

Open Records Law: The Buck Stops with Municipalities!

By Jodi Yin

In response to the thousands of requests for public records that are made in Wisconsin each year, many of the state's municipalities regularly produce documents in hard copy and/or in PDF format. A recent appellate court decision, *WIREdata, Inc. v. Village of Sussex and Village of Sussex Custodian*, warns municipalities against this practice when responding to a request for raw electronic data. This decision makes it clear that municipalities may be violating the state's open records law when responding to open records requests with electronic data in PDF format. Furthermore, when it comes to a violation of Wisconsin's open records law, the buck stops with the municipalities.

The plaintiffs ("WIREdata") in *WIREdata, Inc. v. Village of Sussex and Village of Sussex Custodian* filed open records requests with three municipalities in April of 2001, seeking detailed real estate assessment records in the same format created and maintained by the municipalities' independent contractor assessors. In each case, the municipality's assessor inputted raw data regarding property appraisals into a computer software program, called Market Drive, which was developed and copyrighted by Assessment Technologies of WI, LLC. Each municipality had licensing privileges for read-only access of the Market Drive software.

In response to WIREdata's open records requests, all three municipalities referred WIREdata to the assessor and/or the private computer programming firm hired by Assessment Technologies to program the Market Drive software. WIREdata was then told that accessing the requested information would be time-consuming, difficult, and costly. Additional information was requested from WIREdata before the records could be produced.

Less than two months after submitting its initial open records requests, WIREdata filed three separate

mandamus actions against the municipalities, appraisers, and software developer. Each of the trial courts' decisions was appealed. At issue on appeal was: (1) whether the municipalities and their independent contractor assessors were responsible statutory authorities under the open records law; (2) whether WIREdata submitted valid open records requests; (3) whether the municipalities denied WIREdata's open records requests; (4) whether the municipalities complied with the open records law by providing the records in PDF format; and (5) whether the imposition of costs and attorney's fees on the assessor and software developer was appropriate.

The court ultimately held that "where the open records law is concerned, the buck stops with the municipalities." The municipalities--not the independent contractors--are the responsible authorities under Wisconsin's open records law, and each municipality violated the law when it delayed and, effectively, denied WIREdata's valid requests for access to "source material" contained on these databases. The court explained that source material includes data as it is inputted by the assessors and stored in the database, regardless of its physical form or characteristics. PDF files did not provide this source material because assessors did not input data into or maintain assessments records in PDF. Instead, the municipalities should have produced the raw data used by assessors for WIREdata's inspection and copying. The municipalities' failure to provide this source material in the proper format subjected each to attorney's fees and costs.

The *WIREdata* decision serves as a cautionary tale for all of Wisconsin's municipalities. While not every open records request will require production of raw electronic data, the *WIREdata* decision reveals that municipalities must be prepared to effectively and efficiently respond to open records requests by producing raw data that resembles the information the public might have accessed prior to the dawn of the computer era. This requires municipalities to structure its contracts and licensing agreements with independent contractors to allow for quick access of public records in a wide range of databases.



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Wisconsin Insurance Law Alert

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Recent Wisconsin Appellate Decisions

by Lori Lubinsky, Ena Seiler & Jodi Yin

Timely Answer to Complaint: Section 802.06, Stats., was revised to require that an answer to a complaint, cross-claim, or reply to a counterclaim be served within 20 days after service. However, if a defendant in the action is an insurance company, the state, an officer, employee, agent, or agency of the state, or if any cause of action raised in the original pleading, cross-claim, or counterclaim is “founded in tort,” an answer or reply shall be served within 45 days. Wis. Stats. § 802.06(1).

UIM Coverage; Umbrella Policy: When an insurer fails to give proper notice of the availability of UIM coverage in an umbrella policy as required by sec. 632.32(4m), Stats., whether the insurer must provide retroactive UIM coverage is a question of fact depending on whether the insured would have purchased the coverage had it known of the availability of UIM. The court did not reach the issue of what the UIM limits would be because the parties had previously stipulated to an amount of UIM coverage. *Stone v. Acuity Ins. Co.* (Ct. App. Aug. 15, 2006).

Unlawful Sale of Insurance: Assisted living service contracts qualified as insurance as defined in sec. 600.03(25), Stats.; the sale of those contracts by a business uncertified to sell insurance violated sec. 610.11, Stats. *Homeward Bound Servs., Inc. v. Office of the Ins. Comm’r* (Ct. App. Sept. 7, 2006).

Insurance Coverage: Volunteer using her own vehicle to deliver religious statues on behalf of a church organization was covered by a liability insurance certificate issued to the Archdiocese. *Heikken v. United Servs. Auto. Ass’n* (Ct. App. Sept. 6, 2006).

ATCP Violation: Section. 100.20, Stats, which provides double damages and actual attorney’s fees for violations of Wis. Admin. Code ch. ATCP 110, the Home Improvement Practices Act, applies to the entire damage award even when a portion of the claimed damages is attributable to wrongdoing separate from the ATCP violation. *Stuart v. Weisflog’s Showroom Gallery* (Ct. App. May 3, 2006), petition for review granted.

CGL Coverage; ATCP Violation: CGL policy provides coverage for misrepresentations made by contractor in

violation of ATCP 110 because intent is not an element of the statutory misrepresentation; therefore, the misrepresentation constitutes an accident triggering coverage. The “your product” exclusion did not apply as the claimed misrepresentation was for the design; the “your work” exclusion did not apply as the insurer failed to specifically exclude “code misrepresentations,” which is separate and distinct from other forms of misrepresentation. The insurer was liable for the double damage award and the attorney’s fees as all damages flowed from the property damage. *Stuart v. Weisflog’s Showroom Gallery* (Ct. App. Aug. 23, 2006), petition for review granted.

UIM: Court invalidated a reducing clause in policy because insured was misled by the UIM definition; nothing in the UIM definition, policy index, or declarations page indicated that the reducing clause existed. *Gresens v. State Farm Mut. Auto. Ins. Co.* (Ct. App. Oct. 10, 2006).

Medical Malpractice: Patient’s Compensation Fund was not required to pay until a hospital’s primary and umbrella policies covering an unlicensed first year medical resident were exhausted; non-economic damage caps did not apply under the wrongful death statute or the medical malpractice statute because the student was not a health care provider under chap. 655, Stats. *Estate of Hegarty v. Beauchaine* (Ct. App. Oct. 10, 2006).

UM: Policy excluding UM coverage for injuries caused by vehicles designed primarily for off-road use did not provide coverage for an insured acting as a flagman at a demolition derby who was injured by an uninsured vehicle that was refitted to participate in demolition derbys and was no longer driven on public roadways. *Schleusner v. IMT Ins. Co.* (Ct. App. Oct. 17, 2006).

Governmental Immunity: School District was not immune from suit because the known and compelling danger exception to governmental immunity was construed to apply when a student was injured while using “fatal vision goggles,” which simulate the effects of intoxication, even though the teacher had used the goggles for several years without accident or injury. *Voss v. Elkhorn Sch. Dist.* (Ct. App. Oct. 18, 2006), petition for review filed.

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 sec. 895.045(2), Stats., when the common plan to purchase alcohol is not also a “common scheme

or plan” to engage in the conduct that caused the injury. *Richards v. Badger Mut. Ins. Co.* (Ct. App. Nov. 14, 2006)

Economic Loss Doctrine. Under the “other property” exception to the economic loss doctrine, summary judgment was not appropriate to dismiss tort claims brought by the purchaser of a contaminated defoamer product where disputed issues of material fact remained as to whether the defoamer or the contaminant were components of the end dairy product within the meaning of the “integrated system” and “disappointed expectations” tests. *Foremost Farms USA Coop. v. Performance Process, Inc.* (Ct. App. Nov. 16, 2006)

Coverage. Coverage under two separate automobile liability policies was denied for car driven by named insured’s daughter because the car did not meet the definition of “your insured car” under one policy and because the known loss doctrine precluded coverage under the other policy. *American Fam. Mut. Ins. Co. v. Bateman* (Ct. App. Nov. 22, 2006).

Excess Policy: Optional excess policy did not include excess automobile liability insurance because the policy language mentioned only a home and a boat, and there was no premium paid for automobile liability coverage. *Borman v. Sohns* (Ct. App. Dec. 5, 2006).

Economic Loss Doctrine: The economic loss doctrine does not apply to bar a claim brought under sec. 134.01, Stats., for conspiracy to maliciously injure a person in his reputation, trade, profession or business. *Brew City Redev. Group, LLC v. The Ferchill Group* (Dec. 13, 2006).

Employment: When one temporary worker was injured by another temporary worker from a different agency, Worker’s Compensation Act precluded suit against injured employee’s own agency and the employer, but did not preclude injured employee from bringing suit against the other temporary agency. *Warr v. QPS Cos. Inc.* (Ct. App. Dec. 19, 2006).

Multiple Policies: Insured was not entitled to collect two policy limits because sec. 631.43 (1), Stats., which limits the liability of the insurer to its proportionate share of the actual loss when the insured has other insurance on the same property, modifies sec. 632.05 (2), Wis. Stats., which provides for payment of policy limits whenever there is a total loss through no fault of the insured. *Wegner v. West Bend Mut. Ins. Co.* (Ct. App. Dec. 19, 2006).

Open Records: Public employer was not required to disclose the contents of closed session meetings during discovery in litigation involving non-renewal of school district employee. *Sands v. Whitnall School Dist.* (Ct. App. Dec. 27, 2006).

Liability for Underage Drinking: Plaintiffs injured in an automobile accident with an intoxicated minor stated a common law negligence claim against defendants who allowed an underage drinking party on their property even though they did not provide alcohol to the minors. *Nichols v. Progressive N. Ins. Co.* (Ct. App. Jan. 25, 2007).

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