

## **Wendy M. Day v. Allstate Indemnity Co., et al., (2011 WI 24)**

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On April 29, 2011, the Wisconsin Supreme Court issued a decision in *Wendy M. Day v. Allstate Indemnity Co., et al.*, 2011 WI 24 ("*Day*") in which the court held that Allstate failed to demonstrate that the family exclusion contained in a homeowner's policy unambiguously precluded coverage.

In *Day*, 8-year-old Emma Day drowned as a result of having a seizure while taking a bath at the home of her father, Clinton Day, and her stepmother, Holly Day. Emma's mother, Wendy Day, filed suit against Holly alleging that Holly was negligent for leaving Emma unattended in the bathtub. Holly tendered her defense to Allstate, which had issued a homeowner's policy listing Clinton and Holly as the named insureds. The policy included coverage for family liability. However, the policy contained a family exclusion which read in part: "We do not cover bodily injury to an insured person ... whenever any benefit of this coverage would accrue directly or indirectly to an insured person."

After a series of stipulations, the only remaining claims were the survival action advanced on behalf of Emma's estate and Wendy's claim for wrongful death. Allstate sought a declaration that the family exclusion precluded coverage for both claims. The circuit court denied Allstate's motion. The court of appeals reversed, reasoning that both claims were excluded from coverage because Clinton, an insured, was entitled to half of any recovery on either claim. The Wisconsin Supreme Court reviewed the court of appeals decision on the wrongful death claim.

The Wisconsin Supreme Court noted that the family exclusion would apply if any benefit of coverage would accrue directly or indirectly to an insured person. Allstate asserted that Holly would benefit by her contractual right to defense and indemnification and, therefore, a "benefit of coverage" "would accrue directly or indirectly to an insured person." The court rejected Allstate's assertion, finding that such an expansive interpretation of "benefit" would render the family exclusion meaningless because in every case where there is an initial grant of coverage, a "benefit" would accrue to the insured.

Having determined that Allstate failed to demonstrate the term “benefit” unambiguously includes the right to defense and indemnification, the court next examined whether any insurance proceeds will accrue directly or indirectly to an insured person as a result of Allstate’s coverage of Wendy’s claim. Allstate asserted that because half of the wrongful death claim belongs to Clinton, any insurance proceeds Wendy recovers for Emma’s wrongful death must be split between Wendy and Clinton. The court found that Allstate’s position was based on the mistaken assumption that because Clinton has a right to make a claim under the wrongful death statute – and because his claim would be consolidated with Wendy’s claim – Clinton will have an entitlement to a portion of any insurance proceeds Wendy recovers. The court held that each beneficiary’s recovery for wrongful death may be independent from the recovery of any other beneficiary. Thus, although Clinton has a right to bring a claim for Emma’s wrongful death, a judgment in favor of Wendy does not entitle Clinton to any ownership of her recovery. If Clinton were to remain a party in the action, he would have to prove his own loss (any loss sustained by Clinton would be a “benefit” and, thus, not recoverable under the Allstate homeowner’s policy).

Justice Ziegler issued a dissenting opinion. Justice Prosser and Justice Gableman joined the dissent.

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