

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

February 8, 1996

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

**NOTICE**

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

**No. 92-1748**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**NATIONAL BROKERAGE SERVICES OF WISCONSIN, INC.,**

**Plaintiff-Respondent-Cross Appellant,**

**v.**

**UNITED WISCONSIN INSURANCE COMPANY,  
UNITED WISCONSIN LIFE INSURANCE COMPANY,**

**Defendants-Appellants-Cross Respondents.**

APPEALS from a judgment of the circuit court for Dane County:  
SUSAN R. STEINGASS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

SUNDBY, J. This is a breach of contract case in which the circuit court submitted to the jury the question whether defendants United Wisconsin Insurance Company and United Wisconsin Life Insurance Company (collectively UWIC) breached their contract with National Brokerage Services of Wisconsin, Inc. (NBS) to establish the NuMed Benefit Trust, a group of

employers providing health insurance coverage for their employees. The jury answered that UWIC breached the contract and determined that NBS's damages were \$500,000. We affirm the judgment entered on the jury's verdict. However, we reverse the judgment on NBS's cross-appeal denying taxation of NBS's photocopy costs and remand to allow the trial court to exercise its discretion under § 814.036, STATS., whether to award such costs.

## THE APPEAL

NBS does not administer health insurance plans; it is a broker. It and L.K. Lloyd & Assoc. (Lloyd), also an insurance broker, put together a group of employers who wished to self-insure their health insurance obligations to their employees. They recruited UWIC, wholly owned subsidiaries of Blue Cross & Blue Shield, to provide "stop-loss" coverage for any single benefit exceeding \$30,000.

On March 17, 1989, the parties signed a Letter of Intent to establish a trust to administer the plan. The Letter was drafted by UWIC and provided that: "It is the intent of the parties that the trust be provided stop-loss coverage through an appropriate corporate entity decided upon by UWIC and UWLIC." UWIC included a condition that: "It is a precondition of this business arrangement that all parties be assured of the legality of the Trust ...." Prior to executing the necessary contracts, Lloyd provided UWIC with opinions that the Trust was legal. Plainly, UWIC was concerned that the Trust, which would do business wherever allowed by law, would either be protected by the federal Employee Retirement Income Security Act (ERISA) or would meet the requirements of the laws of the states in which the Trust would do business. This concern was addressed in Articles 18 and 24 of the Administrative Services Agreement (ASA), in provisions of the Professional Administrative Services Agreement (PASA), and in the Stop-Loss Insurance Agreement.

Articles 18 and 24 of the ASA provide:

18. In the event that a court, regulator, or administrative judge of competent jurisdiction declares any provision of this Agreement to be invalid or unenforceable, such

declaration shall have no effect on the validity or enforceability of the remainder of this Agreement.

....

24. Notwithstanding anything contained in this Agreement, the Professional Administrative Services Agreement and the Stop Loss Insurance Agreement, the parties intend that said agreements conform with all applicable state and federal laws and regulations including ERISA. *If, at any time, it is determined that any of said agreements are not in conformity with said laws and regulations, the parties shall act promptly to conform said agreements with said laws and regulations.*

(Emphasis added.)

The PASA provides in part:

*If any provision of this AGREEMENT is found to be invalid, such provision shall be deemed modified to comply with applicable law and the remaining provisions of this AGREEMENT shall remain in full force and effect according to their terms.*

(Emphasis added.)

The Stop-Loss Agreement contains a virtually identical provision.

UWIC's concerns proved valid; on May 2, 1989, the Wisconsin Office of the Commissioner of Insurance (OCI) issued an order requiring the principals of NBS to immediately "cease and desist" from collecting premiums from Wisconsin insureds because the "plan [was] presently not insured."<sup>1</sup> On

---

<sup>1</sup> OCI issued this order in response to the May 1, 1989 meeting with the parties.

May 3, William Hanson, Lloyd's representative, arranged a second meeting of the parties with OCI's Deputy Commissioner, Stanley DuRose. DuRose agreed that OCI would not enforce the cease-and-desist order for six months, to allow the trust to become fully insured. DuRose testified: "[W]e gave a six-month period for transition to full coverage. So we would have accepted [the Trust] for the first six months."

DuRose gave the parties several options to fully insure the Trust, including that NBS contract with an insurance carrier to insure the Trust, with UWIC continuing to provide stop-loss coverage. In fact, within six months, NBS contracted with Community National Insurance Co. to insure primary coverage and provide underwriting and administrative services. However, by then, UWIC had withdrawn and refused to provide stop-loss coverage. UWIC claims that because OCI ruled that the Trust was illegal, the "previously-signed documents [were] void." May 12, 1989, letter from Robert I. Wertheimer, UWIC staff attorney, to Michael Collins, NBS's counsel. On May 18, 1989, Wertheimer again wrote Collins informing him that UWIC's position was that "changing the Trust from a self-funded status (with stop-loss insurance) to a fully-insured status totally changed substantive, fundamental and material terms of the business arrangement which the parties had sought to put in place."

We agree with UWIC that OCI's requirement that the Trust be fully insured changed the nature of the Trust. The original intent of the parties was to create a self-insured Trust. However, UWIC has not shown that OCI's requirement that the Trust be fully insured affected its responsibilities under the contracts. While one of OCI's options was that UWIC provide the insurance, UWIC informed the parties and OCI at the May 1 meeting that it was unwilling to fully insure the Trust. Thereafter, NBS and Lloyd explored other options.

Further, the jury heard overwhelming evidence that UWIC's true reason for withdrawing from the consortium was that it did not wish to be involved in any business transaction with NBS. UWIC's counsel, Robert Wertheimer, testified that during negotiations and the course of business dealings, "there had developed at UWIC very serious concerns about NBS." He further testified: "[T]he more we got to know the NBS people and the NBS people[s] practices, the more our concerns grew."

William Hanson, Lloyd's representative, testified that shortly after the meeting with OCI, he had several telephone conversations with John Scheibel, UWIC's representative. Scheibel told Hanson that UWIC would consider a continuation with Lloyd, "basically a new transaction," but that NBS "had to be out." Scheibel testified that in a telephone conversation with Hanson on May 4, 1989, he told Hanson: "NBS has to be legally cut out. If there's no way to do it, we should let the block go, but we should start over. It won't be 3,000 people, but it may be something the market needs." Hanson testified that on May 5, he received a telephone call from Scheibel and Wertheimer who told him that if Lloyd could buy NBS's accounts, it was possible that UWIC would proceed with Lloyd, but NBS had to be completely removed from the contract.

UWIC correctly points out that OCI ruled that the Trust they agreed to did not comply with Wisconsin insurance law. However, UWIC's conclusion that they were thereby free to withdraw from their contractual commitments does not follow. Each agreement contemplated that it would be modified to comply with all applicable state and federal laws. The ASA specifically required the parties to promptly conform all agreements to such laws. UWIC's counsel's assertion in his letter of May 18, 1989, to NBS's counsel that the proposal to fully insure the Trust "totally changed [the] substantive, fundamental and material terms of the [parties'] business arrangement" is not supportable. The severability and conformity clauses of the contracts required UWIC to cooperate with its associates to make the Trust conform to Wisconsin's insurance laws which require that health insurance coverage be insured. We further conclude that the jury could infer from the evidence that UWIC's claim that the illegality of the Trust was their reason for withdrawing from the consortium was pretextual and that their real reason was to terminate any contractual relationship with NBS. This evidence negates UWIC's argument that it acted in good faith when it withdrew from the consortium. The jury's finding that UWIC breached the contracts with NBS is supported by the evidence.

#### THE CROSS-APPEAL

The trial court denied NBS's claim for photocopy costs pursuant to § 814.04(2), STATS. In *Ramsey v. Ellis*, 163 Wis.2d 378, 384-86, 471 N.W.2d 289, 292-93 (Ct. App. May 16, 1991), *aff'd*, 168 Wis.2d 779, 484 N.W.2d 331 (1992), we held that photocopy costs were not allowable under § 814.04(2), STATS. However, in *Zintek v. Perchik*, 163 Wis.2d 439, 475-77, 471 N.W.2d 522, 536-37

(Ct. App. May 29, 1991), *overruled in part on other grounds, Steinberg v. Jensen*, 194 Wis.2d 440, 534 N.W.2d 361 (1995), another panel of the court held that the "catch-all" provision--"[a]ll the necessary disbursements and fees allowed by law," § 814.04(2)--allowed the trial court to award photocopy costs under § 814.036, STATS., which provides: "If a situation arises in which the allowance of costs is not covered by ss. 814.01 to 814.035, the allowance shall be in the discretion of the court."

In *Wausau Medical Center v. Asplund*, 182 Wis.2d 274, 297-98, 514 N.W.2d 34, 44-45 (Ct. App. 1994), we allowed the trial court to award photocopying expenses, relying on *Zintek*. We did not consider *Ramsey*.

On November 14, 1995, the Wisconsin Supreme Court accepted our certification of *Kleinke v. Farmers Cooperative Supply & Shipping*, No. 95-0856, to resolve the possible conflict between *Ramsey, Zintek and Wausau Medical Center*. We reverse the judgment insofar as it denied NBS's motion for an award of photocopy costs and remand for further proceedings to allow the trial court to exercise its discretion under § 814.036, STATS.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.