

Wisconsin Court of Appeals Holds That When An Insurer Provides a Defense to Its Insured, Extrinsic Evidence Must be Considered by the Court on the Question of Coverage

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Posted By: Heidi L. Vogt

Practice Area: Insurance Coverage and Risk Management

***Stimac Family Trust v. Wis. Power & Light Co.*, No. 2016AP748 (Wis. App. Apr. 19, 2017) (recommended for publication)**

In *Stimac Family Trust v. Wis. Power & Light Co.*, No. 2016AP748, unpublished op. (Wis. App. Apr. 19, 2017), the Wisconsin Court of Appeals held that when an insurer provides a defense to its insured, any extrinsic evidence offered by either party must be considered by the court on the question of coverage.

Wisconsin Power and Light Company ("WPL") severed a sewer line causing flood damage to The Stimac Family Trust's ("Stimac") property. WPL hired Aquire Contracting and Restoration, Inc. ("Aquire") to perform the restoration work. After completion of the restoration work, Stimac observed mold growth and an odor of sewage. WPL and Aquire denied responsibility.

Stimac filed suit, claiming Aquire was negligent in its restoration efforts. Aquire's insurer accepted the tender of defense under a reservation of rights and bifurcated the coverage issue. The insurer moved for summary judgment on coverage issues based on the four corners of the complaint and policy, whereas Aquire relied upon affidavits. The circuit court granted the insurer's motion, and agreed that the coverage analysis should be confined to the four corners of the complaint and policy.

Relying on two Wisconsin Supreme Court cases, *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87 and *Olson v. Farrar*, 2012 WI 3, the court of appeals ruled that when an insurer provides a defense to its insured, any extrinsic evidence offered by either party must be considered by the court on the question of coverage. The court reasoned that like the insurers in *Sustache* and *Olson*, the insurer had provided a defense to Aquire under a reservation of rights, was granted bifurcation of the coverage issues, and had proceeded to summary judgment on coverage. Thus, the court determined the case had gone beyond the initial duty to defend stage and had advanced to a determination of coverage where extrinsic evidence is permitted to resolve coverage. Accordingly, the court of appeals reversed and remanded the lower court's ruling having determined that the circuit court should have considered the extrinsic evidence.

The court did not address the Wisconsin's Supreme Court decision in *Water Well Solutions v. Consolidated Ins.*, in which the court "unequivocally" held "there is no exception to the four-corners rule" in duty to defend cases. 2016, WI 54, ¶ 24.

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