a) provides that cancellation of a worker's compensation policy by an insurer for any reason other than nonrenewal is not effective until thirty days after the insurer has given written notice of the termination to the insured employer and the department of workforce development or the Wisconsin compensation rating bureau if the department so designates.

<sup>6</sup> A party may be liable for breach of the implied contractual covenant of good faith even though all the terms of the contract have been complied with. *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995). This rule is intended as a guarantee against arbitrary or unreasonable conduct by a party. *Id.*

There was a special verdict question asking whether Travelers had breached that covenant,<sup>7</sup> as well as a question asking whether Travelers “breach[ed] the contract with ... Keller, by failing to conduct timely audits and submit timely billings.” The jury answered yes to both questions. It also determined that Travelers owed Keller \$71,500 as a result of its breach of contract.

¶17 Travelers moved for judgment notwithstanding the verdict. It argued that the damages Keller claimed—from closing his business—resulted from Travelers’ report of his delinquency to the bureau, because Keller knew that if he was delinquent with Travelers, he could not obtain other insurance from the risk pool. Therefore, Travelers asserted, it was immune from liability under WIS. ADMIN. CODE § INS 21.01(11) for both breach of contract and breach of the implied covenant of good faith, and both claims should be dismissed.<sup>8</sup> The court denied this motion, concluding that the immunity did not extend to the cancellation of the policy or to Travelers’ actions leading up to the cancellation.

¶18 Travelers also moved that the verdict be set aside because the evidence was insufficient to support findings that its auditing and billing practices had breached the contract and breached the implied covenant of good faith. In addition, Travelers asserted, even if those practices were a breach, there was no evidence those practices had caused Keller to go out of business. The trial court concluded that there was evidence from which the jury could find a breach of

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<sup>7</sup> The question on the implied covenant of good faith was phrased this way: “Did plaintiff breach the duty of good faith in performing its contract with defendant?”

<sup>8</sup> Travelers made this argument for the first time the second day of trial. The court declined to consider it then because it had not been raised in a motion to dismiss or motion for summary judgment and Keller did not have an adequate opportunity to respond. However, the court said, the issue could be raised in a post-verdict motion.

contract and a breach of the implied covenant. With respect to causation, the court stated that

[t]he jury heard evidence that [Travelers] did not submit billings for over three years, and that when it did so, those billings were grossly inaccurate, inflated and contradictory. A reasonable jury could concluded that this caused the resultant loss of insurance and shut down [sic] of the business, causing the damages in question.

¶19 The court entered judgment on the jury verdict. After offsetting the judgment in favor of Travelers against the judgment in favor of Keller, the net judgment in favor of Keller was \$38,937.00.

#### DISCUSSION

¶20 We first consider Travelers' argument that, notwithstanding the verdict, the trial court should have dismissed the claims against it because it was immune from liability under WIS. ADMIN. CODE § INS 21.01(11). A motion for judgment notwithstanding the verdict accepts the findings of the verdict but contends the moving party is entitled to judgment for reasons evident in the record other than those decided by the jury. *Hicks v. Nunnery*, 2002 WI App 87, ¶15, 253 Wis. 2d 721, 736, 643 N.W.2d 809. We review the court's denial of a motion for judgment notwithstanding the verdict de novo, applying the same standard as the trial court. *Id.*

¶21 Whether WIS. ADMIN. CODE § INS 21.01(11) requires dismissal of Keller's counterclaim against Travelers presents a question of law, which we review de novo. *Fazio v. Department of Employee Trust Funds*, 2002 WI App 127, ¶7, 255 Wis. 2d 801, 809, 645 N.W.2d 618.

¶22 WISCONSIN ADMIN. CODE § 21.01(11) provides in full:

(11) INSURER'S LIABILITY. There is no liability on the part of and no cause of action of any nature arises against any insurer, its authorized representatives, its agents, its employees, or any firm, person or corporation furnishing to the insurer information relating to the reasons for cancellation or nonrenewal, for any statement made by them in complying or enabling the insurer to comply with this section, or for the provision of information pertaining thereto.

¶23 We agree with the trial court's analysis that this section does not provide immunity for all Travelers' conduct that Keller asserted breached the contract and breached the implied covenant of good faith. While the counterclaim did assert that Travelers breached its contract by notifying the department that Keller was delinquent in his premium payments, Keller's argument to the jury was that it was Travelers' auditing and billing practices that breached the contract and breached the implied covenant of good faith, and that is what the jury was asked to decide. The plain language of the regulation provides immunity for liability on a claim that is premised on statements made or information provided that are necessary in order to comply with the regulation. Under WIS. ADMIN. CODE § INS 21.01(10), which incorporates WIS. STAT. § 102.31(2)(a), Travelers is required to give notice of cancellation to the department or bureau. Therefore, Travelers' notification to the bureau of Keller's delinquency in premium payments and the cancellation of Keller's policy based on nonpayment may not be the basis for liability to Keller. However, there is nothing in the language of the regulation that suggests Travelers is immune from liability for its auditing and billing practices or for the cancellation itself, as distinct from the reporting of delinquency and cancellation to the department or the bureau.

¶24 We next address Travelers' argument on the sufficiency of the evidence. Travelers argues that the evidence is insufficient to support the jury's finding that it breached the terms of the policy in its auditing and billing practices

because the policy provides for an annual audit to determine the premium due for a given policy period and also allows three years after the end of the policy period to audit and adjust the amount of premium due. According to Travelers, it complied with these provisions. Travelers also argues there is no evidence that it did not act in good faith in auditing and billing Keller, and therefore there is no evidence to support the finding that it breached the implied covenant of good faith in performing its contract obligations. Finally, Travelers contends there is no evidence that its auditing and billing practices caused the cancellation on October 2, 1997; rather, that cancellation was for nonpayment of premium that was properly audited and billed, and Keller failed to pay for reasons unrelated to the manner in which Travelers audited and billed.

¶25 A motion challenging the sufficiency of evidence to support a verdict should not be granted unless the court is satisfied that, considering all of the evidence and reasonable inferences from the evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party. WIS. STAT. § 805.14(1). This standard applies both to the trial court and to the appellate court reviewing the trial court's ruling. *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388, 541 N.W.2d 753, 761 (1995). However, because the trial court is in a better position to decide the weight and relevancy of the testimony, an appellate court must give substantial deference to the trial court's better ability to assess the evidence. *Id.* Thus, where, as here, the trial court has concluded there is sufficient evidence, this court may not set aside the verdict for insufficient evidence unless there is a complete failure of proof. *Kuklinski v. Rodriguez*, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996).

¶26 Applying this standard, we conclude that, even if the evidence was sufficient to support the jury's finding that Travelers' auditing and billing practices breached its contract or its finding that Travelers breached the implied covenant of good faith, there was no evidence that that conduct caused the cancellation of the policy, and, thus, no evidence that that conduct caused Keller to close his business. Viewed most favorably to Keller, the evidence is that he ceased doing business in late September 1997 because he learned his insurance was going to be cancelled on October 2, 1997; he knew he could not operate without insurance; he knew he could not obtain insurance outside the risk-sharing plan; and he knew he could not obtain insurance under the plan from an insurer other than Travelers. Therefore, the proper inquiry is whether there is any evidence that any auditing or billing conduct of Travelers that either breached the contract or was not in good faith caused the cancellation.

¶27 Viewed most favorably to Keller, the evidence is that the cancellation occurred because he did not pay the premium of \$13,320 for 1996/1997 and \$15,561 for 1996/1997 before October 2, 1997; he did not learn he had been billed for these amounts until late September 1997; and Travelers would not allow him to pay in installments. However, as Keller acknowledged at trial, the policies did not require Travelers to allow a payment plan. Keller also acknowledged that the policies provided for a final audit at the end of each policy period to determine the premium due. The only evidence is that Travelers did this for 1996/1997. The form that Keller's accountant returned with the payroll for 1996/1997 was dated June 10, 1997, by Travelers, and the form said it was the second request for information. The premium adjustment notice and the bill for premium due for 1996/1997 were sent to Keller's address as shown on the policy within two weeks of the date on which Keller's accountant signed the form and the

due date was specified—fifteen days from the date of the bill. The fact that Keller did not receive these was not due to any fault of Travelers: the only evidence was that Travelers was not informed until late September 1997 that Keller's address had changed. Whether Keller or his agent was remiss in not informing Travelers sooner of his address change is not relevant. The relevant point is that there is no evidence that Keller's failure to receive the bill for the 1996/1997 premium within a few days of July 21, 1997, was caused by Travelers' failure to comply with any contract term or was in any other respect the fault of Travelers.

¶28 With respect to the premium of \$15,561, which was added to the 1997/1998 policy by endorsement, Keller did not argue in the trial court and does not argue on appeal that Travelers breached the contract or breached the implied covenant of good faith by adjusting the premium through endorsement during the policy period. The policy language expressly permits audits to be done during the policy period, and there is nothing in the policy language that entitles Keller to pay only \$850 until after the expiration of the policy period—an amount that is indisputably not based on an estimate of Keller's payroll for the policy year 1997/1998, or any preceding policy period. It is not clear when Travelers first sent notice of the additional premium for 1997/1998 or billed for it. The possible inferences from the evidence are: August 1, 1997, the date of issue of the endorsement; sometime between August 1 and August 28, 1997; or not until August 28, 1997, when the notice of cancellation was sent. However, it does not matter which of these inferences one accepts, because Keller did not argue in the trial court and does not argue on appeal that Travelers breached the policy by not sooner notifying him of, or billing him for, the 1997/1998 additional premium stated in the endorsement.

¶29 Travelers complied with the policy terms by mailing to Keller's address on the information page a notice at least thirty days in advance of cancellation for the nonpayment of premium with the cancellation date. Again, there is no evidence that Keller's failure to learn until late September of the premium due for the 1997/1998 policy or of the cancellation date of October 2, 1997, was the result of any failure by Travelers to comply with the contract terms or was otherwise the fault of Travelers.

¶30 Keller also testified that he did not pay the premium Travelers demanded before October 2, 1997, to avoid cancellation because he did not believe it was accurate, since it included wages paid to employees on jobs performed in other states. However, the jury found that Keller did owe the \$13,320 billed for 1996/1997, and it found he owed \$7,145 for the first four-and-one-half months of the policy period 1997/1998, which is, pro rated, more than the \$15,561 that Travelers demanded for the full policy period to avoid cancellation. Since Keller has not appealed the jury's finding of the amount he owed Travelers, he is precluded from arguing that he did not owe the premium that Travelers demanded he pay to avoid cancellation on October 2, 1997. Accordingly, Travelers' demand for premium he owed in order to avoid cancellation is not, as a matter of law, a breach of the policy terms or a breach of the implied covenant of good faith.

¶31 The specific auditing and billing practices Keller asserts as violations of the contract terms and the implied covenant of good faith were those related to policy period 1995/1996 and the premium adjustment for policy period 1997/1998 made in December 1997. However, there is no evidence that either had any relationship to the cancellation of the policy on October 2, 1997, or to Keller's reason for closing his business. Viewed most favorably to Keller, the evidence is



that even though Travelers sent him a notice in July 1996 stating that it had done a physical audit for 1995/1996 and the earned premium was \$160, it did not do an audit until sometime in late 1997 or early 1998. Even if that conduct were a breach of the policy terms or a breach of the implied covenant of good faith, there is no evidence that it played any role in the cancellation of Keller's policy on October 2, 1997, or Keller's closing his business.

¶32 The same is true of the premium adjustment for 1997/1998 made in December 1997. The adjustment of that premium to \$32,563 based on an "estimated audit" is inexplicable: there is no evidence for the payroll figure of \$81,196; this premium was more than twice that of any preceding full policy period; the notice itself shows the audit was for the policy period May 15, 1997 to October 2, 1997; the policy provided that when Travelers cancelled, the premium would be calculated prorata; and the final determination by Travelers was that only \$7,145 was due. However, there is no evidence this inaccurate premium adjustment had anything to do with the October 2, 1997 cancellation or Keller's closing his business.

¶33 In summary, we conclude the trial court correctly ruled that WIS. ADMIN. CODE § INS 21.01(11) does not provide immunity for any liability arising out of Travelers' auditing and billing practices or its cancellation of Keller's policy. However, the trial court erred in not granting Travelers' post-verdict motion for dismissal of the counterclaim based on insufficiency of the evidence, because there is no evidence that the damages awarded by the jury for Keller's closing of his business were caused by any conduct of Travelers that breached its contracts with Keller or that breached the covenant of good faith implied in those contracts. Accordingly, we reverse the judgment in favor of Keller and remand

with directions to dismiss Keller's counterclaim and to enter an amended judgment in favor of Travelers for \$32,563.00 on its complaint.

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

Not recommended for publication in the official reports.

