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Law Watch

A Quarterly Update from Crivello Carlson, S.C.

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RECENT PRESENTATIONS

Remzy Bitar and **Tim Johnson** recently spoke at the Winter Conference of the Badger State Sheriff's Association about federal civil rights liability involving department and supervisory failure to train and officer-involved shootings.

Remzy Bitar and **Sara Mills** recently presented to the Wisconsin Police Chiefs Association at its annual conference. Remzy spoke about updates in Wisconsin's Open Records law and Sara spoke about the Driver's Privacy Protection Act (DPPA) and its application to law enforcement agencies.

For more information or to arrange a presentation on any of these or other legal topics, please contact Crivello Carlson at (414) 271-7722.

FIRM NEWS

Jeff Nichols and **Rebecca Levin** obtained a defense verdict in Juneau County, Wisconsin in a medical malpractice case. After a two week trial, the jury took only 45 minutes to render its decision that the defendant ER Doctor was not negligent in his failure to diagnose postpartum eclampsia.

Crivello Carlson recently welcomed two new faces. Attorney **Matteo Reginato** (Marquette, '13) joined the firm in June and Attorney **Benjamin Sparks** (Marquette, '13) joined the firm in January. Ben is licensed to practice in both Wisconsin and Illinois.

We are pleased to announce that **Nick Kotsonis** was recently appointed to the firm's Board of Directors effective January 1, 2014.

Larry Drabot received a favorable decision from the Court of Appeals affirming summary judgment in favor of his client, a janitorial service contractor. The Appellate Court agreed that warnings were not necessary to advise the plaintiff that carpets were wet from being cleaned where the plaintiff admitted that he was aware that his shoes became wet as he walked across the carpet, yet proceeded onto a tile floor and slipped.

Pat Brennan and **Sara Mills** won summary judgment in the United States District Court for the Eastern District of Wisconsin. Plaintiff, a Lieutenant Colonel in the Wisconsin Air National Guard, alleged that her superiors conspired with an employee assistance program provider to defame her in a workgroup assessment analyzing low morale and Plaintiff's effectiveness as a commander. The district court dismissed all of Plaintiff's claims against all defendants.

Ryan Braithwaite recently received two favorable decisions from the Court of Appeals affirming victories in the circuit court regarding tax assessments of Boston Store at Mayfair Mall in Wauwatosa. In the first decision, the appellate court affirmed a trial victory in a dispute over the 2009-2010 tax assessment of Boston Store. In the second decision, the Court of Appeals affirmed the dismissal of the 2011 claim for excessive assessment by Boston Store.

Pat Brennan and **Todd Jex** obtained summary judgment for a distributor in a product liability case involving an alleged defective garbage truck. The distributor was dismissed under Wis. Stats §895.047(2), which the Court held to be constitutional despite the accident occurring before the effective date of the statute.

Remzy Bitar, Amy Doyle and **Matteo Reginato** obtained summary judgment in a case alleging a regulatory taking of property stemming from the municipality's denial of a variance request. The court ruled that the Plaintiffs' claim was barred by the applicable statute of limitations and also held that the regulatory takings claim failed as a matter of law.

Bill Ehrke obtained an Initial Determination of No Probable Cause from the Wisconsin Equal Rights Division in a Disability Discrimination case where the finance employee of a Wisconsin municipality made a claim for discrimination and constructive termination based on an alleged disability of depression and sleep apnea.

Pat Brennan and **Tim Johnson** recently won a motion for declaratory judgment for indemnification against two separate co-defendants in a products liability case.

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Update

RECENT WISCONSIN COURT OF APPEALS DECISIONS

INSURANCE LAW - Intentional Acts

Fetherston v. Parks
2012AP001920

Defendant Parks was driving 60 MPH late one evening in a 25 MPH zone and passed a police car. Parks saw the police car begin to pursue him, so he accelerated to 90 MPH. Parks continued speeding along a two-lane road, weaving in and out of traffic and passing other vehicles on the left and right. Parks ultimately lost control. He came to stop when he hit the Plaintiffs' vehicle approaching in the other direction. American Family insured Parks and argued that the intentional acts exclusion in his auto policy precluded coverage because Parks' reckless driving "was substantially certain to lead to the accident and lead to the concomitant injuries." After a bench trial, the circuit court agreed and dismissed American Family from the suit. The Fetherstons' insurer, Acuity, appealed. The court of appeals reversed. Although the parties agreed that Parks' driving "was so reckless as to be substantially certain to result in injury," the circuit court did not analyze the second prong of the required inquiry regarding subjective intent: whether Parks "had in mind" or "planned" to cause injury. Although Parks clearly intended to evade police, the parties agreed he did not intend to lose control of his vehicle and injure the Fetherstons. Therefore, because it was undisputed that Parks did not intend to injure the Fetherstons and because the exclusion required such intent, the court held that the exclusion did not bar coverage.

INSURANCE LAW - Notice of Claim

Anderson v. Aul
2013AP00500

Thomas Aul was an attorney who had professional liability insurance through Wisconsin Lawyers Mutual Insurance Company (WILMIC). The Andersons bought real property from Aul Real Estate, which was owned by Attorney Aul, and chose to proceed with representation by Attorney Aul in that transaction. Later, the Andersons became dissatisfied with Attorney Aul's representation of their interests and retained independent counsel. The Andersons' new attorney wrote Attorney Aul a letter on December 23, 2009 setting forth the reasons for the Andersons' dissatisfaction and demanding $117,125. However, WILMIC did not receive notice of the Andersons' claim until March 9, 2011, eleven months after the end of Attorney Aul's April 1, 2009 to April 1, 2010 policy period and more than 14 months after the Andersons first set forth the basis for their claims. The Andersons filed suit against Attorney Aul on March 2, 2012, alleging breach of fiduciary duty, legal malpractice/negligence, breach of contract, and misrepresentation. WILMIC intervened in the action and moved for summary judgment, arguing that the Andersons' claim was not covered under Attorney Aul's policy because, among other reasons, the claim was not timely reported. The circuit court agreed with WILMIC and held that because WILMIC did not receive timely notice, the claim was not covered. The appellate court reversed and held that a "finding of untimeliness is not solely dispositive" of the coverage question. A circuit court must also determine whether the untimely notice prejudiced the insurer, and unreasonably late notice does not automatically prejudice an insurer.

INSURANCE LAW - Pollution Exclusion

Wilson Mutual Ins. Co. v. Falk
2013AP00776

The Falks are dairy farmers who had a farmowners policy of insurance providing property and personal liability coverage through Wilson Mutual Insurance Company. The policy contained an exclusion for "losses resulting from the discharge, dispersal, seepage, migration, release, or escape of 'pollutants' into or upon land, water, or air." The policy defined "pollutant" as (1) any solid, liquid, or gaseous irritant or (2) any solid, liquid, or gaseous contaminant. The Falks used their cows' manure as fertilizer on their fields. Unfortunately, manure from their farm polluted a local aquifer and contaminated their neighbors' water wells. The Falks notified Wilson Mutual of the neighbors' claims, and Wilson Mutual filed an action for a declaratory judgment that the claims were not covered by virtue of the pollution exclusion. The circuit court agreed with Wilson Mutual and held that manure is "waste." The Court of Appeals reversed, explaining that the "linchpin of the court's methodology" must be the examination of the questionable term or phrase "as understood by a reasonable person in the position of the insured." Further, if the substance in question is not generally irritating or damaging, such as carbon dioxide, it is not a pollutant even if it would be irritating or damaging at abnormally high levels or when exposure is extended. The court held that "manure is an everyday, expected substance on a farm that is not rendered a pollutant under the policy merely because it may become harmful in abnormally high concentrations or under unusual circumstances."

RECENT WISCONSIN SUPREME COURT DECISIONS

INSURANCE LAW -

Economic Loss Doctrine

State Farm Fire and Casualty Co. v. Hague Quality Water International
2014 WI 5 (per curiam)

State Farm insured the home of Larry Krueger. Krueger's water softener failed, causing extensive water damage to his home. State Farm then brought products liability and negligence claims against the manufacturer of the water softener, Hague Quality Water International. The circuit court dismissed the suit, holding that it was barred by the economic loss doctrine. The economic loss doctrine bars the recovery of purely economic losses in consumer transactions through tort remedies where the only damage is to the product purchased by the consumer. The Court of Appeals reversed, explaining that the doctrine does not bar tort actions for damage to "other property" caused by the defective product if the plaintiff can establish 1) that the damaged property is not part of an integrated system involving the defective product ("integrated system test") and 2) that the defective product did not merely fail to meet the plaintiff's expectations ("disappointed expectations test"). Because the water softener at issue damaged drywall, flooring, and woodwork that were not part of an integrated system with the water softener, State Farm survived the first test. Because the water softener was not intended to prevent water damage but instead was intended to soften Krueger's water, State Farm also survived the second test. Hague Quality Water appealed to the supreme court, but the court split 3-3 (Justice Prosser did not participate) and therefore the appellate court's decision was affirmed. Justices Abrahamson, Walsh Bradley and Crooks voted to affirm the appeals court ruling in favor of State Farm, and Justices Roggensack, Gableman, and Ziegler voted to reverse.

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INSURANCE LAW -

Stacking

Belding v. State Farm Mutual Ins. Co.
2014 WI 8

Belding was driving his truck in January 2010 when Deanna Demoulin ran a red light and hit Belding's truck, leaving Belding with severe injuries. At the time of the accident, Demoulin was uninsured and Belding had UM coverage through State Farm. Belding also had coverage through State Farm for another family vehicle that his wife usually used. Belding sought to recover under both State Farm policies, because his damages far exceeded the limits of the UM policy applicable to the truck involved in the accident. State Farm rejected Belding's claim based on the policy's drive-other-car exclusion. Belding argued that the exclusion violated state law that prohibited anti-stacking provisions in auto policies, which was in place at the time his policies were issued. The supreme court agreed with Belding. It explained that drive-other-car exclusions exist to protect insurers when an insured has multiple vehicles but has not paid a premium to cover all of them. But the court held that the stacking law in effect at the time, Wis. Stat. § 632.32(6)(d) trumped Wis. Stat. § 632.32(5)(j), the statute permitting drive-other-car exclusions. Thus, State Farm could not use the drive-other-car exclusion to prevent Belding from stacking other available coverage.

LAND USE -

Tax Assessments

Sausen v. Town of Black Creek Board of Review
2014 WI 9

Plaintiff owned a 10-acre plot in the Town of Black Creek that had an assessed value of $27,500. For purposes of real estate taxation, the town assessor classified the plot as "productive forest land," but Plaintiff argued that while the value was correct, the property should have been classified as "undeveloped land." Productive forest land is assessed at full value, while undeveloped land is assessed at 50% of its full value. The plaintiff argued that the Town board should use his classification and also argued that he did not bear the burden of proving that the Town's classification was incorrect. The supreme court unanimously rejected the Plaintiff's arguments. Instead, it invoked the general rule that the party seeking judicial relief bears the burden of proof and held that taxpayers bear the burden of establishing that an assessor's property classification is incorrect.

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Upcoming Decisions

Bill Ehrke recently won a breach of contract and bad faith jury trial in which the insured sustained a $1.39 million loss in a home fire. Our client, a builders risk insurer, had denied the claim based on policy provisions which excluded coverage where there was other "permanent property insurance" that applied to the loss. The Plaintiff sued as an LLC in this case (he was the sole shareholder), but was also the homeowner who recovered $1.5 million from his homeowners carrier. In that settlement, the homeowner and his insurer "allocated"/ labeled the payments primarily to additional living expenses and contents so that the amount allocated to the dwelling itself was well below the actual value.

The matter was originally tried in 2010, and the jury awarded the Plaintiffs their compensatory and bad faith damages. Bill argued the appeal to the Wisconsin Court of Appeals, and the Court of Appeals reversed the original verdict and remanded the matter for a new trial on all issues.

After the four day jury trial, the jury found that there had been no breach of contract on the first party property damage claim, and that the insurer had properly and fairly interpreted and applied the conditions and exclusions in the policy relating to permanent property insurance. The case was then dismissed and the court has granted costs and will be entering judgment against the plaintiff this month.

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