

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 11, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

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. 03-1351-FT**

**Cir. Ct. No. 01CV001693**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**MARY A. VVALTHER,**

**PLAINTIFF-APPELLANT,**

**ASSOCIATED BANK OF GREEN BAY,**

**INVOLUNTARY-PLAINTIFF,**

**v.**

**AMERICAN FAMILY INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT,**

**FOUR SEASONS ROOFING AND STRUCTURAL, L.L.C.,  
HIGHLANDS INSURANCE COMPANY, N.E.W. RESTORATION  
SERVICE, INC. AND XYZ INSURANCE COMPANY,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Brown County:

MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mary Vvalther appeals a summary judgment dismissing her bad faith action against American Family Mutual Insurance Company.<sup>1</sup> She argues that genuine issues of material fact exist as to whether American Family had a reasonable basis for denying Vvalther's claim for mold remediation and living expenses during that repair. She also argues that the court should have delayed ruling on the summary judgment motion until the parties completed discovery regarding American Family's payments on other insureds' mold losses. Because we conclude that the coverage issue is fairly debatable regardless of any additional evidence that could be found during discovery, we affirm the judgment.

¶2 To establish a bad faith claim, Vvalther must show that there was no fairly debatable basis for denying coverage. *See Trinity Evangelical Luth. Church & School-Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶33, 261 Wis. 2d 333, 661 N.W.2d 789. Insurers have the right to litigate a claim where they feel there is a question of law or fact that needs to be decided before they, in good faith, are required to pay. *Benke v. Mukwonago-Vernon Mut. Ins. Co.*, 110 Wis. 2d 356, 366, 329 N.W.2d 243 (Ct. App. 1982).

¶3 We conclude that the policy language creates a debatable issue regarding coverage for mold remediation. Vvalther's policy includes this language:

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<sup>1</sup> This is an expedited appeal under WIS. STAT. RULE 809.17 (2001-02).

**LOSSES NOT COVERED**

We do not cover loss to the property described in Coverage A – Dwelling and Dwelling Extension resulting directly or indirectly from or caused by one or more of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

**6. Other Causes of Loss:**

...

- c. smog, rust, corrosion, frost, condensation, mold, wet or dry rot....

Vvalther contends that this language excludes losses caused by mold, but not mold itself. Regardless of whether that is a correct interpretation of the policy, we conclude that construction of that language is fairly debatable. In *Cooper v. American Family*, 184 F. Supp. 2d 960 (D. C. Ariz. 2002), the court construed that language in American Family’s favor. Vvalther notes that American Family’s denial of coverage in this case preceded *Cooper*, establishing that American Family knew that the law did not support its position. We disagree. The rationale stated by the federal court existed prior to the court’s decision. Vvalther also notes that an Arizona appellate court reached an opposite conclusion in *Liristis v. American Family*, 61 P.3d 22 (Ariz. App. 2002). The disagreement between these cases underscores the debatability of the question.

¶4 Applying Wisconsin law does not yield a different conclusion. No Wisconsin case reviews this policy language. Whether a reasonable insured would have understood the policy to cover mold, but not loss caused by mold, is a debatable matter.

¶5 Finally, additional discovery about American Family’s past payment practices regarding mold claims is not relevant to the debatability of the policy language. The debatability of coverage arises from the policy language itself, not

American Family's practices. Therefore, the trial court properly ruled on the motion for summary judgment before completion of discovery.

*By the Court.*—Judgment affirmed.

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

