PETERSON JOHNSON MURRAY

Recent Case Update

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Insurance – Summary Judgment – Stacking – UIM – Saladin v. Progressive Northern Insurance Company (Court of Appeals, 12 AP 1649, June 4, 2013)

On August 26, 2010, plaintiff was driving his vehicle when he was struck by another vehicle that was traveling at a high rate of speed and in the wrong direction on the interstate. At the time of the accident, plaintiff's vehicle was insured by American Family and his two motorcycles were insured by defendant. Plaintiff made UIM claims against American Family and defendant. Defendant denied coverage based upon its policy's "drive other cars" exclusion, arguing that coverage was foreclosed because plaintiff was not driving a covered vehicle at the time of the accident. The circuit court agreed and granted defendant's motion for summary judgment. The plaintiff appealed. The question presented was whether Wis. Stat. § 632.32(5)(j) and § 632.32(6)(d) permit insurance companies to prohibit "stacking," i.e., adding together UIM coverages, under separate policies, during the two-year period when both statutes were in force.

The court of appeals reversed, concluding that the insurer's "drive other car" exclusion could not prevent stacking UIM coverages under the circumstances. The court stated that, consistent with its recent decision in Belding v. Demoulin, 2013 WI App 26, 346 Wis. 2d 160, 828 N.W.2d 890 (petition for certiorari granted), the only interpretation that "gives effect to all the applicable provisions under the statutory scheme" still holds true regardless of whether the court is addressing UM or UIM coverage.

Insurance – Stacking – UIM – Westra v. State Farm Mutual Automobile Insurance Company (Court of Appeals, 13 AP 48, June 18, 2013)

This case involves a dispute between plaintiff and his automobile insurer over stacking UIM limits. Specifically, plaintiff sought to recover UIM benefits under two additional policies he had with respect to vehicles he owned after he had already received UIM proceeds from three other vehicles involved in the subject accident. Plaintiff's insurer denied those claims. The issue was whether a provision in plaintiff's insurance policies that limited the stacking of UIM

coverage to the coverage limits for three vehicles was permissible under Wisconsin law on July 7, 2011, the date of the underlying accident.

The circuit court determined that Wisconsin Stat. § 631.43(1), which generally prohibits insurance policies from including anti-stacking provisions, and Wis. Stat. § 632.32(6)(d), which was in effect from November 2009 until November 2011 and applied specifically to underinsured motorist coverage allowing insurers to "limit the number of motor vehicles for which coverage limits may be added to 3 vehicles," were irreconcilable. The court therefore applied the more specific statute, § 632.32(6)(d), and concluded that the anti-stacking provision was permissible at the time of the accident, granting defendant's motion for summary judgment. Plaintiff appealed.

The court of appeals affirmed concluding that Wis. Stat. § 632.32(6)(d) plainly and unambiguously allowed insurers to restrict both inter- and intra-policy stacking of UIM coverage to the coverage limits for three vehicles and, thus, defendant's anti-stacking provision is permissible under § 632.32(6)(d). The court continued, even though Wis. Stat. § 631.43(1) prohibits the anti-stacking provision, § 631.43(1) irreconcilably conflicts with § 632.32(6)(d). Section 632.32(6)(d) is the more specific statute, and, the court concluded, it must therefore apply § 632.32(6)(d) instead of § 631.43(1).

Personal Injury – Release – Unilateral Mistake – Burrows v. Progressive Classic Insurance Co. (Court of Appeals, 12 AP 763, June 19, 2013) (unpublished)

Plaintiff was injured in a motor vehicle accident on October 30, 2005, by a vehicle insured by defendant. Defendant's adjuster followed up with plaintiff the day after the accident. Defendant's adjuster explained that she would like to meet with plaintiff to discuss repairs, rental and personal injuries with her and that plaintiff explained that November 1, 2005, would be perfect. Defendant's adjuster met with plaintiff on that day, but plaintiff was still in very poor physical condition at the time. At the meeting, defendant's adjuster offered to pay plaintiff's past medical bills up to $1000, future medical bills incurred within 60 days up to $1000, and $500 for a full settlement of the personal injury claim. Plaintiff accepted the settlement offer and signed the release without reading it.

Days after the meeting, plaintiff retained a law firm to represent her that contacted defendant. Defendant notified the law firm that the matter had been settled. A year later, plaintiff underwent a cervical fusion and the performing doctor submitted a report citing the motor vehicle accident as a substantial factor necessitating the surgery. Judgment was rendered in defendant's favor and plaintiff appealed, contending that the release she signed was unconscionable and therefore unenforceable, and the agreement was based on a mutual mistake.

The court of appeals concluded that the release was not unconscionable because plaintiff made the meeting to discuss settlement, plaintiff should have reviewed the agreement, and that the release was not a mutual mistake because defendant did not have any medical records and the possibility of surgeries and permanent injuries were considered at the time the release was signed.

Personal Injury – Insurance – Interpretation – Exclusions – Schinner v. Gundrum (Wisconsin Supreme Court, 11 AP 564, July 12, 2013)

Defendant hosted an underage drinking party at a shed at defendant's family's business. One of defendant's guests, Cecil, assaulted and seriously injured another guest, plaintiff. Defendant knew that Cecil had a tendency to become belligerent when intoxicated, but permitted him to drink anyway. Plaintiff sued defendant and his insurer to secure damages for his injuries. The insurer disputed coverage and asserted that it had no duty to defend and indemnify defendant because his actions as a party host were intentional and, thus, there was no "accident" and no "occurrence" and, even if there was an "occurrence" under the applicable insurance policy, coverage would be excluded for bodily injury arising out of a non-insured location.

The circuit court granted the insurer summary judgment determining that there was no accident when someone intentionally procured alcohol for an underage drinking party and even if defendant's actions were an accident, that plaintiff suffered bodily injury at an uninsured location. The court of appeals reversed on both issues, concluding that there was an occurrence because plaintiff's assault was an accident when viewed from the standpoint of either the injured person or the insured and that the non-insured location exclusion did not apply because plaintiff's injury did not arise from some "condition" of that premises.

The Wisconsin Supreme Court framed the issue as whether plaintiff's injury resulted from an occurrence as defined by the insurer's homeowners' insurance policy, thus triggering coverage for defendant; and, if so, whether that coverage was excluded because the injury "arose out of" an uninsured location that was not "used in connection with" an insured premises under the homeowner's policy. The Wisconsin Supreme Court reversed the court of appeals, holding that defendant's action in setting up an isolated shed for a drinking party, procuring alcohol and expecting others to bring alcohol, inviting many underage guests and encouraging them to drink including a guest that is known to become belligerent when intoxicated constitutes intentional acts that violate the law. Viewed from the standpoint of a reasonable insured, defendant's intentional acts created a direct risk of harm resulting in bodily injury, notwithstanding his lack of intent that a specific injury occur and, thus, plaintiff's bodily injury was not caused by an "occurrence" within the meaning of the policy and the insurer is not obligated to provide insurance coverage for defendant. Moreover, even if there was an occurrence under the insurer's homeowner's policy, coverage is excluded because the injury arose out of the use of an isolated shed for an underage drinking party on uninsured premises; thus failing to trigger coverage under the homeowner's policy.

Insurance – Reducing Clause – UIM – Botdorf v. Krebsbach (Court of Appeals, 12 AP 2041, July 30, 2013)

On October 9, 2009, plaintiffs renewed an automobile insurance policy through its insurer, including UIM coverage and a reducing clause. Earlier that year, legislation was enacted which, among other things, prohibited the inclusion of reducing clauses in "motor vehicle insurance policies issued or renewed" on or after November 1, 2009. On November 10, 2009, shortly after the new law took effect, the plaintiffs contacted their insurer to request insurance for their newly acquired vehicle. The insurer processed a policy endorsement for the existing policy and informed the plaintiffs that their vehicle would have coverage effective November 11, 2009.

Plaintiffs' insurer then sent plaintiffs a document entitled "Amended Auto Policy Declarations" showing coverage for the new vehicle.

On November 28, 2009, while driving the newly insured vehicle, plaintiffs were involved in an accident. Plaintiffs' insurer denied their UIM claim. Plaintiffs' insurer moved for summary judgment asserting that the reducing clause foreclosed plaintiffs' claim for UIM coverage. The circuit court granted summary judgment to plaintiffs' insurer, reasoning that the addition of the vehicle to the policy was merely an endorsement to the original policy because it did not change the underlying merits of the original policy, and therefore the endorsement itself did not amount to a new policy issued or renewed after November 1, 2009. The plaintiffs appealed.

The court of appeals reversed holding that the endorsement their insurer issued to cover their vehicle on November 11, 2009, was a "polic[y] issued" after November 1, 2009, and that, therefore, Wis. Stat. § 632.32(6)(g) acts to bar the reducing clause included in the policy that the circuit court relied upon when determining that the plaintiffs were not entitled to UIM coverage. The court supported its decision by noting that certainly, by prohibiting insurance companies from including reducing clauses in their policies, the legislature, in passing 2009 Wisconsin Act 28, § 3171, meant to expand that coverage, and when reasonable, the court should broadly construe the statutes to ensure that purpose is achieved.

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Peterson, Johnson & Murray, S.C.

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.

Milwaukee
Suite 500
788 N. Jefferson St.
Milwaukee, WI 53202
(414)278-8800

Madison
Ninth Floor
3 South Pinckney
Madison, WI 53703
(608)256-5220

Kenosha
Suite 102A
10411 Corporate Drive
Pleasant Prairie, WI 53158
(262)997-6300

Manitowoc
Suite 206
4400 Calumet Avenue
Manitowoc, WI 54221
(920)684-4720

Chicago
200 West Adams St.
Suite 2125
Chicago, Illinois 60606
(312)782-7150