

Stone v. Acuity

Insurers Breathe a Collective Sigh of Relief Regarding Underinsured Motorist Coverage Limits in Umbrella Policies

By: Ena Seiler

The Wisconsin Supreme Court recently held that when an insurer fails to provide the notice of the availability of UIM coverage as part of an umbrella insurance policy, the appropriate remedy is to read in the level of coverage necessary for the policy to conform to the UIM limits contained in Wis. Stat. § 632.32(4m)(d), specifically \$50,000 per person and \$100,000 per accident.

For several years the insurance industry and its counsel struggled with the implications of the *Rebernick v. Wausau Gen. Ins. Co.* decision. In *Rebernick*, the supreme court decided that an insurer was required to provide notice to an insured of the availability of underinsured (UIM) coverage in an umbrella policy. If the insurer did not provide the proper notice, the umbrella policy was reformed to include UIM coverage. However, the *Rebernick* court, while announcing that the umbrella policy must be reformed to include UIM coverage, failed to address the very important question of what the UIM limits would be when these policies were reformed.

Insurers and their counsel speculated that there were three possible options for the reformed UIM limits: (1) statutory minimums of \$50,000/\$100,000; (2) what the insured would have purchased had he or she received proper notice (the intent of the insured); or (3) the underlying umbrella policy limits, which are generally \$1 million or more. Insurers were in the unenviable position of potentially paying huge UIM claims because of the inherently large policy limits of umbrella policies. In the very recent case, *Stone v. Acuity*, the court answered this question; it held that an umbrella policy, where proper *Rebernick* notice was not provided to the insured, is reformed as a matter of law to provide the statutory minimum UIM coverage of \$50,000 per person and \$100,000 per accident.

In *Stone*, Acuity provided \$300,000 of automobile liability insurance, including \$300,000 of UIM coverage, and a \$1 million umbrella policy to the Stones. Acuity originally issued the Stones' auto insurance and personal umbrella endorsement in 1993. Beginning in 1996, Acuity sent out notices of the availability of UIM coverage

on auto renewal policies in order to comply with the newly enacted notice requirements of Wis. Stat. § 632.32(4m). However, at that time Acuity did not offer UIM coverage for umbrella policies. In 1999 Acuity began offering UIM coverage for its personal umbrella policies. It then provided notice of the availability of such coverage to new applicants only; it did not provide notice of the availability of UIM coverage to existing personal umbrella policyholders, including the Stones. Thus, the Stones never received notice that UIM coverage was available as part of their umbrella insurance.

Mr. Stone was seriously injured in an auto accident and received \$510,000 from the tortfeasor and her insurer. Acuity reserved its right to appeal the denial of its summary judgment motion and entered into a stipulation with Stone that it would pay \$500,000 if UIM coverage was found on appeal. This stipulation limited Acuity's exposure under the Stones' \$1 million umbrella policy.

The court first determined that Acuity's 1996 notice of the availability of UIM in its auto policies was not sufficient to notify insureds that UIM umbrella coverage would become available in 1999. Therefore, the notice sent out for the Stones' personal automobile policy renewal in 1996 failed to satisfy the notice requirements of Wis. Stat. § 632.32(4m). The court ruled that the stipulation providing for \$500,000 of UIM coverage was binding on Acuity.

The court then addressed the general question of an insured's remedy when an insurer violates the notice provision, the all-important question that was left unanswered by *Rebernick*. The court decided that when an insurer fails to provide notice of the availability of umbrella UIM coverage, the policy is reformed to provide \$50,000 per person and \$100,000 per occurrence. *Stone v. Acuity* (April 11, 2008).

Bottom Line:

The *Stone* decision is the best possible outcome for the insurance industry given the existence of *Rebernick*. However, another UIM case summarized in this issue, *Nault v. West Bend*, suggests that the "appropriate remedy" may be revisited again in the near future because the law as applied provides virtually no UIM umbrella coverage when one considers the catastrophic protection contemplated by umbrella policies.

Insurance companies should provide notice of availability of UIM coverage to current and future umbrella policyholders. However, insurers should also consider lobbying the legislature to codify both the UIM notice requirements and UIM minimums for umbrella policies. The government relations group at Axley Brynelson is always available to assist you with all of your lobbying needs. ■

Employment Law: Retiree was entitled to receive retirement health benefits at city's expense where ordinance, which was incorporated into employee handbook, provided for the same. *Loth v. City of Milwaukee* (Ct. App. Dec. 27, 2007).

Landlord/Tenant: Landlords were not unjustly enriched by the structures tenants erected at their own expense during tenancy because the structures were not useful to landlords and landlords did not accept or retain any purported benefit. *Ludyjan v. Cont'l Cas. Co.* (Ct. App. Feb. 13, 2008).

Governmental Immunity: Cheerleader's negligence claim against school district was barred by Wis. Stat. § 893.80(4) because no exceptions to the general rule of governmental immunity existed, but her claim against spotter was not barred by Wis. Stat. § 895.545(4m) because cheerleader and spotter were not participating in a sport between opponents. *Noffke ex rel. Swenson v. Bakke* (Ct. App. Feb. 14, 2008), petition for review granted.

Special Assessments: Special assessments levied by city after completing public improvement work complied with procedural requirements of Wis. Stat. § 66.0703, conferred special benefits on commercial property owners, and were reasonably apportioned. *Park Ave. Plaza v. City of Mequon* (Ct. App. Feb. 20, 2008).

Subrogation: State agency created to provide property insurance for local governments contractually waived its subrogation claim against subcontractor for fire damage caused by subcontractor's employee, and subrogation-right waiver provision in insurance contract did not limit waiver to contract price. *Wisconsin State Local Gov't Ins. Fund v. Thomas Mason Co.* (Ct. App. Feb. 20, 2008).

Worker's Compensation: LIRC's decision that held an employer liable based on a theory not raised before administrative law judge violated employer's due process rights. *Waste Mgmt v. LIRC* (Ct. App. Feb. 26, 2008).

Zoning and Planning: Town had authority under Wis. Stat. § 236.45(2) to impose temporary town-wide prohibition on land division while developing Town's comprehensive plan. *Wisconsin Realtors Assoc., Inc. v. Town of West Point* (Ct. App. Feb. 28, 2008).

Medical Malpractice: Any negligence on the part of a nurse employed by a “health care provider,” as defined under Wis. Stat. Ch. 655, is covered by the health care provider’s insurance. *Rogers v. Saunders* (Ct. App. March 5, 2008).

Asbestos Testing: Federal and state standards require that an asbestos inspection company must determine the asbestos content of each layer of multi-layered building materials; the inspection company may not average the asbestos content of all layers. *State v. Harenda Enters. Inc.* (March 13, 2008).

Insurance Coverage: A medical supplement policy agreeing to pay expenses for all “further expenses that would have been covered by Medicare Part A” was required to pay the full amount charged by the hospital, not the lower amount that Medicare would have paid. *Froedtert Mem’l Lutheran Hosp. v. Nat’l States Ins. Co.* (Ct. App. March 18, 2008).

Liability for Underage Drinking: As a matter of public policy, a claim for common-law negligence cannot be maintained against social hosts who were aware that minors on their property were consuming alcohol, but who did not provide the alcohol, when an underage guest later caused an alcohol-related car accident. *Nichols v. Progressive N. Ins. Co.* (March 25, 2008).

Employment Law: A terminated employee’s age discrimination claim was not barred by the “ministerial exception” of the First Amendment; the teacher’s position was not ministerial in nature. *Coulee Catholic Sch. v. LIRC* (Ct. App. April 17, 2008).

Products Liability: A bystander, just like a user or consumer, must demonstrate that a product is defective based on application of the “consumer contemplation test” which provides that a product is unreasonably dangerous only where it is dangerous beyond contemplation of the consumer who purchased the product. *Horst v. Deere & Co.* (Ct. App. April 30, 2008).

Antitrust/Implied Repeal Doctrine: Twenty-four taverns that agreed to curb drink specials after intense pressure from the city of Madison benefitted from immunity provided to the city based on the “implied repeal doctrine,” which provides that municipalities [and in this case the immunity was extended to taverns as well] may take action that is anticompetitive in certain situations and that action is immune from antitrust enforcement under state law. *Eichenseer v. Madison-Dane County Tavern League* (May 6, 2008).

ATCP Violation: Wis. Stat. § 100.20, which provides double damages and actual attorney’s fees for violations of Wis. Admin. Code ch. ATCP 110, the Home Improvement Practices Act (“HIPA”), applies to the entire damage award when there is no clear way to apportion damages; if a party requests apportionment, in order to apportion damages in lawsuits containing HIPA claims, the party requesting apportionment must meet the burden of showing the damages can be separated; the insurer was liable for the double damage and attorney’s fees awards as all damages flowed from the property damage; the Economic Loss Doctrine does not apply to statutory claims; and an employee may be held personally liable for HIPA violations. *Stuart v. Weisflog’s Showroom Gallery* (March 28, 2008).

Underinsured Motorist Coverage: Based on the recent supreme court decision, *Stone v. Acuity*, the insurer was required to provide UIM coverage in an umbrella policy and the failure to offer such coverage and provide such notice resulted in the policy being reformed to provide UIM limits of \$50,000/\$100,000. *Nault v. West Bend Mut. Ins. Co.* (Ct. App. May 20, 2008).

Made Whole Doctrine: The Made Whole Doctrine does not apply when an insurer fully satisfies its obligations under an insurance contract, has provided its insureds with the opportunity to settle their claim with the tortfeasor and the tortfeasor’s insurer, the pool of settlement funds available to the insureds exceeds the total claims of both the insureds and the insurer, and the insureds settle their claim, even though the insureds’ settlement, together with the insurer’s policy payments, does not satisfy the insureds’ total claim. *Muller v. Society Ins.* (May 30, 2008).

Joint and Several Liability: Conceded liability for procuring alcohol for an underage drinker who causes injury by driving while intoxicated cannot constitute a “concerted action” under Wis. Stat. § 895.045(2), when the common plan to purchase alcohol is not also a “common scheme or plan” to engage in the conduct that caused the injury, in this case driving while intoxicated. *Richards v. Badger Mut. Ins. Co.* (June 3, 2008).

Open and Obvious Hazard: Hotel with a waterpark that had a Lily Pad Walk, where the “danger” of falling into the water or the “danger” of crossing by hands on ropes was the purpose of the Lily Pad Walk, had no duty to provide signs warning of the dangerous nature of this open and obvious hazard and, therefore, was not liable when the plaintiff fell into the water and injured his back. *Pagel v. Marcus Corp. d/b/a Hilton Milwaukee City Ctr.* (Ct. App. June 3, 2008).

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