IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WOODROW A. WIEDENHOEFT,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY,

Defendant.

OPINION AND ORDER

05-C-246-C

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This is a civil action for monetary and declaratory relief. Plaintiff Woodrow A. Wiedenhoeft has two insurance policies with defendant Allstate Insurance Company: an automobile policy first issued in 1993 that provides $100,000 in underinsured motorist coverage and a personal umbrella policy issued in 1998 that does not provide any coverage for injury caused by an underinsured motorist. Plaintiff contends that he was not given written notice that underinsured motorist coverage was available under the personal umbrella policy and that the failure to notify him is a violation of Wis. Stat. § 632.32(4m). He asks that the personal umbrella policy be reformed to provide retroactive underinsured motorist coverage in the amount of $1,000,000. This case is before the court on defendant's motion to dismiss or in the alternative for summary judgment. Jurisdiction is present. 28

U.S.C. § 1332.

Defendant's motion will be denied; plaintiff's claim is not barred by claim preclusion or by waiver, as defendant contends. It is an entirely separate claim related to a different policy of insurance from the one on which plaintiff sued in state court. Whether plaintiff can recover any additional money form defendant on a reformed policy is a separate question that is not at issue in this case.

From the complaint, notice of removal and the parties' briefs and evidentiary submissions, I find the following facts to be undisputed.

UNDISPUTED FACTS

Plaintiff Woodrow A. Wiedenhoeft is a citizen of Wisconsin. Defendant Allstate Insurance Company is an Illinois corporation with its principal place of business in Illinois. In 1993, defendant issued to plaintiff and his wife an automobile insurance policy, No. 011642434. This policy afforded various types of coverage, including underinsured motorist coverage with injury limits of $100,000 for each person. In addition to this automobile insurance policy, defendant issued a personal umbrella policy, No. 011246933, to plaintiff and his wife with bodily injury limits of $1,000,000 for each person.

On April 30, 1999, plaintiff's wife was fatally injured in an automobile accident caused by the negligence of one or possibly two other motorists. Plaintiff recovered $22,500

from the insurance provider of one of the other motorists and filed a claim for $100,000 under the underinsured motorist provision under the automobile insurance policy. The provision contained a "reducing clause" designed to reduce the $100,000 limit by amounts paid on behalf of the persons legally responsible for the injury. Defendant offered to pay plaintiff $77,500 in exchange for a full and final release of all claims. After further negotiation, the parties agreed in a Release and Trust Agreement that defendant would pay plaintiff $77,000 in exchange for a partial waiver, which plaintiff signed on June 30, 2000. (It is not clear why the figure agreed upon is $77,000 and not $77,500.) The partial waiver provides that plaintiff "covenant[s] to indemnify and hold harmless Allstate Insurance Company from and against all claims and demands on account of or in any way growing out of the personal injury and wrongful death of Patricia Wiedenhoeft, including claims based on subrogation, reimbursement, statutory rights or rights arising by operation of law, and claims of medical care providers," but it reserved to plaintiff "the right to pursue underinsured motorist coverage above Seventy-Seven Thousand Five Hundred Dollars ($77,500.00) in policy number 011642434."

Pursuant to this reserved right, plaintiff brought an action in state court against defendant in April 2002, contending that the reducing clause was unenforceable under Wisconsin state law and seeking an additional $22,500 in uninsured motorist coverage. Plaintiff prevailed in the trial court but lost on appeal when the Wisconsin Court of Appeals

found that the reducing clause was not ambiguous when read in context.

Approximately eight months after the court of appeals' ruling, plaintiff brought the present action in which he alleges that defendant did not provide him written notification of the availability of underinsured motorist coverage with respect to his other policy, the personal umbrella policy. He contends that this failure violates Wis. Stat. § 632.32(4m), which requires an insurer writing a policy insuring against loss in connection with injury or death caused by a motor vehicle to provide one of the insured written notice of the availability of underinsured motorist coverage if the policy does not contain such coverage. As relief, plaintiff seeks reformation of the personal umbrella policy to provide $1,000,000 underinsured motorist coverage retroactive to the date the policy was issued. If such relief is granted, plaintiff intends to pursue additional sums for his wife's death under the reformed policy.

OPINION

Defendant's motion raises the question whether plaintiff's claim is barred by claim preclusion, as defendant contends. In general, "[t]he doctrine of claim preclusion provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences." Kruckenberg v. Harvey, 2005 WI 43, ¶ 19, 279 Wis. 2d 520, 694 N.W.2d 879. It bars a subsequent suit if the

claim upon which the suit is based arises from the "same incident, events, transaction, circumstances, or other factual nebula" as a prior suit that has gone to final judgment. Okoro v. Bohman, 164 F.3d 1059, 1062 (7th Cir. 1999). Because the prior suit in this case was decided in Wisconsin state court, Wisconsin law governs the issue of claim preclusion. U.S. Gypsum Co. v. Indiana Gas Co., 350 F.3d 623, 628 (7th Cir. 2003) ("preclusive effect of a state judicial decision depends on state rather than federal law"); Wilhelm v. County of Milwaukee, 325 F.3d 843, 846 (7th Cir. 2003) (same) (citing 28 U.S.C. § 1738).

The three requirements of claim preclusion under Wisconsin law are "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 551, 525 N.W.2d 723, 728 (1995). There is no dispute that the first requirement is satisfied here. The final judgment requirement is satisfied as well, despite plaintiff's contention to the contrary. Although a reversal can deprive a judgment of its preclusive effect, that is not the effect of the appeals court's reversal of the judgment in plaintiff's case. The appeals court remanded the case with directions. Wiedenhoeft v. Allstate Insurance Co., 2004 WI App 125, 2004 WL 1171694, at *2. No further proceedings are necessary; therefore, the case has preclusive effect. Moore's Federal Practice § 131.30[2][c][iii] (3d ed. 2005).

The identity of claims requirement presents a difficult question. "Wisconsin has

adopted a transactional approach to determining whether two suits involve the same cause of action." Id. Under the transactional approach, which is set forth in the Restatement (Second) of Judgments § 24 (1982), a court's goal is "to see a claim in factual terms and to make a claim coterminous with the transaction, regardless of the claimant's substantive theories or forms of relief, regardless of the primary rights invaded, and regardless of the evidence needed to support the theories or rights." Kruckenberg, 2005 WI 43, at ¶ 26. Weight should be given to considerations such as "'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" Id. at ¶ 27 (quoting Restatement § 24(1)).

The real issue is whether I must consider in this suit plaintiff's intention to seek additional sums under his personal umbrella policy for the wrongful death of his wife. If so, it seems quite obvious that claim preclusion would apply. Plaintiff should have brought in one suit all of his claims to recover underinsured motorist insurance benefits from defendant. As the Supreme Court of Wisconsin has observed, "The transactional approach to claim preclusion reflects 'the expectation that parties who are given the capacity to present their entire controversies shall in fact do so.'" Id. (quoting Restatement § 24(2) cmt. a). The fact that plaintiff pursued different legal theories to recover under each of his insurance policies does not alter this conclusion. "Under the transactional approach, the legal theories,

remedies sought and evidence used may be different between the first and second actions." Id. at ¶ 26.

If, however, this case does not encompass plaintiff's admitted intention to seek additional compensation under the umbrella policy, then it is about nothing more than whether defendant failed to provide plaintiff with written notice regarding the availability of underinsured motorist coverage and if so, whether defendant is entitled to the option of purchasing such coverage retroactive to the date the umbrella policy was delivered. Limited to these two narrow issues, the claims in this case do not overlap plaintiff's earlier claim against defendant; the facts regarding defendant's failure to provide plaintiff with a statutorily required written notification in 1998 are different from the facts underlying plaintiff's claim under his automobile policy for underinsured motorist benefits in time, space and origin.

Although both parties assume that plaintiff's anticipated claim for damages under the reformed umbrella policy will be resolved by this case, I will have no occasion to determine what claims plaintiff may or may not make on the policy as reformed. The first question related to the merits of plaintiff's claim is whether defendant failed to provide a particular written notice as required by Wisconsin law. If I conclude that plaintiff has shown that defendant did not provide this notice, the second and final question is what remedy is appropriate. To make plaintiff whole for the lack of notice, he may be entitled to retroactive

reformation of his umbrella policy *if* he can show that neither he nor his wife had notice of their right to purchase underinsured motorist insurance as part of their umbrella policy. Rebernick v. Wausau General Insurance Company, 2005 WI App 15, ¶ 12, 278 Wis. 2d 461, 692 N.W.2d 348. Although plaintiff asks in his prayer for relief for compensatory damages for his wife's death, such a remedy is not available for the statutory violation alleged. Compensatory damages are awarded to make a plaintiff whole for the losses he has incurred that result from the defendant's alleged wrong; defendant's failure to provide plaintiff with notification of his right to purchase additional insurance did not cause the death of his wife. Musa v. Jefferson County Bank, 2001 WI 2, ¶ 29-30, 240 Wis. 2d 327, 620 N.W.2d 797; see also Rebernick, 2005 WI App 15, at ¶ 19 (Kessler, J., dissenting in part) (opportunity to purchase retroactive underinsured motorist coverage "seems [] to be the only equitable remedy" for violation of Wis. Stat. § 632.32 (4m)). Plaintiff must seek compensation for the loss of his wife via his insurance policies and may be barred from doing so by the terms of the Release and Trust Agreement he signed.

In a sense, defendant's motion is premature. Its arguments do not relate to the claim made in this case but to the claim plaintiff intends to make if successful here. That claim is not at issue in this case. Accordingly, I will deny defendant's motion to dismiss or in the alternative for summary judgment.

ORDER

IT IS ORDERED that defendant Allstate Insurance Company's motion to dismiss or in the alternative for summary judgment is DENIED.

Entered this 1st day of August, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge