Wisconsin Insurance Law Alert

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News

Wisconsin Legislature Plays Ping-Pong With Auto Insurance Laws

by Timothy Barber

Two years ago, the Wisconsin Legislature made several significant changes to the laws governing automobile insurance policies as part of the 2009-10 bi-annual budget bill [known as "Truth in Auto Insurance Law"]. These changes were motivated, in part, to reverse the changes to the law that were enacted in the 1995 "Tort Reform" legislation. Now, the legislature has again turned the tables and enacted 2011 Wis. Act 14, which basically undoes nearly all of the changes made to auto insurance law in the 2009-10 budget bill. Confused yet?

Changes to Mandatory Minimum Levels of Insurance Coverage

Before 2009, Wisconsin law did not require drivers to have automobile insurance, and instead required drivers to possess "proof of financial responsibility" in the event of an accident—although an insurance policy with certain limits qualified as proof of "financial responsibility." The 2009 Truth in Auto Insurance Law changed this and required that all Wisconsin drivers possess automobile liability insurance with certain minimum levels of coverage. The 2009 law increased the mandatory minimum insurance policy limits required to provide "proof of financial responsibility" for operating a motor vehicle from $25,000 to $100,000 per person and from $50,000 to $300,000 per occurrence. It also increased mandatory property damage coverage in automobile liability polices from $10,000 to $25,000 and raised the mandatory minimum coverage for medical payments from $1000 to $10,000.

Under 2011 Wis. Act. 14, these increased mandatory limits are reduced back to the levels required before the Truth in Auto Insurance Law was passed. However, the 2011 legislation retains the requirement that all drivers possess automobile liability insurance. Therefore, the minimum level of coverage required is now $25,000 per person; $50,000 per accident; $10,000 for property damage and $1,000 for medical payments.

Uninsured Motorist Coverage

Before 2009, insurance policies were required to contain uninsured motorist coverage with limits of $25,000 per accident and $50,000 per occurrence. The Truth in Auto Insurance Law raised those minimums to $100,000 per person and $300,000 per occurrence. The 2009 law also clarified that an "uninsured motorist" included a driver that caused an accident and fled the scene but did not actually impact the injured person's vehicle—a "miss-and-run" accident or "phantom vehicle."

The 2011 law reduces the minimum levels of required uninsured motorist coverage to their pre-2009 levels. It also modifies the definition of "uninsured motorist" to exclude so-called "phantom vehicles" that do not make physical contact with the insured's vehicle. Uninsured motorist coverage is available for damages caused by so-called "phantom vehicles" only if: 1) an independent witness verifies the existence of the vehicle, 2) the insured notifies police of the accident within 72 hours and 3) within 30 days the insured files a statement, under oath, with his insurer attesting to the accident. Finally, the new law provides that government vehicles are not included in the definition of "uninsured motor vehicle."

Underinsured Motorist Coverage

The 2009 Truth in Auto Insurance Law mandated that every policy of automobile insurance contain underinsured motorist coverage with limits of $100,000 per person and $300,000 per occurrence. 2011 Wis. Act 14 abolishes the requirement that insurance policies provide mandatory underinsured motorist coverage. Insurers now need to provide only a written offer of coverage of $50,000 per person and $100,000 per accident.

The 2009 legislation also required insurers to offer all customers supplemental underinsured and uninsured motorist coverage in all umbrella policies and authorized a court to "reform" a policy that failed to offer this coverage. The new 2011 law removes the requirement that insurers provide a written offer of supplemental underinsured and uninsured motorist coverage when writing umbrella policies. Umbrella policies can be written without this supplemental coverage.

The 2011 law also changes the definition of what constitutes an "underinsured motor vehicle." Prior to the 2009 legislation, insurers could offer underinsured motorist coverage that defined an "underinsured motor vehicle" as 1) a motor vehicle with policy limits less than what was necessary to compensate the injured driver or 2) a motor vehicle with policy limits less than the limits of the injured driver's policy limits. Most insurers adopted the second definition, which courts described as providing a "fixed, pre-determined amount of coverage," and had the effect of reducing underinsured motorist coverage available by any monies paid by the negligent driver. In other words, if an insured purchased a policy with underinsured motorist limits of $100,000 and a negligent driver injured him but had $50,000 in coverage available, the insured would have only $50,000 of underinsured motorist coverage available.

The 2009 Truth in Auto Insurance Law prohibited insurers from using the second definition and instead required all policies to utilize the first definition, such that a driver's underinsured motorist coverage would be triggered anytime the at-fault driver's limits were less than what was necessary to cover his injuries, and the insured would be entitled to the full limit of underinsured motorist coverage listed in the policy. The 2011 law allows insurers to utilize either definition.

Stacking and Reducing Clauses

The 2009 Truth in Auto Insurance Law made it illegal for insurers to include provisions in their policies that reduced the amount of coverage by any amount the insured received from other sources to cover his or her injuries. Once the 2011 law becomes effective, insurers can again include clauses in their policies that reduce the amount of coverage available to an insured by the amounts paid by a negligent driver, monies paid under worker's compensation law, and any disability payments the insured received.

The 2009 legislation also made it unlawful for insurance companies to prohibit "stacking" of insurance coverage when an insured purchased multiple policies that covered the same risk. Under the new 2011 law, insurers can once again prohibit insureds from "stacking" the coverage limits of multiple policies.

Commercial Liability Policies

The new law defines "commercial liability policy" to mean a policy that is intended principally to provide primary coverage for an insured's general liability arising out of its business or other commercial activities but that includes coverage for the insured's liability arising out of the ownership, maintenance, or use of a motor vehicle as one component of the policy. Under the new law, "commercial liability policies" are not subject to the same required mandatory coverage and limits provisions as are personal liability policies.

Effective Dates

The changes made under the 2009 Truth In Auto Insurance Law were effective as to policies issued or renewed on or after November 1, 2009. The changes made in the 2011 legislation are effective as to policies issued or renewed on or after November 1, 2011.

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Case Summaries

Update: In our last issue, we discussed the Court of Appeals' recent decision in *Maxwell v. Hartford Union High School District*, 2010 WI App 128, 329 Wis. 2d 654, 791 N.W.2d 195. In *Maxwell*, the court adopted a new rule that when an insurer exclusively controls the defense of a lawsuit without expressly reserving its rights, obtaining a result "to the detriment and prejudice of the insured," the insurer is barred from later enforcing any coverage defenses. This spring, the Wisconsin Supreme Court accepted the insurer's Petition for Review. The parties are currently briefing the issues.

Wis. Stat. § 118.51; Schools; Student Transfers: Wis. Stat. § 118.51(2) allows any public school student to attend a nonresident district under conditions enumerated in statute; Wis. Stat. § 118.51(6) does not provide for a percentage limit on resident student transfers after the 2005-06 school year; school districts cannot deny applications on the grounds of undue financial burden. *School Dist. of Stockbridge v. Evers*, 2010 WI App 144 (Sept. 29, 2010).

Governmental Immunity; Agency; Subcontractors: Governmental immunity applies to subcontractor working on city construction project if subcontractor is agent of city; and city retains ultimate responsibility for project. *Bronfeld v. Pember Cos., Inc.*, 2010 WI App 150 (Oct. 5, 2010).

Bad Faith; Coverage: Pollution exclusion did not exclude coverage for damage caused by accumulation of bat guano; bat guano was not the type of "waste" contemplated in the pollution exclusion. *Hirschhorn v. Auto-Owners Ins. Co.*, 2010 WI App 154 (Oct. 19, 2010), pet. rev. granted Mar. 15, 2011.

Coverage; Surface Water; Concurrent Causes: Heavy rains that washed away a home foundation were excluded under a "surface water" damage exclusion; under an "anti-concurrent cause" clause, defective construction methods did not render the damage a covered loss because the covered risk (defective construction methods) would not have been actionable without the excluded risk (surface water damage). *American Family Mut. Ins. Co. v. Schmitz*, 2010 WI App 157 (Oct. 20, 2010).

Coverage; Negligent Misrepresentation: In a consolidated appeal of 10 cases denying insurance coverage to the Archdiocese of Milwaukee stemming from allegations of child abuse by former priests, allegations in plaintiffs' complaints, including negligently misrepresenting that children were safe in the presence of priests, were intentional acts rather than accidental occurrences, and excluded from coverage. *John Doe 1 v. Archdiocese of Milwaukee,* 2010 WI App 164 (Nov. 23, 2010).

Failure to Supervise Inmate; Government Immunity: Probation and parole officers were immune from suit for alleged negligent failure to supervise a jail inmate who shot a victim while on work release; complaint did not allege a violation of ministerial duty, and therefore failed to state a claim; when a complaint fails to allege ministerial duty or other exception to immunity, plaintiff's remedy is to seek to amend the complaint. *Broome v. State Dept. of Corrections*, 2010 WI App 176 (Nov. 24, 2010).

Double Damages; Forest Fires: There is no presumption in favor of double damages under Wis. Stat. § 26.21, which authorizes property owners to recover double the damages actually suffered for loss sustained in forest fires; the statute is permissive, not mandatory. *Heritage Farms v. Market Ins.*, 2011 WI App 12 (Dec. 2, 2010).

Covered Insured: Contrary to affidavit submitted by an English professor, the definition of "insured" in a homeowner's policy was not ambiguous; policy excluded coverage for injuries to insured, whether or not insured was a resident of the home. *Progressive Northern Ins. Co. v. Olson*, 2011 WI App 16 (Dec. 7, 2010).

Inmates; Due Process: Confidential informant's testimony was sufficient to support finding that inmate incited a riot; prison's failure to provide surveillance video footage to inmate in a disciplinary hearing did not violate the inmate's due process right to a fundamentally fair hearing, as the video footage added nothing of evidentiary value. *Jackson v. Buchler*, 2010 WI 135 (Dec. 14, 2010).

Economic Waste; Negligent Construction: When faced with multiple measures of damages following negligent construction of a building, a court must determine whether a proposed replacement or repair would result in unreasonable destruction of property, i.e. "economic waste;" the economic waste rule does not require defendants to present evidence of the property's diminished value. *Champion Cos. v. Stafford Dev.*, 2011 WI App 8 (Dec. 22, 2010).

Coverage; Intentional Acts; Mental Capacity: Intentional acts exclusion and mental capacity clause excluded coverage when insured shot a victim with intent to kill, even though he lacked the mental capacity to govern his conduct; insured's mother, also an insured, had no reasonable expectation of coverage because the exclusions apply to all insureds if the intentional act was committed by "any insured." *Wright v. Allstate Cas. Co.*, 2011 WI App 37 (Feb. 1, 2011).

Contracts; Statute of Repose; Statute of Limitations: Wisconsin's 10-year statute of repose does not apply if parties have contracted otherwise; an easement created an exception to the statute of repose when a school district failed to maintain a tunnel within the easement; six-year statute of limitations for contract claims did not bar the claim because the district breached the easement anew each day it failed to maintain the tunnel. *Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 35 (Feb. 1, 2011).

Dog Bite Statute; Public Policy: Public policy does not preclude strict liability under Wis. Stat. § 174.02 for injuries resulting when a child wakes a sleeping dog; insured was an owner under the statute because she exercised dominion over the dog, sheltered the dog, provided water, and was generally responsible for the dog's well-being at the time the child was bitten. *Erdmann v. Progressive Northern Ins. Co.*, 2011 WI App 33 (Feb. 8, 2011).

Schools; Student Records: When a party seeks access to confidential pupil records under Wis. Stat. § 118.125(2)(f) to impeach a witness "who has testified in the action," the circuit court must determine the relevance of the records to the witness's testimony; a witness who has been deposed has "testified in the action" under the statute. *Anderson v. Northwood Sch. Dist.*, 2011 WI App 31 (Feb. 8, 2011).

Civil Procedure: Courts have discretionary authority under Wis. Stat. § 806.07(1)(h) to vacate an order that was erroneously signed and entered, even if the motion to vacate was filed over a year later. *Werner v. Hendree*, 2011 WI 10 (Feb. 16, 2011).

Employment; Vocational Rehabilitation Benefits: Employee who suffered work-related injury, returned to work with permanent work restrictions, and was subsequently fired for cause (sleeping on the job) was entitled to vocational rehabilitation benefits under Wis. Stat. § 102.61. *Oshkosh Corp. v. LIRC*, 2011 WI App 42 (Feb. 23, 2011).

Accord and Satisfaction; Interest on Judgment: Deposit of check from insurer for policy limits did not create an agreement barring plaintiff's remaining claims based on accord and satisfaction; insurer's failure to clarify plaintiff's ambiguous statutory settlement offer resulted in a valid offer of settlement, entitling plaintiff to double costs and interest on the judgment under Wis. Stat. § 807.01. *Kubicheck v. Kotecki*, 2011 WI App 32 (Feb. 23, 2011).

Personal Injury; Ownership of Premises: Tavern owner had a duty to protect members of the public who are "on the premises," including a parking lot used and maintained by the tavern but not owned by the tavern, because a tavern owner has superior knowledge of the dangers posed by the place and character of the business. *Flynn v. Audra's Corp.*, 2011 WI App 39 (Feb. 23, 2011).

Uninsured Motorist Coverage; Executive Umbrella Policy: Executive umbrella policy was contextually ambiguous when "follow form" language could be reasonably read to provide UM coverage to spouse of insured, and policy did not specifically exclude UM coverage; therefore, spouse of insured was entitled to UM benefits. *Wadzinski v. Auto-Owners Ins. Co.*, 2011 WI App 47 (Mar. 1, 2011).

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