Wisconsin Supreme Court Holds the Made Whole Doctrine Does Not Apply

Jul 22 2016

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Practice Area: Insurance Coverage and Risk Management

***Dufour v. Progressive Classic Ins. Co.*, 2016 WI 59 (Wis. July 6, 2016)**

In *Dufour v. Progressive Classic Ins. Co.*, 2016 WI 59 (Wis. July 6, 2016), a negligent motorist struck and injured Dennis Dufour while Dufour was operating his motorcycle. The tortfeasor's insurance company, American Standard, paid Dufour its $100,000 limits for Dufour's bodily injury, and Dufour gave American Standard and the tortfeasor a release. Dufour's insurer, Dairyland Insurance Company, then paid Dufour its $100,000 underinsured bodily injury limits and also paid Dufour $15,589.86 for his property damage. Subsequently, Dairyland received in subrogation from American Standard the amount in property damage Dairyland had paid to Dufour.

Dufour asserted that, because the value of his injuries exceeded the total insurance proceeds he had received, the made whole doctrine required Dairyland to pay him the subrogated property damage funds it had received from American Standard. When Dairyland declined to pay Dufour a second time for his property damage, Dufour asserted claims against Dairyland for breach of contract and bad faith.

The Wisconsin Supreme Court held the made whole doctrine did not apply under the circumstances and, therefore, permitted Dairyland to retain the subrogated property damage funds. The court observed that multiple circumstances led the equities to favor the insurer. First, Dairyland had paid Dufour its bodily injury limit of $100,000 and had paid him the full value of his property damage. Accordingly, Dufour had recovered "every dollar [he] was entitled [to receive] under his contract of insurance with Dairyland." Dufour, 2016 WI 59, ¶ 49. Second, Dufour was afforded priority in recovering from the tortfeasor: "Dairyland permitted Dufour to recover all benefits to which he was entitled under both policies before it pursued its separate subrogation claim against the tortfeasor's insurer." Id., ¶ 50. By allowing Dufour to recover all proceeds under both policies, the court observed that Dairyland and Dufour were not in competition for a limited pool of funds. Third, the policy Dairyland issued to Dufour provided separate coverages for bodily injury and for property damage, and the court "decline[d] to rewrite Dairyland's policy to provide for lump sum coverage where such coverage was not contemplated by the parties." Id., ¶ 51.

Because the Wisconsin Supreme Court held that Dairyland did not breach its contract when it declined to turn over to Dufour the subrogated property damage funds, the court also held that Dairyland did not commit bad faith. Id., ¶ 55.