

**COURT OF APPEALS
DECISION
DATED AND FILED**

APRIL 29, 1998

**Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin**

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 § 808.10 and RULE 809.62, STATS.

No. 97-1595

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ARMAMENT SYSTEMS AND PROCEDURES, INC.,

PLAINTIFF-RESPONDENT,

V.

FEDERATED MUTUAL INSURANCE COMPANY,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Fond du Lac County:
HENRY B. BUSLEE, Judge. *Reversed.*

Before Snyder, P.J., Brown and Anderson, JJ.

ANDERSON, J. Federated Mutual Insurance Company
appeals from an order denying its motion for summary judgment against
Armament Systems and Procedures, Inc. The circuit court found that Federated's
"business risk" exclusions were inapplicable. Rather, the court concluded that
Federated's commercial general liability policy provides coverage for Armament's
economic losses allegedly stemming from a defective mold sold to Armament

from Federated's insured. We conclude that, under the "impaired property" exclusion of Federated's policy, coverage for Armament's damages does not exist. We therefore reverse the order.

The relevant facts are as follows. Armament is a corporation engaged in the manufacture and sale of law enforcement products such as police batons and baton holders. Armament contracted with Federated's insured, Team Tooling, Inc., to design and manufacture an injection mold for a piece of the baton holder. Armament has alleged that the mold was defective in design, material and manufacture and that the baton holder mold has not performed as warranted in that it has always produced damaged parts and the inserts have suddenly and accidentally broken on eight occasions.¹ As a direct result of the alleged mold defects, Armament claims damages from loss of use and diminution in value of the product line of baton holders causing a substantial loss of income and damage to Armament's business reputation. Armament claimed that Federated, as Team Tooling's commercial liability insurer, provided liability coverage for the claimed damages.

Federated filed a motion for summary judgment. Federated sought dismissal of Armament's complaint contending that its policy did not provide

¹ The complaint against Federated is Armament's third amended complaint. The first complaint alleged three causes of action for breach of contract against Team Tooling, Inc. Armament next added Federated, Team Tooling's commercial liability insurer, as an additional defendant and added a fourth cause of action for negligence. Subsequently, venue was changed from Outagamie County to Fond du Lac County. Federated then filed a motion to stay the proceeding pending a coverage determination, which the court granted. Federated also filed a motion for summary judgment seeking declaratory judgment on the issue of coverage. Pending resolution of Federated's motion, Team Tooling filed for bankruptcy and the matter was stayed. In January 1997, the bankruptcy court lifted the automatic stay. In February 1997, the circuit court granted an order dismissing Team Tooling as a party and permitting Armament to file this third amended complaint directed at Federated alone.

coverage for the claimed damages. The circuit court denied the motion finding that “[Armament] has provided sufficient proof of ‘an occurrence’ resulting in ‘property damage,’ as those terms are defined in Federated’s policies, and ... that the damages alleged by [Armament] are not excluded by the ‘work product’ or ‘business risk’ exclusions in said policies.” Federated filed a petition for leave to appeal the nonfinal order, which this court granted.

The circuit court decided the issue upon a motion for summary judgment which may be used to address issues of insurance policy coverage. *See Calbow v. Midwest Sec. Ins. Co.*, No. 97-2457, slip op. at 3 (Wis. Ct. App. Mar. 4, 1998). For summary judgment to be granted, there must be no genuine issue of material fact and the movant must be entitled to judgment as a matter of law. *See* § 802.08(2), STATS. In addition, the question of whether insurance coverage exists for the particular claims in a lawsuit is a question of law that we review de novo. *See Calbow*, slip op. at 3-4. The only issue here is the question of law involving the policy’s interpretation.

Federated renews its argument on appeal that the commercial general liability (CGL) policy it issued to Team Tooling does not insure against business risks such as substandard or faulty workmanship. The CGL policy covers property damage caused by an occurrence that takes place in the coverage territory. “Property damages” includes “[p]hysical injury to tangible property, including all resulting loss of use of that property” or “[l]oss of use of tangible property that is not physically injured.” There is no question that Armament seeks to recover damages occasioned by the loss of use caused by Team Tooling’s mold and that the mold itself was not physically injured. Accordingly, we presume the complaint states a claim for property damage caused by an occurrence as defined by the policy.

The question then is whether coverage is excluded under the terms of the policy. The impaired property exclusion in subsection “m” of the exclusions provision states that the policy does not apply to:

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” ...; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” ... after it has been put to its intended use.²

It is clear that this provision is a form of a business risk exclusion. See *Bulen v. West Bend Mut. Ins. Co.*, 125 Wis.2d 259, 261-62, 371 N.W.2d 392, 393 (Ct. App. 1985) (“‘business risk’ refers to the expenses of repair or replacement incurred by the contractor in the event [his or her] work does not live up to its warranties” as contrasted with the risk of injury to people and damage to property caused by the contractor’s faulty workmanship). Under CGL policies,

² The CGL policy defines “impaired property” as:

[T]angible property, other than “your product” or “your work,” that cannot be used or is less useful because:

- a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of “your product: or “your work;” or
- b. Your fulfilling the terms of the contract or agreement.

“The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.”

Id. at 264, 371 N.W.2d at 394 (quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 791 (N.J. 1979)).

Here, Armament’s baton holders fall under Federated’s “impaired property” exclusion. Armament’s baton holders are less useful because the product line incorporated Team Tooling’s defective mold and they could only be restored to use by adjusting or shaving off the flashing or by Team Tooling fulfilling its contractual warranties (if it had not filed for bankruptcy).

Armament is seeking damages caused by Team Tooling’s defective mold which was incorporated into Armament’s baton holder product line, but which failed to meet the warranted specifications. Armament is seeking compensation for economic loss because Team Tooling’s mold was not that for which Armament had bargained. Damages from this type of liability are excluded under the impaired property exclusion.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

