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

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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

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.

§ 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

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

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.

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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").

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).

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