Appeal No. 2007AP1868 **Cir. Ct. No. 1989CV16174**

WISCONSIN COURT OF APPEALS
DISTRICT I

JOHNSON CONTROLS, INC.,

PLAINTIFF-RESPONDENT,

V.

LONDON MARKET,

DEFENDANT-APPELLANT,

AFFILIATED FM INSURANCE COMPANY, AIU INSURANCE COMPANY, ALLIANZ UNDERWRITERS INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AMERICAN EMPLOYERS' INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, ASSOCIATED INTERNATIONAL INSURANCE COMPANY, CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA, EMPLOYERS MUTUAL CASUALTY COMPANY, EMPLOYERS REINSURANCE CORPORATION, FEDERAL INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, INTERNATIONAL SURPLUS LINES INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, LANDMARK INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, WESTPORT INSURANCE CORPORATION, STONEWALL INSURANCE COMPANY, TIG INSURANCE COMPANY, TRANSAMERICA PREMIER INSURANCE COMPANY, UNITED NATIONAL INSURANCE COMPANY AND WESTCHESTER FIRE INSURANCE COMPANY,

DEFENDANTS.

FILED

FEB 19, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Bridge and Gaylord,[1] JJ.

This case involves the latest summary judgment dispute over insurance coverage in an ongoing lawsuit which has already spawned two prior appeals. In the present appeal, Johnson Controls is seeking a legal defense from several underwriters of an excess umbrella liability policy (collectively, London Market). The appeal raises two primary questions. First, should a duty to defend be imported from an underlying umbrella insurance policy into an excess umbrella liability policy by language in the excess policy stating that it is subject to the same terms, definitions, exclusions and conditions as the underlying policy "except as otherwise provided"? The excess policy explicitly promises indemnification for certain liabilities but makes no mention of a duty to defend other than as noted above. Second, is the excess liability carrier's duty to defend primary in nature, such that it may be triggered even if the excess policy expressly requires exhaustion of the underlying policy as a precondition to liability and the underlying policy has not been exhausted?

Both of these issues appear to be matters of first impression in this state, and both would seem to have broad implications for the business community as well as the insurance industry. The Metropolitan Milwaukee Association of Commerce has filed an amicus curiae brief explaining that local businesses collectively spend millions of dollars in premiums to purchase layered insurance policies similar to the one at issue here, and have an obvious need to clarify

[1] Circuit Judge Shelley Gaylord is sitting by special assignment pursuant to the Judicial Exchange Program.

whether defense coverage from an excess carrier exists under commonly issued policies. The Complex Insurance Claims Litigation Association has filed an amicus curiae brief arguing that reading a duty to defend into an excess policy which did not explicitly so provide, and where no premium for defense was collected, would undermine stability and predictability in the underwriting market. The Wisconsin Association for Justice has filed an amicus curiae brief arguing that public policy should require an excess umbrella carrier to provide a defense when the underlying carriers refuse to do so, and that London Market should be estopped from attempting to deny defense coverage years into this litigation. It also points out that the principles established in this litigation will apply to small business owners and individuals, as well as to big businesses. Given the novelty of the issues presented and the significant public interests at stake, we certify this appeal to the Wisconsin Supreme Court for its review and determination pursuant to WIS. STAT. RULE 809.61 (2007-08).[2]

Johnson Controls has been involved in years of litigation with multiple insurers over coverage for the potential costs associated with cleaning up environmental pollution at numerous sites covered by various policies. Johnson Controls has now settled with one of the insurers involved in the litigation for less than the full policy amount, but continues to seek coverage and defense from other insurers. The present appeal deals only with whether London Market has a duty to defend Johnson Controls under the terms of its excess umbrella liability policy. The facts necessary to resolve the appeal are undisputed and center on the policy language.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Under the "Coverage" section of its policy, London Market agreed to indemnify Johnson Controls for liability for three general categories of damages otherwise covered by three underlying umbrella insurance polices issued by Travelers Indemnity Company. A "Limit of Liability" section of the London Market policy specified that liability would attach to London Market "only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective net loss liability." Another "Conditions" section of the London Market policy contained what is commonly referred to as a "follow form" provision, stating:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and Limits of Liability *and except as otherwise provided herein*) as are contained in … the Underlying Umbrella Policies … prior to the happening of an occurrence for which claim is made hereunder.
>
> It is a condition of this Policy that the Underlying Umbrella Policies shall be maintained in full effect during the currency hereof ….

(Emphasis added.) Each of the three underlying umbrella policies contained duty-to-defend provisions in their liability sections. The London Market policy did not specifically mention any duty to defend.

Johnson Controls contends that the follow-form provision in the London Market policy plainly incorporates the duty-to-defend provisions from the underlying umbrella policies because the London Market policy has not "otherwise provided" by explicitly stating that there is no duty to defend. It points out that London Market explicitly excluded other risks from the underlying policies, such as premiums and dollar limits, and could have excluded a duty to defend, as it did in other policies. London Market responds that, by promising only indemnity for excess liability arising from three types of damages, it *did*

provide "otherwise" than the liability coverage in the underlying policies, which explicitly promised both indemnity and a duty to defend. It further contends that a comparison to the price of other policies shows it did not collect a premium for defense under the instant policy. Both parties resort to general principles of contract and insurance policy interpretation to support their positions, but neither cites any Wisconsin caselaw specifically dealing with the incorporation of a duty-to-defend clause by follow form language similar to that at issue here.

There are other arguments in the briefs which we believe also present novel questions of law and public policy. Johnson Controls suggests that Wisconsin law implies a common law duty to defend under any insurance policy unless the policy expressly disclaims it. It cites several cases which mention in passing the possibility of an implied duty to defend under an indemnity clause, but none that actually hold that there is such a duty, or discuss the circumstances under which it could be found to exist. *See, e.g.,* ***Gerrard Realty Corp. v. American States Ins. Co.***, 89 Wis. 2d 130, 141, 277 N.W.2d 863 (1979); ***Grieb v. Citizens Cas. Co. of New York***, 33 Wis. 2d 552, 557-58, 148 N.W.2d 103 (1967).

London Market disputes the proposition that there is any implicit duty to defend an insured unless a policy expressly disclaims that duty. It instead claims that the duty to defend arises only by contract. *See* ***Novak v. American Family Mut. Ins. Co.***, 183 Wis. 2d 133, 515 N.W.2d 504 (Ct. App. 1994). Furthermore, even if a duty to defend might be implied in certain types of insurance policies, London Market argues that no such duty should be implied for an excess umbrella policy, which it asserts is secondary by its very nature. It reasons that it would make no sense to require an excess insurer to fulfill the obligation of an underlying primary insurer who had already undertaken a duty to defend. To do so would ignore the layering structure of an excess policy, under

which maintenance of the underlying primary policy is a condition of the secondary excess policy. To some extent, London Market's argument begs the question whether it is in fact a true excess carrier if the terms of its policy could be interpreted to provide a duty to defend. However, if there is a common law duty to defend under Wisconsin law, we believe the Wisconsin Supreme Court is in the best position to determine whether and under what circumstances it would extend to an excess carrier.

London Market next points out that the recognized majority rule is that an "excess insurer is not obligated to defend until the primary policy limits are exhausted." ***Azco Hennes Sanco, Ltd. v. Wisconsin Ins. Sec. Fund***, 177 Wis. 2d 563, 568, 502 N.W.2d 887 (Ct. App. 1993) (citations omitted); *see also* 14 COUCH ON INSURANCE § 200:44. Therefore, even if it did have either an imported contractual duty or an implied common law duty to defend, London Market argues that the duty would not have been activated here because the underlying policy limits had not been exhausted. In other words, London Market contends that its limitation of liability clause would apply to any duty to defend, as well as any duty to indemnify.

Johnson Controls counters that an insurer may have a primary duty to defend even when its duty to indemnify is secondary. It relies on the general rule that a duty to defend is broader than the duty to indemnify, such that an insurer is required to tender a defense whenever liability coverage is fairly debatable. *See* ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis. 2d 39, 44, 577 N.W.2d 366 (Ct. App. 1998); ***Red Arrow Prods. Co. v. Employers Ins. of Wausau***, 2000 WI App 36, ¶17, 233 Wis. 2d 114, 607 N.W.2d 294. Johnson Controls further contends that, even if London Market did not have a primary duty

to defend in the first instance, it had at least a duty to drop down and defend once the underlying insurance carriers refused to do so.

We see very little guidance in Wisconsin law as to whether an excess insurer has a primary, rather than secondary, duty to defend, and under what circumstances a secondary duty to defend would be triggered. Given the number of excess insurance policies which are no doubt in effect in this state, we believe clarification from the Wisconsin Supreme Court on these issues would be very helpful to both the insurance industry and policyholders.