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DISTRICT IV

March 6, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1747

Society Insurance v. Bavaria Sausage Kitchen, Inc.
(L.C. # 2011CV1027)

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

Society Insurance appeals from a circuit court's declaratory judgment finding that Bavaria Sausage Kitchen, Inc.'s insurance policy with Society Insurance provides coverage for claimed damages by Hunters Reserve, Inc. in a Minnesota federal court action. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

The undisputed facts are as follows. Hunters Reserve assembles and supplies gift packages containing various cheese and wild meat products, such as shelf-stable sausage, which it sells to customers through retail, catalog, and Internet sales. In April 2009, Hunters Reserve contracted with Bavaria Sausage to provide sausages for its gift packages. Hunters Reserve shipped wild game meats to Bavaria Sausage. Bavaria Sausage processed the wild game meats into sausage using its own ingredients and casings, and sent the finished product to Hunters Reserve. Hunters Reserve assembled gift packages, which included different cheeses and crackers along with Bavaria Sausage's sausages, and sold them to customers.

Hunters Reserve's customers complained that the sausages spoiled and leaked juices in the gift packages. Customers returned over 23,500 unsold gift packages to Hunters Reserve and refused to receive 1,900 gift packages. Hunters Reserve was unable to salvage the unsold food items and packaging materials. Due to the high costs incurred as a result of the defective sausages, Hunters Reserve demanded reimbursement from Bavaria Sausage, which Bavaria Sausage refused.

On April 30, 2010, Hunters Reserve filed a complaint against Bavaria Sausage in Minnesota federal court seeking over \$1,000,000 in damages for breach of contract, breach of warranty, negligence, and misrepresentation. Hunters Reserve claimed that it sustained damage to its property, including other items in the gift packages and the packaging materials. Hunters

¹ All references to the Wisconsin Statutes are to the 2011-2012 version unless otherwise noted.

Reverse also claimed damages for lost profits, damage to long-term customer relationships, and lost business opportunities.

On March 2, 2011, Society Insurance, Bavaria Sausage's liability insurer, filed a complaint in Dane County Circuit Court seeking a declaratory judgment that its liability policy with Bavaria Sausage does not provide coverage for the damages claimed by Hunters Reserve in the Minnesota federal court action. The circuit court found that the policy provides coverage for Hunters Reserve's claims for incidental and consequential damages for damage to and recall of the components of Hunters Reserve's gift packages other than Bavaria Sausage's products, and for costs associated with recalling and disposing of the gift packages. Society Insurance now appeals.

On appeal, Society Insurance argues: (1) Hunters Reserve's claims are barred from coverage under the economic loss doctrine; and (2) the policy excludes coverage for the damages claimed by Hunters Reserve.

The interpretation of an insurance policy is a question of law, which we review de novo. *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. Judicial interpretation of an insurance policy seeks to effectuate the intent of the contracting parties. *Id.* An insurance policy is construed as it would be understood by a reasonable person in the position of the insured. *Id.* This court may not, however, interpret insurance policies "to provide coverage for risks that the insurer did not contemplate or underwrite and for which it has not received a premium." *Id.*

Our policy interpretation procedure follows the three steps outlined in *American Girl*. First, we must determine whether the policy's insuring agreement makes an initial grant of

coverage. *Id.*, ¶24. If the claim triggers the initial grant of coverage, we next examine the various exclusions to see whether any of them preclude coverage of the present claim. *Id.* We analyze each exclusion separately; the inapplicability of one exclusion will not reinstate coverage where another exclusion has precluded it. *Id.* Finally, if a particular exclusion applies, we examine whether any exception to that exclusion reinstates coverage. *Id.*

Under the first step of the analysis, whether the policy provides an initial grant of coverage, Society Insurance argues that the economic loss doctrine bars coverage, alleging that standard general liability policies do not provide coverage for a breach of contract, and thus there is no initial grant of coverage. However, the Wisconsin Supreme Court has rejected this argument. *See American Girl*, 268 Wis. 2d 16, ¶¶34-36; *see also Acuity v. Society Ins.*, 2012 WI App 13, ¶¶29-31, 339 Wis. 2d 217, 810 N.W.2d 812 (relying on *American Girl* and rejecting the argument that the economic loss doctrine barred coverage). Society Insurance identifies no other impediment to an initial grant of coverage, and so we move on to the second step of the analysis and examine whether any policy exclusions limit coverage.

Society Insurance argues that exclusion o., titled “Recall Of Products, Work Or Impaired Property,” excludes coverage of Hunters Reserve’s claims. Exclusion o. (referred to by the parties as “the recall exclusion”) states that coverage does not apply to:

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “Your work”; or
- (3) “Impaired property”;

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

The policy further defines “[y]our product” as “[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by ... [y]ou.” The word “[y]ou” refers to the policyholder.

Society Insurance argues that Hunters Reserve’s claims for damages are barred by the recall exclusion because Bavaria Sausage’s contaminated sausages caused the recall of Hunters Reserve’s gift packages. Specifically, Society Insurance emphasizes the phrase “[d]amages claimed for any loss,” arguing that “any loss” to Hunters Reserve as a result of Bavaria Sausage’s product recall is excluded from coverage. Society Insurance’s argument, however, ignores the language of the policy.

Under the policy’s plain language, the recall exclusion applies to “any loss, cost or expense” incurred by the policyholder “or others” for the loss of use or recall of the policyholder’s product, work, or impaired property. In other words, the policy excludes coverage for losses incurred by Bavaria Sausage or others for the loss of use or recall of *Bavaria Sausage’s product or work*, that being the sausages used in the gift packages. Thus, to the extent that Hunters Reserve claims damages for losses or expenses incurred from the recall or disposal of the contaminated sausage itself, such claims are barred under the recall exclusion, as the circuit court correctly concluded.

While the contaminated sausages were Bavaria Sausage’s product and included in Hunters Reserve’s gift packages, the gift packages themselves were not Bavaria Sausage’s product or work. Hunters Reserve assembled the gift packages, and included the sausages along

with its own cheeses, crackers, and packaging materials. The gift packages were Hunters Reserve's product, not that of the policyholder.

Contrary to Society Insurance's assertions, the policy language does not extend the exclusion to damages *caused* by the policyholder's product to others' products or work, that being in this case Hunters Reserve's other contents in the gift packages and the packaging itself. Society Insurance's interpretation would require adding language to the policy that the recall exclusion covers losses "resulting from" the policyholder's recalled product. Absent such causation language in the policy, the recall exclusion does not extend to Hunters Reserve's claimed damages concerning its gift packages. Because the other contents of the gift packages and the packaging materials were products of Hunters Reserve and not Bavaria Sausage (the policyholder), the recall exclusion does not bar claims for losses related to those products.

The parties do not address whether the policy contains an exception to the recall exclusion that reinstates coverage and thus we do not reach the third step in the policy interpretation procedure. *See American Girl*, 268 Wis. 2d 16, ¶24.

In conclusion, we agree with the circuit court's ruling that the recall exclusion applies to losses for Bavaria Sausage's products only. It follows that the insurance policy bars coverage for Hunters Reserve's damage claims for "any loss" or "expense incurred" from recalling and disposing of the contaminated sausage. However, Hunters Reserve also suffered losses and incurred expenses due to the loss of use and disposal of its gift packages and packaging materials. We conclude that the recall exclusion does not bar coverage for the claims by Hunters Reserve for incidental and consequential damages for damage to and recall of components of

Hunters Reserve's gift packages other than Bavaria Sausage's products, and for costs associated with recalling and disposing of Hunters Reserve's gift packages.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals