PETERSON JOHNSON MURRAY

Recent Case Update

VOL. XXII, NO. 3
Fall 2013

Insurance – Bad Faith – Statute of Limitations – Eagle Fuel Cells – ETC, Inc. v. Acuity (Court of Appeals, 12 AP 2811, September 10, 2013) (unpublished)

A fire occurred at plaintiff's manufacturing facility in Eagle River, Wisconsin, on March 27, 2009. Both the building and plaintiff's equipment were heavily damaged. As a result of the fire and what was damaged, plaintiff could not produce any product. As a result, plaintiff could not produce as much product as it did before the fire, and it sustained a loss of business income. Plaintiff had commercial property insurance through defendant. Pursuant to the policy, defendant paid plaintiff $129,216.37 for damage to the building and $181,116.73 for damage to personal property. Plaintiff also submitted a claim to defendant for $211,216.69 in lost business income under the policy's "Business Income and Extra Expense Coverage Form." Defendant paid plaintiff $42,000 toward that claim, but it disputed the amount of plaintiff's business income loss. Defendant retained an accounting firm to evaluate plaintiff's lost business income claim and submitted various reports to plaintiff and, when it was clear the parties could not find common ground, unsuccessfully mediated the claim on April 14, 2010.

Plaintiff filed suit on December 29, 2011. Defendant moved to dismiss as the claim was not filed within the one year statute of limitations and, alternatively, for summary judgment arguing that the policy in question required any legal action to be brought within two years after the date of the loss. The circuit court dismissed plaintiff's contract claims finding that those claims were barred by the two year statute of limitations. Defendant also moved for summary judgment on the grounds that plaintiff failed to make the preliminary showing of bad faith and that the bad faith claim was barred by the two year statute of limitations for intentional torts, which the circuit court also granted on both grounds. Plaintiff appealed.

The court of appeals affirmed, finding that the operative language in the policy focused on the term "inception" and that "the phrase 'inception of the loss' rules out a construction which would postpone the start of the period of limitation until the insured's loss is discovered, or should have been discovered;" thus, because plaintiff filed its claim two years after the fire loss, its contract claims were barred by the statute of limitations. The court of appeals also affirmed the circuit court's holding regarding plaintiff's bad faith claim and

determined that plaintiff both failed to show that defendant acted unreasonably and that the claim was timely filed.

Insurance – Summary Judgment – Coverage – Evidence – Birkholz v. Cruckson (Court of Appeals, 12 AP 2730, September 11, 2013)

Plaintiff's husband, a police officer, was shot and killed in the line of duty by defendant, who was insured. Defendant shot himself dead rather than surrender to police after firing dozens of shots at police inside and outside of his home in March 2011. Because defendant's homeowners' policy excluded coverage for injury or damage "which is expected or intended by the insured," the circuit court granted insurer summary judgment holding that damages from defendant's act of shooting was expected and intended by defendant. Plaintiff appealed arguing that the facts did not establish conclusively that defendant intended the harm caused and that whether the incident was an "accident" should be determined from the point of view of the victim.

The court of appeals affirmed holding that defendant's actions were intentional, not accident, as a matter of law, and they trigger the intentional acts exclusion and the point of view with respect to insurance coverage is "when an insured is seeking coverage, the determination of whether an injury is accidental under a liability insurance policy should be viewed from the standpoint of the insured."

Personal Injury – Summary Judgment – Schools – Immunity – Yang v. Appleton Area School District (Court of Appeals, 13 AP 1281, October 15, 2013)

Plaintiff was injured at school in eighth grade during physical education class while attempting to retrieve a volleyball that had landed on the top of closed retractable bleachers. Plaintiff filed suit against the school and its insurer seeking damages for her injuries. The circuit court granted summary judgment in favor of the school district, concluding that the district is entitled to governmental immunity under Wis. Stat. § 893.80(4). The plaintiff appealed arguing that the danger presented by the retractable bleachers was a known and compelling danger negating immunity.

The court of appeals affirmed noting that none of the exceptions to immunity cited in previous decisions came remotely close to the situation in the present case or that the alleged hazard in this case was so clear and absolute, and so certain to cause injury, as to constitute a known and compelling danger.

Insurance – Personal Injury – Coverage – UIM – Johnson v. Mountain West Farm Bureau Mutual Insurance (Court of Appeals, 13 AP 805, October 15, 2013)

On January 9, 2011, plaintiff was injured in an auto accident in Wisconsin and sought UIM benefits under a Montana insurance policy which contained an extraterritorial clause that increases coverage for an out-of-state accident to provide the minimum amounts and types of coverage required to use that state's roads. The Montana policy provided $25,000/$50,000 in underinsured motorist benefits. The Montana insurer conceded that, under Montana's stacking

rules, plaintiff was entitled to $50,000 and offered that amount, but plaintiff rejected the offer. Plaintiff asserted that subsection (2) of the extraterritorial clause adopted Wisconsin's omnibus statute which mandated that Wisconsin-issued insurance policies contain UIM coverage of at least $100,000 per person and $300,000 per accident. The Montana insurer argued that the extraterritorial clause adopted only Wisconsin's financial responsibility law, Wis. Stat. ch. 344, which did not require underinsured motorist insurance and therefore did not increase the amount of policy coverage. The circuit court interpreted this clause to increase coverage to the minimums required of Wisconsin-based insurance policies by the omnibus statute, Wis. Stat. § 632.32.

The court of appeals reversed concluding that Wis. Stat. ch. 344 was the proper measure of coverage for plaintiff's extraterritorial clause because Wisconsin's omnibus statute only refers to policies delivered or issued in the state of Wisconsin. Because Wis. Stat. ch. 344 only speaks to liability coverage, and not UIM, plaintiff is only afforded $50,000 in coverage.

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All unpublished decisions are marked as unpublished in this Update. The full text of these and other Wisconsin cases can be found on the State Bar's Web site at www.wisbar.org. Further information can be provided by any member of the firm by phone or e-mail (enter first letter of first name, followed by last name, @pjmlaw.com). Questions can be directed to Recent Case Update editor Kevin Fetherston by phone or at kfetherston@pjmlaw.com.

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