IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ERLAND ANDERSON,
d/b/a ANDERSON DAIRY SYSTEMS,

OPINION AND
ORDER

Plaintiff,

00-C-0312-C

v.

FEDERATED MUTUAL INSURANCE
COMPANY,

Defendant.

- -

This is a civil action for declaratory relief and indemnification in which plaintiff Erland Anderson, d/b/a Anderson Dairy Systems, seeks an order declaring that the insurance policies plaintiff purchased from defendant Federated Mutual Insurance Company obligate defendant to indemnify plaintiff for the judgment entered in favor of Dale Peterson against plaintiff in Anderson v. Peterson, 96 CV 4, a case in Barron County, Wisconsin.

After plaintiff filed suit in the Circuit Court for Barron County, Wisconsin, defendant removed the case to federal court pursuant to 28 U.S.C. § 1441. It is before the court now on plaintiff's motion for summary judgment. Jurisdiction is present. The parties are of diverse

citizenship and the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332.

Plaintiff contends that summary judgment is proper because there are no genuine issues of material fact and defendant is required to indemnify him as a matter of law. According to plaintiff, the judgment against him in state court falls within the coverage of the insurance policies plaintiff purchased from defendant because the judgment is for "property damage" caused by an "occurrence" that took place within the coverage territory during the policy period. Defendant agrees that there are no genuine issues of disputed fact. However, defendant opposes plaintiff's request for summary judgment, arguing that it is entitled to summary judgment because as a matter of law the judgment against plaintiff is not covered by the relevant insurance policies. Specifically, defendant contends that the damages plaintiff owes Peterson are not "property damages" caused by an "occurrence," or, alternatively, the damages fall within the business risk exclusions denying coverage.

The issue before the court is the scope of the coverage of the insurance policies plaintiff purchased from defendant. The parties do not dispute the wording of the Commercial Package Policies or the Commercial Umbrella Liability Policies in effect from July 11, 1991 through July 11, 1998. I conclude that Peterson's damages are covered by defendant's Commercial Package Policies. Therefore, plaintiff's motion for summary judgment will be granted.

For the sole purpose of deciding this motion, I find from the parties' proposed findings

of fact that the following material facts are undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff is a sole proprietorship dealer for Dairy Equipment Company, a division of DEC International Inc. Plaintiff's dealership agreement with Dairy Equipment Company authorizes plaintiff to market and sell Dairy Equipment Company's Bou-Matic product line. Plaintiff's primary offices are in Rice Lake, Wisconsin. Defendant is a Minnesota corporation licensed to do business in Wisconsin. Dale Peterson is a dairy farmer whose farm is located in Cameron, Wisconsin.

B. *Anderson v. Peterson*, Barron County Case No. 96 CV 4

1. Background

On January 3, 1996, plaintiff filed suit against Dale Peterson in the Circuit Court for Barron County, alleging that Peterson owed plaintiff $13,000 on account for a Bou-Matic milking parlor plaintiff sold Peterson in 1994 and for various goods and services plaintiff sold Peterson between September 1994 and July 1995. In response, Peterson filed a counterclaim, alleging that plaintiff had negligently misrepresented the capabilities of the Bou-Matic milking

parlor and that such misrepresentations had damaged Peterson's dairy farm. The jury rendered a verdict against plaintiff, finding that he negligently misrepresented the design and performance capabilities of the milking parlor and that Peterson was entitled to damages in the amount of $150,000. Subsequently, the Barron County Clerk of Court entered judgment in favor of Peterson against plaintiff in the amount of $150,000, plus costs of $4,912.21 and interest under Wis. Stat. §§ 814.04(4) and 815.05(a).

Both plaintiff and Peterson appealed the judgment to the Wisconsin Court of Appeals. The court of appeals affirmed the judgment, concluding that the evidentiary record was adequate to sustain the verdict and rejecting plaintiff's argument that the economic loss doctrine barred Peterson's recovery. Both plaintiff and Peterson petitioned the Supreme Court of Wisconsin for review of the decision, but the supreme court denied the petition.

On October 15, 1999, plaintiff paid Peterson $50,000 on the outstanding judgment. Plaintiff borrowed the money from Dairy State Bank in Rice Lake, Wisconsin and has not made any payments on the loan to date. The loan accrues simple interest at 8.5% each year.

2. Jury instructions and verdict

In pertinent part, the jury in Anderson v. Peterson was instructed as follows:

> Questions 6 and 15 of the special verdict inquire what sum of money will reasonably compensate Dale Peterson for losses to his dairy farm. The measure

of damages for loss of a dairy cow is the difference in the value before damage and after damage. In addition, you may award reasonable costs of veterinary expenses incurred in the attempt to cure or treat sick animals as a result of the events complained of.

If Dale Peterson lost milk-producing cows, some amount of milk production would be lost from the time of death to the time it was reasonable to replace the cows. You may award as damages the amount of income lost during such a time as the plaintiff was reasonably required to replace the animals involved. . . .

. . .

To constitute negligent misrepresentation in this case, there are four elements which must be proved by Dale Peterson. First, that Erland Anderson made the representation of fact. . . .

. . .

Secondly, that such representation of fact was untrue is the second element. Thirdly, Dale Peterson needs to prove that Erland Anderson was negligent in making these representations. . . .

. . .

Fourthly, Dale Peterson must prove that he believes the representation to be true and relied thereon to his damage.

. . .

A person injured by negligent misrepresentation in the sale of property is entitled to be fairly and reasonably compensate[d] for any damage the person sustained as a result of the misrepresentation. In answering question 15, the measure of damages is the difference, if any, between the market value of the property at the time of purchase and the amount of money that Dale Peterson paid for the property.

In addition, the law provides that a person who has been damaged by a misrepresentation shall be fairly and reasonably compensated for his loss.

In determining the damages, if any, you will allow an amount that will reasonably compensate the injured person for all losses that are the natural and probable result of the misrepresentation.

The special verdict rendered by the jury in Anderson v. Peterson is in pertinent part, as follows:

7. Did Erland Anderson make any representation(s) of fact to Dale Peterson as to the design or performance or capabilities of the Bou-Matic Xpressway Milking Parlor and Agri-Comp 2045 Computer?

ANSWER: __X__ Yes _____ No

8. If you answered question 7 "yes," then answer this question: Was such representation untrue?

ANSWER: __X__ Yes _____ No

9. If you answered both question Nos. 7 and 8 "yes," then answer this question: Was Erland Anderson negligent in making the representation?

ANSWER: __X__ Yes _____ No

10. If you answered question 9 "yes," then answer this question: Was Erland Anderson's negligent representation a cause of Dale Peterson's damages?

ANSWER: __X__ Yes _____ No

11. If you answered question 10 "yes," then answer this question: Did Dale Peterson believe such representation to be true and rely on it?

ANSWER: __X__ Yes _____ No

. . .

15. . . . What sum of money will fairly and reasonably compensate Dale Peterson for his out-of-pocket loss as a result of the misrepresentation?

ANSWER: $150,000

3. The milking parlor

In early 1992, Peterson began discussing the possibility of purchasing a new Bou-Matic milking parlor from plaintiff. During these discussions, plaintiff gave Peterson marketing literature and discussed the capabilities of the milking parlor. In July 1994, plaintiff sold Peterson a Bou-Matic Xpressway Parallel Milking Parlor for a purchase price of $148,000. Plaintiff helped install the milking parlor at the Peterson farm.

The milking parlor is basically an assembly-line system. The first leg of the assembly line is a corral filled with dairy cows called the cow holding area. When the system cycles, the crowd gate moves forward and pushes the cows in the corral toward the entrance gates. Simultaneously, the entrance gates open, allowing the appropriate number of cows to move into the milking area. Sequencing gates in the milking area direct the cows into individual milking stalls. Once in the stalls, each cow is snugged into position by a Bou-Matic Exit Reel. This snugging process is referred to as indexing. The exit reel is a gate that is mounted on a horizontal axis that positions the cows in their stalls by pushing on each cow's brisket. When the cows in the stalls have finished milking, the exit reel rotates on its horizontal axis and directs the cows out of the parlor. Simultaneously, the next group of cows is directed into the milking stalls. Peterson's milking parlor was also equipped with an Agri Comp 2045 computer.

4. Trial testimony and evidence

At trial, Peterson put in the following evidence regarding the milking parlor:

- The exit reel clubbed Peterson's cows on the back with enough force to make them wince in pain and possibly break their backs.
- The exit reel was configured with a gap and Peterson's cows' heads were severely pinched in the gap.
- The milking parlor had a metal curb upon which the cows split and cut their hooves repeatedly.
- The parlor is not capable of indexing cows individually. Small cows were not positioned properly and large cows were forced to stand with their legs underneath their belly.
- The automatic take off mechanism did not release on time, so Peterson's cows were chronically over-milked. This resulted in unhealthy teats.
- The sequencing gates banged and clattered.
- The computer record-keeping system did not work. It assigned production figures to the wrong cows.
- Without computer records, Peterson was unable to identify sick cows and provide them with timely, veterinary attention.
- The foregoing stressed Peterson's herd, physically injured the herd, decreased herd health, caused some cows to die prematurely, required some cows to be destroyed and decreased herd productivity.

Regarding the exit reel clubbing his cows on the back and the exit reel gap, Peterson testified as follows:

> Q: In respect to the area in between the exit Reel and the post, was there a gap in there?
>
> A: Yes.
>
> Q: . . . [W]ere there any problems with that gap?
>
> A: Yes, end cows where that exit reel goes, there was a gap between that post and the exit reel, the first cow would stick her head in [there] and when this thing indexed, it pinched her. It pinched them so tight, you didn't even know because they didn't even beller. I think there was three of

them that did that. One took three steps and never walked again; the other two, I did manage to get up and get them sold.

Regarding the problems with the entrance gates, Peterson testified:

Q: Did you have a problem with the entrance gates?
A: Yes, I did.
Q: What was the problem?
A: At first where the gates open, . . . the hole is left open when the gates are closed so the cows stick their heads in there and when the gates open, it pinches their head in there and on some of the smaller heifers when there is ten cows to go in, the eleventh one would think she was going to turn that one way and the hole was wide enough so she could get her front shoulders through but not her hips, and then they would get hung up in there, then you can't push them back either and you have to take the thing apart to get them back through.
Q: What was that doing to your cows?
A: That pretty much ruins them by the time you get them out. If they do walk again, why there ain't much hope for them.

Regarding his inability to monitor cow health because of the malfunctioning computer, Peterson testified:

Q: What would be the consequences of not monitoring which cows were not eating and pooping [and] which cows were having problems?
A: By the time you find that they are sick, it's too late, it's history, all the drugs in the world won't bring them back.

Regarding reduced milk production, Peterson testified:

Q: Mr. Peterson, what effect did the damage that this system was doing to your cows have on your milk production?
A: You beat a cow up like that, she ain't gonna milk. She is going to try and take care of herself before she makes milk.
Q: What effect did these problems with the systems have on the health of

your cows?

A: You beat cows up, they ain't gonna survive. Their health just goes downhill.

Q: At the time your cows were getting beat up by this system, did you have a computer operating so that you could identify which cows were in need of attention.

A: No I didn't.

Q: Based on what was going on with this system, were you able to properly care for your herd?

A: No.

Peterson testified further:

Q: Are you able, yourself, to try and quantify the money damages that were being caused to you and your herd?

A: What do you want to know?

Q: Were you able to quantify the money in money terms the damage that was being caused to your herd or was that something you had to hire someone to do?

A: I hired, I believe his name is Behr, for that.

To quantify the damages described, Peterson presented the expert testimony of agricultural-economist Michael Behr, Ph.D. Behr testified that Peterson sustained damages from January 1995 through April 1998 in four categories: reduced milk production, loss of young stock production from missing cows, loss of beef production from missing cows and loss of dairy capital because of reduced herd size. Behr calculated Peterson's damages to be

$465,500, itemized as follows:

By Year		By Category	
1995	$ 5,117	Milk Loss	$ 790,134
1996	$ 88,341	Young Stock Loss	$ 8,357
1997	$ 83, 511	Cull Cow Loss	$ 32,174
1998	$ 288,531	Cost Saving	$(590,465)
		Capital Loss	$ 225,300
Total	$ 465, 500	Total Loss	$ 465,500

C. Insurance Policies

Seven commercial-liability policies issued by defendant covered plaintiff continuously from July 11, 1991 through July 11, 1998: Policy No. 9046309, effective July 11, 1991 through July 11, 1992; Policy No. 9046309, effective July 11, 1992 through July 11, 1993; Policy No. 9046309, effective July 11, 1993 through July 11, 1994; Policy No. 9046309, effective July 11, 1994 through July 11, 1995; Policy No. 9046309, effective July 11, 1995 through July 11, 1996; Policy No. 9046309, effective July 11, 1996 through July 11, 1997; and Policy No. 9046309, effective July 11, 1997 through July 11, 1998.

Seven commercial, umbrella-liability policies issued by defendant covered plaintiff continuously from July 11, 1991 through July 11, 1998: Policy No. 9046310, effective July 11,

1991 through July 11, 1992; Policy No. 9046310, effective July 11, 1992 through July 11, 1993; Policy No. 9046310, effective July 11, 1993 through July 11, 1994; Policy No. 9046310, effective July 11, 1994 through July 11, 1995; Policy No. 9046310, effective July 11, 1995 through July 11, 1996; Policy No. 9046310, effective July 11, 1996 through July 11, 1997; and Policy No. 9046310, effective July 11, 1997 through July 11, 1998.

By letter dated February 5, 1996, plaintiff's lawyer tendered the defense of Peterson's counterclaim against plaintiff to defendant. On February 8, 1996, defendant wrote plaintiff, informing him that it had hired Mark Henkel to defend against the counterclaim. The letter also iterated the Insuring Agreement and identified several exclusions that could preclude coverage under the policy. Correspondence from defendant to plaintiff establishes that defendant stayed abreast of the proceedings in Anderson v. Peterson. On January 19, 1998, Patrick Carroll, claims supervisor for defendant, wrote a letter to plaintiff stating:

> As you are aware, there was a Hearing and Motions that were brought [in] this case on December 23, 1997.
>
> I believe you probably have been in touch with your attorney, Mr. Doyle, in regards to the outcome of the Hearing. In essence, the Court has dismissed all tort claims against Anderson Dairy Systems and [has] added [a] fraudulent and intentional misrepresentation claim, [a] negligent misrepresentation claim, and [a] breach of contract claim. Additionally, it is my understanding that the plaintiff['s] attorney made a motion for punitive damages in connection with these claims.
>
> I am writing this letter to inform you of your coverage status.

. . .

> Based on the allegations that are remaining in this lawsuit that we have no duty to indemni[f]y Anderson Dairy Systems for any of these counts. It is important to note that the word language indemnify means that in the event a Judgment would be rendered against Anderson Dairy systems on these counts of fraudulent and intentional misrepresentation, negligent misrepresentation or breach of contract, that we would provide no coverage or payment of those judgments.

The letter also outlines specific policy provisions that relate to the availability of coverage and concludes:

> As you can see by the above definitions, that what remains in this lawsuit, does not meet the definition of bodily injury and property damage as defined by the policy. "Your product" and "your work" specifically excludes any warranties or representations that may have been made on behalf of Anderson Dairy Systems. . . .
>
> Your Umbrella Policy #9046310 also has similar exclusions.
>
> In summary, neither your Commercial General Liability Policy #9046309 nor your Commercial Umbrella Policy #9046310 provide[s] coverage to indemnify you for this lawsuit. . . .

D. Provisions in the Commercial Package Policies

The following are relevant provisions in the Commercial Package Policies:

Coverage:

All policies

Coverage A. Bodily Injury and Property Damage Liability

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

. . .

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory," and

(2) The "bodily injury" or "property damage" occurs during the policy period.

Supplementary Payments:

All policies

We will pay, with respect to any claim or "suit" we defend:

5. All costs taxed against the insured in the "suit."

7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in the court the part of the judgment that is within the applicable limit of insurance.

Definitions:

All policies

9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

7/11/91 through 7/11/96

10. a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned.

b. "Your work" will be deemed completed at the earliest of the following times:

(1) When all of the work called for in your contract has been completed.

(2) When all of the work to be done at the site has been completed if your contract calls for work at

more than one site.

(3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

c. This hazard does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle created by the "loading or unloading" of it;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification in this coverage Part or in our manual of rules includes products or completed operations.

7/11/96 through 7/11/98 Identical to the above, except:

c. (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limits.

All policies

11. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible personal property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

14. "Your product" means:

a. Any goods or products manufactured, sold, handled, distributed or disposed of by:

(1) You;

(2) Others trading under your name; or

(3) A person or organization whose business or assets you have acquired; and

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product" and

b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of other but not sold.

15. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

a. Warranties or representations made at any time with respect to fitness, quality, durability, performance or use of "your work", and

b. The providing of or failure to provide warnings or instructions.

7/11/94 through 7/11/98

"Impaired property" means tangible 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.

Relevant Exclusions:

7/11/91 through 7/11/93

SECTION I - COVERAGES

2. Exclusions

This insurance does not apply to:

k. “Property damage” to “your product” arising out of it or any part of it.

l. “Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. “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 “your work;” 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.

Changes to Coverage Exclusions after 1993

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusions K and L are deleted and replaced by the following:

K. "Property Damage" to "your product" arising out of it, or any part of it except when caused by:

i) Fire
ii) Smoke
iii) Collapse

L. "Property Damage" to "your work" arising out of it, or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply:

1. if the damaged work or the work out of which the damages arises was performed on your behalf by a subcontractor; or
2. if the cause of loss to the damaged work arises as a result of:

i) Fire
ii) Smoke
iii) Collapse

OPINION

A. Standard of Review

1. Summary judgment

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex at 324.

If there are no disputed material facts and the sole issue involves the interpretation of an insurance policy, a question of law is presented which is appropriate for summary judgment. See Greene v. General Casualty Co., 216 Wis. 2d 152, 157, 576 N.W.2d 56, 59 (Ct. App. 1997).

2. Interpretation of insurance contracts

Wisconsin insurance policies are governed by Wisconsin law. See Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1091 (7th Cir. 1999). Interpretation of the language of an insurance policy is governed by the same rules of construction that govern other contracts. See Peace v. Northwestern National Ins. Co., 228 Wis. 2d 106, 120, 596 N.W.2d 429, 435 (1999) (citing Weimer v. Country Mutual Ins. Co., 216 Wis. 2d 705, 721, 575 N.W.2d 466 (1998)). The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties. See General Casualty Co. of Wisconsin v. Hills, 209 Wis. 2d 167, 175, 561 N.W.2d 718, 722 (1997).

The language of an insurance policy should be interpreted according to its plain and ordinary meaning as understood by a reasonable person in the position of the insured. See Kremers-Urban Co. v. American Employers Ins. Co., 119 Wis. 2d 722, 735, 351 N.W.2d 156, 163 (1984). It is well established that terms in an insurance policy are ambiguous if they are

fairly susceptible to more than one reasonable interpretation when read in context. See Peace, 228 Wis. 2d at 154, 596 N.W.2d at 450. Whether an ambiguity exists in an exclusion from coverage depends upon the meaning that the words used to describe the exclusion would have to a reasonable person of ordinary intelligence in the position of the insured. See Kozak v. United States Fidelity & Guaranty Co., 120 Wis. 2d 462, 467, 355 N.W.2d 362, 364 (Ct. App. 1984). If coverage is ambiguous, the policy is construed in favor of coverage and exclusions are construed narrowly against the insurer. See Smith v. Atlantic Mutual Ins. Co., 155 Wis. 2d 808, 811, 456 N.W.2d 597, 599 (1990). However, this principle does not allow a court to eviscerate an exclusion that is clear from the face of the insurance policy. See Whirlpool Corp. v. Ziepert, 197 Wis. 2d 144, 152, 539 N.W.2d 883, 886 (1995).

B. Property Damage

The first issue in this case is whether Peterson's damages fall within the definition of "property damage" provided in the Commercial Package Policies. The policies define "property damage" as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible personal property that is not physically injured. All such loss of use shall be deemed to occur at the time

of the “occurrence” that caused it.

Plaintiff contends that Peterson's damages constitute property damage under the insurance policies because the cows are tangible property that were physically injured by the milking parlor’s repeated clubbing, cutting, pinching, and overmilking of the animals. The defective computer system also made it difficult or impossible to identify cows needing veterinarian attention. Furthermore, plaintiff contends, the physical injury to the cows resulted in the “loss of use” of the cows because the injuries resulted in milk loss, loss of offspring production, loss of beef production and loss of capital because of reduced herd size.

Defendant contends that Peterson's damages are economic losses that do not constitute “property damage” within the definitions of the insurance policies. Peterson was awarded damages for negligent misrepresentation and was therefore compensated for his economic losses caused by the milking parlor's failure to perform as plaintiff represented. Defendant argues that Peterson’s retention of a forensic economist to testify on the economic losses to his farm shows that Peterson's damages were solely pecuniary in nature and are therefore not “property damage.”

Defendant concedes that Peterson's cows were physically injured by the milking parlor and that the defective computer system made it difficult or impossible to identify cows needing veterinarian attention. Furthermore, defendant concedes that Peterson suffered milk loss, loss

of offspring production, loss of beef production and loss of capital as a result of a reduced herd size. Because the parties do not dispute that the cows were injured by the milking parlor, the only issue is whether these damages fall within the definition of "property damage." This is a question of law. See Katze v. Randolph & Scott Mut. Fire Ins., 116 Wis. 2d 206, 212, 341 N.W.2d 689, 691 (1984).

In determining whether Peterson's damages constitute "property damage," the court looks to what a reasonable lay person in the position of the insured would understand the definition of "property damage" to mean. See Kozak at 466-467, 355 N.W.2d at 364. I find that a reasonable person would believe that clubbing, cutting, pinching and overmilking of cows constitute "physical injury to tangible property." A reasonable person would also believe that the loss of milk production, loss of offspring production and loss of beef production constitute "loss of use of that property."

In Wisconsin Electric Power Co. v. California Union Insurance Co., 142 Wis. 2d 673, 419 N.W.2d 255 (Ct. App. 1987), the court found that damages to cows fell within a similar definition of "property damage." Wisconsin Electric Power had installed a three-phase power supply to a dairy farm in 1970. See id. at 675, 419 N.W.2d at 256. Shortly after installation, the dairy farmer began noticing unusual behavior in his cows, such as nervousness, a decline in milk production, failure to breed, ill health and premature death. See id. at 676, 419 N.W.2d

at 256. In 1981, the cause of the problems was determined to be stray voltage emanating from the three-phase power supply. See id. In 1982, Wisconsin Electric Power altered the power system and the problems with the cows ended. See id. The dairy farmer obtained a judgment against Wisconsin Electric Power. The Wisconsin Court of Appeals found that the judgment against Wisconsin Electric was covered by a commercial general liability insurance policy. See id. at 682, 419 N.W.2d at 258-259. Although the court focused on the definition of "occurrence," the definition of "property damage" was similar to the definition of "property damage" in this case. The policy stated:

> (f) Property Damage Liability: for damages because of injury to or destruction of tangible property, including the loss of use thereof, caused by an occurrence. . .

Id. at 678, 419 N.W.2d at 257.

The damages suffered by the cows in Wisconsin Electric are nearly identical to the damages Peterson's cows suffered: a decline in milk production, failure to breed and ill health. Because the Wisconsin Court of Appeals found that these damages constituted "property damage," it is not unreasonable for a lay person to believe the same.

Defendant relies on Smith v. Katz, 226 Wis. 2d 798, 595 N.W.2d 345 (1999), for the view that misrepresentations and omissions produce economic damage and not property damage. However, the issue in Smith was whether the insurance carrier had a duty to defend

under a commercial general liability policy. See id. at 800, 595 N.W.2d at 347. The Wisconsin Supreme Court reasoned that the insurer's duty to defend was not triggered unless the complaint alleged "property damage" that met the definition in the insurance policy. See id. at 816, 595 N.W.2d at 354. Although the court recognized that the majority view is that misrepresentations and omissions produce economic damage rather than property damage, the court stated,

> We are not saying that strict responsibility misrepresentations or negligent misrepresentations can *never* cause "property damage" as defined in the policies, particularly when "property damage" can include "loss of use of tangible property that is not physically injured."

Id. (Emphasis in original).

This case is distinguishable from Smith because the parties do not dispute that Peterson's cows sustained physical injuries and that those injuries caused loss of use of the cows. The insurance policy does not rely on the theory of liability to determine whether there is "property damage" under the insurance policies. The Commercial Package Policy states:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

Once the definition of "property damage" is met, the only qualification under defendant's insurance policies is that the plaintiff must be legally obligated to pay and the property damage must take place in the coverage territory during the policy period. There is no qualification

limiting defendant's payments to certain theories of liability. Specifically, there is no exception denying coverage to the insured who is legally obligated to pay damages because of "property damage" suffered in a negligent misrepresentation case.

In Anderson v. Peterson, the jury awarded Peterson damages based on the injuries his cows suffered as a result of his use of plaintiff's milking parlor. Although the theory of liability was negligent misrepresentation, damages were awarded for the loss of milk production, among other things. The jury instructions read:

> Questions 6 and 15 of the special verdict inquire what sum of money will reasonably compensate Dale Peterson for losses to his dairy farm. . . .
>
> If Dale Peterson lost milk-producing cows, some amount of milk production would be lost from the time of death to the time it was reasonable to replace the cows. You may award as damages the amount of income lost during such a time as the plaintiff was reasonably required to replace the animals involved. . . .

In addition to awarding damages based on the loss of milk production, the jury was instructed:

> A person injured by negligent misrepresentation in the sale of property is entitled to be fairly and reasonably compensate[d] for any damage the person sustained as a result of the misrepresentation. In answering question 15, the measure of damages is the difference, if any, between the market value of the property at the time of purchase and the amount of money that Dale Peterson paid for the property.
>
> In addition, the law provides that a person who has been damaged by a misrepresentation shall be fairly and reasonably compensated for his loss.
>
> In determining the damages, if any, you will allow an amount that will reasonably compensate the injured person for all losses that are the natural and

probable result of the misrepresentation.

The jury instructions allowed for compensation to Peterson in three different ways. The jury could compensate for 1) the loss of milk production; 2) the difference between the market value of the property at the time of purchase and the amount of money that Peterson paid for the property; and 3) an amount that would reasonably compensate Peterson for all losses that were the natural and probable result of the misrepresentation.

The relevant part of the special verdict form stated:

> 15. . . . What sum of money will fairly and reasonably compensate Dale Peterson for his out-of-pocket loss as a result of the misrepresentation?
> ANSWER: $150,000

The special verdict form did not allow the jury to distinguish among the three possible bases for an award of damages or for the amount of damages attributable to each. According to the instructions, the jury could award damages for the loss of milk production by physically injured cows or the "resulting loss of use" from "physical injury to tangible property."

Because the special verdict form did not separate the reasons for compensating Peterson and because some of the damages awarded can potentially fall within the definition of "property damage," defendant is responsible for the full amount. Defendant tendered the defense in Anderson v. Peterson and had an obligation to request a verdict form separating covered damages from uncovered damages. See Valley Bancorporation v. Auto Owners

Insurance Co., 212 Wis. 2d 609, 619, 569 N.W.2d 345, 349 (Ct. App. 1977).

> Because we cannot determine with certainty what facts were relied upon by the jury in making its determinations, we must determine who bears the responsibility for proving whether the conduct covered by the insurance policy gave rise to the damages determined by the jury. We believe that this burden lies upon the insurer.

Id. (Citations omitted). Having failed to request a special verdict form distinguishing damages awarded for loss of milk production from other compensation for damages that may not meet the definition of "property damage," defendant is required to cover the entire judgment.

C. Occurrence

Having decided that Peterson's damages meet the definition of "property damage," I must decide whether the property damage was caused by an "occurrence" as defined in the Commercial Package Policies. The Commercial Package Policies state:

> 9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The question is whether both the negligent misrepresentation and the herd's continuous exposure to the milking parlor's harmful conditions meet the definition of "occurrence" under the insurance policies. Defendant argues that the Wisconsin courts have never held that negligent misrepresentation is an occurrence under commercial general liability policies, but it

says nothing to counter plaintiff's claim that Peterson's herd's continuous exposure to the milking parlor's harmful conditions is an "occurrence." I find that the continuous and repeated exposure of Peterson's cows to the harmful conditions of the milking parlor constitutes an occurrence under the Commercial Package Policies. Furthermore, the jury verdict in Anderson v. Peterson establishes that the property damage to Peterson's cows was caused by continuous and repeated exposure to the harmful conditions of the milking parlor during the policy period.

Because I find that the continuous exposure meets the definition of "occurrence," it is unnecessary to decide whether a negligent misrepresentation is an "occurrence" under the insurance policies. Furthermore, it is unnecessary to decide whether the Products-Completed Operations coverage or the Commercial Umbrella Policies apply, because the Commercial Package Policies provide coverage.

D. Exclusions

1. Business-risk exclusion

The Commercial Package policies in effect from July 11, 1991, through July 11, 1993 state:

> 2. Exclusions
> This insurance does not apply to:

k. “Property damage” to “your product” arising out of it or any part of it.

l. “Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The following changes were made to the exclusions after 1993:

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
Exclusions K and L are deleted and replaced by the following:

K. “Property Damage” to “your product” arising out of it, or any part of it except when caused by:

iv) Fire
v) Smoke
vi) Collapse

L. “Property Damage” to “your work” arising out of it, or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply:

1. if the damaged work or the work out of which the damages arises was performed on your behalf by a subcontractor; or
2. if the cause of loss to the damaged work arises as a result of:

i) Fire
ii) Smoke
iii) Collapse

“Your product” and “your work” are defined in the policies as follows:

14. “Your product” means:

a. Any goods or products manufactured, sold, handled, distributed or disposed of by:

(1) You;
(2) Others trading under your name; or
(3) A person or organization whose business or assets you have acquired; and

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product" and

b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of other but not sold.

15. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

a. Warranties or representations made at any time with respect to fitness, quality, durability, performance or use of "your work", and

b. The providing of or failure to provide warnings or instructions.

Defendant contends that these business-risk exclusions apply in this case because the business risk involved is the expenses of repair or replacement incurred by the insured when his work did not live up to its warranties. Using the definitions in the policies, defendant contends that Peterson's damages are related to plaintiff's "product" (the milking parlor) and plaintiff's "work" (the installation of the milking parlor).

Plaintiff does not dispute that the milking parlor is his "product" and "work," but he contends that the business-risk exclusion does not apply because Peterson's damages were not

for the cost of repairing or replacing the milking parlor. At trial, Peterson did not present evidence of the cost of repairing or replacing the milking parlor or claim damages for those costs. Peterson was awarded damages arising out of the physical injury to his dairy herd and the loss of use of his dairy herd resulting from plaintiff's negligent misrepresentation.

In Jacob v. Russo Builders, 224 Wis. 2d 436, 453, 592 N.W.2d 271, 278 (Ct. App. 1999), the Wisconsin Court of Appeals applied similar business-risk exclusions where a building contractor performed defective masonry work on Jacob's residence. The court focused on which damages were covered by the commercial general liability policy and which damages were excluded under the business-risk exclusions. See id. at 443-444, 592 N.W.2d at 274. The parties agreed that expenses to repair the defective masonry were not covered under the policy because those expenses fell within the business-risk exclusion, see id., but other damages were covered because they were not a direct consequence of repairing the defective work. See id. at 451, 592 N.W.2d at 278. Accordingly, the insurance policy did not exclude damages for repair of interior damage, relocation costs, temporary repairs, and the loss of use and enjoyment of the property. See id. Distinguishing the business-risk exclusion from the risks intended to be covered by the insurance policy, the court stated:

> 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.

Id. at 447, 592 N.W.2d at 275.

In Anderson v. Peterson, Peterson did not seek damages for the cost of repair or replacing the milking parlor. Therefore, the business-risk exclusion does not apply. Plaintiff is liable for the physical injuries to Peterson's cows, including the loss of use of the cows. Damage to cows is the risk intended to be covered by defendant's insurance policy because it constitutes damage to property other than to the milking parlor itself.

2. Exclusion M

Defendant contends that Exclusion M applies to situations in which a product fails to meet a represented level of performance. Exclusion M denies insurance coverage for:

> "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 "your work;" 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.

"Impaired" property is defined in defendant's insurance policies as:

> "Impaired property" means tangible 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.

Defendant contends that because Peterson's damages resulted from plaintiff's negligent misrepresentation, Exclusion M applies to this case. Plaintiff does not disagree that Peterson's damages resulted from plaintiff's misrepresentation, but contends that Exclusion M does not apply because the damage to Peterson's cows does not fall within the definition of "impaired property" or "property that has not been physically injured."

Peterson's damages stem from physical injury to his dairy cows caused by the repeated clubbing, cutting, pinching and overmilking by the milking parlor. Peterson's damages are not from "property that has not been physically injured." Furthermore, Peterson's damages do not fall within the definition of "impaired property." Although Peterson's cows are tangible property that "cannot be used or is less useful" because of plaintiff's milking parlor that is "known or thought to be defective, deficient, inadequate or dangerous," Peterson's cows cannot be "restored to use." The "repair, replacement, adjustment or removal" of the milking parlor will not restore deceased or injured animals to use. Therefore, Exclusion M does not apply to preclude insurance coverage.

E. Costs and Attorney Fees

Plaintiff contends that since there is coverage under defendant's insurance policies, plaintiff is entitled to the interest accrued on the Peterson judgment, litigation costs and attorney fees. The Commercial Package Policies state:

> We will pay, with respect to any claim or "suit" we defend:
> 5. All costs taxed against the insured in the "suit."
> 7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

Defendant does not dispute the language of the contract. Under the provisions of the insurance policy, plaintiff is entitled to the amount of the verdict, all costs taxed against the insured and all interest on the full amount of the Peterson judgment in Anderson v. Peterson. Accordingly, plaintiff is entitled to recover the $150,000 verdict, the $4,912.21 in costs taxed against plaintiff and interest on the judgment. Plaintiff is not entitled to the accrued interest on the $50,000 borrowed from Dairy State Bank used to pay down the judgment because that expense is not a "cost taxed against" plaintiff in the underlying suit.

With regard to attorney fees, defendant contends that plaintiff is not entitled to recover attorney fees because defendant did not breach its duty to provide plaintiff with a defense in the underlying action. Whether an insured can recover attorney fees is a question of law. See Ledman v. State Farm Mutual Auto. Ins. Co., 230 Wis. 2d 56, 69, 601 N.W.2d 312, 317 (Ct. App. 1999). In Ledman, the Wisconsin Court of Appeals stated, "Attorney's fees should only

be awarded in limited circumstances: when an insurer breaches its duty to defend an insured." Id. at 70, 601 N.W.2d at 318. Because defendant provided plaintiff with a defense in the underlying action of Anderson v. Peterson, I conclude that plaintiff is not entitled to attorney fees incurred to establish coverage in this declaratory judgment action.

ORDER

IT IS ORDERED that the motion for summary judgment filed by plaintiff Erland Anderson is GRANTED. IT IS DECLARED that the Commercial Package Policies plaintiff Erland Anderson purchased from defendant Federated Mutual Insurance Co. from July 11, 1991, through July 11, 1998, require defendant to indemnify plaintiff for the judgment against plaintiff in Anderson v. Peterson, Barron County case number 96 CV 4, in the amount of $150,000.00, plus costs in the amount of $4,912.21, plus interest on the unpaid portion of the judgment. Plaintiff's motion for an award of attorney fees is DENIED.

FURTHER, IT IS ORDERED that plaintiff's motion to strike defendant's reply brief in opposition to plaintiff's motion for summary judgment is DENIED as moot.

The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 27th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge