

U.S. DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

'06 FEB 15 A9:41

STEVEN A. AVERY

Plaintiff, U.S. DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN Civil Action Case No.: 04 CV 0986

vs.

MANITOWOC COUNTY, THOMAS K.
KOCOUREK, individually and in his official
capacity as Sheriff of Manitowoc County, and
DENIS R. VOGEL, individually with respect only
to his executive, administrative and advice and
counsel functions and in his official capacity as
District Attorney of Manitowoc County

Defendants.

**MEMORANDUM IN SUPPORT OF
STATE FARM'S MOTION TO INTERVENE**

1. Steven Avery filed this complaint against the defendant, Thomas K. Kocourek, in his official capacity as the Sheriff of Manitowoc County, seeking damages for actions taken by Mr. Kocourek during a 1985 criminal investigation. The complaint alleges that at all times, Thomas K. Kocourek was acting within the scope of his employment and pursuant to his authority as the Sheriff of Manitowoc County; and, that he acted intentionally.

2. During the times alleged in the complaint, State Farm had in effect a policy of homeowner's insurance for the defendant, Thomas K. Kocourek. A copy of the homeowner's policy is attached to the proposed complaint for declaratory judgment.

3. Thomas K. Kocourek tendered this lawsuit to State Farm, asking it to defend and indemnify him for the damages sought by the complaint pursuant to the terms of the homeowner's policy.

4. Under Coverage L - Personal Liability Coverage, (on page 10 of the policy) State Farm's policy provides personal liability insurance coverage to Thomas K. Kocourek as follows:

"If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the insured is legally liable; and
2. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

5. Under Section II - Exclusions, (found on page 11 of Exhibit 1) State Farm's policy provides that its personal liability coverage does not apply to:

- a. bodily injury or property damage which is expected or intended by an insured;
- b. bodily injury or property damage arising out of business pursuits of an insured ...

6. In the Definitions section, (found on page 1 of Exhibit 1), State Farm defines the term "business" to mean:

2. a trade, profession or occupation. ...

7. State Farm's policy does not cover injury or damage that arises out of Thomas K. Kocourek's business or profession and if there is no coverage, State Farm does not have a duty to defend or indemnify him.

8. If State Farm wrongfully refuses to defend its insured, it may be found in bad faith and obligated to pay damages in excess of its policy limit. It is necessary for State Farm to intervene in this case so that it can raise the policy defenses set forth in the proposed complaint for declaratory judgment and have the court declare its obligations under the policy..

9. State Farm's interest in these proceedings is adverse to Thomas K. Kocourek and adverse to all other parties in this lawsuit and no existing party can adequately represent State Farm's interest in obtaining a judgment declaring its obligations to defend and indemnify its insured.

10. This motion is timely made and allowing State Farm to intervene to obtain a declaratory judgment will not prejudice the rights of any party. The court can determine State Farm's policy obligations based on the four (4) corners of the complaint and the plain language of the policy, and no discovery is necessary.

Dated at Appleton, Wisconsin, this 14 day of February, 2006.

MENN LAW FIRM, LTD.

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