Recent Wisconsin Insurance Decisions

Mar 15 2022

Posted By: Mollie T. Kugler

Practice Area: Insurance Coverage and Risk Management

***Link v. Link*, Case No. 2020AP1244 (Feb. 1, 2022)**

In *Link*, the Plaintiffs' claims (defamation, invasion of property, and intentional and negligent infliction of emotional distress) arose out of allegations that the defendant Link posted Plaintiffs' photos, with sexually suggestive and degrading captions, on a members-only fetish website. After Link sought personal injury coverage under his homeowner's policy with Midwest Family Mutual Insurance ("Midwest"), Midwest intervened in the lawsuit, and the merits issues were bifurcated and stayed. Link then refused to provide responses to Midwest's discovery requests in the coverage proceeding, relying on the Fifth Amendment. Midwest sought a no-coverage determination based on the policy's cooperation and concealment clauses. The circuit court granted summary judgment for Midwest, finding it had no duty to defend or indemnify Link.

The Court of Appeals affirmed, rejecting the defendant's argument that an insurer cannot base a coverage denial on the insured's invocation of his Fifth Amendment privilege. While Link argued he was in a "Catch-22" in that an admission of fault in the coverage action would harm his defense in the underlying suit, Link requested a defense and indemnity under the policy. The court explained that an insured is entitled to invoke the privilege but not to avoid his contractual duties on that basis, and this reasoning applies to evaluating a breach of either the cooperation clause or the concealment clause. While Midwest had remedies for Link's discovery noncompliance under the discovery statutes, all relief available under the insurance contract also remained available. The court further determined that the facts Link concealed through his discovery noncompliance were material and that the discovery noncompliance was prejudicial to Midwest. Finally, the court rejected Link's public policy arguments, determining, among other things, that those accused of egregious, criminal acts cannot invoke the privilege and still receive coverage, while typical insureds are required to cooperate.

The decision is recommended for publication.

***Brellenthin v. American Family Mutual Insurance Company*, Case No. 2020AP1782 (Feb. 8, 2022)**

Brellenthin is a first-party coverage case wherein the insureds' lawsuit was dismissed for failure to file suit within the applicable statute of limitations. On July 9, 2018, the insureds sustained damage in their house from a leaking refrigerator and subsequently filed a homeowner's claim with American Family. While American Family agreed there was a covered loss, the parties disagreed as to the cost of repair. The public adjuster hired by the insureds provided a repair estimate higher than American Family's, as it included the cost to repair water damage in additional rooms, to match undamaged items with items replaced, and to paint a floor scratched during mitigation work. American Family hired an engineer whose opinions substantiated its initial repair estimate. In particular, American Family asserted the damage to additional rooms was caused by longer-term water exposure, which is not covered, and that the policy does not cover the cost to repair or replace undamaged items, but agreed to pay for the additional cost of painting the scratched floor. The insureds later demanded an appraisal under the policy's appraisal clause, and American Family denied, asserting appraisal is appropriate for damages disputes, not coverage disputes.

On May 20, 2019, the insureds' public adjuster wrote American Family to confirm its understanding American Family would not be enforcing the policy's one-year suit against us limitation until a year after it had completed the claim adjustment process. American Family did not specifically respond to the letter. In a July 4, 2019 email, American Family reminded the insureds that the one-year date of loss anniversary would be July 9, 2019. The insureds filed suit on January 16, 2020, and American Family moved for summary judgment based on the one-year statute of limitations. The circuit court granted the motion, finding the one-year statute was not tolled where one party demanded appraisal and the other refused, and equitable estoppel did not apply.

The Court of Appeals affirmed. As an initial matter, the insureds' demand for arbitration was not a sufficient step to constitute "conduct[ing] an appraisal" under Section 631.83(5), and even if it was, American Family denied the request for appraisal within eleven days of the demand. Moreover, it was a prerequisite to the appraisal process that American Family determined damage due to a loss was covered, and there was no such determination. As to equitable estoppel, the court determined American Family was not required by any statute or the insurance policy to explicitly respond to the insureds' letter setting forth their assumption the statute of limitations would be tolled. The Court found no fraud, misrepresentation or other inequitable conduct by American Family. Moreover, American Family had no legal obligation to remind the insureds or their public adjuster of the statute of limitations or that it was approaching. The limitation was clearly stated in the American Family policy.

This is a *per curiam* decision.

***Brey v. State Farm Mutual Auto Insurance Company*, Case No. 2019AP1320, 2022 WI 7 (Feb. 15, 2022)**

In *Brey*, the dispute was whether Brey was entitled to underinsured motorist ("UIM") coverage under the auto liability policy State Farm issued to his mother and her husband for the death of Brey's father in an auto accident. Brey qualified as an insured under the policy as a resident relative of his mother and her husband. Brey's father was not an insured under the policy, and the vehicle in which his father was a passenger in the accident was not insured under the policy. The policy language of the UIM coverage provided the "bodily injury must be: 1. Sustained by an insured; and 2. Caused by an accident that involves the ownership, maintenance, or use of an underinsured motor vehicle as a motor vehicle." The circuit court ruled Brey could not obtain UIM coverage under the policy because he did not sustain bodily injury, granting summary judgment for State Farm. The Court of Appeals reversed, finding subsections (1) and (2)(d) of Section 632.32, Wisconsin's Omnibus Statute, bar an insurer from limiting UIM coverage to only those insureds who sustain bodily injury or death.

The Wisconsin Supreme Court reversed, finding Section 632.32(2)(d) (the definition of underinsured motorist coverage set forth in the Omnibus Statute) does not bar an insurer from requiring an insured sustain bodily injury or death to trigger UIM coverage. The Court found the Court of Appeals took a "hyper-literal" approach to statutory interpretation and erred in strictly construing the statutory definition of underinsured motorist coverage in isolation, rather than interpreting it in the context of the pertinent text of the Omnibus Statute as a whole. Rather, the statutory context and structure of Section 632.32(2)(d) indicate UIM coverage only exists when an insured suffers bodily injury or death, and the statutory and legislative history of Section 632.32(2)(d) "fortifies" the Court's plain-meaning analysis. Among other things, the legislature's 2011 repeal of the definition of "underinsured motor vehicle," which left the definition of "underinsured motorist coverage" at issue, "increased coverage flexibility" for insurers and "narrowed the required scope of UIM coverage generally." Finally, the Court determined that wrongful death claims under UIM (and UM) policies are derivative tort actions, and Brey cannot maintain a derivative action against State Farm because Brey's father was not an insured under the State Farm policy.

This decision is published at 2022 WI 7.
