Insurance

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ice agency. The children were not permitted to testify. In the original divorce proceeding the family court commissioner was dismissed by the trial judge without it appearing in the record that he had been given an opportunity to carry out his duties as set forth in chapter 247. This case presented a situation where adequate safeguards for the protection of the children’s interest were lacking, thus requiring the appointment of a guardian ad litem.

Under circumstances where the trial court in its discretion is satisfied that representation of the children and information concerning their future welfare is adequate, section 247.045 would seem to be satisfied without appointment of a guardian ad litem. The hard and fast rule laid down by the court requiring the appointment of a guardian ad litem where custody of minors is at issue is overly stringent in the absence of a clear showing of abuse of discretion on the part of the trial judge.

DONALD J. WALL

INSURANCE

I. BAD FAITH—EXCESS LIABILITY

Perhaps the most significant decision rendered by the Wisconsin Supreme Court in the field of insurance law during the past term was Alt v. American Family Mutual Insurance Co. This decision provided additional answers and guidelines to insurance litigators who are constantly faced with the difficult problems of excess liability for the bad faith handling of settlement negotiations.

The narrow question addressed by the court in Alt was, in the words of the court, “whether, in a claim against an insurance company for liability for failure to settle a claim, there

35. It is the court commissioner’s duty to represent the public interest in the maintenance of the marriage relationship and to advise the judge “as to the merits of the case and the rights and interests of the parties” in cases where reconciliation efforts fail.

1. 71 Wis. 2d 340, 237 N.W.2d 706 (1976). A major portion of the Litigation Law section meeting at the 1976 Wisconsin Bar Association Convention was devoted to the topic of the current status of the bad-faith excess-liability issue in Wisconsin, with counsel from both sides in the Alt case giving presentations on the question.
must be evidence of an unequivocal and legally binding offer before a jury issue can be raised in respect to an insurer’s lack of good faith.”

The court also dealt with the similar question of whether a demand by the insured or the insured’s attorney that settlement be affected within the policy limits is a condition precedent to finding bad faith on the part of the insurer.

*Alt* arose from a 1969 accident in which an automobile driven by the insured struck Alt, a six year old pedestrian, causing severe brain damage, motor disability, loss of sight in one eye and substantial medical expenses. The insured had an automobile liability insurance policy with $50,000 of coverage.

Counsel for the minor plaintiff and his father alleged that on one occasion prior to the commencement of the automobile negligence action, and on a second occasion several months before trial, offers to settle the case for the $50,000 policy limits had been tendered to the insurer, but that these offers had yielded no response and had never been communicated to the insured. The insurer disputed the fact that these offers had ever been made. An offer of judgment for the policy limits tendered immediately prior to trial was rejected by the plaintiffs due to its tardiness and the expense already undertaken in preparation for trial.

At trial the jury awarded the plaintiff $279,478.30 in damages over the policy limits and a judgment for this excess was then taken against the insured. As is common in bad faith excess liability cases, the insured assigned her bad faith cause of action against the insurer to the plaintiffs.

The minor plaintiff, by her guardian ad litem, and her father brought an action against the insurer alleging bad faith in the handling of the settlement negotiations in the automobile negligence case. While maintaining its position that no offers had ever been made by plaintiffs, the insurer moved for summary judgment on the grounds that even if offers had been made as alleged, they were not “legally binding” offers since the guardian ad litem did not join in the offers. The absence of a legally binding offer, it was argued, would preclude a finding of bad faith as a matter of law.

The trial court granted the insurer’s motion, agreeing that a legally binding offer is necessary before bad faith can be found. The court further held that the failure of the insured to

2. 71 Wis. 2d at 342, 237 N.W.2d at 708.
demand settlement within the policy limits precluded a finding of bad faith on the part of the insurer.

On appeal the supreme court reversed, holding that the trial court erred in granting summary judgment based on the above legal conclusions, and remanded the case for trial, making it clear that the factual questions in regard to the alleged settlement negotiations had not been foreclosed.

The court rejected the insurer’s primary argument that bad faith liability can only be imposed where a claimant makes a legally binding offer. A review of the prior Wisconsin cases, including Baker v. Northwestern National Casualty Co. and Hilker v. Western Automobile Insurance Co., led the court to the conclusion that the insurer “has an affirmative duty to seize whatever reasonable opportunity may present itself to protect its insured from excess liability.” Applying this duty broadly to the question presented in Alt, the court prescribed the following guidelines for insurers in the conduct of settlement negotiations:

It is obvious . . . that what we speak of when referring to bad faith is the breach of a known fiduciary duty. This carries with it the duty to act on behalf of the insured and to exercise the same standard of care that the insurance company would exercise were it exercising ordinary diligence in respect to its own business. Since that is the accepted standard, an insurance company, in which is vested the exclusive control of the management of a case, breaches its duty when it has the opportunity to settle an excess liability case within policy limits and it fails to do so. Only if the overtures towards settlement appear, as were said in Baker v. Northwestern National Casualty Co. (1965), 26 Wis. 2d 306, 313, 132 N.W.2d 493 (Baker II) to be “jocular or frivolous,” may an insurance company ignore them and even then it does so at its peril.

The court rejected the insurer’s contention that the alleged offer by the minor plaintiff unaccompanied by the approval of his guardian ad litem was per se “jocular or frivolous” within

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3. 22 Wis. 2d 77, 125 N.W.2d 370 (1963).
4. 204 Wis. 1, 231 N.W. 257, 235 N.W. 413 (1931).
5. 71 Wis. 2d at 350, 237 N.W.2d at 713.
6. Id. at 348, 237 N.W.2d at 712. The court quoted with favor from Rova Farms Resort, Inc. v. Investors Ins. Co. of America, 65 N.J. 474, 323 A.2d 495 (1965), the leading bad-faith excess-liability case, in support of its holding.
the meaning of *Baker v. Northwestern National Casualty Co.*

The court pointed out that an insurance company becomes bound to a settlement contract if conditions subsequent—such as guardian ad litem approval—occur. In any case, however, the absence of such approval would not justify the insurance company’s failure to take seriously a reasonable settlement offer.

In order to avoid breaching its duty to exercise good faith in the investigation and adjustment of claims against its insured, the court stated:

> We hold... that in all cases involving a probable overage, an insurance carrier must be circumspect in respect to all settlement overtures which are not patently frivolous, whether they be legally binding offers or not, at least in situations where it would be apparent to a reasonable insurer that excess liability was probable and liability almost certain.

The second issue dealt with by the court was whether the insured must make a demand for a settlement within the policy limits before the insurer’s duty to settle arises. Quickly dismissing the question, the court stated that the lack of demand to settle by the insured was only inconclusive evidence of good faith.

The court concluded by holding that although the action against an insurer for breach of its duty to protect its insured from excess liability is a negligence action, the plaintiff must assume the middle burden of proof and prove by clear and convincing evidence that the insurer’s duty to its insured has been breached.

In another bad faith action, the supreme court faced, for the second time, *Howard v. State Farm Mutual Automobile Liability Insurance Co.* *Howard* involved an action for damages resulting from the alleged negligence and bad faith of the defendant insurer in the investigation, settlement negotiations and defense of claims arising out of a 1968 automobile accident. At trial in the automobile negligence case, the insured incurred more than $100,000 of liability in excess of the policy limits. At

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7. 26 Wis. 2d 306, 313, 132 N.W.2d 493, 497 (1965).
9. 71 Wis. 2d at 353, 237 N.W.2d at 714.
10. 70 Wis. 2d 985, 236 N.W.2d 643 (1975). The first appeal appears at 60 Wis. 2d 224, 208 N.W.2d 442 (1973).
various times prior to trial, the insurer rejected settlement offers within policy limits.

On two subsequent occasions shortly before trial, the defendant insurer made formal offers to permit judgment to be taken against it for the policy limits plus costs. However, the injured plaintiff had long since withdrawn its offer to settle for the policy limits. 11

The defendant insurer appealed from the excess liability judgment and the denial of its motions after verdict. It argued, inter alia, that an insurer’s offer of judgment pursuant to section 269.02 of the Wisconsin Statutes 12 should, as a matter of law, preclude a finding of bad faith. Dismissing the insurer’s argument, the court emphasized that the insurer’s view of the law “would render an insurer’s prior conduct without consequence.” 13 The court, therefore, held that such settlement offers, although relevant, would not, as a matter of law pre-

11. Just prior to the automobile negligence trial, the plaintiff therein had raised its previously rejected demand by requiring State Farm to pay its policy limits of $10,000 and the insured to contribute an equal sum. In the Howard appeal, the defendant insurer argued that its liability should not exceed the policy limits since the insured failed to mitigate her damages by not attempting to raise the $10,000 necessary to consummate the settlement. The court held that the insurer waived its mitigation defense by failing to amend its pleadings to reflect its reliance on the mitigation defense, and, in any case, there was no evidence to sustain the defendant’s claim that the insured failed to make a reasonable effort to mitigate damages.

12. Wis. Stat. § 269.02(1) (1969) provided:

(1) After issue is joined but before the trial the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days, he may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly, provided the summons and complaint have been filed. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, he shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.

(2) After issue is joined but before trial the defendant may serve upon the plaintiff a written offer that if he fails in his defense the damages be assessed at a specified sum. If the plaintiff accepts the offer and serves notice thereof in writing before trial, either party may file proof of service of the offer and acceptance and the damages will be assessed accordingly. If notice of acceptance is not given the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed the damages offered, neither party shall recover costs.

(3) Subs. (1) and (2) shall apply to offers which may be made by any party to any other party who demands a judgment or set-off against the offering party.

13. 70 Wis. 2d at 995, 236 N.W.2d at 647.
clude a finding of bad faith. It reasoned:

A contrary holding would deprive the insured of the law's protection in the case where it is most needed—the one with unquestioned liability and damages far in excess of policy limits. The insurer could be encouraged to gamble with the insured's money in the hope of saving some of its own. When it becomes apparent that the gamble has failed and that the case will be tried, the insurer could avoid liability for the excess simply by offering its policy limits in judgment. Such is not the law.¹⁴

The court's holding, in light of its subsequent opinion in Alt v. American Family Mutual Insurance Co.,¹⁵ is hardly remarkable. Through Howard and Alt, the Wisconsin Supreme Court has reemphasized to insurers that their duty to the insured encompasses more than a duty to pay benefits under the policy. The conduct of settlement negotiations in the wake of these decisions will undoubtedly reflect a deepened concern with protecting the insured in the earliest stages from excess liability.

II. Creation of Insurance Contract

In Security Insurance Co. v. Department of Industry, Labor and Human Relations,¹⁶ the court examined the role which the doctrine of estoppel plays in the creation of an insurance contract. The Security Insurance case arose out of an October 22, 1968 accident in which an employee of the Town of Woodville was injured in the course of his employment, thus entitling him to worker's compensation benefits. After a series of proceedings, the Department of Industry, Labor & Human Relations (DILHR) found that during the period in which the injury occurred, both Threshermen's Mutual Insurance Company and Security Insurance Company of Hartford had policies of worker's compensation insurance in effect covering the Town of Woodville. The department's finding was affirmed by the Dane County Circuit Court.

Security had insured the Town of Woodville during the period from December 12, 1966 through December 12, 1967, but declined to renew its coverage. It sent notices to that effect to the DILHR, the Wisconsin compensation rating bureau and

¹⁴. Id., 236 N.W.2d at 648.
¹⁵. 71 Wis. 2d 340, 237 N.W.2d 706 (1975).
¹⁶. 69 Wis. 2d 746, 233 N.W.2d 386 (1975).
the Town of Woodville. Thereafter, Woodville obtained insurance from Threshermen's for the period of December 12, 1967 to December 12, 1968. The report of insurance, required to be filed pursuant to Wisconsin Statutes section 205.08(5), was sent to the Wisconsin compensation rating bureau.

Meanwhile, an agent of Security prevailed upon the company to issue a policy covering Woodville for the period from December 12, 1967 to December 12, 1968 under the apparent belief that additional insurance business might be forthcoming. Security filed its notice of insurance coverage under the new policy with the rating bureau, as had Threshermen's. Upon receipt the bureau sent a letter to Woodville inquiring whether the double coverage was inadvertent. This letter was never answered.

Security's agent was subsequently informed by Woodville's town clerk of the town's decision to purchase insurance from Threshermen's rather than Security. Security's agent responded by returning the policy to the home office of Security. In response to inquiries regarding coverage for the injured employee in 1968, Security recognized the problem and sent a notice of cancellation to the town and the DILHR.

The tardiness of Security's notice of cancellation under Wisconsin Statutes section 102.31(1)(a) prompted the trial court to find coverage by Security for one half of the injured employee's benefits, together with Threshermen's. In its analysis of the case, the trial court also found that the injured employee had attained an insured status independent of the insurance contract by virtue of the filings with the rating bureau and the DILHR.

On Security's appeal of the DILHR's finding and the circuit court's affirmance, the DILHR contended that the activities of Security in filing reports of insurance effectuated the creation of an insurance policy so that cancellation pursuant to section 102.31 (1)(a) was necessary to terminate coverage. In support of its position the Department cited a Connecticut case, Piscitello v. Boscarello,17 for the rule that "[t]he declarations of coverage made in the report are a representation that the insurer is estopped to deny."18

The supreme court found that the second policy issued by

17. 113 Conn. 128, 154 A. 168 (1931).
18. 69 Wis. 2d at 751, 233 N.W.2d at 389.
Security never ripened into a contract since the town's decision to insure with Threshermen's and to reject the policy proferred by Security's agent demonstrated the lack of mutual assent essential to the formation of any contract.19

The court declined to apply the Piscitello rule to the facts presented since the only valid basis underlying the estoppel in the Connecticut case was that court's implied purpose of providing worker's compensation coverage to injured employees.20 In Security Insurance, however, it was undisputed that full coverage would be available to the injured employee under Threshermen's policy and the only issue was whether Security's aborted policy issuance should render it responsible for one half of the benefits paid. Having distinguished the facts of the case at bar, the court held that a compensation insurer would be estopped from denying representations in its filings under section 205.08(5) only where the employee would be left without worker's compensation coverage, and conversely, where full coverage was available to the employee, an insurer who erroneously reports insurance coverage would not be estopped from denying it. The new estoppel rule was adopted by the court in spite of its statement that "[c]ontracts of insurance are never created by estoppel."21

It remains to be seen what insurer activities pursuant to section 205.08(5) will be sufficient to create an estoppel. It is also unclear whether the court entirely rejected the trial court's suggestion that "the existence of insurance as an independent (of contract) insured status of the worker . . . [arises] as a


20. The Connecticut court in Piscitello cited Connecticut statutory authority for its holding that the insured employee is given by statute a direct right of recovery from the insurer. The primary emphasis of the Connecticut court's analysis, however, was directed towards the estoppel theory of coverage:

As regards employees, the insurer is estopped to deny the truth of the formal record so made by it, whether or not the particular employee whose rights are in question examined the file where such records are kept. . . . Whether or not, therefore, the policy in question was in fact accepted so as to be binding upon the insured is of no consequence as regards this claimant.

113 Conn. at 752, 154 A. at 170.

21. Id. at 752, 233 N.W.2d at 390, citing Kamikawa v. Keshkinen, 44 Wis. 2d 705, 711, 172 N.W.2d 24, 27 (1969).
Left unresolved is the question of the extent of the insurer's obligations to the employer when the employee attains the independent insured status since the absence of a contract will certainly make this question more difficult.

III. Fire Insurance

The issue resolved by the Wisconsin Supreme Court in *Gimbels Midwest, Inc. v. Northwestern National Insurance Co.* was whether a compromise agreement fixing the amount of a fire loss at less than the fire policy's face value is of binding effect in a situation where the valued policy law applies. The court held that such an agreement was not binding.

Subsequent to a fire resulting in damage to a building owned by the plaintiff, a settlement was entered into between plaintiff's assignor (who was the insured under the fire policy) and the defendant insurer for $14,206.47, a sum representing the actual fire loss. The policy had a face value of $55,000. Following this settlement, the interest in the fire policy was assigned to the plaintiff. After some discussions between the plaintiff and the department of building inspection, a raze order was issued by the department declaring that the structure had sustained severe fire damage to the extent that it was unfit for occupancy and it was unreasonable to repair. Plaintiff then returned the unnegotiated settlement draft, filed a supplemental proof of loss and demanded the full $55,000 face value of the policy. The insurer declined to satisfy the $55,000 demand, and suit was brought to resolve the question of the amount the plaintiff was entitled to recover. Upon a finding by the trial court that the insured was entitled to the full face value of the policy, the defendant insurer appealed.

In affirming the trial court's holding that the agreement was binding, the supreme court relied on its recent holding in *Gambrell v. Campbellsport Mutual Insurance Co.* that "when, as a result of an insured loss, the owner is precluded..."
from rebuilding and is required by the municipality to destroy
the insured building, a constructive total loss results and the
valued policy law applies to require the insurer to pay the full
face value of the policy.”

The valued policy law, section 203.21 of the Wisconsin Stat-
utes, provides, “Whenever any policy insures real property and
the property is wholly destroyed, without criminal fault on the
part of the insured or his assigns, the amount of the policy shall
be taken conclusively to be the value of the property when
insured and the amount of loss when destroyed.” The court
drew from Gambrell the proposition that the valued policy law
is to be considered a part of the insurance contract and further
noted that a settlement for less than face value of the policy
where a total loss occurs is “invalid as unsupported by ade-
quate consideration.” On this authority, the court held that
“an attempted settlement for less than the face value where
there has been a total loss, constructive or otherwise, is void ab
initio as contrary to public policy.”

The result reached by the Wisconsin court in Gimbels
seems equitable since the insured is provided with no greater
benefit than was bargained for, indemnity for loss, while the
insurer bears no greater burden than the risk it has undertaken.

IV. COVERAGE CLAUSES AND EXCLUSIONS

In Davison v. Wilson, the court found invalid as against
public policy an automobile liability insurance policy provi-
sion which purported to exclude liability coverage for any
employee, including the named insured, for injury sustained by a
coemployee arising out of the maintenance or use of an automo-
bile during the course of employment. The effect of the policy
provision was to exclude coverage for a third-party liability suit

27. *Id.* at 91. See generally S. Kimball, *Insurance and Public Policy* (1960); Alex-
28. 72 Wis. 2d at 92, 240 N.W.2d 145.
29. *Id.*
30. 71 Wis. 2d 630, 239 N.W.2d 38 (1976).
31. In addition to the invalidation on public policy grounds, the court based its
decision on the trial court's finding that the policy failed to comply with Wis. Stat. § 204.34(5) (1973) which requires any policy exclusion of coverage for injuries to automo-
bile passengers to be stated prominently on the face of the policy in contrasting color.
32. The policy provided coverage as follows: "To pay on behalf of the insured all
sums which the insured shall become legally obligated to pay as damages because of
coverage A, bodily injury, sickness or disease."
brought under Wisconsin Statutes section 102.29(1) against its insured, and also to deny its insured benefits if the insured were injured while riding as a passenger in his own car when driven by a coemployee during the course of employment.

Davison sustained injuries in an accident while a passenger in an automobile operated by Wilson. At the time of the accident, both were employees of the State of Wisconsin and were using the vehicle in the course of their employment. On the basis of the above-mentioned exclusion, Wilson’s automobile liability insurer denied coverage. At a trial limited to the coverage question the court found for the insured and the insurer appealed.

On appeal, the supreme court noted that the invalidated exclusion was located among other policy exclusions which denied coverage where the named insured was an employer. The court on previous occasions has found such exclusions in automobile liability policies valid since the employer is clothed with an immunity under the Worker’s Compensation Act from tort suits, the benefits of the Act itself being the injured employee’s exclusive remedy against the employer. However, the policy exclusion under consideration limited coverage for employees rather than employers.

The employee, unlike the employer, does not enjoy the protection of immunity from tort suits since an injured employee is permitted to sue a coemployee tortfeasor whose negligence causes the injuries sustained. Since the policy sought to exclude coverage for injuries sustained by coemployees, the named insured in Davison would be left personally liable in a third-party action under section 102.29(1) and the injured coemployee plaintiff would be denied the benefit of an insured defendant. This state of affairs, reasoned the court, resulted in “a windfall” to the insurer “at the expense of the injured employee and its own insured.”

The court further reasoned that the purported justification for the exclusion, an actuarial reduction in premiums because of a lessened risk, did not outweigh the resultant denial of coverage to the injured employee and named insured.

The court also found public policy objections on two other

35. 71 Wis. 2d at 637, 239 N.W.2d at 42.
grounds. First, the policy exclusion had the effect of discouraging car pools, with the consequent effect of increasing traffic, thereby increasing the risk exposure of automobile liability insurers. Secondly, the policy provision contravened the public policy expressed in Wisconsin Statutes section 204.34(4) which mandates coverage for the named insured under his own contract of insurance when he sustains bodily injuries, since, in a sense, the named insured is denied the benefits of his own policy by the denial of coverage to a coemployee who might operate the named insured's vehicle.

In Lawver v. Boling, the Wisconsin Supreme Court encountered the difficult task of determining whether coverage exists under an underlying fact situation to which both a policy exclusion and coverage provision apply. The court held that exclusionary clauses are to be construed strictly in such a case and coverage clauses are to be construed broadly so as to afford greatest protection to the insured.

Lawver, while on an unannounced visit to the farm of his father-in-law, the defendant Boling, agreed to help repair the side of a barn. Whether or not Lawver was to be compensated for his work was not discussed at this time. A chair elevation rig was improvised from materials supplied by Boling so that Lawver could be raised along the side of the barn. A rope was connected to the rig, inserted through a pulley at the top of the barn and secured to the rear of a pickup truck in order to raise and lower the rig. Lawver sustained injuries in a fall from the rig when the rope snapped as Boling moved the truck forward to raise the rig. It was not until sometime after the accident that Lawver and Boling discussed for the first time the possibility that Lawver might be compensated for the work performed, but nothing was concluded in that regard. Lawver brought suit against Boling, Boling's automobile liability insurer and Boling's farmowner's comprehensive liability insurer.

The automobile insurance policy provided coverage for "damages because of bodily injury or property damage, arising out of the ownership, maintenance or use" of an automobile, but excluded coverage for "bodily injury to any employee of the insured arising out of and in the course of employment by the insured." The trial court denied the automobile insurer's mo-

36. 71 Wis. 2d 408, 238 N.W.2d 514 (1976).
tion for summary judgment which had been based on the employment injury exclusion and the evidence regarding Lawver's discussion with Boling of compensation for the work performed.

Boling's farmowner's policy provided bodily injury damages coverage but excluded coverage for "the ownership, maintenance, operation, use, loading or unloading of . . . automobiles." The trial court granted a motion for summary judgment made by the farmowner insurer, having found that the accident arose out of the use of a truck within the meaning of the policy exclusion.

On appeal the supreme court affirmed the trial court's denial of summary judgment for the automobile insurer, holding that a question of fact existed as to whether or not Lawver was an employee of Boling so as to be excluded from coverage under the automobile policy. The automobile insurer raised a second argument, however, contending that the plaintiff's injuries were attributable to negligence in constructing the chair rig and, therefore, could not be said to be injuries "arising out of" the use of an automobile. Dismissing this argument, the court explained that "the phrase 'arising out of' is not so much concerned with causation as it is with defining the risk for which coverage will be afforded."37 The court went on to state that the coverage question is to be resolved by determining whether the "use" involved was "reasonably consistent with the inherent nature of the vehicle."38 Holding that the use of the truck under the facts in Lawver was reasonably consistent with the use of a farm vehicle, the court found no abuse of discretion by the trial court in denying the automobile insurer's motion for summary judgment.

Of greater significance was the court's discussion considering the trial court's granting of summary judgment to the farmowner's insurance carrier. The trial court was of the opinion that a determination that the injuries arose out of the use of a truck so as to result in coverage under the automobile policy precluded a finding of coverage under the farmowner's policy because of the exclusion for automobile use. The court on appeal conceded that prior Wisconsin cases tended to sup-

37. Id. at 415-16, 238 N.W.2d at 518.
38. Id. at 416, 238 N.W.2d at 518, citing Allstate Ins. Co. v. Truck Ins. Exchange, 63 Wis. 2d 148, 216 N.W.2d 205 (1974).
port the trial court’s conclusion.\(^{39}\)

In one such decision, *Village of Luck v. Hardware Mutual Casualty Co.*,\(^{40}\) the court sustained a trial court summary judgment in favor of the defendant-insurer in an action brought by its insured, a municipality, for the defense costs and judgment paid in a wrongful death action. The insured claimed it was entitled to coverage since one of the allegations in the death action complaint was based on conduct covered by one of the policy provisions. The complaint in the wrongful death action alleged two counts of negligence on the part of the municipality: one based on negligent operation of a municipal truck by street construction workers, and the other based on the municipality’s negligence in failing to provide barriers, signs, and signals for pedestrian safety. The court found no liability under the policy on the basis of a motor-vehicle use exclusion even though the second alleged basis for negligence was a covered risk under the policy.

Along the same lines, the court in *Allstate Insurance Co. v. Truck Insurance Exchange*\(^{41}\) held that a homeowner’s insurer could not be liable under a policy containing an exclusion for loss arising out of the loading or unloading of a vehicle—even though the court acknowledged that the loss was also a result of conduct which was covered by the homeowner’s policy.

Thus, in both earlier Wisconsin cases, the court had found that insurance policy exclusions apply so as to discharge the insurer from liability even where evidence was present indicating a concurrent cause of loss which fell within the coverage of the policy.

Apparently overruling its prior holdings, the court relied on *State Farm Mutual Automobile Insurance Co. v. Partridge*,\(^{42}\) decided by the California Supreme Court, which held that “when two . . . risks constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy.”\(^{43}\) Realizing that its decision resulted in a strict construction of the exclusion in the farmowner’s policy, the court was nevertheless persuaded by the rationale

\(^{39}\) 71 Wis. 2d at 417, 238 N.W.2d at 519.

\(^{40}\) 268 Wis. 223, 67 N.W.2d 306 (1954).

\(^{41}\) 63 Wis. 2d 148, 216 N.W.2d 205 (1974).


\(^{43}\) Id. at 102, 514 P.2d at 129, 109 Cal. Rptr. at 817.
for the California rule since "the insurer, under such circumstances, is not being held to provide coverage for a risk which it did not contemplate and for which it received no premium. Indeed, it would appear to be unfair to the insured to deny benefits he has paid for." 44

Based on its determination to apply the California rule to the facts in Lawyer, the court reversed the trial court's order for summary judgment in favor of the farmowner's insurer, remanding the case for trial with both insurers remaining as defendants.

Although the holding of Lawyer was specifically within the context of the propriety of the summary judgment granted by the trial court, the court's conclusion appears to have wider ramifications: "We conclude [the farmowner’s insurer] should not be excused from its obligation to defend the action or pay benefits until it has been determined that the injuries did not result, even in part, from a risk for which it provided coverage and collected a premium." 45 As a practical matter, this holding results in an obligation on the insurer's part to defend all actions in which injuries are alleged to have been sustained by a covered risk although an excluded risk is also alleged to have been a source of the injury. This conclusion follows from the fact that the determination referred to in the above-quoted language is a question of fact which in almost all cases must go to the jury.

Of even greater significance, however, is the fact that the court's holding will require insurers to pay benefits whenever the injuries involved arise, to any extent, out of a covered risk, notwithstanding the existence of an express exclusion from liability applicable to the facts.

In a 1964 case, Foryan v. Firemen's Fund Insurance Co., 46 the Wisconsin court raised the issue of whether the concept of permission as used in coverage clauses required by the omnibus statute 47 differs from the concept of permission found in the

44. 71 Wis. 2d at 422, 238 N.W.2d at 521.
45. Id., 238 N.W.2d at 522.
46. 27 Wis. 2d 133, 133 N.W.2d 724 (1964).
47. Wis. STAT. § 204.30(3) (1973) provides, in pertinent part, as follows: No . . . policy [of automobile liability insurance] shall be issued or delivered in this state to the owner of a motor vehicle, unless it contains a provision substantially as follows: . . . The insurance hereby afforded shall not apply unless the riding, use or operation is with the permission of the assured named in this policy . . . .
extended coverage provision under Wisconsin Statutes section 344.33(2) of the financial responsibility chapter. The specific question raised was whether implied permissive automobile use was to be viewed from the point of view of the driver or the owner. The court declined to answer the question since the issue had not been raised on appeal.

The court finally faced the question again this term in Gross v. Joecks. In both Foryan and Gross, coverage for drivers of non-owned automobiles was in issue, the factual question being whether or not permission to drive had been extended by the car owners.

The policy in Gross afforded coverage to the insured for liability arising out of the use of any unowned automobile while being operated by the insured "with the permission of the owner and . . . within the scope of such permission." This provision was modelled after the "any motor vehicle" coverage of section 344.33(2).

The omnibus statute, section 204.30 of the Wisconsin Statutes, also limits coverage to permissive use of the insured vehicle, but differs in that omnibus coverage "follows the vehicle insured" when driven by any permitted driver, whereas the financial responsibility law extended coverage "follows the driver insured" in any vehicle driven with permission. A further difference between the two types of coverage is that the omnibus coverage must be included in any policy issued or delivered within Wisconsin whereas the "any motor vehicle" coverage must be included in a policy only where the insured is required to file proof of financial responsibility as a condition to the reissuance of a previously revoked automobile operator license.

The court held that in spite of these differences "the concept of permissive use is to be viewed the same regardless of whether the question arises under the 'any motor vehicle' coverage of sec. 344.33(2), Stats., or the omnibus coverage under sec. 204.30(3)." The "key factor" in the court's view was that

48. The permissive use concept in Wis. Stat. § 344.33(2) (1973) appears as follows: "A motor vehicle policy of liability insurance shall insure the person named therein using any motor vehicle with the express or implied permission of the owner . . . ."
49. 27 Wis. 2d at 142, 133 N.W.2d at 729.
50. 72 Wis. 2d 583, 241 N.W.2d 727 (1976).
51. 27 Wis. 2d at 141, 133 N.W.2d at 729 (emphasis added).
52. 72 Wis. 2d at 589, 241 N.W.2d at 730.
"both [policy provisions] are required by statute" even though the "any motor vehicle" coverage is so required only when financial responsibility must be proven. Furtner, the court found that both policy provisions served a common purpose, protection of the public.

The result of Gross is that the cases which have liberally construed the concept of permission in favor of coverage under the omnibus statute apply with equal force to the "any motor vehicle" coverage of section 344.33(2).55

V. UNINSURED MOTORIST COVERAGE

In Seigel v. American Interstate Insurance Corp., the Wisconsin court invalidated an attempt by an automobile liability insurer to limit its uninsured motorist coverage for bodily injury to five specific scheduled payments: medical expenses, loss of earnings, disability and death benefits and funeral expenses.

The court reversed a trial court finding that the provisions of the insurance policy in question complied with the require-

53. Id.
54. The insured in Gross was not required to file proof of financial responsibility but the provision nevertheless appeared in the policy. While the court acknowledged this fact, it nevertheless found as the "lay factor" that such coverage was required by statute.
55. See Upton v. Tatro, 68 Wis. 2d 562, 229 N.W.2d 691 (1975); Nordahl v. Peterson, 68 Wis. 2d. 538, 229 N.W.2d 682 (1975).
56. 72 Wis. 2d 522, 241 N.W.2d 178 (1976).
57. Coverage I—Family Protection Against Uninsured Motorists (Bodily Injury Liability): . . .

Insuring Agreements—Coverage 1

1. Bodily Injury by Uninsured Driver. To pay all sums as provided in the following schedule which the insured or his legal representatives shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so, the amount of recovery under the following schedules, shall be made by agreement between the insured or such representative and the company, or, if they fail to agree, by normal recourse to the court having jurisdiction. Payments under the following Schedule are subject to the maximums stated under paragraph 4, Limits of Liability of the Conditions of this Coverage.

Schedule:

1. Medical expense. All reasonable expenses incurred from the date of the accident by such insured or legal representatives, for necessary medical, surgical
ments of Wisconsin Statutes section 204.30(5)(a). That statute requires that automobile liability insurers provide coverage for "bodily injury or death . . . for the protection of persons injured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom."

The court acknowledged that the statute failed to enumerate what types of damage were contemplated by the term "bodily injury." However, the court cited authority which listed several types of damages generally recognized as recoverable for bodily injury which were not included within the bodily injury coverage of the defendant's policy. Most notably absent from the items of "bodily injury" damage enumerated in the defendant's policy were damages for pain and suffering, which are said to be "the primary legal element of damage resulting from injury . . . ." 5

Finding no legislative intent to limit coverage for "bodily injury" damages, the court held that the use of the term "bodily injury" in the statute "[pointed] to the conclusion that the insured is entitled to recover for those elements of damage for which a comprehensive definition of the term 'bodily injury' would allow." 6

and dental services, including prosthetic devices, and necessary ambulance, hospital and professional nursing to or for each insured who sustains bodily injury caused by accident.

(2) Loss of earnings. The actual loss of earnings suffered by the insured if as a result of such accident he becomes wholly unable to engage in his usual occupation or employment, and while such total disability continues during his lifetime. Such actual loss of earnings shall be computed upon the basis of the insured's average monthly earnings during the one year immediately preceding such accident.

(3) Disability. Ten dollars per day to each insured who is the head of a household or to each insured who is the spouse of the head of a household at the time of such accident, and five dollars per day to any other insured, while such insured is totally disabled as a result of bodily injury sustained in such accident requiring continuous confinement indoors, under the care of a licensed doctor of medicine other than himself.

(4) Death benefits and funeral expenses. The maximum benefit under this section shall be $15,000 for the death of any one person as a result of said accident and $30,000 if such accident results in the death of more than one person. The amount recoverable within these limits shall be governed by the applicable Wrongful Death and/or Survival Statutes.

58. A. Widiss, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.50 (1989).
59. 72 Wis. 2d at 529, 241 N.W.2d at 182, citing 9 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE §§ 387.3-.7 (1965).
60. 70 Wis. 2d at 530, 241 N.W.2d at 182.
Hence, the Wisconsin court in *Seigel* has effectively prohibited any policy provision restricting the types of damages for which persons injured by the negligence of uninsured motorists may seek recovery.

In *Drake v. Milwaukee Mutual Insurance Co.*, the court held that where a person sustains injuries in an automobile accident due to the joint negligence of two parties, only one of which is solvent, and elects to commence a negligence action against the solvent driver rather than first suing his own automobile liability insurer for uninsured motorist benefits, the negligence action must be resolved before any action can be brought under the uninsured motorist coverage. The plaintiff sustained injuries in an automobile accident in which her uninsured host collided with another vehicle whose driver was insured under a policy having limits of $50,000. The plaintiff commenced an action in 1974 against the estate of the uninsured motorist, the driver of the second vehicle, and the second driver's insurer, alleging that the two drivers were joint tortfeasors. On two occasions prior to the commencement of the negligence action the plaintiff made a claim against her own insurer under the uninsured motorists provision of the policy, but the insurer had denied coverage apparently because the insured driver's policy would afford sufficient coverage to satisfy the plaintiff's claim.

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61. 70 Wis. 2d 977, 236 N.W.2d 204 (1975).
62. The uninsured motorist coverage provided by the defendant insurer was as follows:

To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

The standard reduction clause, now prohibited by Wis. Stat. § 204.30(5)(a) (1973) was also present:

(b) Any amount payable under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this Part shall be reduced by:

(1) all sums paid on account of such bodily injury by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury . . . .
The plaintiff later commenced a second suit against her own insurer alleging that it had breached its obligation to pay the uninsured motorist coverage policy limits of $15,000. She also sought damages for emotional distress and punitive damages. The trial court sustained a demurrer to the complaint finding that it failed to state a cause of action.

On appeal, the court addressed the issue of whether an action against an insurer by its insured under the uninsured motorist coverage was demurrable where the insured had previously commenced an action against the allegedly negligent parties, including the uninsured motorist. Plaintiff relied upon the recent case of Collicott v. Economy Fire & Casualty Co., where the holding was summarized by the Drake court as follows: "[A]n insured may sue his insurance company under the uninsured motorist coverage, even if there are other insured parties involved in the accident who are potentially liable but have not yet been sued." Collicott controlled, the plaintiff argued, because her uninsured motorist claims were made prior to the commencement of the negligence action.

The court found, however, that the election by plaintiff to sue the uninsured motorist's estate, the insured driver and his insurer rendered Collicott inapplicable. Instead, the court relied on another line of cases which established the policy that uninsured motorist coverage was merely a "backstop or last resort protection." Based on this authority, the court reasoned:

It makes no sense to let Drake sue [the uninsured motorist's] estate, the other driver, and her insurance company, and proceed to sue her own insurance company in a subsequent suit, when a judgment or settlement in the first suit may well preclude any recovery at all in the second suit (as it will in this case) and may also resolve the main question at issue in the second suit (whether Drake is legally entitled to recover from [the uninsured motorist's] estate for her

63. The negligence action was settled during the pendency of the appeal in the action against the insurer. 70 Wis. 2d at 981, 236 N.W.2d at 207.
64. 68 Wis. 2d 115, 227 N.W.2d 668 (1975).
65. 70 Wis. 2d at 982, 236 N.W.2d at 207.
injuries). To hold otherwise would be to approve a second suit which may ultimately prove to be completely fruitless or at least redundant in important respects.48

The effect of Drake is to clarify two options open to a plaintiff injured by the negligence of an uninsured motorist: (1) Based on Collicott, an immediate suit may be brought against his own insurer under the uninsured motorist coverage even if other potentially liable sources are available for suit; or (2) An action may be commenced against the uninsured motorist and other potentially liable parties and proceed to judgment, after which it can be determined whether a recovery has been yielded in excess of the uninsured motorist policy coverage, thus precluding any recovery against the plaintiff's own insurer.

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I. FAIR EMPLOYMENT

A. Right to Discrimination Hearing

In Watkins v. Department of Industry, Labor and Human Relations,1 the supreme court held that the Fair Employment Act2 requires the Department of Industry, Labor and Human Relations (DILHR) to make a discrimination determination if demanded by the complainant even though the employer or union has rectified the alleged discrimination after the filing of the complaint. No determination, however, is required if the parties later enter into a bilateral conciliation agreement.

The complainant in Watkins was a black woman employed by the Milwaukee County social services department. She alleged in her complaint that the employer had discriminated against her because of her race in refusing her a requested job transfer. Before the department made its initial determination as required by Wisconsin Statutes section 111.36(3)(a),3 she

48. 70 Wis. 2d at 982-83, 236 N.W.2d at 207.

1. 69 Wis. 2d 782, 233 N.W.2d 360 (1975).