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JLO Newsletter March 2015

Wisconsin's Three-Step Analysis to Insurance Policy Interpretation
By Brittany R. Cannon

In December 2014, the Supreme Court of Wisconsin decided two insurance coverage cases in which the court clearly identified its process in interpreting insurance policies. *Wilson Mut. Ins. Co. v. Falk*, 2014 WI 136, 857 N.W.2d 156; *Preisler v. General Cas. Ins. Co.*, 2014 WI 135, 857 N.W.2d 136. An understanding of how Wisconsin courts analyze insurance policies is crucial in defending any insurance coverage case.

The Supreme Court of Wisconsin identifies its primary task in interpreting insurance policies as determining and carrying out the parties' intentions. *Preisler*, 857 N.W.2d at 142 *citing Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WI 20, ¶ 22, 338 Wis.2d 761, 809 N.W.2d 529. Wisconsin courts interpret insurance policy language according to its plain and ordinary meaning as understood by a reasonable insured. *Id.* The first step is to examine the facts of the insured's claim to decide whether the policy makes an initial grant of coverage for the claim set out in the complaint. *Id.* at 143. The analysis ends there if the policy clearly does not cover the claim. *Id.* However, if the claim set out in the complaint triggers a potential grant of coverage, the court will examine whether any of the policy's exclusions preclude coverage for that claim. *Id.* Finally, if an exclusion precludes coverage, the court analyzes exceptions to the exclusion to determine whether any exception reinstates coverage. *Id.*

The two coverage cases decided in December 2014 provide examples of how this interpretation process works. In *Wilson Mut. Ins. Co.* and *Preisler*, the court determined that the seepage of either cow manure or septage into a water supply is an "occurrence" triggering an initial grant of coverage under each insurance policy. However, coverage was excluded in both cases under step two of the analysis due to the pollution exclusion clause. The pollution exclusion clause in both cases is commonly found in commercial general liability policies. The court determined that cow manure and decomposing septage qualify as pollutants when they seep into a water supply. None of the exceptions to the pollution exclusion reinstated coverage; therefore, coverage remained excluded under the policies in both cases.

Wisconsin courts have been following this three-step process in interpreting insurance policies for at least ten years. In 2012, the United States District Court for the Western District of Wisconsin cited to a case from 2004 to indicate that it first looks to the factual allegations to determine whether there is an initial grant of coverage, then looks to any exclusions that may preclude coverage, and finally looks to any exceptions to applicable exclusions. *Carlon Co. v. Delaget, LLC*, No. 11-CV-477-JPS, 2012 WL 1854146, at *4 (W.D. Wis. May 21, 2012) *citing Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶ 24, 268 Wis.2d 16, 673 N.W.2d 65. This is the same three-step analysis used by the Wisconsin courts in the December 2014 cases discussed *supra*. Therefore, this is now a well-established process for interpreting insurance contracts in Wisconsin.

In *Carlon Co.*, Delaget was sued by Carlon for the alleged breach of its duty of ordinary care in safeguarding and protecting the user name and password for Carlon's accounts. As a result of this alleged breach, almost $700,000 was removed from Carlon's accounts without authorization. *Id.* Delaget's insurance company, Acuity, filed a Motion for

Firm News

Congratulations to **Brittany R. Cannon** and **Nicholas M. Matchen** on recently passing the Minnesota Bar Exam and being sworn in by the Minnesota Supreme Court.

Ms. Cannon graduated from the University of Wisconsin Law School in 2014 and currently practices in the area of civil litigation with a focus on construction defect and products liability.

Mr. Matchen graduated from the University of St. Thomas School of Law in 2014 and practices in the areas of workers' compensation and civil litigation with a focus on government liability and land use. ●

Congratulations to **Matthew P. Bandt** for recently prevailing at trial in a workers' compensation matter where the petitioner was claiming 40.5% permanent partial disability due to chronic regional pain syndrome and 90% permanent partial disability for a consequential mental health injury. The total claim was for a combined permanent partial disability rating of 94.05%, which amounts to $437,332.50. Despite prior findings that the employee suffered from work related chronic regional pain syndrome and that as a result he also sustained a consequential mental health injury, the compensation judge denied the entire claim finding that at the time of the second hearing the employee's symptoms of chronic regional pain syndrome had subsided and that the employee's consequential mental health injury was no longer contributing to his current mental health disability. ●

Summary Judgment requesting that the court find and declare that Acuity had no duty to defend or indemnify Delaget due to a lack of coverage in Acuity's policy. *Id.* The court ended its analysis at step one as it was determined that no initial grant of coverage existed for the claims against Delaget. As such, it was not necessary for the court to examine the exclusions or exceptions to those exclusions.

In another case from 2012, the Court of Appeals of Wisconsin expanded on the effects of this three-step analysis. The court determined that an insurer has no continuing duty to defend after only arguably covered claims are settled and dismissed. *Society Ins. v. Bodart*, 2012 WI App 75, 343 Wis.2d 418, 819 N.W.2d 298. An insurer's duty to defend is determined based on the allegations in the underlying complaint, construed liberally. Consistent with this rule, once all covered (and arguably covered) claims have been settled and dismissed, there are no longer any allegations in the complaint that are arguably covered, no matter how liberally construed. Therefore, the complaint would fail under the court's first step in the insurance policy interpretation analysis as there is no initial grant of coverage for the remaining claims.

Understanding this well-established three-step analysis to insurance policy interpretation is crucial in determining whether Wisconsin courts will find coverage for claims brought against an insured. These recent cases are evidence that the Wisconsin courts continue to abide by this three-step process even after over ten years. Therefore, it is important to follow the same three steps in considering whether to grant or deny defense and indemnification to an insured. ●

Recent Developments in Wisconsin Workers' Compensation Appellate Procedure
By: Matthew P. Bandt

The procedure for seeking appellate review of workers' compensation decisions in Wisconsin is somewhat archaic. Workers' compensation hearings take place before an administrative law judge (ALJ). After the ALJ issues a decision, an aggrieved party may seek review with the Labor and Industry Review Commission (LIRC or "The Commission"). The party must file a Petition for Review within twenty-one days from the date the ALJ's decision was mailed. Wis. Stat. § 102.18(3).

While an ALJ has the benefit of presiding over a hearing and observing live testimony, the Commission's order will be limited to a record review. *Amsoil, Inc. v. LIRC,* 173 Wis.2d 154, 496 N.W.2d 150 (Wis. Ct. App. 1992). Nonetheless, the Commission owes no deference to the ALJ, including on issues of credibility. *Id.* However, where a reversal is contingent upon the credibility of a witness, the Commission typically consults with the ALJ.

The parties can appeal the Commission's order by filing a summons and complaint in circuit court. *See* Wis. Stat. § 102.23(1)(a). The summons and complaint must be filed within thirty days of the date of the order. *Id.* The circuit court may set aside an order where: 1) the Commission acted without authority or in excess of its powers; 2) the order or award was procured by fraud; or 3) the Commission's findings of fact do not support the order or award. Wis. Stat. § 102.23(1)(e). The circuit court shall not substitute its judgment for that of the Commission as to the weight or credibility of the evidence on any finding of fact. Wis. Stat. § 102.23(6). Typically, circuit court judges give great deference to LIRC and mostly perform a cursory review.

According to Wis. Stat. § 102.23(1)(a), a party seeking review before the circuit court must name the Commission as a defendant. The statute further provides that the "adverse party" shall also be named a defendant. *Id.* There exists a long line of cases in which there has been great confusion as to the definition of "adverse party" under the statute. The most recent and prominent case on point is *Xcel Energy Services, Inc. v. LIRC,* 349 Wis. 2d 234, 833 N.W.2d 665 (Wis. 2013). In *Xcel Energy,* the Commission reversed the ALJ's denial of permanent total disability. The employer and insurer appealed the Commission's order by filing a summons and complaint in circuit court. The only parties to the case were the employer, the insurer, and the claimant. Therefore, pursuant to Wis. Stat. § 102.23(1)(a), the employer only named the claimant and the commission as defendants. The employer did not deem its own insurer, ACE American Insurance Co., to be an adverse party, and therefore, did not name ACE as a defendant.

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Industry News

Our firm's publication, *Investigating and Defending Products Liability and Toxic Tort Claims,* will be released April 15, 2015. This compendium of Minnesota law thoroughly details the law of Products Liability in Minnesota. The treatise will be made available on our website and clients may request a hardcopy or disk by contacting Michael Rossing-Kluegel by email at mrossing@jlolaw.com. ●

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The Commission moved to dismiss the summons and complaint on the grounds ACE should have been named a defendant. The circuit court judge denied the Commission's order, but upheld the Commission's finding of permanent and total disability.

Xcel appealed to the Wisconsin Court of Appeals. The court of appeals did not rule on Xcel's appeal, but instead reversed and remanded the circuit court judge's ruling on the grounds he lacked competency to hear the matter due to ACE not being named an adverse party. The court of appeals instructed the judge to grant the Commission's motion to dismiss the summons and complaint. The court of appeals relied on its decision in *Miller Brewing Co. v. LIRC (Miller I),* 166 Wis.2d 830, 480 N.W.2d 532 (Wis. Ct. App. 1992) in which the court indicated, under Wis. Stat. § 102.23 (1)(a), an " 'adverse party'… includes any party bound by (the Commission's) order or award…." The court of appeals further noted that its decision in *Miller I* was affirmed by the Wisconsin Supreme Court in *Miller Brewing Co. v. LIRC (Miller II),*173 Wis. 2d 700, 495 N.W.2d 660 (1993).

Xcel appealed to the Wisconsin Supreme Court. The supreme court reversed the court of appeals on the grounds ACE did not need to be named an adverse party, but the supreme court proceeded to affirm the Commission's finding of permanent total disability based on the merits of the case. *Id.* at ¶¶ 2-3. The supreme court defined an "adverse party" as any party for whom the Commission's order was favorable or any party "whose interest is in conflict with the modification or reversal of the award." *Id.*

In an effort to avoid further confusion on the issue of naming defendants on appeal, Chief Justice Shirley Abrahamson issued a concurring opinion in which she recommended that the Workers' Compensation Advisory Council propose revisions to the statute to clarify who must be named a party under the statute. *Id.* at ¶ 71. Judge Abrahamson's recommendation led to Section 32 of Wisconsin Assembly Bill No. 711 (2013). Section 32 proposed to add the following language to Wis. Stat. § 102.23*:* "The commission shall identify in the order or award the persons that must be made parties to an action for the review of the order or award… and the summons and complaint shall name the party commencing the action as the plaintiff and shall name as defendants the commission and all persons identified by the commission...."

On January 31, 2014, State Representative Dan Knodl introduced the bill, but it failed to pass. Therefore, any party seeking review following an order from the Commission must still be wary about properly identifying defendants in the summons and complaint. They should pay very close attention to the definition of adverse party expressed by the Wisconsin Supreme Court in *Xcel Energy.* Otherwise, the appeal could be dismissed. ●

Referrals & Inquiries

A ***referral*** is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please complete the section below and return it via email to info@jlolaw.com.

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Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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