

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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JENNIFER PETKUS,

Plaintiff,

v.

ORDER

RICHLAND COUNTY, WISCONSIN COUNTY  
MUTUAL INSURANCE CORP./  
AEGIS CORPORATION, and  
WILSON MUTUAL INSURANCE COMPANY,

12-cv-104-wmc

Defendants.

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On October 13, 2011, pro se plaintiff Jennifer Petkus filed a lawsuit in Richland County Circuit Court against the Richland County Sheriff's Department for violations of the Fourth Amendment and negligence in executing search warrants on her property in May of 2009. Petkus also brought suit against (1) the county's insurance company, defendant Wisconsin County Mutual Insurance Corporation/Aegis Corporation, for declining to pay her claim against the county, and (2) her own insurance company, defendant Wilson Mutual Insurance Company, for breach of contract and bad faith in denying her claim for property damage. On February 15, 2012, the county and Wisconsin Mutual removed this case to federal court. Presently before the court are Wilson Mutual's motions for (1) summary judgment on both claims against it and (2) bifurcation of the bad faith proceedings from the breach of contract proceedings. Petkus has also filed a motion for leave to file an amended response to the motion to bifurcate.

After considering the parties' summary judgment materials, the court will grant Wilson Mutual's motion for summary judgment and deny its motion to bifurcate as moot.

#### UNDISPUTED FACTS<sup>1</sup>

- At times relevant to this action, plaintiff Jennifer Petkus resided at 28098 County Highway CC, in the Town of Cazenovia, Wisconsin. On May 19, 2009, the Richland County Sheriff's Department executed search warrants at Petkus's residence, as well as the adjoining property at 28332 County Highway CC.
- Petkus states that the execution was carried out at least in part by "animal activists and volunteers who were not Law Enforcement," but admits that the Sheriff's Department served the warrants, Sheriff's Department employees and district attorneys were present at the scene and ultimately reported removing over 300 animals, as well as documents from the properties.
- On May 21, 2009, Petkus was allowed back onto her properties. Petkus discovered damage to personal property and the structure, and theft of property at both premises.
- Defendant Wilson Mutual Insurance Company issued to Petkus a homeowner's policy, covering the period March 28, 2009 to March 28, 2010. The policy included a provision titled "Civil Authority," stating, "We do not pay for a loss which results from order of civil authority, except as provided under Coverage D." (The parties appear to agree that Coverage D is not relevant to this case.)
- The policy also stated: "No suit may be brought against us unless all the terms of this policy have been complied with and . . . [t]he suit is brought within two years after the loss." This language was modified by an "Amendatory Endorsement" stating, "For Property Coverages, the suit must be commenced within one year after the discovery of the loss."

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<sup>1</sup> Based on the submissions of the parties and State of Wisconsin's online Circuit Court database, the following facts appear to be material and undisputed, unless otherwise noted.

- In January 2010, Petkus notified Wilson Mutual of the damage to and theft of her property. By letter to Petkus dated April 20, 2010, Wilson Mutual notified Petkus that her claim was denied based on the "Civil Authority" exclusion in the policy.
- Specifically, Wilson Mutual wrote that: "The civil petition filed against you by Richland County established that everyone who was present on your property on those three days were there under authority of either the Richland County Sheriff's Department or the district attorney's office. Accordingly, everyone was there under order of civil authority."
- On February 28, 2011, Petkus filed a lawsuit against Richland County, Wilson Mutual Insurance Company, Wisconsin County Mutual Insurance Corporation and Aegis Corporation. That case was dismissed on October 13, 2011 for Petkus's failure to properly serve defendants.
- On July 18, 2011, Petkus filed the present lawsuit in state court. The case was removed to this court on February 15, 2012.

## OPINION

### 1. Breach of Contract

Regarding the breach of contract claim, Wilson Mutual argues that Petkus's claim is time barred under both Wis. Stat. § 631.83 and the terms of the policy.<sup>1</sup> Wis. Stat. § 631.83(1)(a) states:

*Fire insurance.* An action on a fire insurance policy must be commenced within 12 months after the inception of the loss. This rule also applies to riders or endorsements attached to a fire insurance policy covering loss or damage to property or to the use of or income from property from any cause, and to separate windstorm or hail insurance policies.

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<sup>1</sup> The parties agree that Wisconsin law controls Petkus's deadline for filing a claim against Wilson Mutual.

This provision “protects the insurer from stale claims and creates a strong incentive for the party with the most control over its own losses to monitor them carefully.” *Ward Management Co. v. Westport Ins. Corp.*, 598 F.Supp.2d 923, 927 (W.D. Wis. 2009) citing *Borgen v. Economy Preferred Ins. Co.*, 176 Wis. 2d 498, 509 500 N.W.2d 419, 423 (Wis. Ct. App. 1993).

Given that the loss at issue occurred in May 2009, Wilson Mutual argues that Petkus’s July 2011 complaint missed the deadline for filing a suit under the terms of this statute by over a year. In response, Petkus argues that the general six-year statute of limitations for breach of contract actions should apply, but cites no authority indicating that this is so.

“Where a general statute and a specific statute apply to the same subject, the specific statute controls.” *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 37, 302 Wis. 2d 358, 735 N.W.2d 30. Moreover, Wisconsin courts have interpreted the term “fire insurance” as used in Wis. Stat. § 631.83(1)(a) to include all types of property damage indemnity insurance; as a result, the statute has been applied to a wide range of indemnity claims for damage to property. *See, e.g., Jones v. Secura Ins. Co.*, 2002 WI 11, ¶6 n.5, 249 Wis. 2d 623, 638 N.W.2d 575 (home leaning toward lake, chimney separating from house, deck slanting); *Bronsteatter & Sons, Inc. v. American Growers Ins. Co.*, 2005 WI App 192, ¶ 7 n.5, 286 Wis. 2d 782, 703 N.W.2d 757 (property vandalism); *Arnold v. Cincinnati Ins. Co.*, 2004 WI App 195, ¶ 52, 276 Wis. 2d 762, 688 N.W.2d 708 (mold damage). For the same reasons, the court concludes that Wisconsin’s

one-year statute of limitations covers an action on the homeowner's insurance at issue in this case.

Alternatively, citing *Yocherer v. Farmers Ins. Exchange*, 2002 WI 41, 252 Wis. 2d 114, 643 N.W.2d 457, Petkus argues that her claim under the insurance contract is not time-barred because the statute of limitations runs from the date of the breach of contract, rather than the date of the loss itself. *Yocherer* concerned underinsured motorist insurance, not insurance for property damage subject to Wis. Stat. § 631.83(1)(a). *Id.* at ¶ 1. In contrast, Wisconsin courts have construed the “inception of the loss” language in § 631.83(1)(a) “strictly, even when a loss was not discovered until after the limitations period had ended.” *Ward Management Co.*, 598 F.Supp.2d at 927 (citing *Borgen*, 176 Wis. 2d 498; *Bronsteatter*, 2005 WI App 192, 286 Wis.2d 782, 703 N.W.2d 757).

The court concludes, therefore, that Petkus's claim under the insurance contract is barred by Wis. Stat. § 631.83(1)(a).<sup>2</sup>

## 2. Bad Faith

Wilson Mutual also moves for summary judgment on Petkus's bad faith claim. To establish a claim of bad faith, the insured must show that an insurer (1) lacked a reasonable basis for denying benefits of the policy; and (2) had “knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.” *Weiss v. United Fire &*

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<sup>2</sup> In light of this ruling, there is no need for the court to address Wilson Mutual's argument that the claim is barred under the one-year deadline established by the policy itself.

*Cas. Co.*, 197 Wis. 2d 365, 377, 541 N.W.2d 753, 757 (1995) (citation omitted). The first prong of the test is objective: whether the facts establish a reasonable basis for denial. *Id.* at 377–78, 541 N.W.2d at 757. The second prong is subjective: whether the insurer knows there was a reasonable basis for denying the claim or act with reckless disregard for the truth. *Id.* at 377, 541 N.W.2d at 757. Under the test for bad faith, the insured has the burden of proof, and “it is the insurer, rather than the insured, that gets the benefit of the doubt.” *Liebovich v. Minnesota Ins. Co.*, 2007 WI App 28, ¶ 18, 299 Wis. 2d 331, 728 N.W.2d 357.

Absence of a reasonable basis for denying a claim exists when the claim is not “fairly debatable” on the law or facts. *Trinity Evangelical Lutheran Church & School–Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶ 33, 261 Wis. 2d 333, 661 N.W.2d 789 (citation omitted); *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 691, 271 N.W.2d 368, 376 (1978). When an objectively reasonable basis exists to deny coverage, a court need not consider allegations of investigative flaws or the subjective element of bad faith. *See Samuels Recycling Co. v. CNA Ins. Cos.*, 223 Wis. 2d 233, 250, 588 N.W.2d 385, 392 (Wis. Ct. App. 1998).

In its motion for summary judgment, Wilson Mutual argues Petkus cannot prove bad faith on a number of grounds. Because it is dispositive of the motion, the court need only address whether Wilson Mutual’s denial of Petkus’s claim under the “civil authority” exclusion was “fairly debatable.” The heart of Petkus’s assertion that her claim falls outside this exclusion is that the search warrant was executed, at least in part,

by “animal activists and volunteers who were not Law Enforcement.” She also admits, however, that (1) the warrants were served by the Richland County Sheriff’s Department; (2) Sheriff’s Department employees and district attorneys were present at the scene; and (3) the Sheriff’s Department reported removing over 300 animals from the properties. Given these facts, Wilson Mutual’s denial of Petkus’s claim on the grounds that “everyone who was present on your property on those three days were there under authority of either the Richland County Sheriff’s Department or the district attorney’s office” is at least “fairly debatable.”

In her brief opposing summary judgment, Petkus seems to agree that interpretation of the civil authority exception is debatable, but argues that this should work in her favor: “when a[] definition is ambiguous, such as Civil Authority, the findings are in favor of the insured, not insurer.” While it is true that insurance contracts are generally construed in favor of coverage, this canon is not applicable in the bad faith context because applying it would effectively nullify the “fairly debatable” test. *See Sawotka v. Midwest Sec. Life Ins. Co.*, 2007 WI App 130, ¶ 5, 301 Wis. 2d 750, 731 N.W.2d 384 (unpublished decision) (“[Plaintiff] argues that Midwest acted in bad faith by not construing the allegedly ambiguous language in favor of coverage. We do not apply that rule of contract construction to a bad faith claim because doing so would nullify the ‘fairly debatable’ test.”) Based on the facts adduced by the parties, the court concludes that Wilson Mutual had an objectively reasonable legal, as well as factual, basis

to deny coverage. Accordingly, the court must also grant summary judgment on the bad faith claim.

### 3. Bifurcation

Because the court is granting Wilson Mutual's motion for summary judgment, the parties' motions regarding bifurcation of the claims against Wilson Mutual are denied as moot.

#### ORDER

IT IS ORDERED THAT

- (1) Defendant Wilson Mutual Insurance Company's motion for summary judgment (dkt. #12) is GRANTED, and Wilson Mutual is DISMISSED from the lawsuit.
- (2) Wilson Mutual's motion to bifurcate the proceedings (dkt. #15) and plaintiff Jennifer Petkus's motion for leave to file an amended response to that motion (dkt. #23) are DENIED as moot.

Entered this 11th day of March, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge