STATE OF WISCONSIN | CIRCUIT COURT Branch 10 | DANE COUNTY

J.H. Findorff & Sons, Inc,
Plaintiff

vs.

Case No. 15CV550

Beazley Insurance Co. et al.,
Defendants

DECISION AND ORDER FOR MOTION FOR DECLARATORY JUDGMENT

This case concerns liability for alleged defects in the engineering of a parking ramp. The plaintiff has moved for a declaratory judgment that 1) language in Beazley's policy making it's insured responsible for $100,000 of damages was a deductible not a self-insured retention and 2) that Beazley is responsible for the full amount of damages and must seek any reimbursement for the first $100,000 from its insured. For the reasons stated below the motion is denied, but the court holds that Beazley is liable for amounts in excess of $100,000 notwithstanding the fact the Arnold and O'Sheridan is insolvent and will not be able to satisfy the deductible.

SUMMARY OF FACTS

Arnold and O'Sheridan, Inc. was a firm responsible for allegedly defective engineering design of a parking ramp. The firm is dissolved and insolvent. Beazley insured Arnold and O'Sheridan and there is no dispute that there was a policy in effect that provides coverage. The policy includes what it refers to throughout as an "Each Claim Deductible" in the amount of $100,000. The issue is whether Beazley is liable to Findorff for the full amount of damages, including the first $100,000.

DISCUSSION

> The interpretation of an insurance contract is a question of law subject to de novo review. An insurance policy is construed to give effect to the intent of the parties, expressed in the language of the policy itself, which we interpret as a reasonable person in the position of the insured would understand it. The words of an insurance policy are given their common and ordinary meaning. Where the language of the policy is plain and unambiguous, we enforce it as written, without resort to rules of construction or principles in case law. This is to avoid rewriting the contract by construction and imposing contract obligations that the parties did not undertake. Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation. If the language is ambiguous, it is construed in favor of coverage. In interpreting an insurance policy, the court may also consider the purpose and subject matter of the insurance. [citations omitted]

Danbeck v. Am. Family Mut. Ins. Co., 2001 WI 91, 245 Wis. 2d 186, 193, 629 N.W.2d 150, 153-54.

The insurance policy in this case obligates the insurer "To pay on behalf of the Insured Damages and Claims Expenses, in excess of the Each Claim Deductible" for covered acts or events. Wilkinson Aff. Exh. 4, Bates 3051, Policy Sec. I. The "Each Claim Deductible" is $100,000, including Claims Expenses. *Id.* at Bates 3037, Policy Declarations Item 4. "Satisfaction of the Each Claim Deductible is a condition precedent to the payment by the Underwriters of any amounts hereunder, and the Underwriters shall be liable only for the amounts in excess of the Each Claim Deductible." *Id.* at 3071,Policy Section IX.A.

Whether the $100,000 amount that the insured must pay is called a deductible or self-insured retention does not affect Beazley's liability under the policy. The policy language plainly obligates Beazley to pay only damages in excess of $100,000.

Findorff argues that interpreting the policy this way conflicts with Wis. Stat. §632.22, which provides that "the bankruptcy or insolvency of the insured shall not diminish any liability of the insurer to 3d parties." It argues that the requirement that the insured pay its deductible before Beazley pays directly conflicts with the statute. The conflict is illusory and the two can easily be reconciled while preserving the full meaning of each. The statute provides that Beazley's liability to Findorff shall not be diminished because of Arnold and O'Sheridan's insolvency. Under the policy Beazley is liable for any damages over $100,000 that have been paid by Arnold and O'Sheridan.

The statute simply means that Arnold and O'Sheridan's inability to pay the deductible because of insolvency does not relieve Beazley of the obligation to pay damages in excess of $100,000. In other words, Beazley cannot use an insolvent insured's inability to pay its deductible to deny coverage for amounts in excess of the deductible; it must pay what it is liable for regardless of whether the insured pays its deductible. This is consistent with the ruling in *Gulf Underwriters Ins. Co. v. Burris,* 674 F.3d 999 (8th Cir. 2012) that the failure of an insolvent insured to fulfill its self-insured retention obligation cannot be grounds for an insurer to make payments under the policy and that Section 632.22 is not intended to expand coverage.

CONCLUSION

The judgement requested is DENIED. However, the court adjudges that Beazley is not liable for the first $100,000 of damages, but must pay any amounts in excess of $100,000 for which its policy would provide coverage, as if the $100,000 deductible had been paid.

Dated: August 30, 2016

BY THE COURT:

Juan B. Colás
Circuit Court Judge

Copy: Counsel BY FAX ONLY