

Wisconsin Court of Appeals Holds That Alleged Incorporation Of Wrong Ingredient Constitutes Property Damage Caused By An Occurrence

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Wisconsin Pharmacal Co., LLC v. Nebraska Cultures of California, Inc., et al., 2014 WI App __, 2014 WL 5470615

In *Wisconsin Pharmacal Co., LLC v. Nebraska Cultures, Inc., et al.*, 2014 WI App __, 2014 WL 5470615, defendants Nebraska Cultures, Inc. and Jeneil Biotech, Inc. allegedly supplied the incorrect ingredient (Lactobacillus acidophilus instead of Lactobacillus rhamnosus) to a manufacturer of a health supplement. The manufacturer mixed the acidophilus supplied by defendants with other ingredients to form a tablet. When it was later discovered that the tablets contained acidophilus instead of rhamnosus, the retailer rejected the supplement. The manufacturer then sued Nebraska Cultures and Jeneil Biotech and asserted misrepresentation and contract claims. The trial court dismissed the misrepresentation claims. After an order bifurcating coverage and staying the underlying action, the insurers for Nebraska Cultures and Jeneil Biotech successfully moved for summary judgment on the basis that the claims were not covered by their respective policies. The appellate court reversed.

First, the court determined that the complaint alleged "property damage" in accordance with the policies' CGL definitions. In particular, the insurers argued that incorporation of the wrong ingredient did not change the shape, appearance or material dimensions of the manufacturer's tablets. The appellate court disagreed, reasoning that the ingredients had been physically altered when they were blended together and compressed into tablets. The court also cited cases from other jurisdictions that found "property damage" where incorporation of "defective, faulty or inadequate parts" rendered the finished product unusable. In this case, the manufacturer also destroyed the tablets because they were useless. Accordingly, those allegations were sufficient to establish "property damage."

The appellate court likewise rejected the insurer's argument that there was no property damage in accordance with the economic loss rule. Citing prior Wisconsin authority, the court reiterated that the economic loss rule is a remedies principle that does not determine insurance coverage.

The appellate court next held that the allegations against the insureds constituted an "occurrence." The insurers pointed to Wisconsin authority that allegations of misrepresentation are not an occurrence, but the appellate court observed that the trial court had dismissed the misrepresentation claims, leaving only contract claims against the insureds. Furthermore, there were no allegations that either insured intended to provide the wrong ingredient.

Lastly, the court concluded that none of the so-called "business risk" exclusions applied. The "your product" exclusion, for example, did not bar coverage for claims to the other property damaged, *i.e.*, the unusable finished product. Likewise, the "impaired property" exclusion did not apply because the product could not be restored to use.

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