

WISCONSIN LEGISLATURE AMENDS WORKERS' COMPENSATION ACT TO CLOSE EXCLUSIVE REMEDY LOOPHOLE

By Matthew P. Bandt

On January 9, 2018, the Wisconsin Court of Appeals held that the exclusive remedy provision of the Wisconsin Workers' Compensation Act, *Wis. Stat. § 102.03(2)*, does not bar a temporary employee from bringing tort claims for his or her work injuries against his or her temporary employer. *In Re: The Estate of Carlos Esterley Cerrato Rivera v. West Bend Mut. Ins. Co.*, No. 2017AP142. In response, on March 1, 2018, the Wisconsin legislature enacted legislation closing the loophole exposed by the Court of Appeals.

In *Rivera*, Carlos Rivera was employed by Alex Drywall. His employer provided him to Alpine Insulation as a temporary skilled worker. Mr. Rivera was killed in a motor vehicle accident, while a passenger in a vehicle owned by Alpine Insulation and driven by an Alpine employee. The driver was found to be negligent.

Mr. Rivera's Estate did not make a claim for dependency benefits under the Wisconsin Workers' Compensation Act. Instead, the Estate

filed a wrongful death action against Alpine in Circuit Court. Alpine successfully moved for summary judgment based on the exclusivity rule and the Estate appealed.

The Court of Appeals ruled in favor of the Estate and reversed summary judgment. In reaching its decision, the Court of Appeals cited *Wis. Stat. § 102.24(2)*, which indicates a "temporary help agency is the employer of an employee whom the temporary help agency has placed with or leased to another employer that compensates the temporary help agency for the employee's services." As such, the Court indicated Alex Drywall, as the temporary agency, was protected under the exclusivity provision, but Alpine Insulation was not.

Next, the Court interpreted *Wis. Stat. § 102.29(6)(b)*, which specifically precludes a temporary employee from bringing a claim against the temporary employer where the employee also makes a claim for compensation under the

Congratulations



Tessa M. McEllistrem and **Jessica E. Schwie** successfully obtained directed verdict in a defamation case after three days of jury trial in Scott County. The Court awarded the Employer a directed verdict because the former Dispatch employee failed to show that the opinions stated by her former employer were the reason that she did not obtain a City of Edina job and held that there was no evidentiary basis for a reasonable jury to find that plaintiff suffered any harm to her reputation, as required for defamation.

Workers' Compensation Act. According to the Court, the language of the statute conversely implies that a temporary employee who does not make a claim for workers' compensation benefits is not prohibited from bringing a tort claim against his or her temporary employer.

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The Court of Appeals reasoned that Alpine's interpretation of *Wis. Stat. § 102.29(6)(b)* would require the Court to ignore the plain language of the statute, which specifically bars claims against temporary employers where an employee does make a claim for workers' compensation benefits, not simply where an employee can make a claim.

Furthermore, the Court reasoned that the plain meaning of the statute does not conflict with the exclusive remedy provision. Instead, the statute strikes a balance between the temporary worker's ability to bring a third-party claim against his temporary employer, or instead, a workers' compensation claim against his actual employer, the temporary agency, but not

both. The Court of Appeals indicated the legislature likely intended to treat a temporary employer somewhere between an employer protected by the exclusivity rule and a third-party subject to tort liability.

On February 7, 2018, counsel for Alpine filed a Petition for Review with the Wisconsin Supreme Court. The petition is pending.

In the meantime, the Wisconsin legislature enacted 2017 Wisconsin Act 139, which amended *Wis. Stat. 102.29* to prohibit a temporary employee from suing his temporary employer, as long as the employee has the right to make a workers' compensation claim. In other words, the employee can no longer choose between suing his temporary employer, or instead,

filing a workers' compensation claim against the temporary agency that pays him. The legislature amended similar parts of the statute to close similar loopholes applying to leased or loaned employees and lawsuits by employees against co-workers coming from a temporary agency, as well as the agencies that employ them.

The amendment applies to workers' compensation claims or tort lawsuits filed after March 1, 2018.



Case Announcements



Leonard J. Schweich was retained to substitute as counsel on the eve of arbitration and successfully defended a general contractor in a claim brought by homeowners arising out of the allegedly defective construction of their home. The homeowners were seeking nearly \$1 million in damages. The three-arbitrator panel found that the homeowners failed to prove that the home was not habitable. The panel accepted the contractor's arguments that there were no

defects and that the homeowners failed to present evidence to support damages in the form of repair costs or the difference in fair market value of the home. The panel also rejected the homeowners' request that the purchase of the home be rescinded. **Leonard J. Schweich** obtained a finding of no liability and no damages were awarded. The homeowners subsequently sought to vacate the arbitration award. **Vicki A. Hruby** handled the motion to vacate the arbitration award and successfully obtained confirmation of the arbitration award. The homeowners appealed the confirmation of the award and the matter was privately resolved as the appeal was pending.



CGL Exclusions J(5) and J(6)

By Tessa M. McEllistrem

The 7th Circuit decision of *Westside Salvage, Inc. v. RSUI Indemnity Company*, 878 F.3d 219 (7th Cir. 2017) clarified the applicability of coverage for faulty workmanship found in exclusions J(5) and J(6).

In 2010, ConAgra discovered that it had a dangerously hot grain bin at its Illinois facility. ConAgra then hired Westside to fix the issue with the grain bin; however, the bin exploded while Westside was working on it. This explosion then led to burns and other various injuries to three workers and completely damaged the bin. The injured workers then sued Westside and ConAgra, with ConAgra filing a crossclaim against Westside for property damage to its bin. Westside had a \$1 million primary insurance policy with Colony Insurance, as well as an \$11 million excess insurance policy with RSUI. Colony tendered its limits and removed itself from the case; however, a Colony-hired attorney stayed on and represented Westside through trial after receiving reservation letters from RSUI. These letters indicated that it was RSUI's position that ConAgra's property damage claim against Westside could potentially fall outside of coverage. Importantly, Westside's policy with RSUI included a damage to property clause which excluded certain property damage claims from coverage. The case proceeded to a jury trial in which Westside and ConAgra were found liable for the workers' injuries and Westside was found liable for the property damage to ConAgra's grain bin. Both Westside and ConAgra appealed, and the personal injury judgment as to ConAgra was reversed and, instead, it was held that Westside was solely liable for the workers' injuries. Additionally,

Westside filed a Complaint in District Court claiming that RSUI should have settled the explosion litigation claims within policy limits and breached its duty to settle in not doing so. The District Court found that an insurer only has a duty to settle when there is an offer to settle all claims against the insured and, at the same time, there is a reasonable likelihood the insured will face liability exceeding policy limits. The District Court found that Westside failed to show that there was a time when those conditions were satisfied and, therefore, granted summary judgment to RSUI. Westside then appealed that decision.

The Court of Appeals first discussed a choice of law analysis following Illinois' choice of law rules, which holds that Illinois courts only engage in choice of law analysis when there is a conflict between Illinois law and the law of another state, such that "a difference in law will make a difference in the outcome." *Citing Townsend v. Sears, Roebuck and Company*, 879 N.E.2d 893 (Ill.2d 2007). Here, Westside was making an argument that there was a conflict between Illinois and Iowa law, which affected whether the damage-to-property exclusion bars coverage for ConAgra's property damage claim. However, ConAgra brought a claim for property damage caused by ongoing operations, as defined in the policy itself. The Court held that whether that claim is covered by the policy depends on the application of the damage-to-property exclusion, noting that the damage-to-property exclusion will, in general, exclude from coverage property that has been damaged due to incorrectly performed work. Therefore, the Court found there was no conflict and applied the law of Illinois to determine whether the damage-to-property exclusion applies to

ConAgra's property damage claim against Westside.

The damage-to-property exclusion at issue eliminates insurance coverage for property damage to:

(5) that particular part of real property on which you or any contractor or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or

(6) that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it.

The 7th Circuit found that, pursuant to Illinois law, "the exclusion does not exclude coverage for damage done only to the precise area of the property being worked on. Rather, the exclusion applies to property damage caused by poor workmanship." *Citing Pekin Ins. Co. v. Willett*, 704 N.E.2d 923 (Ill. App. 1998). Therefore, the 7th Circuit found that Westside's insurance policy did not cover the damage to the grain bin because Westside performed its work incorrectly by failing to reduce the grain temperature in a timely manner. The Court went on to hold that the damage-to-property exclusion does not apply only to the precise area of the property being worked on if the work performed was poor. Therefore, the damage that Westside caused was a normal risk associated with its business of remedying hot grain bins before they explode.

As to RSUI's duty to settle, the Court noted that "The duty to act in

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good faith in responding to settlement offers . . . only exists where there is coverage under the policy.” *Citing American Family Mut. Ins. Co. v. Westfield Ins. Co.*, 962 N.E.2d 993 (Ill. App. 2011). The Court reasoned that because the damage to property exclusion removed ConAgra’s claim from coverage under Westside’s policy with RSUI, RSUI therefore had no duty to act in good faith in responding to an offer to settle that claim.

Westside made the argument that RSUI should be estopped from as-

serting a lack of coverage as a defense because RSUI had taken over the defense and handled the settlement discussions. However, “if an underlying complaint presents an issue of potential insurance coverage, and the insurer believes that the policy does not cover the claim, the insurer may not refuse to defend the insured, but must either defend the suit under a reservation of rights or seek a declaration of no coverage.” *Citing Mobile Oil Corp. v. MD. Cas. Co.*, 681 N.E.2d 552, 560 (Ill. App. 1997). The Court noted that here, RSUI sent Westside reservation let-

ters before it began to defend the suit. Moreover, Westside was represented through trial by an independent counsel that was hired by its primary insurance carrier, not RSUI. Therefore, the Court found that because RSUI took sufficient steps to insure that it would not prejudice Westside’s defense even though RSUI was involved in it, RSUI was not estopped from asserting a defense of non-coverage. The Court, therefore, upheld the District Court’s granting of summary judgment.

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