COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3477 **Cir. Ct. No. 02CV000392**

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

PATZ SALES, INC.,

PLAINTIFF,

V.

GRAETZ MANUFACTURING, INC.,

DEFENDANT-APPELLANT,

WAUSAU UNDERWRITERS INSURANCE COMPANY,

INTERVENING-PARTY-RESPONDENT.

APPEAL from a judgment of the circuit court for Marinette County: TIMOTHY A. DUKET, Judge. *Affirmed.*

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

¶1 CANE, C.J. Graetz Manufacturing, Inc., appeals a judgment declaring that Wausau Underwriters Insurance Company had no duty to defend or

to indemnify Graetz for claims arising from the dissolution of Graetz's business relationship with Patz Sales, Inc. Graetz argues that: (1) the trial court erred when it decided the "separate and distinct" questions of whether Wausau had a duty to defend and a duty to indemnify in the same motion; (2) Patz's complaint alleged property damage caused by Graetz's actions, creating a duty to defend under Coverage A, "Bodily Injury and Property Damage," of Wausau's Commercial General Liability Coverage Form; and (3) Patz's complaint alleged an offense, arising from letters and brochures mailed to Patz's customers, that triggered a duty to defend under Coverage B, "Personal and Advertising Injury Liability."

¶2 We conclude that it was not improper for the trial court to settle the questions of defense and indemnity in one motion; if there is no arguable coverage there is neither a duty to defend nor a duty of indemnity. We further conclude that, because the Patz complaint contains no allegations that could trigger a duty to defend under Coverage A or Coverage B of the Wausau policy, the trial court properly determined that there was no arguable coverage. We therefore affirm the judgment.

BACKGROUND

¶3 On December 6, 2002, Graetz, a producer of agricultural machines and precision machine parts, was sued by a longtime distributor of its products, Patz Sales, Inc. Patz's complaint alleged that under a 1945 agreement it had become an exclusive supplier for an array of Graetz products, including gutter chain cleaners. Patz also alleged that by agreements in 1969 and 1994 its exclusive relationship with Graetz continued unchanged until September 2002.

¶4 According to Patz, Graetz first refused to fill a purchasing order on September 19 and then, on or about September 24, informed Patz it would no

longer supply it with any parts. The Patz complaint alleged that in addition to this breach of contract, which damaged its reputation, supply network and profits, Graetz used a variety of methods, including letters, brochures and direct solicitation, to "misappropriat[e] Patz's dealers and distribution system, customers, and other business." Based on these asserted facts, Patz alleged violations of Wisconsin's Fair Dealership Law, intentional deceit, negligent misrepresentation, strict responsibility misrepresentation, breach of contract, breach of covenant of good faith and unfair competition, resulting in over five million dollars in damages.

¶5 Patz also moved for a temporary injunction preventing Graetz from terminating Patz's exclusive distributorship. Graetz counterclaimed for its own losses and opposed the motion.

¶6 Wausau Underwriters Insurance Company, Graetz's insurer, was joined as an intervening party and filed a motion for a declaratory judgment of no coverage. Pending resolution of that issue, the trial court stayed any further action on the injunction. The trial court subsequently entered judgment for Wausau Underwriters, declaring there was no coverage and, therefore, no duty to defend. This appeal followed.

STANDARD OF REVIEW

¶7 The grant or denial of a declaratory judgment is addressed to the trial court's discretion. ***Bellile v. American Fam. Mut. Ins. Co.***, 2004 WI App 72, ¶6, 272 Wis. 2d 324, 679 N.W.2d 827. However, when the exercise of such discretion turns upon a question of law, we review the question de novo, benefiting from the trial court's analysis. ***Id.***

¶8 The interpretation of an insurance policy is a question of law this court reviews de novo, applying the same rules of construction we apply to contracts generally. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co***., 2000 WI 26, ¶¶22-23, 233 Wis. 2d 314, 607 N.W.2d 276. We interpret insurance policies as a reasonable person in the position of the insured would understand them. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). We do not, however, construe policies to provide coverage for risks the insurer did not contemplate, and for which it has not received a premium. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65.

¶9 If the language of an insurance policy is fairly or reasonably susceptible, when read in context, to more than one construction, the policy is ambiguous. *See* ***Sprangers v. Greatway Ins. Co.,*** 182 Wis. 2d 521, 536-37, 514 N.W.2d 1 (1994). Whether ambiguities exist is a question of law. *See* ***Western Cas. & Surety Co. v. Budrus***, 112 Wis. 2d 348, 351, 332 N.W.2d 837 (Ct. App. 1983). We resolve ambiguities in an insurance policy against the insurer and in favor of the insured. *See* ***Garriguenc v. Love***, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975).

¶10 To determine whether coverage exists under a particular policy, the court first examines the facts of the insured's claim to ascertain whether the insuring agreement makes an initial grant of coverage. ***American Girl***, 268 Wis. 2d 16, ¶24. If an initial grant is triggered, we examine the exclusions to see if any of them apply; exclusions are narrowly or strictly construed against the insurer and any ambiguities are resolved in favor of coverage. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990). Finally, we look to see if any exception to a particular exclusion would reinstate coverage. The

applicability of an exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies. ***American Girl***, 268 Wis. 2d 16, ¶24.

¶11 In determining the duty to defend, it is the nature of the "claim alleged against the insured which is controlling even though the suit may be groundless, false or fraudulent." ***Grieb v. Citizens Cas. Co.***, 33 Wis. 2d 552, 558, 148 N.W.2d 103 (1967). The duty to defend is based solely on allegations contained within the "four corners of the complaint," without resort to extrinsic facts or evidence. ***Atlantic Mut. Ins. Co. v. Badger Med. Supply Co.***, 191 Wis. 2d 229, 236, 528 N.W.2d 486 (Ct. App. 1995). Those allegations are construed liberally; the duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable rather than actual coverage. ***General Cas. Co. v. Hills***, 209 Wis. 2d 167, 176 n.11, 561 N.W.2d 718 (1997); ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 735, 593 N.W.2d 814 (Ct. App. 1999).

DISCUSSION

I. The Scope of the Declaratory Judgment

¶12 Graetz argues that the trial court erred by deciding the duty to defend and the duty to indemnify "in one motion, before any meaningful discovery, and based solely on the unsubstantiated allegations of an adversary's complaint." Graetz points to cases which establish that those duties are separate and distinct, arguing that final determinations about indemnity are made after the underlying facts of the case are developed. We are not persuaded.

¶13 The duty to defend and the duty to indemnify are distinct, but coverage is the necessary precondition for both. There is no duty to defend unless

there is at least arguable coverage. *See* ***Smith v. Katz***, 226 Wis. 2d 798, 806-07, 595 N.W.2d 345 (1999) ("[T]he insurer may have no duty to defend a claim that ultimately proves meritorious ... because there is no coverage …. Conversely, the insurer may have a clear duty to defend a claim that is utterly specious because … it would be covered."). Similarly, though the duty to indemnify ultimately requires a finding of actual coverage, that point would not be reached unless a court could at least find arguable coverage. ***Elliott v. Donahue***, 169 Wis. 2d 310, 320-21, 485 N.W.2d 403 (1992). The fact that the trial court found no arguable coverage thus makes the determination process Graetz complains of not only proper, but inevitable.

II. The Property Damage Claim

¶14 Graetz argues that coverage exists under the Coverage A, Bodily Injury and Property Damage, section of Wausau's policy because Patz alleges a loss of use of "tangible property that is not physically injured," one of the definitions of property damage in the insuring agreement. Rather than evaluating each allegation on its own, Graetz contends, the trial court summarized and interpreted Patz's complaint as alleging a single underlying offense, namely the breakdown of a business relationship leading to economic loss. On that basis, the court held that exclusion m(2), which covers damages arising out of "a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms," barred coverage for all Patz's claims. Graetz cites ***American Girl*** as support for the contention that the court was wrong to read the Patz complaint summarily, and wrong to assume either that the Wausau policy did not cover economic loss resulting from contractual liability or that breach of contract is never a covered event in such policies.

¶15 Under the Coverage A section of the policy, Wausau Underwriters agrees to pay those sums the insured becomes legally obligated to pay as damages "because of 'bodily injury' or 'property damage.'" The property damage must be caused by an "occurrence" that takes place in the coverage area. The policy defines property damage as, among other things, "loss of use of tangible property that is not physically injured" and occurrence as an accident, including "continuous or repeated exposure to substantially the same general harmful conditions."

¶16 Graetz is thus correct that the threshold question with regard to this second claim is whether Patz alleges "property damage" caused by an "occurrence" within the meaning of the policy's general grant of coverage. Patz's complaint alleges that Patz was left without an inventory and without access to Graetz's product line as a result of Graetz's actions, resulting in a loss of use of tangible property that is not physically injured. Whether Graetz's actions would constitute an occurrence within the policy's meaning of the term is more uncertain.

¶17 But even if an initial grant of coverage exists under the policy, exclusion m(2), for damages arising out of breach of contract, applies to Patz's allegation and operates to deny coverage. If Patz was injured by being left without an inventory and without a ready means of obtaining an alternate product, that injury arose directly from Graetz's refusal to fill purchase orders and, eventually, to supply Patz with anything at all. Under these circumstances, as the trial court held, there would be no arguable coverage under Coverage A of the policy, and consequently no duty to defend.

III. The Advertising Injury Claim

¶18 Graetz argues lastly that Patz alleges one or more offenses, arising from letters and brochures mailed to Patz's customers, that trigger a duty to defend under Coverage B, Personal and Advertising Injury Liability, of the Wausau policy.

¶19 The letter Graetz sent to prospective distributors begins by asking them to read the enclosed brochure and consider Graetz's ties to the farmers who are the "backbone of this Great Country." The second paragraph promises that Graetz can deliver the same quality products "their customers have come to expect" at reduced cost to them and "larger profit to you." The rest of the letter provides price information and asks the reader to apply for a distributorship. Patz's name never appears in the letter nor does it mention any other supplier or distributor relations that might exist.

¶20 The brochure that accompanied this letter is two double-sided pages, showing images of Graetz parts accompanied by advertiser's descriptions: "Meticulously forged and heat-treated to create the optimum hardness for maximum strength and wear." The only reference to Patz occurs indirectly in the paragraph under the Graetz logo. "Previously available through only one distributor in Pound, Wisconsin, you can now purchase these items directly from the 'original' manufacturer."

¶21 Graetz asserts that the Patz allegations of negligent representation and strict liability misrepresentation are covered under the "Advertising Injury" section of the insuring agreement because Graetz's solicitation of Patz customers turned a promise of exclusive dealership into a misrepresentation.

¶22 Under the Coverage B section of the policy, Wausau Underwriters will pay those sums that the insured becomes legally obligated to pay as damages "because of personal and advertising injury." Personal and advertising injury is defined as injury, including consequential bodily injury arising out of one or more of a list of specific offenses. The enumerated offenses relevant to Patz's complaint are d ("oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services") and e ("oral or written publication, in any manner, of material that violates a person's right or privacy").[1]

¶23 Wisconsin gives "advertising injury" clauses their ordinary meaning. *See* ***Bruner***, 225 Wis. 2d at 744-45. But advertising injury clauses only supply coverage when the advertising itself is an independently tortious source of injury. ***Western States Ins. Co. v. Wisconsin Wholesale Tire, Inc.***, 184 F.3d 699, 703 (7th Cir. 1999). Arguable overage will not exist, therefore, unless Patz has alleged an injury related to wrongful advertising and that injury arose out of one of the enumerated offenses set out in Coverage B.

¶24 If advertising is given its broad, ordinary meaning of calling attention to a product or business in order to increase sales,[2] then the letter and

[1] The other offenses are: false arrest, detention or imprisonment; malicious prosecution; the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; the use of another's advertising idea in your "advertisement;" or infringing on another's copyright, trade dress or slogan in your "advertisement." Nothing Patz alleged can be linked, explicitly or by implication, to these offenses.

[2] That meaning can be found in an ordinary dictionary. *See* ***Cuna Mut. Ins. Soc. v. DOR***, 120 Wis. 2d 445, 450, 355 N.W.2d 541 (Ct. App 1984). THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 19 (1980), for example, defines "advertise" as "[t]o call the attention of the public to a product or business; … to proclaim the qualities or advantages of (a product or business) so as to increase sales." The Wausau policy's definition of an (continued)

brochure that Patz complains of are advertising because they tout Graetz's ability to sell its product cheaply and the company's status as "original manufacturer" of the product. *See* ***Atlantic Mut.***, 191 Wis. 2d at 239. To the extent those self-promotional claims were effective, at least some of the losses Patz alleges, including loss of customers and damage to the distribution network, are connected to Graetz's advertising.

¶25 But that is not enough to create coverage under the policy. Patz must still allege one of the Coverage B enumerated offenses. Graetz claims that several of Patz's allegations fit the rubric of offense e ("oral or written publication, in any manner, of material that violates a person's right or privacy"). We disagree.

¶26 The parties argue over whether the text of enumerated offense e contains a typographical error,[3] but we need not address that disagreement here. If offense e is read as Wausau proposes, as referring to publications that violate a right *of* privacy, there is no coverage. Nothing in the complaint, or in the advertising complained of, could be construed as violating the common law right of privacy. According to the Patz complaint, offense e covers both published material that violates privacy and published material that violates " a person's *right."* But even under that reading, offense e does not trigger a duty to defend. The phrase cannot be interpreted to mean coverage exists when any right is violated. The structure of Coverage B, with its list of carefully delineated offenses

---

advertisement reflects this standard construction: "a notice that is broadcast or published to the general public or specific market segments about goods, products or services for the purposes of attracting customers or supporters."

[3] According to Wausau, the standard version of enumerated offense e ends with the words "that violates a person's right of privacy."

all connected to advertising, makes such an interpretation impossible. Read in the way that Graetz recommends, that short half clause would give back to the insured everything, and perhaps more, than the policy exceptions take away.

¶27 Wausau Underwriters' obligations are not circumscribed by Patz's choice of legal theories, however. *See* ***Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.***, 43 F.3d 1119, 1122 (7th Cir. 1994). If Patz's complaint alleges facts that would show the insured had committed one of the enumerated offenses, the duty to defend is activated. We must therefore determine whether the facts alleged in Patz's complaint might constitute an offense under the terms of the policy.

¶28 It is not uncommon for advertising injury clauses to include unfair competition, usually associated with copyright and trademark violations, among their enumerated offenses. But the Wausau policy does not explicitly include that offense in its Coverage B list. Nor does Patz allege any facts that would suggest that Graetz was infringing on copyrights owned by Patz or confusing the public about the origins of a product. What Graetz advertised to potential customers was something it owned and its letter and brochure sought to help the customer distinguish between Graetz and Patz, not to confuse them.

¶29 Patz's complaint also alleges injuries to reputation, which might, by extension, implicate enumerated offense d, publication of materials that disparage products, goods or services. Nothing in the letters and brochures Graetz sent out, however, disparages the products at issue. The Graetz brochure praises Graetz products, but those are the products that Patz sells as well. The Graetz letter promises lower prices and greater profits without mentioning Patz. If Patz's reputation was damaged, that damage was not caused by the publication of the

Graetz letter or brochure. The letters and brochures may have turned Patz's problems into Graetz's windfall, but they did not cause the injury to Patz's reputation. That injury occurred because Patz could not fill its orders. Patz's complaint contains allegations that involve letters and injury to reputation; without a causal connection between the two, however, Patz has not alleged an injury *arising out of* disparagement. *See* ***Atlantic Mut. Ins. Co.,*** 191 Wis. 2d at 242*; see also* ***Nichols v. American Employers Ins. Co.***, 140 Wis. 2d 743, 748-51, 412 N.W.2d 547 (Ct. App. 1987) (claim for sexual harassment not covered by a policy that provides coverage for defamation even if the complaint were to allege a defamatory statement).

¶30 This court thus concludes that neither the "Property Damage" nor "Advertising Injury" section of the Wausau policy creates arguable coverage for the actions Patz complains of. In the absence of arguable coverage, we must agree with the trial court there is no duty to defend.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.