Wisconsin Civil Trial Journal

Winter 2020 • Volume 18 • Number 3

Breach of Contract, Bad Faith, and the Impact of *Dahmen* and *Brethorst*
Michael J. Wirth & Abigail T. Hodgdon

Also In This Issue

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

Columnists

Ryan J. Garrison
Garrison Financial, LLC and
Garrison Settlements

Micaela E. Haggenjos
Crivello Carlson, S.C.

Andrew B. Hebl
President, Wisconsin Defense Counsel

Abigail T. Hodgdon
Borgelt, Powell, Peterson & Frauen, SC.

Rebecca R. Hogan
The Hamilton Consulting Group

Heather L. Nelson
The Everson Law Firm

Paige Scobee
The Hamilton Consulting Group

Kristen S. Scheuerman
Herrling Clark Law Firm, Ltd.

Laura E. Schuett
Crivello Carlson, S.C.

Monte E. Weiss
Weiss Law Office, S.C.

William R. Wick
Nash, Spindler, Grimstad &
McCracken, LLP

Michael J. Wirth
Borgelt, Powell, Peterson & Frauen, SC.

Editor

Vincent J. Scipior
Coyne, Schultz, Becker & Bauer, S.C.
vscipior@cnsbb.com

Amicus Curiae Committee
Chair: Monte Weiss
Weiss Law Office, S.C.
monte.weiss@mweisslaw.net

Cyber Law and Technology Committee
Chair: Travis Rhoades
Crivello Carlson, S.C.
trhoades@crivellocarlson.com

Vice Chair: Randall Guse
Otjen, Gendelman, Zitzer,
Johnson & Weir, S.C.
rguse@otjen.com

Employment Law Committee
Chair: Elizabeth Rowicki
SECURA Insurance
lrowicki@secura.net

Insurance Law Committee
Chair: Monte Weiss
Weiss Law Office, S.C.
monte.weiss@mweisslaw.net

Litigation Skills Committee
Chair: Frederick Strampe
Borgelt, Powell, Peterson & Frauen, S.C.
fstrampe@borgelt.com

Membership Committee
Chair: Sandy Hupfer
SECURA Insurance
shupfer@secura.net

Website and Social Media Committee
Chair: Nicole Radler
Simpson & Deardorff, S.C.
radler@simpsondeardorff.com

Wisconsin Civil Jury Instructions Committee
Representative: Chris Bandt
Nash, Spindler, Grimstad &
McCracken, LLP
cbandt@nashlaw.com

Women in the Law Committee
Chair: Heather Nelson
Everson, Whitney, Everson &
Brehm, S.C.
hnelson@eversonlaw.com

Vice-Chair: Andrea Goode
Borgelt, Powell, Peterson & Frauen, S.C.
agoode@borgelt.com

Young Lawyer Committee
Chair: Nicole Radler
Simpson & Deardorff, S.C.
radler@simpsondeardorff.com

DRI Representative
Sandy Hupfer
SECURA Insurance
shupfer@secura.net

Executive Director
Jenni Kilpatrick, CAE
jenni@wdc-online.org

Legislative Advisors
Rebecca Hogan
Hamilton Consulting Group
hogan@hamilton-consulting.com

Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

JOURNAL POLICY

WDC Members and other readers are encouraged to submit articles for possible publication in the Civil Trial Journal, particularly articles of use to defense trial attorneys. No compensation is made for articles published and all articles may be subjected to editing.

Statements and expression of opinions in this publication are those of the authors and not necessarily those of the WDC or Editor. Letters to the Editor are encouraged and should be sent to the WDC office at 6737 W. Washington St., Suite 4210, Milwaukee, WI 53214. The Editor reserves the right to publish and edit all such letters received and to reply to them.

President's Message: A Bright Future Ahead

by: Andrew B. Hebl, President, Wisconsin Defense Counsel

As President of WDC for 2020-21, I want to start off by thanking our outgoing President, Christine Rice, who did an outstanding job guiding us through the significant challenges presented by COVID-19. It is hard to imagine where we would be without her brilliant leadership.

As I start my term, I want to begin by introducing myself. I am a partner at Boardman & Clark in Madison. I started my career there 10 years ago, after clerking for the Wisconsin Supreme Court. My practice focuses on insurance defense work, with a substantial amount of coverage work as well, along with the occasional bad faith or malpractice case. I also do a fair amount of civil rights defense work for municipalities.

One of the first things my mentoring attorneys had me do when I started out as a lawyer was join WDC and get involved, and it was the best thing I have ever done for my career. I spent seven years as the editor of our publication, the Wisconsin Civil Trial Journal, and have also written articles for the journal and presented at our seminars. Through these experiences, I have gotten the opportunity to make connections with some of the best lawyers in the state – our members. I have also learned more reading articles in our journal and attending our conferences than any other CLE out there. Finally, the connections this organization facilitates with our sponsors has been so helpful in learning about resources available to assist our practices.

My goal as President over the next year is to ensure that the value inherent in what this organization offers, counting the incredibly high-quality defense attorneys among our membership, continues. To that end, our Board of Directors intends to focus intensely on retaining and growing our membership by offering incentives to existing members to reach out to those around them, as well as to ramp up our engagement with the law schools to get on new lawyers' radar as soon as possible. Our Board will be meeting soon to prepare a strategic plan to achieve these objectives. Despite the difficulties we face with the ongoing pandemic, we expect to keep this organization strong and vibrant, and to deliver real value to our members.

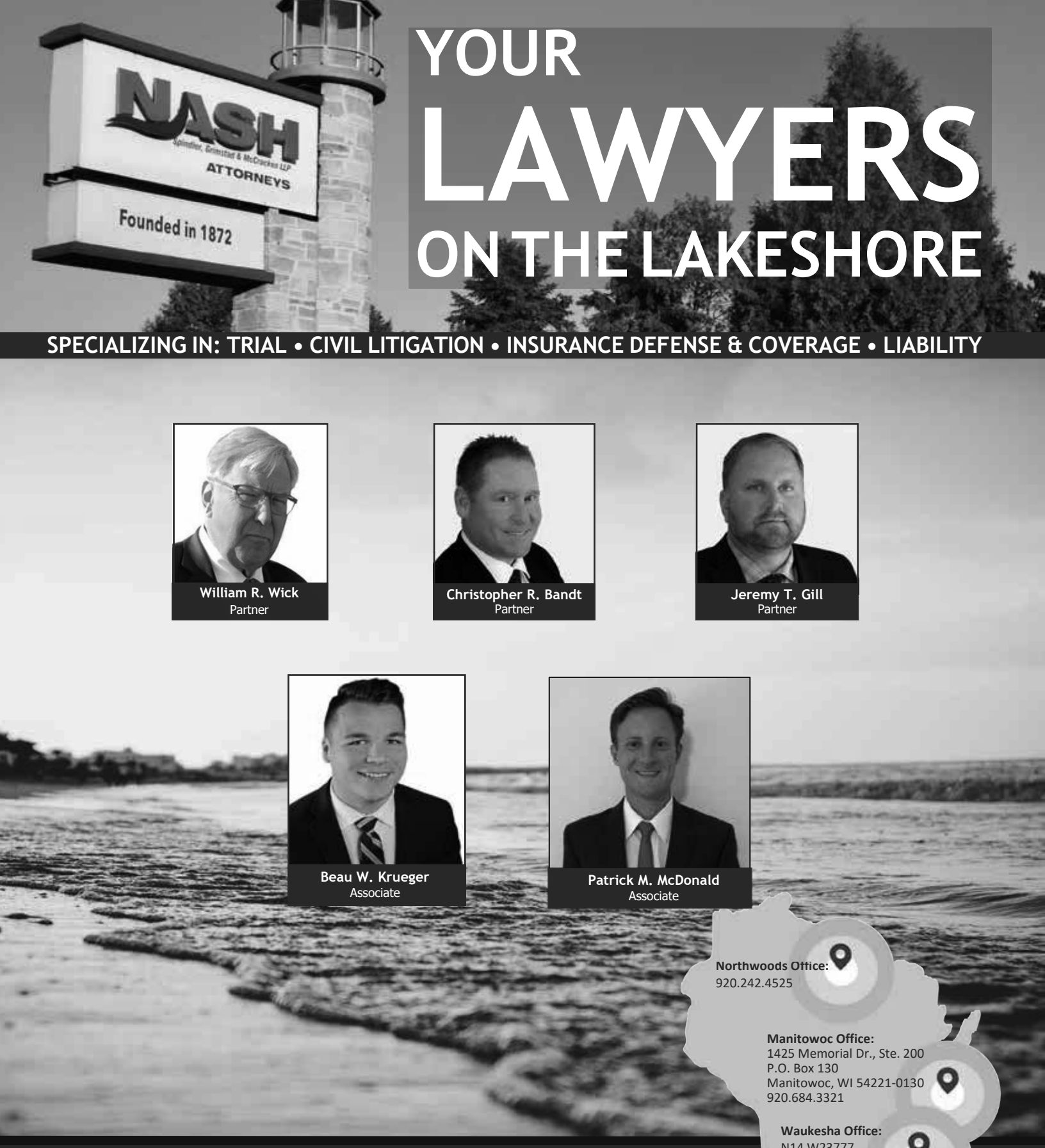
As a member of the Board, I want to ensure you that we are going to do our part. But we need your help too. The strength of this organization comes from the active participation of the high-quality people that are our members. There are numerous opportunities to get involved, whether by contributing an article to the Wisconsin Civil Trial Journal (contact our outstanding Journal Editor, Vince Scipior) or presenting at a seminar (contact our excellent Program Chair, Monte Weiss). We also have numerous additional opportunities to get involved through our various committees. Please reach out to our board members and committee chairs, myself included, if you are ready to take an active role in WDC. These opportunities can lay out a path to membership on our Board.

WDC is as valuable an organization for our members as it has ever been right now, and despite the challenging times we find ourselves in right now, the future remains very bright. I look forward

to working with all of you to ensure that we achieve our full potential as defense lawyers and as an organization. Thank you for your support.

Author Biography:

Attorney Andrew Hebl is a partner in Boardman & Clark's Litigation Practice Group. He also chairs the firm's Technology Committee. Andrew's trial and appellate practice focuses on the representation of insurance companies and their insureds. The cases primarily involve personal injury, property damage, and professional malpractice. Andrew also frequently represents insurance companies in insurance coverage disputes and extra-contractual litigation (bad faith). Finally, Andrew regularly defends municipalities in a wide variety of matters, including major civil rights lawsuits. Andrew is admitted to practice before all Wisconsin state and federal trial and appellate courts and listed in the Best Lawyers in America. He is rated AV-Preeminent by Martindale-Hubbell.



YOUR LAWYERS ON THE LAKESHORE

SPECIALIZING IN: TRIAL • CIVIL LITIGATION • INSURANCE DEFENSE & COVERAGE • LIABILITY

William R. Wick
Partner

Christopher R. Bandt
Partner

Jeremy T. Gill
Partner

Beau W. Krueger
Associate

Patrick M. McDonald
Associate

Northwoods Office:
920.242.4525

Manitowoc Office:
1425 Memorial Dr., Ste. 200
P.O. Box 130
Manitowoc, WI 54221-0130
920.684.3321

Waukesha Office:
N14 W23777
Stone Ridge Dr., Ste. 170
Waukesha, WI 53188
920.242.3209

Super Lawyers

AV

LexisNexis · Martindale-Hubbell
PeerReviewRated
FOR ETHICAL STANDARDS AND LEGAL ABILITY

CONTACT US TODAY!

With our main office in Manitowoc, WI and satellite offices throughout, our coverage area can assist clients in all legal matters across Wisconsin.

NASHLAW.COM

Breach of Contract, Bad Faith, and the Impact of *Dahmen* and *Brethorst*

by: Michael J. Wirth and Abigail T. Hodgdon, Borgelt, Powell, Peterson & Frauen, SC

Since 2001, an insured suing his insurer for breach of contract and for having acted in bad faith was on notice that the two claims would be bifurcated, and that discovery on the bad faith claim would be stayed pending the result of the breach of contract claim.[1] The continuing practical effect of the *Dahmen* decision is that plaintiffs' counsel are not entitled to discovery of the insurance company's claim file until the insurer's breach of the insurance contract has been proven.

With few exceptions, the *Dahmen* rule requiring bifurcation of the two claims and a stay of discovery on the bad faith claim has been followed by circuit courts in Wisconsin. In 2011, *Dahmen* was discussed and distinguished by the Wisconsin Supreme Court in the matter of *Brethorst v. Allstate Property and Casualty Insurance Company*.[2] The *Brethorst* decision upset the expectation that the two claims would be bifurcated as a matter of course by holding that an insured may proceed with discovery on a first-party bad faith claim once he or she has: (1) pleaded a breach of contract by the insurer as part of a separate bad faith claim, and (2) satisfied the court that they have established such a breach or will be able to prove such a breach in the future.[3]

More and more, counsel for plaintiffs in underinsured motor vehicle and uninsured motor vehicle lawsuits are choosing to allege only bad faith as a stand-alone claim. Strengthened by the holding in *Brethorst*, counsel allege that the insurer has not reviewed the plaintiff's claim with the *gravitas* it deserves; has ignored medical bills and the seriousness that such bills suggest with respect to the plaintiff's claimed injuries; and that no reasonable basis for not paying the insurer's policy limits exists. All of that, according to counsel, is sufficient to allow the plaintiff to proceed on a stand-alone claim for bad faith and, more to the point, is grounds for access to those portions of the insurer's claim file not otherwise protected by privilege.

I. A Brief History of Bad Faith Claims

The tort of bad faith in a first-party action was originally recognized in *Anderson v. Continental Insurance Company*.[4] There, the plaintiffs filed suit against their insurer for both breach of contract and bad faith refusal to negotiate a payment after a furnace fire resulted in damage to the contents of their home.[5] The insurer objected to the bad faith claim, arguing that Wisconsin did not recognize such a cause of action.[6] The court held that, while a claim for first-party bad faith had "never been explicitly recognized in this state," an insured is entitled to bring a claim against her own insurance company for bad faith.[7] The court made clear that a bad faith claim is separate and distinct from a breach of contract.[8] Bad faith "is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract."[9]

In 2001, American Family Mutual Insurance Company was the defendant in a first-party

underinsured motorist lawsuit that included a claim for bad faith.[10] American Family moved to bifurcate the contractual and extra-contractual claims, arguing that a failure to do so would unfairly prejudice it with respect to the contract claim because, absent an order for bifurcation, the plaintiffs would be entitled to discover non-privileged information from American Family's claim file that they would not otherwise be entitled to discover. The Dahmens argued that bifurcation would be unfair to them by, among other things, increasing their litigation expenses.

The trial court sided with the Dahmens and denied America Family's motion to bifurcate and stay discovery. American Family petitioned the court of appeals for leave to appeal the non-final order, which was granted. The court of appeals reversed the trial court, recognizing:

> The risk of prejudice to the insurance carrier when discovery proceeds on a bad faith claim while an underlying claim against the same defendant remains unresolved. WISCONSIN STAT. § 805.05(2) provides that a trial court may order a separate trial "always preserving inviolate the right of trial in the mode to which the parties are entitled." The bifurcation of the Dahmens' claims accomplishes this.[11]

The court went on to hold that:

> [W]e are not satisfied that the use of properly drafted jury instructions and a special verdict will sufficiently remedy the prejudice that would likely result if the two claims are litigated in a single trial. Even though the evidence relevant to the bad faith claim is wholly unrelated to the underlying claim for UIM benefits, the evidence on the two issues will likely overlap. Even the best-intentioned and properly instructed jury might not maintain the discipline to discern between the two claims. As a result, the risk for jury confusion and prejudice to American Family is substantial.[12]

Finally, the court held, "[i]f a jury finds that the Dahmens' injuries do not exceed the underlying policy limits, it would not be necessary to proceed with a trial on the claim of bad faith."[13] After *Dahmen* in 2001, things were clearly delineated: a plaintiff suing his insurer for breach of contract and bad faith should fully expect that the two claims would be bifurcated and that discovery on the bad faith claim would be stayed until such time as the breach of contract claim was resolved.

Things appeared to change, however, with the *Brethorst* decision in 2011. There, Brethorst was involved in an accident with an uninsured driver and subsequently filed suit against her uninsured motorist carrier, making a stand-alone claim for bad faith.[14] The insurer offered a small amount of money to compromise and settle the claim.[15] Again, Brethorst did not file a breach of contract claim; she went straight to alleging that her insurer acted in bad faith.

The parties made their arguments to the trial court: The insurer argued that it was entitled to an order bifurcating the bad faith and contract claims. Brethorst argued that since she did not make a breach of contract claim, there was nothing to bifurcate and she could move ahead with only the bad faith claim.

The Wisconsin Supreme Court found in favor of the insurer as to this point: "[W]e conclude that some breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured." [16] Conversely, it held that Brethorst pled facts which, if proven, would demonstrate not only that the insurer breached its contract with her but also that there was no reasonable basis for not honoring the terms of the contract.[17] The Supreme Court therefore affirmed the circuit court's decision denying the insurer's motion to bifurcate and stay.

S-E-A™

Know.

Celebrating 50 years of finding the truth. The truth is, being an industry leader is never easy. In our 50 years, S-E-A has pretty much done it all. Forensic engineering and investigation. Vehicle testing and safety. Consumer product testing and health sciences. Just to name a few. And we do it all with the best talent and technology in the business. So, yeah. We'll blow out some candles. And we'll eat some cake. Then we'll get back to working on the next 50 years.

50TH ANNIVERSARY 1970 – 2020

+1.888.597.5084 | SEAlimited.com

The *Brethorst* court held that the considerations in Dahmen are only partially applicable when a party chooses to plead only a bad faith claim. It held there is a "need to establish a wrongful denial of some contracted-for benefit before permitting discovery for a bad faith claim."[18] Then, it adopted specific procedural requirements for the circumstance where only a bad faith claim is brought. The court held that an insured may not proceed with discovery on a solo first-party bad faith claim until she or he has: (1) pleaded a breach of contract by the insurer as part of the separate bad faith claim, and (2) satisfied the court that she or he has established such a breach or will be able to prove such a breach in the future.[19]

While the court also held that an insurer should be given the chance to show that it did not act in bad faith, unfortunately, it did not give clear instruction as to how that might be accomplished.

II. Distinguishing *Brethorst*

While the holding in *Brethorst* may seem unfavorable at first glance, defense counsel faced with stand-alone bad faith claims should not be easily discouraged. As the saying goes, "hard cases make bad law." While *Brethorst* may have muddied *Dahmen*'s crystal waters, the facts of *Brethorst* can usually be distinguished from the average bad-faith case today.

It is true that the facts in *Brethorst* are unique and somewhat aggravating. However, defense counsel should find this encouraging. In practice, the unusual circumstances in *Brethorst* allow it to be distinguished from the typical case on several points. These distinctions, some of which are outlined below, may be used to support the argument that a plaintiff has failed to make the preliminary showing required for a stand-alone bad faith claim.

a. Physician Opinions

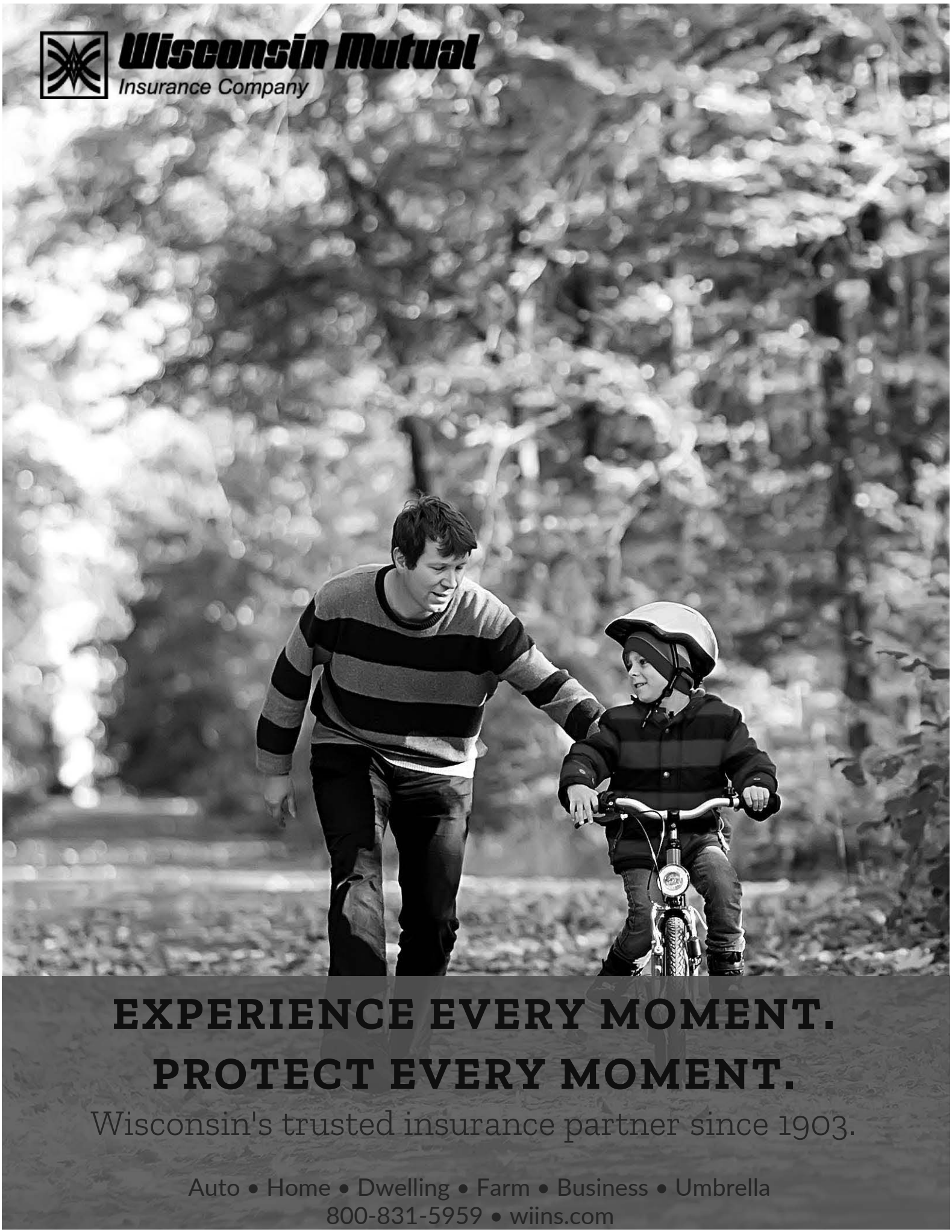
One of the unusual facts in *Brethorst* which led the court to conclude that the plaintiff's pleadings were sufficient was an allegation in Brethorst's complaint that her insurer was provided with a letter from Brethorst's physician.[20] The letter explained to the insurer that Brethorst sustained an "acute cervical and back sprain/strain" and that the physical therapy the physician ordered for Brethorst had not been ordered to treat some pre-existing injury, but had been ordered to treat "the acute injuries from the accident."[21]

Upon receipt of the physician's letter, the insurer in *Brethorst* increased its settlement offer by $300, but maintained its position, based on the opinion of the insurer's adjuster, that the collision was only a minor accident and the full amount of the medical bills was unnecessary.[22] The court critiqued this aspect of the insurer's handling of the claim, stating that by failing to have the claim evaluated by someone with medical training, the insurer "provided nothing to justify its failure to pay, except its wholly unsubstantiated theory that a minor accident could not seriously aggravate a pre-existing injury."[23] The court further noted, with emphasis, that the insurer's "*theory* is not enough."[24]

Absent such a report letter from plaintiff/insured's counsel during the pre-suit investigation, a plaintiff would be hard-pressed to argue that the insurer's interpretation of her medical records lacks a reasonable basis. Medical records are subject to different interpretations – an insurer may find something upon which it relies to deny a claim that plaintiff's counsel, absent a supporting medical report, might not have seen. In the event a plaintiff does produce a medical opinion supporting the amount of medical expenses, *Brethorst* can still be distinguished to support a reasonable basis for denial so long as an insurer had someone with medical training evaluate the claim and arrive at an opposing conclusion.

b. Company Policies

Another fact to be distinguished from *Brethorst* is the type of company policy in place. In *Brethorst*, the insurer apparently had a systemic, company-wide and ratified policy of offering settlement sums substantially less than its insured's medical bills in any accidents involving minor impacts with


Wisconsin Mutual
Insurance Company
EXPERIENCE EVERY MOMENT.
PROTECT EVERY MOMENT.
Wisconsin's trusted insurance partner since 1903.
Auto • Home • Dwelling • Farm • Business • Umbrella
800-831-5959 • wiins.com

resulting soft tissue injuries.[25] The insurer referred to these as Minor Injury Soft Tissue (MIST) cases.[26]

In support of her argument that the insurer failed to conduct a full investigation of her case, Brethorst was able to provide evidence of the insurer's policy of offering artificially low payments in MIST cases. While the court in *Brethorst* did not explicitly address the insurer's policy in determining that the insurer failed to justify its failure to pay, it is clear that such a policy supported the court's ruling that the insurer's evaluation of Brethorst's claim was based on speculation.[27]

An insurer in Wisconsin is required to conduct an appropriate and careful investigation before assessing a claim.[28] While the holding in *Brethorst* may be unfavorable to insurance companies on this point, the company policy at issue was an outlier. So long as an insurer is not stamping certain types of claims and injuries as being less compensable, it can distinguish *Brethorst*. Absent an allegation (based on a reasonable belief) of such an aggravating fact, the insured/insurer settlement negotiations are no more nefarious than any other arms-length negotiations.

Brethorst can further be distinguished with regard to company policy as the plaintiff in *Brethorst* dealt with a claims specialist who was, in part, responsible for implementing the insurer's practice of offering less money in MIST cases.[29] Here, again, if an insurer does not have a practice of offering less money for cases involving low impact accidents and soft tissue injuries, then the argument that an insured did not have a reasonable basis for denying a given claim is weakened.

It's also worth noting that the existence of the insurer's MIST policy in *Brethorst* was not in dispute. Brethorst alleged the use of this practice in her complaint and, in its Answer, the insurer admitted it had what it referred to as a MIST policy.[30] While the insurer disputed Brethorst's characterization of its policy, its admission allowed the court to utilize the fact of its existence in determining that the insurer failed to fully evaluate Brethorst's claim. Of course, if no such policy exists, insurers can use the lack of this type of admission to distinguish *Brethorst* even further.

c. Coverage

While many bad faith claims involve an uninsured or underinsured motorist policy provision, quite a few cases involve claims where the underlying policy coverage is not quite as obvious. The *Brethorst* court was careful to carve out instances where coverage may be at issue, holding that an insurer's egregious conduct towards an insured is not sufficient to create coverage that does not otherwise exist under the policy.[31] The plaintiff's complaint in *Brethorst* was sufficient, in part, because it established that the plaintiff's accident involved an uninsured motorist, the plaintiff's insurance policy covered uninsured motorist claims, and that given the facts and circumstances of the accident, the insurer would be liable and obligated to pay to Brethorst 100% of the damages she sustained as a direct result of the uninsured motorist's negligence.[32]

The coverage provision underlying a stand-alone bad faith claim may not always be as clear as in *Brethorst*. In *Brethorst*, the insurer was not claiming that there was no coverage for the plaintiff's accident. Rather, the insurer disputed the *value* of Brethorst's injuries and the relatedness of the medical expenses she incurred. If defense counsel is faced with a stand-alone bad faith claim where the insurer denied the underlying claim based on lack of *coverage*, the plaintiff cannot find support in *Brethorst*. The court in *Brethorst* was clear that an insured cannot proceed with discovery on a first-party bad faith claim until it has established or will be able to prove a breach of contract. Breach of contract cannot be established where the plaintiff is unable to point to the specific policy provision which was allegedly "breached" based on the facts plead.

d. Subject of the Dispute

Another way *Brethorst* can be distinguished is by focusing on the subject of the dispute. In *Brethorst*, there was no dispute as to whether the insured was

hit by an uninsured motorist, whether the insured's policy provided coverage for such instances, or whether the insured incurred medical expenses in the amount claimed. Rather, the dispute of the plaintiff's underlying claim in *Brethorst* centered around causation – whether the extent of the plaintiff's medical treatment was the result of the accident or a consequence of her pre-existing conditions.[33]

Many bad-faith cases may not be as clear-cut as the case in *Brethorst* when it comes to the underlying issues in dispute. An insurer and insured may disagree on a number of different issues, such as whether coverage exists and the value of the claim. While the court in *Brethorst* found that the insurer had no reasonable basis for failing to pay the claim, in part because the insurer disregarded Brethorst's physician and based its decision on "speculation," such facts are not applicable to other types of disputes.

When it comes to determining the value of a claim or the existence of coverage, for instance, an insurer may have a myriad of ways to evaluate the claim. While the insurance adjuster in *Brethorst* may have lacked the medical training and knowledge to determine that the plaintiff's accident was too minor to cause her resulting injuries, other types of evaluations may not be so far outside the scope of an insurer's expertise. Depending on the type of dispute at issue, it may be possible to distinguish *Brethorst* and show a reasonable basis for denying a claim or disputing the claim's value without an outside expert opinion.

III. Holding Plaintiff's Counsel to *Brethorst's* Standards

All of this leads to the question: What should an insurer do when it is named as a defendant in a suit that alleges only that it acted in bad faith toward the plaintiff/insured? The court in *Brethorst* held that "an insured choosing to pursue only a claim for bad faith must plead facts which, if proven, would demonstrate not only that the insurer breached its contract with the insured but also that there was no reasonable basis for not honoring the terms of the contract."[34]

Where a plaintiff fails to make this preliminary showing, the court in *Brethorst* provided insurers with two forms of relief: (1) granting a motion for summary judgment pursuant to Wis. Stat. § 802.08(2) and (2) granting a motion to dismiss the case under Wis. Stat. § 802.06(2)(f).[35] Thus, when faced with a stand-alone bad faith claim, defendants should evaluate (1) whether the allegations in the complaint are sufficient under *Brethorst* to survive a motion to dismiss and/or (2) whether the plaintiff has made the preliminary showing required by *Brethorst*, through its pleadings and affidavits, sufficient to survive a motion for summary judgment.

a. Evaluate the Pleadings

A plaintiff fails to meet the standard required in *Brethorst* if he or she brings a stand-alone claim for bad faith and fails to sufficiently plead a breach of contract by the insurer. *Brethorst* requires more than a paragraph stating, "the insurer breached its contract with the plaintiff." Rather, a plaintiff must plead with particularity (1) that they are entitled to payment under the insurance contract and (2) allege facts to show that their claim under the contract was not fairly debatable.[36]

Despite an apparent misconception of bad-faith pleading requirements by plaintiffs' counsel in recent years, this standard should by no means be easy to satisfy. The plaintiff in *Brethorst* set a uniquely high bar for plaintiffs filing a stand-alone bad faith complaint by pleading the following elements with particularity:

(1) The facts of the accident;

(2) The underlying provision providing undisputed coverage for the accident;

(3) Proof of the medical expenses plaintiff incurred;

(4) Plaintiff's demand to her insurer

ESi

Engineering Consulting and Forensic Investigation

ESi's expertise spans dozens of industries and specializations organized across several practice groups, each staffed by dozens of in-house experts with the technical knowledge, hands-on expertise, and even courtroom experience required to execute projects for and with our clients from start to finish.

- Multidisciplinary Approach
- Industry Expertise
- Powerful Insights

www.engsys.com

for these expenses;

(5) Documentation of plaintiff's medical expenses;

(6) A letter prepared by plaintiff's physician opining "to a reasonable degree of medical certainty" that her medical expenses were reasonable, necessary, and related to plaintiff's injuries from the accident;

(7) This physician's letter was provided to plaintiff's insurer;

(8) The insurer offered less than plaintiff's medical expenses based on the assessment that the collision was only a minor accident;

(9) The insurer had a company-wide policy of offering sums substantially less than the medical bills incurred in accidents involving minor impact soft tissue (MIST) injuries;

(10) Plaintiff was assigned an adjuster specifically responsible for implementing the MIST policy; and

(11) The insurer acted in bad faith by failing to conduct a full investigation of the case, failing to have plaintiff's claim evaluated by anyone with medical training, and ignoring the medical opinion of plaintiff's physician.[37]

It was this degree of particularity that led the court in *Brethorst* to hold "the insured did not fail to plead breach of contract through her bad faith claim."[38] Anything less than the pleadings outlined in *Brethorst* should create a challenge for plaintiffs and a basis for defense counsel to move for a motion to dismiss.

b. Challenge by Motion

Even if a plaintiff does plead with the particularity laid out in *Brethorst*, the plaintiff's allegations must still withstand the insurer's rebuttal.[39] The court in *Brethorst* provided that the battle for a stand-alone bad faith claim does not end with sufficient pleadings. Rather, before a plaintiff may proceed with discovery, an insurer must be permitted to challenge the elements of the claim, not only by a responsive pleading, but also by motion.[40]

The court in *Brethorst* required that an insurer be permitted to show that it did not breach the insurance contract or that there was a reasonable basis for its conduct in denying, paying, or processing a claim.[41] If an insured's claims withstand an insurer's rebuttal and satisfy the court that the insured has established or will be able to prove *both* (1) the insurer breached its contract with the insured and (2) the insurer had no reasonable basis for not honoring the terms of the contract, *only then*, may a plaintiff move forward with a stand-alone bad faith claim.[42] Any failure by the plaintiff to make this preliminary showing is grounds for the court to grant a motion for summary judgment under Wis. Stat. § 802.078(2).[43]

IV. Conclusion

In conclusion, it should not be easy for a plaintiff to proceed with a stand-alone claim for bad faith against an insurer, and with that, access to the insurer's claim file material. While plaintiffs' counsel may attempt to lean on *Brethorst* for support, the facts of *Brethorst* are a double-edged sword. Defense counsel faced with stand-alone bad faith claims should not be afraid to utilize *Brethorst* and its many hoops. The court in *Brethorst* created a very high bar for bad faith plaintiffs – more in the essence of a pole vault rather than a limbo. In stand-alone insurance bad faith claims, the duty lies with defense counsel to start making plaintiffs jump.

Author Biographies:

Michael J. Wirth is a member of Borgelt, Powell, Peterson & Frauen, SC, and a 1999 graduate of

Marquette University Law School. Attorney Wirth focuses his practice on bad-faith-claim counseling and litigation, first-party property insurance issues, and insurance coverage analysis and litigation.

Abigail T. Hodgdon is a member of Borgelt, Powell, Peterson & Frauen, SC, and a 2020 graduate of Marquette University Law School. Attorney Hodgdon focuses her practice on automobile liability, civil litigation, municipal law, and subrogation and statutory liens.

References

1 *Dahmen v. Am. Fam. Mut. Ins. Co.*, 247 Wis. 2d 541, 635 N.W.2d 1 (Ct. App. 2001).
2 *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, 334 Wis. 2d 23, 798 N.W.2d 467.
3 *Id*. at 55.
4 *Anderson v. Cont'l Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978).
5 *Id* at 680-83.
6 *Id*. at 684.
7 *Id*. at 684, 686.
8 *Id*.
9 *Id*. at 687.
10 *Dahmen*, 247 Wis. 2d 541.
11 *Id.* at 551 (quoting Wis. Stat. § 805.05(2)).
12 *Id.* at 552.
13 *Id*.
14 *Brethorst*, 334 Wis. 2d 23.
15 *Id.*
16 *Id.*
17 *Id*.
18 *Id*. at 48.
19 *Id*. at 55.
20 *Id*. at 31.
21 *Id*.
22 *Id*.
23 *Id*. at 58.
24 *Id*.
25 *Id*. at 32.
26 *Id*.
27 *Id*. at 58.
28 *Id*. at 50.
29 *Id*. at 32.
30 *Id*. at 33.
31 *Id*. at 54.
32 *Id*. at 57.
33 *Id*. at 32.
34 *Id*. at 55.
35 *Id*. at 56.
36 *Id*. at 55.
37 *Id*. at 32, 57.
38 *Id*.
39 *Id*.
40 *Id*.
41 *Id*.
42 *Id*.
43 *Id*.

Unequalled Creativity, Absolute Partnership: Game-Changing Advantages.

At von Briesen, we've transformed the traditional law firm into a modern platform for legal innovation.

Combining our industry leading expertise with innovative technology, we take a collaborative and creative approach to problem-solving the most complex matters.

The result? Game-changing advantages for our clients.

To learn more about our law firm, contact: Susan E. Lovern, President & CEO, at slovern@vonbriesen.com or 414.287.1286. For more information on the services and areas of expertise that we offer, please visit vonbriesen.com.

von Briesen

von Briesen & Roper, s.c. | Attorneys at Law

vonbriesen.com

Milwaukee • Madison • Neenah • Waukesha • Green Bay

Quiet Policy Changes in Wisconsin as a Result of COVID-19: A Deeper Look into the Pandemic Response[1]

by: Rebecca R. Hogan and Paige Scobee, The Hamilton Consulting Group

I. Introduction

By the time you read this article, something related to COVID-19 will have significantly changed. It could be case counts - currently they are at historically high levels in Wisconsin. There could be new orders from the Governor or his administration, with legal challenges in tow. The election may incent a lame duck session to tackle more COVID-19 related legislation. What will not change is the fact that the emergence of COVID-19 earlier this year put a halt on typical lawmaking in Wisconsin and thrust policy reacting to the novel virus to the forefront.

Policy changes made to manage the COVID-19 outbreak came in the form of emergency orders and 2019 Wisconsin Act 185.[2] On March 12, 2020, when Governor Tony Evers declared the health emergency in Executive Order No. 72[3], he officially gave the Department of Health Services (DHS) the authority to lead the response to the pandemic.[4] DHS Secretary Designee Andrew Palm (SD Palm) started to implement basic adjustments the very next day, while the legislature and the Governor started working on a bill that would provide even more clarity on how government and the regulated community would deal with COVID-19.

We are all familiar with the orders to close schools[5], prohibit mass gatherings[6], and prohibit nonessential travel while designating certain businesses as "essential"[7] because they impacted every single one of us. While most of us were wrestling with life under the restrictions, other orders of critical importance were being released.

II. Emergency Orders

Goods and services. It likely did not dawn on any of us as were frantically scooping up toilet paper and canned goods in the stores that these products needed to be quickly replenished. SD Palm authorized the Department of Transportation, in Emergency Order 2[8] and Emergency Order 14[9], to issue overweight permits to support "efficient transport of groceries and supplies" as it was "essential for all Wisconsinites to have access to basic necessities."

Childcare facilities. Childcare settings needed to be in operation even while schools were being closed. Daycare facilities had to stay open to serve the needs of frontline health care workers and other families who went to work in essential businesses. Typically, these facilities must meet standards related to appropriate staffing, training and qualifications, recordkeeping, and meals and snacks. Those items were lifted in Emergency Order 3[10], while Emergency Order 6[11] restricted the size of childcare settings. This order also reminded providers and parents that care needed to be maintained with proper social distancing.

Unemployment insurance. As thousands of people lost their jobs and unemployment insurance (UI) benefits had to be distributed, normal qualifications

for UI eligibility needed to be addressed. Under most circumstances, a claimant must be considered suitable for work to be eligible for benefits.[12] A beneficiary must also perform four work searches a week.[13] Emergency Order 7[14] allowed for temporary exceptions to work-related requirements and allowed the public health emergency to offset four work searches.

Prisons and juvenile facilities. With COVID-19 cases increasing it did not make sense to add more people to prisons or juvenile facilities. Emergency Order 9[15] ordered the Department of Corrections to "implement a moratorium on admissions to the state prisons and juvenile facilities operated by the Department of Corrections to mitigate the spread of COVID-19." Governor Evers also gave the Secretary of Corrections the authority to lift or rescind the order.

Schools. Directing statewide school closure was SD Palm's first Emergency Order.[16] This order was going to put schools in violation of requirements related to hours of direct pupil instruction.[17] Emergency Order 10[18] suspended those requirements but also allowed, amongst other things, students in teacher preparatory programs to graduate without meeting certain testing requirements.

Hardship. COVID-19 created unanticipated hardships for people including hindering the ability to pay rent or utility bills. Service rules for electrical, gas, and water utilities were suspended in Emergency Order 11[19] and a temporary ban on evictions and foreclosures was issued in Emergency Order 15[20]. During the duration of the public health emergency, people did not have to worry about electricity or water being turned off when they were adjusting to lost wages. Homeowners and renters would not face evictions and homelessness because of missed monthly payments.

Health care. The heavily regulated health care workforce needed relief to best serve COVID-19 patients. Multiple orders were required to maintain appropriate staffing and services throughout the emergency order. Emergency Order 16[21] allowed for interstate reciprocity so that out-of-state providers could practice in Wisconsin prior to getting a license from the Department of Safety and Professional Services (DSPS) and specified that doctors practicing telemedicine must meet the requirements set out in Med 24[22], regulations on how providers use telemedicine in Wisconsin. DSPS also needed to search out health care providers with recently expired licenses and let them know they are eligible for renewal and can return to the workforce for the emergency.

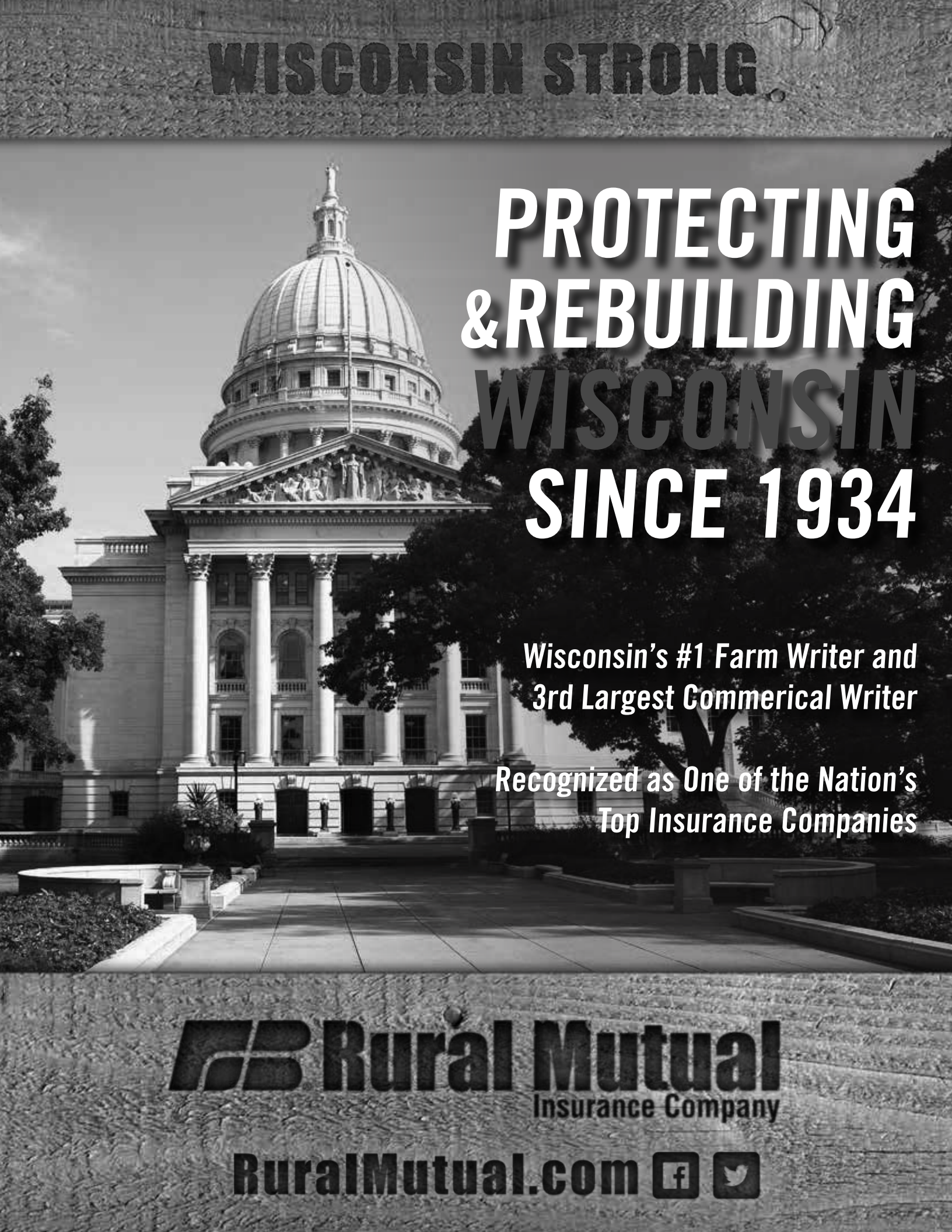
Emergency Order 20[23] expanded Emergency Order 16 to cover other providers like speech-language pathologists, audiologists, and massage therapists. This order also clarified that if a provider started working at a health care facility under exceptions created by Emergency Order 16, the health care facility where the provider worked must notify DSPS within ten days of the provider starting to practice.

Emergency Medical Services (EMS), home health agencies, hospices, nursing homes, and other community services providers were given regulatory relief in Emergency Order 21[24]. The flexibilities included relaxing workforce restrictions and requirements, licensure and certification rules, and the waiving of credentialing fees if there was a clear need.

Department of Safety and Professional Services. Licensed professionals are very familiar with inspections, permits, and the requirements to maintain their license. In the case of a pandemic and the mandatory social distancing, compliance with the rules becomes tricky. Emergency Order 22[25] suspended various rules administered by DSPS to loosen and remove in-person contact requirements for many licensed professionals.

III. 2019 Wisconsin Act 185

On April 14 to 15, 2020, the Wisconsin Assembly and Senate met in their first ever virtual sessions to pass legislation addressing COVID-19. Governor Evers signed the bill that made many simple changes


WISCONSIN STRONG
PROTECTING
&REBUILDING
WISCONSIN
SINCE 1934
Wisconsin's #1 Farm Writer and
3rd Largest Commerical Writer
Recognized as One of the Nation's
Top Insurance Companies
Rural Mutual
Insurance Company
RuralMutual.com

to state programs, with some of the provisions applying for a limited timeframe. 2019 Wisconsin Act 185 was a recognition by the Governor and the legislature that government, at all levels, needed flexibility to best respond to the pandemic. The main provisions in the bill follow.

Administration. Act 185 allows the Department of Administration to transfer employees among agencies, allows DOA to adjust limited term employee hours, allows state employees to take annual leave before it has been accrued, waives requirements for timely filing of adverse employment complaints by state employees and related in-person meeting requirements, allows Wisconsin Retirement System annuitants to reenter critical positions during the emergency without suspending their annuities, and allows state entities to waive in-person requirements.

Retail. The Act prohibits returns of food, cleaning supplies, personal care products, or paper product.

Utilities. It authorizes the Board of Commissioners of Public Lands to offer loans to municipal utilities during the public health emergency, and allows households to apply for heating assistance under DOA's low-income energy assistance program any time in 2020 (normally, this program is limited to September-May).

Local government. Act 185 changes requirements for town meetings and board of review meetings.

Liability. It exempts manufacturers, distributors and sellers of emergency medical supplies and equipment that donate or sell their product from civil liability. Entities are exempt from civil liability only if the product was sold or donated at a price that does not exceed the cost of production.

Medicaid. The Act allows DHS to suspend current copayment/premium requirements for childless adults under Medicaid in order for Wisconsin to receive the enhanced federal medical assistance percentage, requires DHS to create an incentive-based Medicaid payment system to encourage participation in health information exchange, and requires coverage of vaccines under SeniorCare.

Private insurance. The Act create a "surprise billing" mandate during the COVID-19 emergency that an enrollee cannot be charged more for seeing an out-of-network provider (if an in-network provider is not available) for services related to COVID-19, creates a testing for COVID-19 insurance mandate prohibiting cost sharing, bans prohibitions on early refills, and creates non-discrimination provisions related to COVID-19 diagnosis, *i.e.*, for enrollment, renewal, basis for cancellation, or basis for rates.

Health care providers. Act 185 creates liability protections for health care professionals, prohibits DHS from requiring emergency and ambulance service providers to renew their credentials during the public health emergency, waives license renewal requirements during the public health emergency, allows DSPS to grant temporary credentials to former health care providers and providers from other states, and lowers instructional hour requirements for nurse aides to the federal minimum of 75 hours.

Other health care provisions. It implements a public health emergency dashboard with information from hospitals and surgery centers and allows pharmacists to extend certain prescription orders during the public health emergency

Education. It waives requirements for the Department of Public Instruction (DPI) to publish school accountability reports for 2019-20, waives pupil assessments mandated by state law for 2019-20, requires school boards to submit to DPI reports on virtual learning, waives hours of instructions for private school choice programs and extends the enrollment period for school choice, and allows DPI to waive other statutes or rules related to parental choice, charter schools, or the Special Needs Scholarship program.

Tax. The Act allows municipalities to waive interest and penalty payments for property taxes until October 1, 2020, allows the Department of Revenue

to waive other tax penalties if persons failed to remit taxes due to COVID-19, and conforms Wisconsin tax code to changes from the federal coronavirus bills.

Workforce development. The Act temporarily suspends the one-week waiting period for unemployment insurance (UI) benefits, provides that UI claims related to COVID-19 will not be charged to the employer's UI account as normally provided, suspends certain limitations of the state work-share program, and suspends employee records inspection requirements during a public health emergency.

Worker's compensation. It creates a rebuttable presumption for first responders that an injury sustained during the public health emergency was caused by the individual's employment, if the employee has been diagnosed with COVID-19.

Economic development. The Act requires the Wisconsin Economic Development Corporation to submit a report to the governor and legislature by June 30, 2020 on a plan to support major industries that have been adversely affected by COVID-19, including tourism, manufacturing, construction, retail, agriculture, and services.

Other. Act 185 allows the legislature, state agencies, and local governments to suspend deadlines and training requirements during the public health emergency.

IV. Conclusion

COVID-19 brought with it controversial policy changes. Differing opinions on the Safer at Home orders, safe elections and face mask requirements have left the Governor and the republican-led Legislature at extreme odds. It is easy to forget that many of the exemptions and relief provided in the 2020 emergency orders and Act 185 were used as intended for the duration of the public health emergency. Together the Governor and the legislature altered rules and regulations to encourage "business as usual" throughout the unprecedented circumstances.

Author Biographies:

Rebecca R. Hogan is an Owner/Lobbyist at The Hamilton Consulting Group. Rebecca has been developing and advancing policies and related political strategies for Wisconsin lawmakers, administrators and businesses for nearly 20 years. She joined Hamilton Consulting in 2013, where she advocates for clients in policy areas such as health care and workforce development. Before joining Hamilton, Rebecca served as the Director of Health and Human Resources Policy at Wisconsin Manufacturers and Commerce, the state's largest trade association representing business. Rebecca also spent eight years in the Wisconsin State Senate working in a variety of positions for a number of senators, including the current co-chair of the Joint Committee on Finance, Alberta Darling and vice co-chair, Luther Olsen. Rebecca holds a Bachelor of Arts in Political Science and International Relations from University of Wisconsin-Madison.

Paige Scobee is currently a law student at the University of Texas School of Law. She is a former Lobbyist and Researcher at The Hamilton Consulting Group. She earned her undergraduate degree from the University of Wisconsin-Madison.

References

1 Portions of this article are adapted from an original blog post from the authors available at *https://www.hamilton-consulting.com/assembly-passes-covid-19-legislation/* with links to additional information and resources.

2 State of Wisconsin law in response to the COVID-19 pandemic, available at *https://docs.legis.wisconsin.gov/2019/related/acts/185.pdf*.

3 Governor Evers Executive Order #72 available at *https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf*.

4 Wis. Stat. § 323.10.

5 Secretary Designee Andrea Palm Emergency Order 1 available at *https://evers.wi.gov/Documents/EO/SignedSchoolClosure.pdf*.

6 Secretary Designee Andrea Palm Emergency Orders 4, 5, and 8 available at *https://evers.wi.gov/Documents/EO/DHSOrderMassGatheringsof50orMore.pdf*; *https://evers.wi.gov/Documents/COVID19/UPDATEDOrder10People.pdf*; and *https://evers.wi.gov/Documents/COVID19/EMO08-MassGathering10v.2.pdf*.

7 Secretary Designee Andrea Palm Emergency Order 12, the Safer At Home Order, available at *https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf*.

8 Secretary Designee Andrea Palm Emergency Order #2 on March 14, 2020 available at *https://evers.wi.gov/Documents/COVID19/EMO02-DOTPermitsWeightsHours.pdf*.

9 Secretary Designee Andrea Palm Emergency order #14 on March 27, 2020 available at *https://evers.wi.gov/Documents/COVID19/EMO14-DOTWeightPermitExtension.pdf*.

10 Secretary Designee Andrea Palm Emergency Order #3 on March 15, 2020 available at *https://evers.wi.gov/Documents/COVID19/EMO03-DCFRuleSuspensions.pdf*.

11 Secretary Designee Andrea Palm Emergency Order #6 on March 18, 2020 available at *https://evers.wi.gov/Documents/COVID19/DHS%20Order6_3.18.2020.pdf*.

12 Wis. Stat. §§ 108.04 (a) to (bm).

13 Wis. Stat. § 108.04 (2); Wis. Admin. Code ch. DWD 127

14 Secretary Designee Andrea Palm Emergency Order #7, March 18, 2020 available at *https://evers.wi.gov/Documents/COVID19/DWD20200318FINAL.pdf*.

15 Secretary Designee Andrea Palm Emergency Order #9, March 20,2020 available at *https://evers.wi.gov/Documents/COVID19/EMO09-DOC.pdf*.

16 Secretary Designee Andrea Palm Emergency Order #1, March 13, 2020 available at *https://evers.wi.gov/Documents/EO/SignedSchoolClosure.pdf*.

17 Wis. Admin. Code § DPI 8.01(4)(b)1. to 7., and (c).

18 Secretary Designee Andrea Palm Emergency Order #10, March 21, 2020 available at *https://evers.wi.gov/Documents/COVID19/EMO10-DPIRuleSuspensions.pdf*.

19 Secretary Designee Andrea Palm Emergency Order #11, March 22, 20202 available at *https://evers.wi.gov/Documents/COVID19/EMO11-PSCRuleSuspensions.pdf*.

20 Secretary Designee Andrea Palm Emergency Order #15, March 27, 2020 available at *https://evers.wi.gov/Documents/COVID19/EO15BanonEvictionsandForeclosures.pdf*.

21 Secretary Designee Andrea Palm Emergency Order #16, March 27, 2020 available at *https://evers.wi.gov/Documents/COVID19/EMO16-DSPSCredentialingHealthCareProviders.pdf.*

22 Wis. Admin. Code ch. MED 24.

23 Secretary Designee Andrea Palm Emergency Order #20, April 3, 2020 available at *https://evers.wi.gov/Documents/COVID19/EMO20-ModificationOfEmO16.pdf*.

24 Secretary Designee Andrea Palm Emergency Order #21, April 3, 2020 available at *https://evers.wi.gov/Documents/COVID19/EMO21-DHSRuleSuspension.pdf*.

25 Secretary Designee Andrea Palm Emergency Order #22, April 9, 2020 available at *https://evers.wi.gov/Documents/COVID19/EMO22-DSPSRules.pdf*.

CRIVELLO
CARLSON S.C.
ATTORNEYS

Milwaukee, WI
Eau Claire, WI
Madison, WI
Mukwonago, WI
Delafield, WI
Chicago, IL
Edwardsville, IL
Peoria, IL

Crivello Carlson, S.C. is growing in Wisconsin and Illinois. In April, we opened our office in Peoria, IL to serve our clients' needs in the central-Illinois region.

Our recent hires include:
Atty. James Moermond, Eau Claire, WI
Attys. Micaela Haggenjos and Kylie Owens, Milwaukee, WI
Attys. Allison Bell and Robert Everett, Peoria, IL

In this time of uncertainty, our growth is testament to the trust our clients have in the work that we do.

www.crivellocarlson.com
Main Office: 414-271-7722

Coverage Considerations in Construction Defect Cases Involving Statutory and Code Violation Claims

by: Monte E. Weiss, Weiss Law Office, S.C., and William R. Wick, Nash, Spindler, Grimstad & McCracken, LLP

I. Introduction

Construction defect cases are becoming more complex. Claims for statutory violations such as theft by contractor under Wis. Stat. § 779.02(5) and theft implicating Wis. Stat. §§ 943.20 and 895.446 are being alleged with increasing frequency. In construction cases involving remodeling or renovation, violations of marketing, trade, and home improvement practices under Wis. Stat. §§ 100.18 and 100.20 and Wis. Admin. Code ch. ATCP 110 are also being asserted. The claims alleged often result in insurers raising coverage issues necessitating the need for defense counsel on the merits, coverage counsel for the carrier and coverage counsel for the insured. Often insurers will initially provide a defense on merits of the claims and simultaneously seek a judicial declaration regarding the availability of coverage, if any, for such claims.

Allegations of property damage caused by defective work of the insured coupled with claims of statutory and code violations invariably trigger coverage battles between the contractor and its carrier as well as the plaintiff. While coverage is being decided, merits counsel defending the insured must be mindful of the potential for liability to the insured even if the claim is not covered. There is the potential for personal exposure to an insured (whether to the corporation or to its officers if the corporate veil is not available) for these claims. This article provides a general overview of these claims and the coverage implications when such claims are alleged.

II. Theft by Contractor[1]

"Wisconsin's civil theft by contractor statute, Wis. Stat. § 779.02(5), 'safeguards against misappropriation of construction funds' by providing that funds paid to a contractor by a property owner for improvements to that property constitute a trust for a benefit of owners, subcontractors, and suppliers of materials."[2] The statute's purpose is to "protect owners and prime contractors from having to pay twice and to secure subcontractors and suppliers payment for work and materials."[3]

a. Use of Funds

In order to accomplish the statute's purpose, the funds received from the property owner[4] are to be held in trust and used only to pay claims of contractors, subcontractors and material suppliers for work performed on and materials supplied for the improvements to the property.[5] Funds received by an owner must be used to satisfy "due or about-to-become-due" claims for labor and material used for the improvement project.[6] If the funds are used for other purposes, the statute is violated. A violation of the statute can result in civil and criminal liability.[7]

A contractor is obligated to keep the funds in trust and pay only certain claims of other contractors and material supplies. What a contractor may not do is use those funds for any other purpose. For example, use of the funds by a contractor to pay the

Cross Jenks Mercer & Maffei LLP

ATTORNEYS SINCE 1889

LET US SHOW YOU THE BENEFIT THAT A CENTURY OF INSURANCE DEFENSE EXPERIENCE AFFORDS.

For nearly a century, insurance defense has been the core of our business.

ATTORNEYS WAYNE MAFFEI AND NICOLE MARKLEIN
(608) 356-3981

contractor's corporation's routine expenses incurred in the ordinary and normal operation of its business is a violation of the statute.[8] Likewise, the use of such funds to pay a contractor's car lease, telephone expenses and labor and materials incurred on other, unrelated projects is a violation of the statute[9] as is the use of the funds to pay for the contractor's living expenses.[10]

Yet, a general contractor can pay a subcontractor out of its own money before it receives a draw and then use the draw to reimburse itself for the amount of the payment to the subcontractor without violating the statute.[11] There would be no violation even though the contractor has technically not used the owner's funds to pay a claim of a material supplier or a subcontractor.

Having an account for each project is the simplest way to avoid comingling funds. However, some contractors do not set up separate accounts for each project which can lead to co-mingling funds. This practice makes it difficult to trace receipts and disbursements for a specific project, adding to the difficulty of defending against these claims.

b. Statutory Damages

Treble damages are available for theft by contractor under Wis. Stat. §§ 779.02(5) and 943.20.[12] The imposition of treble damages requires proof that a contractor knowingly retained possession of or used contractor trust funds without the owner's consent, without authority to do so and with the intent to use those funds for the contractor's own or another's use. The violation of the statute occurs when the funds are misappropriated.[13] "[T]o sustain a cause of action for treble damages… the elements of both statutes [Wis. Stats. § 779.02(5) and § 943.20], including the specific criminal intent element required by Wis. Stat. § 943.20 must be proven."[14]

While a theft by contractor claim provides for a greater range of damages (*i.e.*, treble damages and attorney's fees), the claim itself makes the potential for coverage under the typical commercial general liability insurance policy unlikely. The claim can also remove the protection from personal liability for corporate officer for actions taken on behalf of a corporate entity.

c. Personal Liability

The statute's imposition of liability does not stop at the doorstep of the contractor. On private projects, personal liability of corporate officers can be imposed.[15] However, for public projects, there is no personal liability of corporate officers.[16] The statutory language precludes civil liability on public projects ("Except as provided in this subsection, this section shall not create a civil cause of action against any person other than the prime contractor or subcontractor to whom such moneys are paid or become due.").[17]

III. Unlawful Marketing and Trade Practice

When suits are commenced for defective workmanship and untimely performance in remodeling and renovation cases, there may be allegations of fraudulent misrepresentations contrary to Wis. Stat. § 100.18, and failure to comply with the requirements of fair trade, business and marketing practices found in Wis. Stat. § 100.20 and Wis. Admin. Code § ATCP 110.

a. Wis. Stat. § 100.18

Wis. Stat. § 100.18 covers a large array of misrepresentations relevant to unfair trade practices. The statute requires proof of three elements: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was "untrue, deceptive or misleading," and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff.[18]

As to the first element, the defendant must have made a statement or representation before one or more members of the public to induce an obligation. The statement may be oral or written.[19] The statement may also be made in a private conversation to one prospective purchaser so long as that purchaser remains a member of the public.[20]

As to the second element, the defendant's statement must have been untrue, deceptive, or misleading. A representation "is untrue if it is false, erroneous, or does not state or represent things as they are" and "is deceptive or misleading if it causes a reader or listener to believe something other than what is in fact true or leads to a wrong belief."[21] The statement also "need not be made with knowledge as to its falsity or with an intent to defraud or deceive so long as it was made with the intent to" induce the obligation that is the subject of the statement.[22]

The final element requires that the plaintiff sustain a monetary or pecuniary loss as a result of the statement. The test for determining whether the plaintiff's loss was caused by the statement is "whether the plaintiff would have acted in its absence."[23] The representation need not be plaintiff's sole motivation for hiring a certain contractor, but "it must have been a material inducement" or "a significant factor contributing to plaintiff's decision."[24]

Proving causation in the context of Wis. Stat. § 100.18 requires a showing of material inducement.[25] A plaintiff is not required to prove reasonable reliance as an element of a § 100.18 claim.[26] However, the court said the "reasonableness of a plaintiff's reliance may be relevant in considering whether the misrepresentation materially induced (caused) the plaintiff to sustain a loss."[27]

b. Wis. Admin. Code § ATCP 110

Wis. Admin. Code ch. ATCP 110 is the Home Improvement Practices Act. The introductory note to ATCP 110 says that the chapter was adopted under authority of Wis. Stat. § 100.20(2) and is administered by the Wisconsin Department of Agriculture, Trade and Consumer Protection. Wis. Stat. § 100.20(1) requires that methods of competition and trade practices in business be fair. Unfair methods of competition in business and unfair trade practices are prohibited. Under the umbrella of "unfair trade practices" is prohibition of unfair methods of competition in business and include loss of money and victimization of third persons.[28]

i. Application

ATCP 110 applies to "home improvements" which are defined in ATCP 100.01(2). A broad spectrum of improvements are included such as remodeling, altering, repairing, painting, or modernizing of residential or non-commercial property, or the making of additions thereto, and includes, but is not limited to, the construction, installation, replacement, improvement, or repair of driveways, sidewalks, swimming pools, terraces, patios, landscaping, fences, porches, garages, basements and basement waterproofing, fire protection devices, heating and air conditioning equipment, water softeners, heaters and purifiers, wall-to-wall carpeting or attached or inlaid floor coverings, and other changes, repairs, or improvements made in or on, attached to, or forming a part of, the residential or non-commercial property and extends to the conversion of existing commercial structures into residential or non-commercial property.

A "home improvement" does not include the construction of a new residence or the major renovation of an existing structure. The applicability of ATCP 110 depends on the size of the project. ATCP 110 applies to "major renovation of an existing structure" which is defined as a renovation or reconstruction contract where the total price of the contract is more than the assessed value of the existing structure at the time of the contract.[29]

Although not an exhaustive list, among the violations of ATCP 110 frequently alleged are:

> **ATCP 110.02(2)(c) and (g)** – misrepresenting directly or by implication that products or materials to be used are of a specific size, weight, grade or quality or possess any other distinguishing characteristic or feature, or are a sufficient size, capacity, character or nature to do the job expected or represented;
>
> **ATCP 110.02(6)(m)** – failing to give or furnish lien waivers;

ATCP 110.02 (7)(b) – accepting payment for home improvement materials or services that are not intended to be provided;

ATCP 110.02(7)(c) – failing to provide timely notice of delay in performance;

ATCP 110.02(10) – using any home improvement contract payment, received prior to the completion of a home improvement, for any purpose other than to provide materials or services for the home improvement;

ATCP 110.02(11) – making deceptive representations concerning the quality and price of the project in order to induce the plaintiffs to enter into the home improvement contact;

ATCP 110.03(1) – failing to inform the homeowner of all building and construction permits that are required for the home improvement and starting work under the home improvement contract before all required state and local permits are issued;

ATCP 110.05(2)(c) – failing to set forth the total price or other consideration to be paid by the homeowner, including any finance charges;

ATCP 110.05(5) – failing to disclose the identity of any person assuming responsibility for the performance of the contract;

ATCP 110.07(4)(a) and (b) – failing to return payments and deliver materials; and

ATCP 110.07(4)(c) – failing to provide an accurate accounting.

Violations of Wis. Stat. § 100.20 and ATCP 110 are frequently pled in remodeling and renovation construction cases.

ii. Pecuniary Loss

Under Wis. Stat. § 100.20(5), a homeowner may recover twice the amount of any pecuniary (*i.e.* monetary) loss, together with costs and reasonable attorneys' fees. Significantly, there must be a causal connection between a violation of the Home Improvement Practices Act and the pecuniary loss. However, that pecuniary loss need not be precisely determined: "Although a party need not prove damages to a mathematical certainty, a party asserting a pecuniary loss for the purposes of Wis. Stat. § 100.20(5) must show that there is a causal connection between a prohibited trade practice under Wis. Admin. Code § ATCP Chapter 110 and the damage incurred."

There can be no recovery under Wis. Stat. § 100.20(5) without a pecuniary loss. *Grand View Windows, Inc. v. Brandt*[30] is a case that involved installation of defective siding and violations of the rules against unfair trade practices. The property owner failed to offer any evidence of pecuniary loss as a result of the violation of any rule and the contractor was not liable to the owners for the penalties under the statute.[31] The Court said in *Grand View Windows* that "the test… for determining whether a representation caused pecuniary loss is 'whether plaintiff would have acted in its absence.'"[32] Additionally, "damages should be proven by statements of facts rather than mere statement or assumption that he has been damaged to a certain extent without stating any facts on which the estimate is made is too uncertain.[33] "The evidence must demonstrate that the injured party has sustained some injury and must establish sufficient data from which the trial court or jury could properly estimate the amount."[34]

Although a party need not prove damages to a mathematical certainty, a party asserting a pecuniary loss for the purpose of Wis. Stat. § 100.20(5) must show that there is a casual connection between a prohibited trade practice under Wis. Admin. Code.

Statewide Representation for Business & Insurance

MILWAUKEE OFFICE
311 E. Chicago St., Ste. 410
Milwaukee, WI 53202
Phone: 414-273-8550
Fax: 414-273-8551

GREEN BAY OFFICE
P.O. Box 11097
Green Bay, WI 54307
Phone: 920-770-4087
Fax: 920-544-4110

www.simpsondeardorff.com

Proud Sponsor of Wisconsin Defense Counsel

§ ATCP Chapter 110 and the damages incurred.[35] In *Grand View Windows*, the court stated, "the ATCP claim… is unrelated to the property damage or breach of contract claims. There is no casual connection between the failure…to give timely notice of a delay and the other claims."[36] The *Grand View Windows* Court went through the testimony of each witness and in conclusion, stated "the record simply does not support a finding that *not telling* … about the delay caused damages ….."[37] Additionally, having found the damage award to be inappropriate, there were no damages to be doubled and attorney's fees could not be imposed.[38]

Another case involving damages in relation to ATCP violations, *Snyder v. Badgerland Mobile Homes, Inc*.,[39] contemplated damages as it relates to the alleged failure to provide start and completion dates in the contract. The *Snyder* Court concluded that because the homeowners failed to establish any pecuniary loss as request by § 100.20(5) as a result of the contractors failure to include start and completion dates in the contract, the homeowners failed to meet the requirement of Wis. Admin. Code §§ ATCP 110.05(2)(d) and 110.07(1).[40] On appeal, the appellate court concluded that the trial court appropriately granted the contractor's summary judgment motion.

Grand View Windows and *Snyder* stand for the proposition that if the plaintiff cannot provide support that pecuniary damages resulted from administrative violations, no award can be imposed against the contractor. For example, a delay in performance may result in incurring rental expenses whereas the failure to provide lien waivers is of no consequence if no liens are filed. Merits counsel should be aware of the proof required for damages under the statute and administrative code.

iii. Personal Liability

Wis. Stat. § 100.20 and Wis. Admin. Code ch. ATCP 110 allow a person who suffers a monetary loss because of a violation of ATCP 110 to sue the violator directly under Wis. Stat. § 100.20(5) and recover twice the amount of the loss, together with costs and reasonable attorneys' fees." ATCP 110 applies to a "seller," which is defined as a person engaged in the business of making or selling home improvements and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees."[41]

A corporate employee may be personally liable for acts he or she takes on behalf of a corporate entity that employs him or her that violate the ATCP 110 and violations may create personal liability for individuals who are alleged to be responsible for prohibited, unfair dealings, and practices. However, merely being an officer, agent, employee, representative, shareholder, or director will not be enough to impose individual liability on a persons with these relationships without proof that he or she was personally responsible for prohibited unfair dealings, or practices.[42]

This could pose a potential problem for merits counsel assigned to represent the corporation. It may be that an employee or officer of the corporation has liability to the corporation for the violations. Alternatively, the merits defense of the corporation may require showing that the employee or officer acted outside of his or her duties. This status could put merits counsel in the unenviable position of navigating potential conflicts of interest.

At times, merits counsel dealing with corporate contractors that find themselves in difficult financial situations will see plaintiffs seek to attach personal liability to agents and employees despite the existence of a corporate entity. In *Rayner v. Reeves Custom Builders, Inc.*,[43] the court said that allowing a corporate agent to use the corporate form to shield malfeasance of his or her own design inadequately deterred the prohibited practices. In a footnote, the *Rayner* Court pointed out that, "This inadequacy is even more apparent in cases where the employer is an insolvent corporation.[44] In such cases "[t]o permit an agent of a corporation ... to inflict wrong and injuries upon others, and then shield himself [or herself] from liability behind his [or her] vicarious character, would often both sanction and

Skilled litigators, exceptional results.

Our litigation attorneys balance unparalleled skill and winning strategies to achieve exceptional results in the courtroom. We have successfully tried hundreds of cases on behalf of individuals, businesses, and insurance companies in federal and state courts throughout Wisconsin and nationwide. Together, we can chart the best path forward.

BoardmanClark

BOARDMANCLARK.COM

encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations."[45] In *Rayner,* it was represented to the court that Reeves Custom Builders had filed for bankruptcy.[46]

In *Jackson v. DeWitt*,[47] the court said that all of the individuals and entities identified in ATCP 110.01(5) are potential sources of the unfair methods of dealing that the ATCP was meant to prevent. The court said that to the extent individuals have the power to prevent unfair dealings with consumers, individuals will incur liability for noncompliance. However, individuals will be held liable as sellers only when they commit violations of their own volition and design. Persons will not be held vicariously liable for all vices imputable to the corporate entity but where the corporate veil frustrates the purpose of the statute the intent of the legislature was to pierce the corporate veil.

In short, a corporate employee may be personally liable for acts he or she takes on behalf of the corporate entity that violate the Home Improvement Practices Act. However, being an officer, agent, employee, representative, shareholder, or director in and of itself will not be enough to impose individual liability on a person in such a class in the absence of proof that he or she was personally responsible for prohibited, unfair dealings or practices.[48]

IV. Coverage Considerations

The standard process for analyzing coverage involves a conditional three-step analysis. The first step requires an examination of the factual allegations in the complaint to determine if they allege a claim that falls within the policy's initial grant of coverage.[49] It is the burden of a person seeking coverage to show that the initial grant covers the claim.[50]

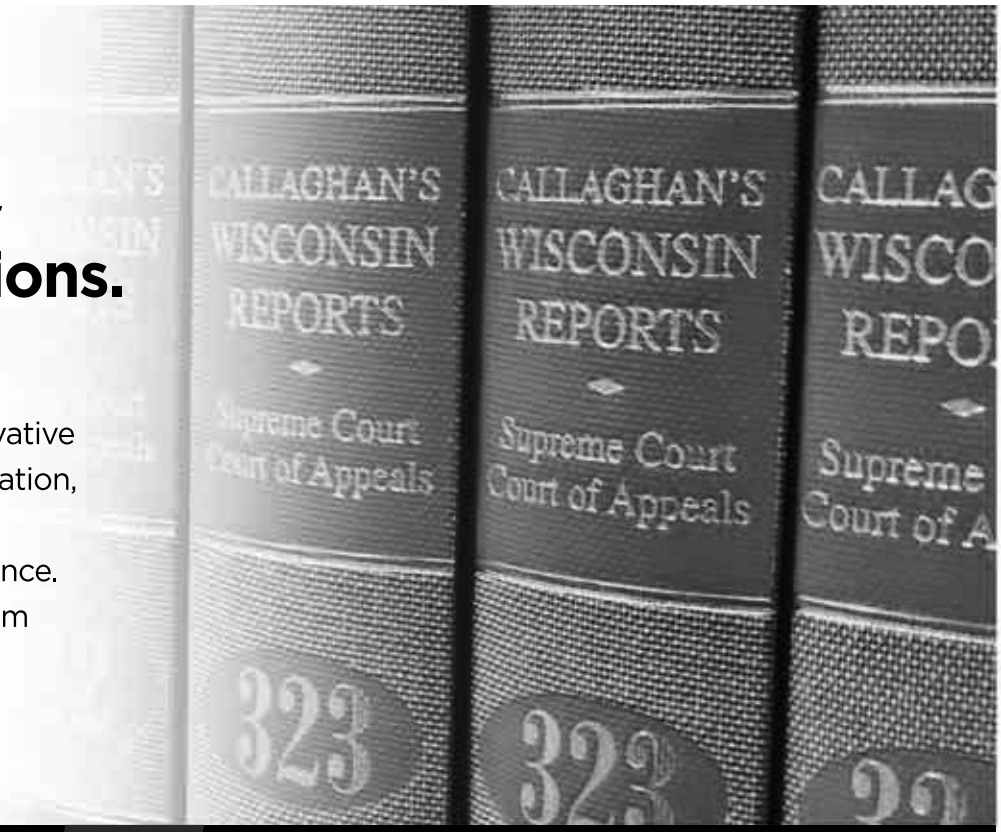
a. Coverage Analysis

Conduct that results in a violation of the statutes and code provisions identified earlier in this article usually does not trigger an initial grant of coverage under a typical commercial general liability policy and a variety of policy exclusions also usually apply.

First, the conduct usually does not constitute an "occurrence" under the policy. Typically, insurance policies define an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." It is long standing Wisconsin law that an "occurrence" must be accidental. Wisconsin subscribes to the concept that an "accident" is "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated."[51] An accident is conduct that lacks an intention.[52] When the conduct is intentional, it cannot constitute an accident or an "occurrence."

Theft is not accidental; it is intentional. Intentional conduct is anathema of accidental conduct and thus, not an "occurrence." Similarly, misrepresentations are generally not "accidents" and thus coverage is usually not available.[53] Even if it is claimed that misrepresentations were negligently made, rather than intentionally, coverage is often not available under the typical commercial general liability policy. Misrepresentations require a degree of volition inconsistent with the term "accident" and therefore, there is usually no "occurrence"[54] as that term is often defined in an insurance policy. Without an "occurrence," the claim will often not fall within the initial grant of coverage.

Second, claims for theft by contractor and/or unlawful marketing and trade practices do not cause "property damage" as that term is often defined in an insurance policy. Usually, misrepresentation damages are pecuniary or economic losses for which coverage under a typical commercial general liability policy is usually non-existent.[55] Theft of money is also not considered "property damage."[56] In the typical commercial general liability policy, "property damage" is either physical injury to tangible property or loss of use of tangible property that has not been physically injured. In order to constitute physical injury to tangible property, there must be an "alteration in appearance, shape, color



A trusted, innovative legal team.

Thoughtful Solutions. Winning Results.

Your toughest problems need innovative thinking, deserve dogged determination, and are successfully resolved with decades of courtroom-won experience. Weiss Law Office is here for you from start to finish.

WEISS LAW OFFICE mweisslaw.net

Complete representation is the cornerstone of our practice. We focus on providing our clients creative, responsive, thorough legal advocacy and advice at every single stage of our representation. We offer large firm experience, but with small firm responsiveness.

MEQUON

1017 W. Glen Oaks Lane
Suite 207
Mequon, WI 53092

APPLETON

1920 E. Northland Avenue
Suite 101
Appleton, WI 54911

Phone: 262-240-9663
Fax: 262-240-9664
Email: info@mweisslaw.net

or in other material dimension."[57] Wisconsin law requires that the loss of use be completely useless.[58] Thus, the loss of money simply does not fall within the definition of "property damage."[59]

b. Duty to Defend

If a claim does not fall within the scope of the initial grant of coverage under the policy, there is no duty by a carrier to defend the claim. This statement, is of course, subject to a significant exception: when an insurance policy provides coverage for even one claim made in a lawsuit, the insurer is obligated to defend the entire suit.[60] In other words, if a lawsuit asserts a theft by contractor claim and/or a claim for unlawful marketing or trade practices and a typical negligence claim (such as completed negligent construction that causes damage to property of others), then even though theft or unlawful marking and trade claims are not covered claims and the negligence claim potentially is a covered claim, then the carrier must defend all of the claims against the insured, including the non-covered theft by contractor or unlawful marketing and trade practices claims.

c. Bifurcation and Stay

When claims for theft by contractor and/or unlawful marketing and trade practices are alleged, insurers invariably seek a determination of the scope of the coverage under the applicable policy. When coverage is an issue, Wisconsin courts have said that an insurer should provide its insured with a defense until coverage issues have been resolved.[61] The preferred method of preserving coverage challenges is to stay the proceedings on the merits until the coverage issues are resolved.[62] If the insurance company is not a party, a motion to intervene together with a motion to bifurcate and stay should be filed.[63]

While the rationale for staying the proceedings and the bifurcation trial of coverage and merits issues is to avoid a carrier breaching its duty to defend[64] and promote judicial economy and settlement[65], in practice this is often not the case. In complex multi-party construction cases, each defendant is likely to have merits, coverage and possibly, personal counsel for the coverage issues. In these circumstances, judges are reluctant to grant a stay but will want coverage issues decided early on, usually by summary judgment or declaratory judgment motion practice.

Often in complex cases, coverage and merits issues are intertwined such that no bright line distinction exists between the two and thus a stay will not accomplish one of its main purposes: to further judicial economy.[66] As such, a trial court may not grant the stay after having weighed the harm to the moving party of not granting the stay versus the harm to the non-moving party of granting the stay and also consider the impact of the delay that the stay will have on the case.[67]

While the insurer and the insured (the contractor and employees) have a right to have the coverage dispute resolved first before the underlying merits of the case moves forward, the insured is also entitled to a defense pending the resolution of the coverage matter – if the merits moves forward.[68] After all, "[i]n return for the premiums paid by the insured, the insurance company assumes the contractual duties of indemnification and defense for claims described in the policy."[69]

The insurer and the insurer-appointed defense counsel will be placed in an awkward position if they are not present during the coverage discovery if merits issues are addressed. Sometimes, the issues of coverage and merits are intertwined such that the issues simply cannot be cleanly separated. If that is the case, then discovery should be permitted on both issues to avoid prejudice to any party. Merits counsel must be mindful of the potential exposure not only to the corporate entity but also the individuals involved who may be insureds under the policy. It may be that additional counsel must be involved to address conflicts of interest on the merits claims.

The response to a motion to bifurcate and stay is

frequently a stipulation or order for a "hybrid" stay that allows discovery between the parties on certain issues for those parts of the case where a clear line between merits and coverage cannot be determined, followed by a motion for summary/declaratory judgment.[70] Since the duty to defend is broader than the duty to indemnify[71], until coverage is decided, merits counsel is obligated to defend the insured on all issues including those for which no coverage is likely such as the claims of damages under the statutory and administrative code provision identified above.[72] When this occurs, merits counsel needs to be familiar with the claims and defenses to these claims.

Yet, a trial court may very well stay the entire merits lawsuit pending the resolution of coverage issue. A complete stay can result where the carrier shows the trial court that a specific policy provision controls its indemnification obligation and that a prompt motion for summary/declaratory judgment can be filed without the necessity of any discovery. For example, if a carrier is relying solely upon a single exclusion that requires no discovery, then a trial court is more likely to grant a stay on the entirety of the merits. However, if there is any overlap between the coverage discovery and the merits discovery, then the stay on the merits portion should not be granted. The ability to file a coverage motion promptly in these circumstances can remove the inherent dilemma in these cases and avoid incurring the expense of providing a defense that is unnecessary based on the terms of the policy.

The impact of these coverage motions can create a time delay for a plaintiff seeking recovery against a defendant. Given the potential for criminal charges arising out of theft claims, a stay may be lengthened to allow for disposition of a criminal action and to avoid the consequences of a defendant in a civil action from being forced to assert Fifth Amendment rights.[73]

Regardless of whether a stay is granted in whole or in part, there will inevitably be delay of the underlying case. Typically, where the insurer seeks to contest a duty to defend, the circuit court will hold separate trials, and usually the coverage litigation is prioritized for disposition ahead of liability questions.[74] In fact, "the precise reason an insurer litigates a coverage issue is to release itself from any settlement and defense obligations"[75]when coverage is not afforded for the claims asserted against the insured.

Federal Courts have also noted: "Wisconsin case law strongly favors allowing an insurer to have coverage determined before incurring the costs of defending its insured or breaching its duty to defend."[76] Thus, an aggrieved party will have to balance the benefit of seeking the remedies associated with a theft by contractor and other "unlikely to be covered" statutory claims against the inevitable increased costs of a companion coverage battle that may result in a significant delay of the underlying merits of the case.

V. Conclusion

With construction defect cases becoming increasing complex with the addition of more "personal liability" claims, defense counsel must be aware of the nature of these claims and their defenses. After all, unless the merits of the case are stayed entirely so that the insurers' coverage obligations can be determined at the outset, defense counsel will have to defend the merits of what are likely claims for which no indemnification is available under the typical commercial general liability insurance policy and, perhaps more importantly, keep the insured advised of the potential for personal exposure.

Author Biographies:

Monte E. Weiss, Case Western Reserve Univ., 1991, of Weiss Law Office, S.C., Mequon, practices primarily in the defense of bodily injury, property damage, and professional negligence claims for insurance companies and self-insured companies. In conjunction with this area of practice, he has drafted several personal lines insurance policies, including homeowner and automobile policies. He routinely represents insurance companies on insurance contract interpretation issues and is a

frequent lecturer and author on insurance topics. He also represents policyholders dealing with coverage denials from their carriers. He is currently on the Executive Committee the Wisconsin Defense Counsel and serves at the Program Chair and is also the chair of the Insurance Law Committee and Amicus Committee. Attorney Weiss can be reached at via his firm's website at www.mweisslaw.net.

William R. Wick is a defense lawyer who concentrates his practice in the areas of general personal injury and medical malpractice litigation. He received his B.S. in 1970 from Carroll College, his M.P.A. in 1972 from the University of Southern California, and his J.D. in 1974 from Marquette University Law School. Mr. Wick was certified by the American Board of Trial Advocacy as a Civil Trial Specialist. He is a member of the State Bar of Wisconsin and a past chair of the Litigation Section. He has been President of the Civil Trial Counsel of Wisconsin now known as the Wisconsin Defense Counsel. Mr. Wick is a fellow of the American College of Trial Lawyers and a member. He is a fellow of the American Board of Trial Advocates (ABOTA) and has been President of the Wisconsin Chapter. He has been included in Best Lawyers in America since 2007. Mr. Wick is a contributor to the Wisconsin Defense Counsel Journal and a frequent lecturer on topics involving civil litigation.

References

1 A detailed analysis of the scope of the theft by contractor statute is beyond the scope of this article. Rather, the summary of the ambit of this statute is limited as its purpose to highlight a commonly asserted cause of action and how the typical commercial general liability insurance policy coverage provisions are correspondingly implicated.

2 *Soria v. Classic Custom Homes of Waunakee, Inc.*, 2019 Wis. App. LEXIS 386, *16, 2019 WI App 48, 388 Wis. 2d 474, 934 N.W.2d 570, 2019 WL 3022365 (citing Wis. Stat. § 779.02(5); *State v. Keyes*, 2008 WI 54, ¶ 21, 309 Wis. 2d 516, 750 N.W.2d 30); *see also Tri-Tech Corp. of Am. v. Americomp Servs., Inc.*, 2002 WI 88, ¶ 23, 254 Wis. 2d 418, 646 N.W.2d 822.

3 *Id.* (citing *Keyes*, 209 Wis. 2d 516, ¶ 29; *Kraemer Bros. v. Pulaski State Bank*, 138 Wis. 2d 395, 402, 406 N.W.2d 379 (1987)).

4 Wis. Stat. § 779.01(2)(c) essentially defines an owner as one who has an ownership in interest in the land and enters into a contract for its improvement. If the person supplying the funds is not an "owner," the theft by contractor statute does not apply.

5 Wis. Stat. § 779.02(5).

6 *Capital City Sheet Metal, Inc. v. Voytovich*, 217 Wis. 2d 683, 685, 578 N.W.2d 643 (Ct. App. 1998).

7 Wis. Stat. §§ 779.02(5), 779.16, 943.20.

8 *Burmeister Woodwork Co. v. Friedel*, 65 Wis. 2d 293, 299, 222 N.W.2d 647 (1974); *see also Capen Wholesale, Inc. v. Probst*, 180 Wis. 2d 354, 509 N.W.2d 120 (Ct. App. 1993).

9 *State v. Sobkowiak*, 173 Wis. 2d 327, 335, 496 N.W.2d 620 (Ct. App. 1992).

10 *Pauly v. Keebler*, 175 Wis. 428, 429, 185 N.W. 554 (1921).

11 *St. Croix Reg'l Med. Ctr. v. Keller*, 2016 WI App 67, n.8, 371 Wis. 2d 564, 884 N.W.2d 534 (unpublished).

12 Wis. Stat. § 895.80 permits the imposition of treble damages for victims of property crimes, including Wis. Stat. § 943.20. This broader range of damages is available as a violation of the theft by contractor statute as such conduct is "punishable under s. 943.20." A finding of a violation of Wis. Stat. § 895.80 can result in an award of treble damages.

13 *Id.*; *see also Sobkowiak*, 173 Wis. 2d at 336.

14 *Tri-Tech Corp.*, 254 Wis. 2d 418, ¶ 43.

15 Wis. Stat. § 779.02(5).

16 Wis. Stat. § 779.16.

17 *Id*.

18 *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.,* 2007 WI 70, ¶ 49, 301 Wis. 2d 109, 732 N.W.2d 792; *see also* Wis. JI-Civil 2418.

19 Wis. JI-Civil 2418.

20 *State v. Automatic Merch. of Am., Inc.*, 64 Wis. 2d 659, 662-63, 221 N.W.2d 683 (1974).

21 Wis. JI-Civil 2418.

22 *Id.*

23 *Id*.

24 *Id*.

25 *K & S Tool*, 301 Wis. 2d 109, ¶ 35.

26 *Novell v. Migliaccio*, 2008 WI 44, 309 Wis. 2d 132, 749 N.W.2d 544.

27 *K & S Tool*, 301 Wis. 2d 109, ¶ 35.

28 *HM Distributors of Milwaukee, Inc. v. Dep't of Agriculture*, 55 Wis. 2d 261, 198 N.W.2d 598 (1972).

29 *See* Wis. Admin. Code § ATCP 110.01(2m).

30 *Grand View Windows, Inc. v. Brandt*, 2013 WI App 95, ¶ 21, 349 Wis. 2d 759, 837 N.W.2d 611.

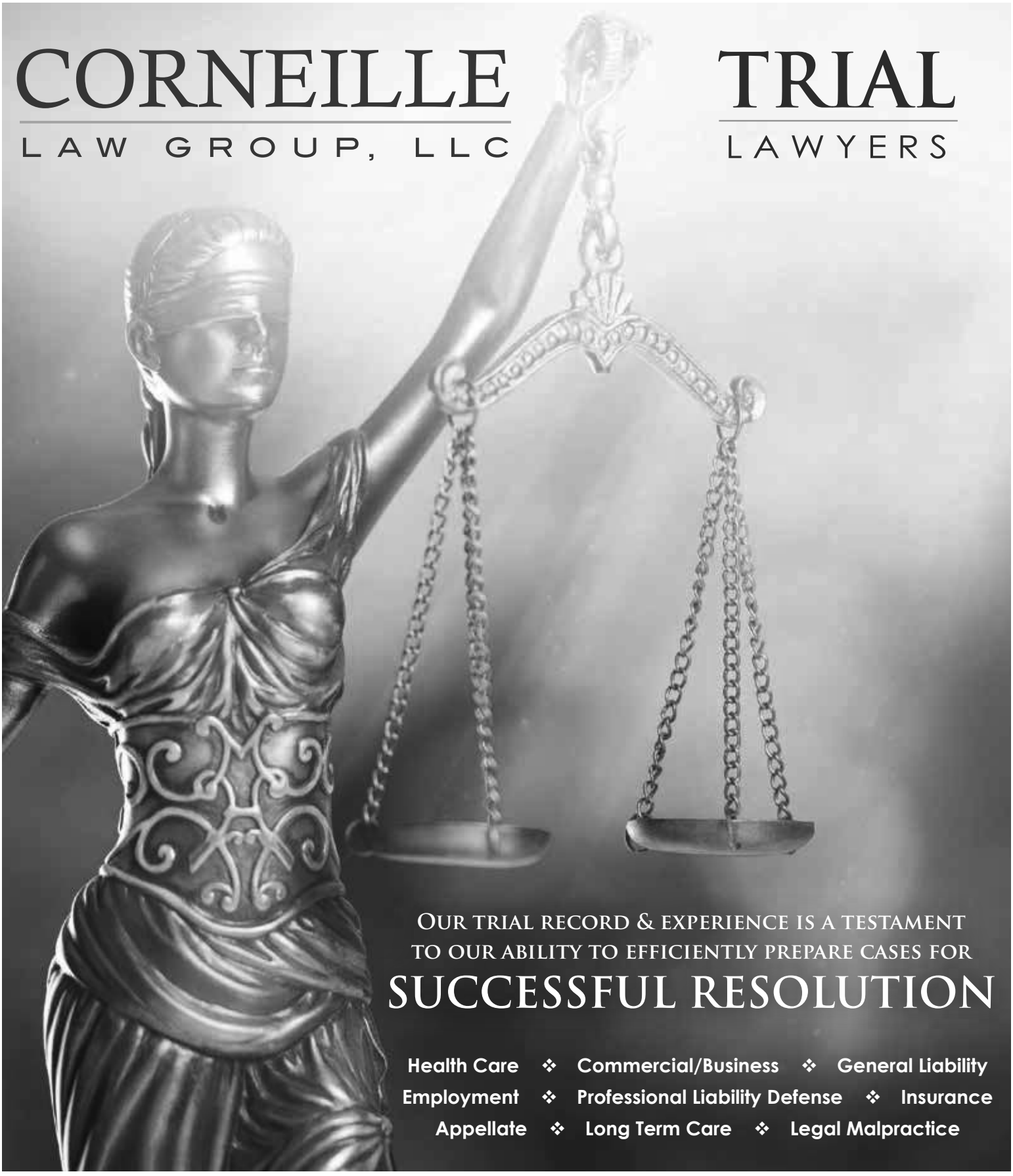
31 *U.S. v. Schumacher*, 154 F. Supp. 425 (E.D. Wis. 1957).

32 *Grand View Windows*, 349 Wis. 2d 759, ¶ 21 (quoting *K & S Tool,* 295 Wis. 2d 298, ¶ 41).

33 *Id*. (quoting *Plywood Oshkosh, Inc. v. Van's Realty & Contr. of Appleton, Inc.*, 80 Wis. 2d 26, 31-32, 257 N.W. 2d 847 (1977)).

34 *Id*. at ¶ 21.

35 *Id*. (citing *Tim Torres Enter. Inc. v. Linscott*, 142 Wis. 2d 56, 70-71, 416 N.W. 2d 670 (Ct. App. 1987) (where party asserted pecuniary loss pursuant to Wis. Stat. § 100.18, the court held there must be "casual connection between the practices found illegal and the pecuniary losses suffered").



GREEN BAY | 615 S. Monroe Avenue | Green Bay, WI 54301 | P 920.884.2312 | F 920.884.2381

MADISON | 7618 Westward Way | Suite 100 | Madison, WI 53717 | P 608.662.1180 | F 608.662.1181

WWW.CORNEILLELAW.COM

36 *Id*.
37 *Id*.
38 *Id*.
39 *Snyder v. Badgerland Mobile Homes, Inc.*, 2003 WI App 49, 260 Wis. 2d 770, 659 N.W.2d 887.
40 *Id*.
41 Wis. Admin. Code § ATCP 110.01(5).
42 *Stewart v. Weisflog's Showroom Gallery, Inc*., 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762.
43 *Rayner v. Reeves Custom Builders, Inc.*, 2004 WI App 231, 277 Wis. 2d 535, 691 N.W. 2d 705 (2004).
44 *Id*.
45 *Id*.
46 *Id*.
47 *Jackson v. DeWitt,* 224 Wis. 2d 877, 887, 592 N.W.2d 262 (Ct. App.1999).
48 *Stewart*, 308 Wis. 2d 103.
49 *Am. Fam. Mut. Ins. Co. v. Am. Girl*, 2004 WI 2, ¶ 24, 268 Wis. 2d 16, 673 N.W.2d 65. (internal citations omitted).
50 *Day v. Allstate Indem. Co.*, 2011 WI 24, ¶ 26, 332 Wis. 2d 571, 798 N.W.2d 199 ("The insured bears the burden of showing an initial grant of coverage, and if that burden is met the burden shifts to the insurer to show that an exclusion nevertheless precludes coverage.").
51 *Id*.
52 *Stuart v. Weisflog's Showroom Gallery, Inc*., 2006 WI App 109, 293 Wis. 2d 668, 721 N.W.2d 127, 136 *aff'd*, 2008 WI 22, ¶ 24, 308 Wis. 2d 103, 746 N.W.2d 762 (internal citations omitted).
53 *Everson v. Lorenz*, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298.
54 *Stuart*, 308 Wis. 2d 103, ¶ 24.
55 *Eberts v. Goderstad*, 569 F.3d 757, 766 (7th Cir. 2009).
56 *Peoples State Bank v. Deedon*, 2017 WI App 41, ¶¶ 6-7, 376 Wis. 2d 525, 900 N.W.2d 343 (unpublished); *see also Qualman v. Bruckmoser*, 163 Wis. 2d 361, 366, 471 N.W.2d 282 (Ct. App. 1991) (loss of value of property based on difference between value of property as represented versus actual value is a pecuniary loss which is not "property damage").
57 *General Cas. Co. of Wis. v. Rainbow Insulators, Inc.*, 2011 WI App 58, ¶ 14, 332 Wis. 2d 804, 798 N.W.2d 320 (citing *Traveler's Ins. Co. v. Eljer Mfg., Inc*., 197 Ill. 2d 278, 757 N.E.2d 481, 502, 258 Ill. Dec. 792 (Ill. 2001) (physical Injury to tangible property means "an alteration in appearance, shape, color, or in other material dimension.")).
58 *Everson*, 280 Wis. 2d 1, § 32.
59 *Deedon*, 376 Wis. 2d 525, ¶ 7.
60 *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶ 21, 261 Wis. 2d 4, 660 N.W.2d 666.
61 *Steadfast Ins. Co. v. Greenwich Ins. Co.*, 2019 WI 6, ¶ 29, 385 Wis. 2d 213, 922 N.W.2d 71 (citing *Wis. Pharmacal Co., LLC v. Neb. Cultures of Cal., Inc.*, 2016 WI 14, ¶ 18, 367 Wis. 2d 221, 876 N.W.2d 72) ("We have established a procedure for an insurance company to follow when it disputes coverage.)).
62 *Newhouse v. Citizens Security Mut. Ins.*, 176 Wis. 2d 824, 836, 501 N.W.2d 1 (1993).
63 *Fire Ins. Exch. v. Basten,* 202 Wis. 2d 74, 96, 549 N.W.2d 690 (1996).
64 *Elliott v. Donahue*, 169 Wis. 2d 310, 318, 485 N.W.2d 403 (1992); *Liebovich v. Minn. Ins. Co.*, 2008 WI 75, ¶ 55, 310 Wis. 2d 751, 751 N.W.2d 764.
65 *Grube v. Daun*, 173 Wis. 2d 30, 76, 496 N.W.2d 106, 124 (Ct. App. 1992) ("the policy of judicial economy is a reason behind requiring insurers either to provide a defense immediately or to use alternate methods to reduce the costs of providing a defense until the coverage issue is decided.").
66 *Id*. (a stay should be in "furtherance of convenience or to avoid prejudice" or must be "conducive to expedition or economy.").
67 *Heikkinen v. United Serv. Auto. Ass'n.*, 2006 WI App. 207, ¶ 26, 296 Wis 2d 438, 724 N.W.2d 243.
68 *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 528-29, 385 N.W.2d 171 (1986); *see also Orlowski v. State Farm Mut. Auto. Ins. Co.*, 2012 WI 21, ¶ 27, 339 Wis. 2d 1, 810 N.W.2d 775 (the payment of premiums entitles an insured to the benefits of the policy provision).
69 *Elliott*, 169 Wis. 2d at 320.
70 Of course, a trial court has discretion to fashion the scope of the stay to meet the needs of the parties to the case. *Hofflander v. St. Catherine's Hosp.*, 2003 WI 77, ¶ 113, 262 Wis. 2d 539, 664 N.W.2d 545.
71 *Acuity v. Bagadia*, 2008 WI 62, ¶ 52, 310 Wis. 2d 197, 750 N.W.2d 817.
72 *Fireman's Fund*, 261 Wis. 2d 4, ¶ 21.
73 *See* David Piehler, Alyson Dieckman, and Monte Weiss, *Pleading the Fifth – Civilly Speaking*, Wis. Civil Tr. J. (Winter 2017), available at https://www.wdc-online.org/wdc-journal/archived-editions/pleading-fifth-civilly-speaking.
74 *Mowry*, 129 Wis. 2d at 528-29; *Elliott*, 169 Wis. 2d at 321; *Reid v. Benz*, 245 Wis. 2d 658, 672-73, 629 N.W.2d 262 (2001); *Newhouse*, 176 Wis. 2d at 836.
75 *Mowry*, 129 Wis. 2d at 523.
76 *U.S. v. Thorson*, 219 F.R.D. 623, 628 (E.D. Wis. 2003).


AMERICAN FAMILY
INSURANCE
Insure carefully, dream fearlessly.

But It's Such a Small Minor Settlement: Do I *Really* Need Court Approval?

by: Kristen S. Scheuerman, Herrling Clark Law Firm, Ltd., Heather L. Nelson, The Everson Law Firm, and Ryan J. Garrison, Garrison Financial, LLC and Garrison Settlements

If you have settled a claim involving a minor, you should be familiar with Wis. Stat. § 807.10. Specifically, § 807.10(3) says:

> If the amount awarded to a minor or individual adjudicated incompetent by judgment or by an order of the court approving a compromise settlement of a claim or cause of action of the minor or individual **does not exceed the amount specified under s. 867.03(1g)**, exclusive of interest and costs and disbursements, and if there is no guardian of the ward, the court may upon application by the guardian ad litem after judgment, or in the order approving settlement, fix and allow the expenses of the action, including attorney fees and fees of guardian ad litem, authorize the payment of the total recovery to the clerk of the court, authorize and direct the guardian ad litem upon the payment to satisfy and discharge the judgment, or to execute releases to the parties entitled thereto, and enter into a stipulation dismissing the action upon its merits. The order shall also direct the clerk upon the payment to pay the costs, disbursements, and expenses of the action and to dispose of the balance in a manner provided in s. 54.12(1), as selected by the court. The fee for the clerk's services for handling, depositing, and disbursing funds under this subsection is prescribed in s. 814.61(12)(a).[1]

There seems to be a lot of confusion over the "threshold" referenced in the bolded text (which, by the way, is $50,000).[2] On both sides of the aisle, we have heard something along the lines of, "you do not need court approval for settlements under $50,000," but a careful reading of § 807.10 reveals that this conclusion misses the mark. Regardless of the size of a settlement, "a minor cannot be bound by an extrajudicial settlement."[3] Accordingly, "a calculated risk is taken in striking a bargain without the benefit of judicial approval."[4]

So why do we not all just seek court approval in minors' claims in every case? Although every case is different, there are often concerns about delay, cost, and frankly uncertainty about the process and what to do with a minor's funds. These concerns all seem heightened when the settlement amount is, well, minor. Even in a modest minor settlement case, we do not think any of these concerns outweigh the benefit of court approval. Court approval protects the insurance company and its insured and secures a binding settlement. From the defense point of view, although in some cases retaining a guardian *ad litem* and obtaining court approval may come with some cost, the peace of mind achieved by entering into an enforceable settlement – and avoiding a claim

resurfacing many years later when new injuries are claimed to be related to the accident – can be well worth the investment. For represented minors, court approval provides a judicially sanctioned layer of confidence and affirmation with respect to the settlement value *and* the method of securing the funds for the benefit of the minor.

Assuming you decide to seek court approval, a guardian *ad litem* is going to need a plan for what to do with the settlement funds on behalf of the minor. Most of us are generally familiar with a structured settlement (and most courts are familiar with this option as well). However, given recent changes in the market, it is difficult to structure less than $10,000 in funds.

The authors of this article recently worked on a case together (Heather L. Nelson represented the insurer, Kristen S. Scheuerman was appointed guardian *ad litem*, and Ryan J. Garrison helped create an investment vehicle for the minor's funds) that involved a very modest settlement (under $10,000). The minor was just four years old at the time. Because the minor was so young, putting his funds into a blocked or restricted bank account was not entirely attractive given the nominal to non-existent interest rates that would yield him essentially no additional meaningful income over time. Because we did not have more than $10,000 to invest, a structured settlement was also not an option. We ended up creating a UTMA (Uniform Transfers to Minors Act) account with a "no cash out" restriction held at TD Ameritrade. Our case was venued in Brown County and the following language was approved by the Court:

> $XXX.XX for the benefit of Minor Child to be placed into an UTMA account, invested specifically as follows: $XXX.XX will fund an UTMA account established for the benefit of Minor Child by the Custodian, Jane Doe, held at TD Ameritrade for Minor's sole and exclusive benefit, managed by Ryan J. Garrison of Garrison Financial, LLC, and shall be managed using a mix of bond mutual funds, stock/equity indexes, and cash. The bond allocation should maintain a range of 70-75% and the Minor's stocks/equities should be in the range of 20-23%. Due to market volatility these allocations may grow outside of the above-detailed allocation for a period of time with the intent to be reallocated back within these originally-described parameters. The third asset class in Minor's account will be cash, which is to be maintained at less than 3% allocation to cash. This may fluctuate based on trading but will usually fall between 1-3% of the portfolio. The funds invested on behalf of Minor Child may not be removed from the supervision and management of Garrison Financial, LLC, and it is the intent of this Order to instruct TD Ameritrade to hold these funds under a "no cash out" restriction (excepting the re-investment parameters described herein) prior to Minor Child's 18th birthday without a court order. Upon Minor Child's 18th birthday (DOB), Minor Child shall have the sole right and responsibility for investment choices and may, if he so chooses, withdraw any or all funds or have the option of leaving the funds invested in an effort to continue to earn interest and/or dividends. Funds may be added to the UTMA at any time without the need of a court order, but funds added will be under the same "no cash out" restriction.

Within the Petition for Approval, the risk tolerance for the investment plan was explicitly described, with reference to a 10+ page comprehensive financial disclosure document. The risk tolerance for this specific plan was rated as 14/100, which is also described as "conservative income." We also provided to the court (and of course to the minor's parents) some market data showing the past performance of the underlying investments with both the return annualized since inception and the max draw down transparent.

Unlike a blocked bank account where there is no risk of loss on the initial principal, there are no guarantees on potential yield income with this type of investment and a loss of principal is a possibility.

“I cannot thank you enough for your responsiveness on this difficult matter. I was in good hands and I’m grateful.”

Glad we could help!
Wisconsin Lawyers Mutual appreciates the trust you put in us to go beyond coverage with valuable risk-management resources and service.

However, like any choice, a thorough, rational, and honest discussion must be had with the minor (if he or she is old enough), the minor's parents, and the minor's counsel (if the minor is represented) about the positives and negatives of an investment like this. It is also reasonable to rely on data and the advice of financial investors, which we did in this case, to decide about investing funds. For example, we did not choose "high risk" stocks or equity indexes, which made the likelihood for loss on the minor's principal much less, even though a higher risk stock *may* have produced a greater potential yield given the amount of time the funds would be invested. Risk and reward were very much balanced out in the final decision for this minor. We also looked at historical trends and anticipated market performance and without any guarantee or promise, we estimated that this young person would earn approximately $10,000.00 on his principal investment by the time he turned eighteen. Compared to other available options, the minor's parents were satisfied that this was a wise investment choice and most importantly, the guardian *ad litem* was able to represent to the court that this funding vehicle was in the minor's best interest.

The facts of every case must be considered when determining an appropriate investment vehicle or funding mechanism. If you find yourself with a modest amount of settlement funds for the benefit of a minor, however, it is encouraging to know that Wisconsin courts may be open to an UTMA investment fund.

Author Biographies:

Kristen S. Scheuerman is a Shareholder at Herrling Clark Law Firm, Ltd, in Appleton, Wisconsin. Kristen earned her JD from Marquette University Law School in 2010. Her practice is primarily devoted to plaintiffs' personal injury cases, but she also handles municipal prosecution for a local municipality. She is an active member of the Wisconsin Association for Justice and is currently serving as Vice-Chair of the State Bar of Wisconsin's Litigation Section. Kristen enjoys legal education and serves as a Program Chair for WAJ's Education Program Committee and she is a regular feature on "The Lawyers," a legal education segment featured on WHBY's "Fresh Take" with Josh Dukelow. In early 2020, Josh and Kristen teamed up to produce a weekly podcast, Civic Revival, which focuses on legal stories in the news and the role of Rule of Law in politics and civic life.

Heather L. Nelson is a Shareholder at The Everson Law Firm in Green Bay. She is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back to her Green Bay roots. Her practice areas include motor vehicle accident, premises liability, wrongful death and products liability. She serves on the Board of Directors of Wisconsin Defense Counsel and as Chair of WDC's Women in the Law Committee. Heather has been active in presenting CLE topics for at WDC conferences and most recently at the North Central Trial Academy.

Ryan J. Garrison is the Founder and President of Garrison Financial, LLC and Garrison Settlements. Together these companies offer trial lawyers and injury victims the most comprehensive and unique financial solutions in the country. As a financial adviser, Ryan specializes in personal injury settlements and tax planning attorney contingency fees. On the settlement side, Ryan focuses on catastrophic injury, traumatic brain injury, and minors' settlements. Ryan enjoys working to understanding clients' needs, and believes he brings candor and honesty to an industry that has confused and misled many individuals. Ryan Garrison is a Registered Representative offering Securities and Advisory Services through United Planners Financial Services of America, a Limited Partnership, Member FINRA, SIPC. Garrison Financial and Garrison Settlements are not affiliated with United Planners.

References

1 (Emphasis added.)
2 *See* Wis. Stat. § 867.03(1g).
3 *In re Andresen*, 17 Wis. 2d 380, 382, 117 N.W.2d 360 (1962).
4 *Id.*

2020 Members

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

WISCONSIN CHAPTER

www.WisconsinMediators.org

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution

Michael Crooks
Madison

Hon. Patrick Fiedler
Madison

Hon. Mark Frankel
Madison

Timothy Hawley
De Pere

Michael Jassak
Oak Creek

Hon. Charles Kahn
Milwaukee

Terry Lyons
Janesville

Robert McCracken
Manitowoc

Jim Smith
Brookfield

Check preferred available dates or schedule your appointments online directly with Academy Members!

WisconsinMediators.org is free, funded by our members

Visit our national roster of 1000+ top neutrals at www.NADN.org

NADN is administrator for the DRI Neutrals Database

www.DRI.org/neutrals

dri™

The Voice of the Defense Bar

* The National Academy of Distinguished Neutrals is an invitation-only professional association of over 1000 litigator-rated mediators & arbitrators throughout the US and a proud partner to both the DRI and AAJ. For more info, please visit www.NADN.org/about

MINNESOTA LAWYERS MUTUAL'S

Defense Program

INSURANCE SPECIFICALLY DESIGNED
AND RATED FOR DEFENSE FIRMS

Proud Corporate Sponsor of the WDC

Members of the WDC have access to MLM's Defense Program offering a lawyers' professional liability policy with preferred pricing and enhanced coverage.

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

Two Ways to Save

- **Preferred pricing** for firms with substantial insurance defense practice
- **A 5% membership credit -** Credit applied to premium on a per attorney basis

Enhanced Coverage*

- **Additional Claim Expense -** Benefit equal to one-half of the policy single limit, up to a maximum of $250k per policy period
- **Increased Supplementary Payment Limit -** From $10k to $25k - this includes loss of earnings if you attend a trial at our request and coverage for costs and fees incurred defending disciplinary claims
- **Aggregate Deductible -** Caps the total amount the insured will have to pay in total deductibles regardless of the number of claims in a single policy period

*Visit www.mlmins.com for qualification details

"We are proud to offer coverage to WDC membership. MLM has long been recognized as a financially stable and consistent carrier for Wisconsin lawyers, and we're thrilled to benefit members of the association."

Paul Ablan, President and CEO
Minnesota Lawyers Mutual

Protect your firm with the ***premium savings*** and ***enhanced coverage*** offered to you as a member of the WDC.

Apply for a quote online!

www.mlmins.com

MINNESOTA LAWYERS MUTUAL® INSURANCE COMPANY

Contact
Chris Siebenaler, Esq.
Regional Sales Director
(612) 373-9641
csiebena@mlmins.com

027122020

Ideas and Strategies for Preparing Your Expert for a Deposition

by: Micaela E. Haggenjos and Laura E. Schuett, Crivello Carlson, S.C.

Each expert has their own quirks and blind spots. The preparation you conducted previously for one expert will likely be quite different than the instruction you give to another expert. The best way to avoid any problems with this is to do your homework, prepare, and keep the lines of communication with your expert open at all times, especially in the weeks prior to the deposition.

I. Know Your Expert's Qualifications

After choosing your expert, you should be quite familiar with his or her qualifications and relevant publications. You should know how long he or she has been an expert, generally what types of cases he or she has done expert work on (including whether the work was for the plaintiff or defense side), how much he or she is typically compensated for their work as an expert, and how long he or she has been in his or her line of work prior to becoming an expert. In other words, you should have done your research on your expert prior to hiring him or her. Knowing these basic background facts about your expert is important for two reasons: (1) you will want to know what you need to spend your time on while preparing them for their deposition, and (2) you can bet on the fact that your opposing counsel will ask questions regarding all of the above information.

You should expect that opposing counsel may ask about degrees which do not seem relevant to the opinions being offered or may spend a significant amount of time during the deposition on the credentials of your expert. This is why learning and reviewing your expert's credentials ahead of time and again just before the deposition is important so that you can prepare your expert accordingly. Some good questions to ask, depending on your expert and his or her qualifications: Are there any courses that your expert did or did not take that may be relevant? Who employs your expert and what is his role with his employer? If certain work experiences are not included on his or her CV, are there possible questions about the expert's lack of experience in that particular occupation? Are there any gaps in time on your expert's CV? Is the CV current and up-to-date? Does the CV list all relevant publications of your expert?

It might seem like it goes without saying, but make sure to inform your expert that he or she needs to know their own qualifications like the back of their hand, as they can be sure that your opposing counsel will ask them questions about it.

II. Research Your Expert

Once you have familiarized yourself with your expert's general background and qualifications, you should spend research your expert's prior deposition testimony, if any. If your expert does have prior deposition testimony, take notes on statements you find most relevant, and keep an eye out for any potentially hurtful statements. You will also want to look for any statements that contradict previous

statements made by your expert, as opposing counsel may attempt to impeach your expert with such statements.

You should also instruct your expert to review their prior depositions, if possible, to prepare for the possibility that your opposing counsel could attempt to trap your expert into stating something that contradicts a previous statement by your expert in a deposition.

Q: What should I do if my expert *has* said something in a prior deposition that is contradictory to his or her current opinion?

A: Do not panic. The fact that he or he has said something (however many years ago) that could seem contradictory to his or her current opinion is not dispositive. Instruct your expert before the deposition on what to do in the event that your opposing counsel asks a question like this. Some good examples of possible answers include: the science has changed and the answer I gave X years ago is no longer correct because Y; or that answer was limited to the particular set of facts in that case, and does not apply to the facts in the present case.

III. Know Your Opposing Counsel

Prior to preparing your expert for the deposition, you should make every attempt to learn as much as possible about your opposing counsel. After all, you will not be able to fully prepare your witness if you do not even know what to expect as far as questions, tone, attitude, and style. If at all possible, learn the personality, style, and quirks of the opposing lawyer, and use this information to your advantage.

IV. Meet with Your Expert

Do not assume that an expert knows what to expect even if they have been deposed as an expert fifty times. Possibly the worst thing you can do is to use your client's money to pay for an expert but then not prepare the expert properly. It is your job to make sure the expert has the tools and techniques necessary to sit in a deposition.

Q: What if I am a new attorney and the expert is well-seasoned? How can I expect them to listen to my instruction when they likely have been an expert in more cases than I have litigated?

A: The American Bar Association has actually published some great advice for dealing with just this situation in an article by Roula Allouch.[1] The article gives young attorneys a series of tips for dealing with an expert witness, including: learn about the subject area your expert will be testifying about whenever possible; remember that while your expert outranks you in the subject-matter expertise, you outrank your expert in legal expertise; instruct your expert to keep things to the point and avoid boring details that provide no benefit to the case whenever possible. If nothing else, "[i]t is critical for the lawyer to remember he or she is the one with the legal knowledge in a case and not to allow himself or herself to be intimated by an expert or his or her expertise."[2]

Nothing is better preparation than practice. After all, practice makes perfect, right? And the extent of this practice deposition can depend entirely on your case, your expert, your own experience in dealing

with experts, and, of course, how much your client is willing to pay.

Even if you do not have the time or the resources to spend more than half an hour with your expert in preparation, take them and use those minutes wisely. Before you meet, prepare a series of questions you think are most important for the expert to know how to answer prior to the deposition, and phrase them as close to the way you think your opposing counsel will phrase them.

Be hard on the expert witness. This is their chosen profession, and they have likely done this before; they can handle it. Ask them the tough questions and try not to keep the practice session too light or friendly, as this will probably not be how the room will feel during the actual deposition. You are not here to be friends with your expert, you are here to prepare them to best represent your client and your case. Prepare them for the probability that they are going to get more than a few uncomfortable or "unfair" questions.

You will also want to instruct your expert to be prepared to answer questions regarding important dates of the case, such as: when the expert was first contacted by counsel; when the expert was retained; when records were received and from whom they were received; when the expert formed his or her opinions in this case; the date of the accident or occurrence in question; and the date key tests were performed, if any.

One way to get your expert involved in their own preparation is to ask your expert about any issues they think are likely to come up. You can even ask for them to prepare a list of issues for you. This will also help you prepare for any depositions you might need to take of the opposing party's expert witness(es).

a. Compensation

Regarding compensation, you will want to know specifics – and you should instruct your expert to know the specifics, as well. You will want to instruct your expert to expect questions on how they are being compensated for their work on this case, involving questions regarding: their hourly rate; how much they have billed to date; how much is owed on the case to date; what percentage of their income comes from legal matters; and what percentage of work is plaintiff versus defense.

b. The Expert's File

It is extremely important your expert knows that he or she should review and be very comfortable with (1) the key facts of the case and (2) the science or subject-matter on which they are there to provide their expert opinion. You should also instruct your expert to organize the file to his or her own liking. This can help him or her to review the file while also preventing stress in the deposition by avoiding a situation in which he or she cannot find a necessary document.

Also instruct your expert to look things up if necessary. While they are an expert rather than a lay witness, they are not expected to have photographic memories or to know all ordinances, codes, or other regulations by heart. Again, pay particular attention to the expert you think might want to protect their ego at all costs – firmly instruct them to avoid answering a question unless they have all facts necessary to answer (although they should have an understanding of what they wrote in their report and of the subject matter they are testifying about as an expert). Particularly caution them to be on their toes when they are testifying about their opinion as to a material fact or legal conclusion in the case.

As you know with a deposition of a lay witness, you should be cautious as to which documents you choose to share with your expert, as they may be discoverable. If you are worried about a document being discoverable but feel that it will be helpful in preparing your expert, simply refer to the document without actually presenting it to the expert or including it in their file. This is a good way to refresh your expert before a deposition without worrying about making a privileged document discoverable in the deposition.

BORGELT POWELL
PETERSON & FRAUEN S.C.

ATTORNEYS & COUNSELORS
ESTABLISHED 1881

Our mission is to provide the very best legal services to insurance companies, businesses, and individuals by providing innovative, effective and efficient advice, consultation, and representation during the investigation, evaluation, and litigation of civil and administrative claims.

Our expertise has resulted in Borgelt Powell's selection as Panel Counsel by some of the largest companies and insurance companies in the country.

Licensed in Wisconsin, Minnesota and Illinois

1243 N. 10th Street, Milwaukee, WI 53205	**(414) 276-3600**
Virtual Offices, Madison, WI	**(608) 258-1711**
7815 3rd Street North, Suite 203, Oakdale, MN 55128	**(651) 256-5000**

dri™ The Voice of the Defense Bar

Martindale-Hubbell® PEER RATED For Ethical Standards and Legal Ability 2020

Super Lawyers® 2020

CLM

c. The Expert's Report

Experts should also know their report in the case, if any, like the back of their hand. Tell them that while they may bring a copy of the report to the deposition (and they should), they should read and re-read and re-read that report in the days prior to the deposition until they can almost recite it. The last thing you want is for your expert to appear as if they do not know what they have written or that they do not seem to be as knowledgeable as their written report made it seem.

d. The *Daubert* Standard

Your expert should be aware of the *Daubert* standard prior to the deposition.[3] If nothing else, he or she should be aware of the set of *Daubert* factors: whether the evidence can be and has been tested; whether the theory or technique has been subjected to peer review and publication; the known or potential rate of error; the existence and maintenance of standards controlling the technique's operation; and the degree of acceptance within the relevant scientific community. In other words, your expert should know to avoid *ipse dixit* opinions and that, if a medical expert, he or she should not rely purely on title and training as the basis of all of his or her medical opinion testimony.

e. Logical Fallacies

Also instruct your expert to avoid the common expert fallacies: *post hoc ergo propter hoc*; *cum hoc ergo propter hoc*; and the false dichotomy fallacy. *Post hoc ergo propter hoc* translates to "after this, therefore because of this." It is commonly seen in unexplained or unexplainable death cases and evolving scientific areas as the fallacy lies in a conclusion based solely on the order of events, rather than taking into account other factors potentially responsible for the result that might rule out the connection. *Cum hoc ergo propter hoc* translates to "with this, therefore because of this," and is a fallacy that correlation establishes causation. This is untrue, however, because causation cannot be established simply because certain events occur within a temporal relationship. Lastly, the false dichotomy fallacy is a common attempt by advocates to eliminate the middle ground. Generally, courts evaluate this fallacy as an example of basing an opinion on false assumptions.

f. Objections

You should instruct your expert about when and how you will be objecting during the deposition. If your expert knows about objections prior to the deposition and knows to listen carefully to the wording of your objection, it may help the expert know how to respond to a question without actually coaching him or her. You should also explain that objecting during depositions is limited to specific circumstances and that in most cases your expert will still have to answer the question. Your instruction on depositions should include the following information:

What Objections Can be Raised at a Deposition? You will want to briefly explain what objections are and how they come into play during a deposition.

What Should the Expert Do if You Object to a Question? Instruct your expert that he or she can still answer as long as you do not instruct them not to. You may want to explain that generally he or she is going to be required to answer, despite your objection, unless there is some extraordinary reason that they should not. The typical objection of attorney-client privilege does not apply here, as there is no attorney-client or other privilege between you and your expert.

How Can Your Objections Help the Expert? Inform your expert that he or she should listen to the substance of your objections for information that can help the expert respond to poorly worded questions.

While it is your job as the attorney to object when your expert has been asked a poorly worded, compound, or vague question, you should also instruct your expert to pay attention to tricky

questions in case you are unable to object before they start answering the question. Let your expert know that they are fully within their rights as the deponent to ask for clarification, to tell opposing counsel that they do not understand the question, or to restate the question back to opposing counsel and ask whether that is what he or she is asking. Emphasize to your expert that they are by no means expected to answer a question they find confusing.

This has the potential to be a problem with well-seasoned experts, as they might feel that they know more than opposing counsel or feel that they have something to prove. Because of this feeling, the expert might try to answer questions that they have no business answering or fail to ask for clarification when needed. Get a feel for your expert and pay attention to whether you think this applies to him or her. If you think there is a chance that it does, perhaps consider scheduling a practice deposition or even a few tricky questions to see how he or she responds.

g. Breaks

Inform your expert that it is perfectly acceptable for him or her to request regular breaks throughout the deposition, and that if the deposition is likely to go for more than a few hours, a break for food might be agreed upon, as well. Also inform your expert that while they are entitled to regular breaks, your opposing counsel might ask that the expert stay to answer a question or the line of questions prior to taking a break.

h. Opposing Counsel is Not Your Friend

Emphasize to your expert that while they should employ active listening and be truthful during the deposition, they should absolutely avoid helping out opposing counsel during their questioning. By employing active listening, they should be hearing the question that is actually being asked, versus the question that they might think is being ask or that they want opposing counsel to have asked. Caution your expert to answer only the question that was asked, and to avoid adding in any extraneous details. It is opposing counsel's task to ask the right questions, not your expert's job to fill in the holes.

You should also instruct your expert to not trust opposing counsel or take anything they say as the truth. For instance, if opposing counsel states in a question that the expert said "x, y and z" previously, make sure your expert does not take this characterization without first asking for background information. If opposing counsel is referencing a prior deposition of your expert, instruct your expert to ask to see a copy of the deposition. If your expert is sure that what opposing counsel stated is *not* the truth, inform the expert that it is completely within their rights to set the record straight and state that opposing counsel is not accurately portraying what the expert has previously said.

Ultimately, caution your expert that opposing counsel will likely try to box them in, trick them, push their buttons, or wear them down into admitting something they do not necessarily agree with, and make sure you provide them with the tools they need to successfully avoid such tactics.

V. Video Deposition

An extra layer of caution should be added when preparing for a video deposition, as it is possible that this video could be shown to a jury at trial rather than live testimony by your expert. Make sure your expert knows this, and plan accordingly.

Dress. Do not expect even a seasoned expert to know how to dress appropriately for a video deposition. Instruct them on appropriate dress and, if you want to be extra cautious, you can even ask them what they are planning to wear on the day.

Attitude. While you want your expert to exude confidence – particularly when speaking about their area of expertise – you also want to make sure they do not come across as arrogant or over-confident, which can be just as damaging as a lack of confidence, if not more. This includes keeping an eye on your expert's tone. If you notice your expert beginning to approach the line between confidence

and arrogance, remind your expert that a jury may watch this and that they are more likely to relate to a person they feel somewhat equal to, as opposed to looked down on. This will be a delicate balance for your expert, between instructing and explaining to the jury when necessary, and talking down to the jury. Make sure your expert knows the difference.

Body Language. Instruct your expert on avoiding distracting or over-the-top gestures or other body language that will distract the jury or that might affect the credibility of your expert. You should also instruct your expert to avoid speaking too fast or hurrying through explanations of material that is not easily understood by a typical juror. If your expert is well-seasoned, this is likely not an area that you will have an issue with. However, if you have a relatively inexperienced expert on your hands, you might want to pay attention to his or her body language, and even take a practice video deposition if necessary. Your expert might not be in a field where he or she needs to speak or put his or her expertise into words very often, so this might be a whole new territory for him or her. Overall, make sure he or she feels comfortable speaking in front of a camera.

You should also make sure to instruct your expert to look directly at the camera regularly, just as he or she would look at the jury box if testifying at trial. Emphasize that video depositions are rather cold and formal feeling to a jury, and that they should make an effort to be personable (and knowledgeable) while speaking to the jury.

VI. Conclusion

Whether you are a new or seasoned attorney, the overall goal to have when hiring an expert is to prepare both yourself and your expert as much as possible. While you can make up for inexperience (on your own part or the part of your expert), you cannot and will not be able to make up for a failure to adequately prepare your expert for his or her deposition.

Author Biographies:

Micaela E. Haggenjos is an associate at Crivello Carlson, S.C. She received her B.A. from the University of Wisconsin in 2016 and her J.D. from Marquette University Law School (cum laude) in the spring of 2020. Micaela has experience in insurance defense and representing state and local governments in both civil rights cases and administrative proceedings.

Laura E. Schuett is a litigator at Crivello Carlson. She received her B.A. from Cornell University (magna cum laude) and her J.D. from the University of Wisconsin. She has been defending toxic tort and products liability cases for over 30 years. She has prepared and deposed hundreds of experts with a wide variety of expertise.

References

1 Roula Allouch, *Tips for Young Lawyers Dealing with Expert Witnesses*, ABA, (July 16, 2019), available at https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-tips-for-young-lawyers-dealing-with-expert-witnesses/.

2 *Id*.

3 *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993); Wis. Stat. § 907.02(1). For an in-depth analysis of the *Daubert* standard, *see* Andrew B. Hebl & Kathryn A. Pfefferle, *Successfully Excluding Treating Physicians' Opinions under Daubert*, Wis. Civil Tr. J. (Summer 2020), available at https://www.wdc-online.org/wdc-journal/archived-editions/successfully-excluding-treating-physicians-opinions-under-da.

Mathie Mediation Services LLC

Call: (414) 585-0650
Email: jmathie@mathiemediation.com

Jim Mathie established Mathie Mediation Services in 2016. Since devoting his entire practice to mediation, hundreds of attorneys have retained his services to mediate their disputes. Jim's four-office downtown Milwaukee suite provides ample space for any mediation. Jim also travels throughout Wisconsin – at no travel expense – to mediate cases. So, if it works best to have a mediation where you are, Jim will accommodate.

Before mediating fulltime Jim litigated cases for 30 years, primarily defending clients in personal injury, property damage, product liability, environmental, construction and transportation lawsuits. His varied background also includes stints as a plaintiff personal injury attorney and in-house counsel for a major insurer. He is a past president of WDC.

Mathie Mediation Services LLC
757 North Water Street, Suite 350
Milwaukee, WI 53202

WDC Leaders Attorney Spotlight: Erik J. Pless

Editor's Note: *In this feature, the Wisconsin Defense Counsel recognizes a member for his or her exceptional accomplishments, both inside and outside of the courtroom. To nominate a member for the next issue, please contact the Journal Editor, Vincent J. Scipior, at vscipior@cnsbb.com.*

In this issue, the Wisconsin Defense Counsel recognizes Erik J. Pless for his exceptional trial success and mentorship. Erik leads the insurance defense litigation team at The Everson Law Firm in Green Bay. He received his J.D. degree from the University of Wisconsin in 1993 and a B.A. *magna cum laude* in 1990 from Wisconsin Lutheran College in Milwaukee. Erik has been an active trial attorney in Northeast Wisconsin since 1993. Over the past 27 years, Erik has litigated more than 70 jury trials to verdict and has argued before the Wisconsin Supreme Court on multiple occasions. He practices primarily in the fields of insurance and tort law, defending insureds and insurers in personal injury, insurance coverage, and bad faith litigation. Erik also handles product liability, legal and other professional malpractice, premises liability, and mold litigation.

Erik served on the Board of Directors for the Wisconsin Defense Counsel from 1998 to 2003. He is a member of the Council on Litigation Management and the Association of Defense Trial Attorneys. Erik earned Board Certification as a Civil Trial Specialist from the National Board of Trial Advocacy in 2004. He has been named an insurance defense Super Lawyer for the past 12 years. Since 1998, Erik has authored the chapter on insurance law for the State Bar of Wisconsin's Annual Survey of Wisconsin Law. Outside of the office, Erik is an endurance athlete, finishing five Ironman distance triathlons.

Erik is an outstanding lawyer and advocate for the insurance industry and his clients. He takes sincere interest in providing the best defense to insureds and the insurers. His honesty, integrity, and dedication to the industry is second to none. Erik exhibits respect, commitment, and devotion to each client that he is entrusted to defend.

Erik regularly mentors young associates and helps them develop solid trial skills. In 2019, he tried two cases to verdict with an associate attorney, providing valuable mentorship and learning opportunities to a junior member of the defense bar. Erik conducts regular litigator strategy meetings to assist and supervise associates, oversee handling of cases, provide guidance, and help them strategize and mount defenses to claims, including defending onerous discovery requests and motions.

In 2019, Attorney Pless had an exceptionally successful year as a civil defense attorney, with several trial victories for his insurance company clients, including a notable declaratory judgment awarding costs and actual attorney fees in a coverage/contract dispute. Some of his noteworthy accomplishments are summarized below.

Summary of 2019 Trial Success

Osvaldo Ortiz-Castro v. American Family
Brown County Case No. 18-CV-528
Verdict Date: November 20, 2019

Facts: This case arose out of a rear-end accident of moderate speed that occurred in Green Bay. The plaintiff had conservative treatment, including injections and physical therapy for a diagnosed L4-5 disc herniation, and ultimately a L4-5 discectomy. No claim for future medical treatment was made. Plaintiff claimed to have work limitations in his self-owned janitorial business, including difficulty kneeling and working more than eight hours per day.

Issues for Trial: The parties entered into a high-low agreement prior to trial, with a minimum recovery of $200,000 and a maximum recovery of $600,000.

At Trial: At trial, the plaintiff sought $731,000 for past medical expenses and past and future pain, suffering, and disability. The jury returned a verdict significantly in line with what was sought by the defense, totaling $180,000. Two dissenting jurors wanted to award significantly less.

Plaintiff's Final Pre-Trial Demand: $450,000
Defendant's Final Pre-Trial Offer: $200,000
Verdict: $180,000 ($200,000 pursuant to the high-low agreement)

Danny Mueller v. Germantown Mut. Ins. Co., et al.
Outagamie County Case No. 18-CV-412
Verdict Date: October 9, 2019

Facts: Plaintiff sustained injuries after he fell while opening a door on a very windy day while leaving the Wildlife Bar and Grill in rural Shawano County. Plaintiff, who did not consume any alcohol, claimed the outer door was sticking, and forced it open. The wind caught the door and flung it open all the way, hitting the side of the exterior wall of the building, and causing Mueller to fall into his parked car, resulting in a complex comminuted proximal humerus fracture.

Issues for Trial: Liability and damages were disputed.

At Trial: Plaintiff's counsel asked for almost half a million dollars in damages. The jury assigned 40% negligence to the defendant and 60% to the plaintiff, resulting in a defense verdict.

Plaintiff's Final Pre-Trial Demand: $150,000
Defendant's Final Pre-Trial Offer: $25,000
Verdict: $0

Karen A. Rafferty v. Floors By Us Inc.
Brown County Case No. 17-CV-1175
Order Date: July 8, 2019

Facts: This litigation arose out of a slip and fall by the plaintiff, Karen Rafferty, at a Menards store. The plaintiff claimed that she slipped and fell in a puddle of water left behind by a mechanical floor cleaner operated by Floors by Us, a contractor hired by Menards. Menards tendered the defense to the insurer for Floors By Us, which was denied. After the damages portion of the case resolved, Menards filed a Motion for Declaratory Judgment based on indemnification language in the parties' contract, asking for Floors By Us to pay for damages, and also attorney fees after denying Menards' tender of defense.

Disposition: The circuit court granted declaratory and summary judgment to Menards, finding that the contract had a valid indemnification clause, and Floors By Us should have provided a defense and indemnified Menards. The court further declared that Floors By Us was responsible for the entirety of the settlement funds owed to the plaintiff, and for paying actual attorney fees and costs to Menards.

Carol K. Burger, et al. v. Robert J. Houg, et al.
Oneida County Case No. 17-CV-215
Verdict Date: April 10, 2019

Facts: Plaintiffs, a married couple, had a single instance of carbon monoxide exposure at their cabin/vacation home in Three Lakes, Wisconsin. The defendant Robert Houg, HVAC technician responded to a "no heat" call from the residence. The defendant went to the property and found that there was a defective sensor, replaced the part, and checked the furnace and found that it was running within manufacturer's specifications. Ultimately the plaintiffs suffered from extended carbon monoxide exposure, resulting in one plaintiff's transport via flight-for-life to receive bariatric chamber treatment. The plaintiffs did not have a carbon monoxide detector in the home.

Issues for Trial: The issue at trial was whether the defendant HVAC technician, Robert Houg (insured by American Family), was negligent when he repaired the furnace.

At Trial: At trial, the plaintiffs sought $250,000.00 combined for past pain and suffering. The jury returned with a verdict finding no negligence on the part of the defendant and awarded $0 for pain and suffering.

Plaintiff's Final Pre-Trial Demand: $165,000
Defendant's Final Pre-Trial Offer: $50,000
Verdict: $0

Editor's Note: This trial result was previously published in the "News from Around the State: Trial and Verdicts" section of the Winter 2019 Issue of the Wisconsin Civil Trial Journal.

Yvonne C. Truax, et al. v. Am. Fam. Mut. Ins. Co., et al.
Winnebago County Case No. 17-CV-936
Verdict Date: January 14, 2019

Facts: Plaintiff, a 96-year-old woman, went to a hair appointment at CJ's Murdock Avenue Salon owned by Carol Schmick. Plaintiff used a cane to assist her when walking, which she hung on the counter in

front of where she sat for a perm. When the perm was done, the plaintiff wanted to use the restroom. Ms. Schmick helped plaintiff to stand by providing some stability on an arm. Plaintiff then walked a single step on her own and fell, ultimately breaking her arm.

Issued for Trial: Liability and damages were disputed.

At Trial: At trial, the plaintiff's attorney asked for $90,000.00 for pain and suffering and an award of negligence against the salon. The jury assigned 60% negligence on the plaintiff and awarded $0 for pain and suffering.

Verdict: $0

For more information, please contact Erik J. Pless at *epless@eversonlaw.com*.

When you need to know

Exponent is a global engineering and scientific consulting firm specializing in the investigation, analysis, and prevention of accidents and failures, as well as third-party support for issues related to products, processes, health, and the environment.

Exponent provides expert and consulting witness as well as demonstrative evidence support for arbitration, mediation, and litigation that involves:

- Personal Injury
- Premise Liability
- Product Liability
- Construction Defect/Delay
- Environmental & Toxic Tort
- Insurance Coverage
- Intellectual Property – Patents, Trade Secrets
- Class Actions/Mass Torts

We also provide FDA, EPA, CPSC, and NHTSA regulatory support.

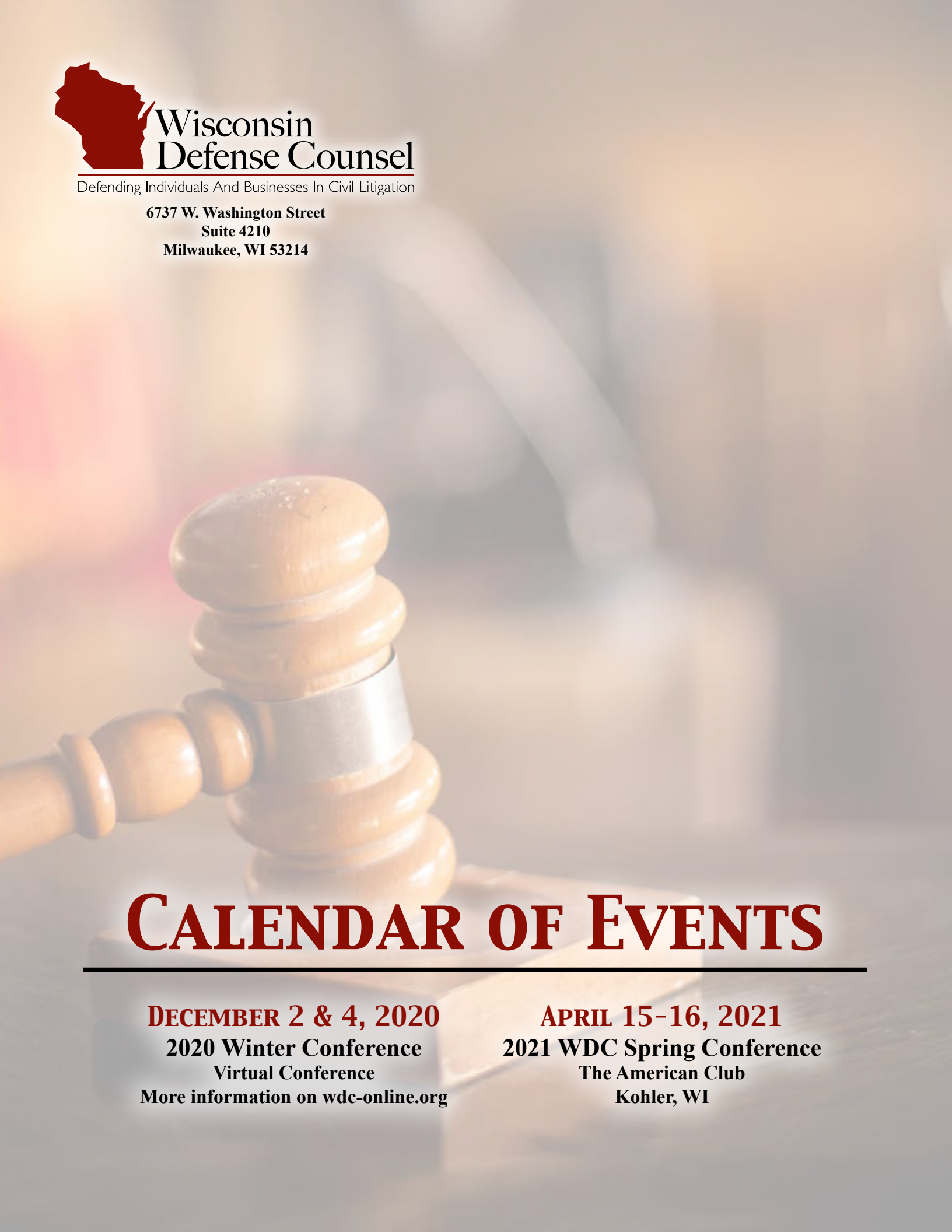
www.exponent.com | 888.656.EXPO

Exponent®

Alexandria | Atlanta | Austin | Bowie | Chicago | Denver | Detroit | Houston | Irvine | Los Angeles | Maynard | Menlo Park | Miami | Natick | New York | Oakland | Pasadena | Philadelphia | Phoenix | Sacramento | Seattle | Warrenville | Washington D.C. | United Kingdom | Switzerland | China | Singapore

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

6737 W. Washington Street
Suite 4210
Milwaukee, WI 53214



Calendar of Events

December 2 & 4, 2020
2020 Winter Conference
Virtual Conference
More information on wdc-online.org

April 15-16, 2021
2021 WDC Spring Conference
The American Club
Kohler, WI