



LAW NOTES

from the Law Firm of
Kay & Andersen, S.C.

April, 2009

What Every Insurer Should Know.....

ABOUT SPOILIATION OF EVIDENCE

Cases are frequently won and lost based on the preservation and evaluation of key evidence. But what happens when pivotal evidence is unintentionally misplaced, damaged, or destroyed? That issue was discussed in a recent Wisconsin Court of Appeals decision, Pegues vs. Progressive Northern Ins. Co., Appeal Number 2008 AP 1500 (February 25, 2009), found at <http://www.wicourts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=35666>. This case involved a motor vehicle rollover accident in which the injured claimant alleged that he lost control on an icy road after a tailgating semi bumped him from behind. The driver pursued a claim under his Progressive policy's UM coverage. Progressive retained an expert who examined and photographed the van, and then concluded that the vehicle had not made contact with another vehicle. Progressive had the vehicle shrink-wrapped and segregated at a Pennsylvania salvage yard pending transport to Wisconsin, where the insured lived. Progressive's Pennsylvania claims office then mistakenly released the van for sale, and although Progressive tried to recover the van, it was repaired before it could be retrieved and thus lost any evidentiary value. The claimant pursued his claim in arbitration and sought sanctions against Progressive for spoliation of evidence. The arbitration panel concluded that sanctions were warranted and barred Progressive from presenting testimony or any other evidence that referenced the van's post-accident condition. The case proceeded to a hearing on the merits, after which the arbitration panel unanimously concluded that the accident occurred due to icy conditions and not a phantom vehicle. The panel found that Progressive's conduct was not egregious or

intentional, and therefore did not warrant a presumption that production of the van would have yielded evidence detrimental to Progressive's position. The driver appealed the arbitration panel's decision, which was ultimately affirmed by the Wisconsin Court of Appeals. The Court of Appeals noted numerous entries in the record to Progressive's effort to segregate the van and to document and preserve its post-accident condition. The arbitration panel had not concluded that Progressive attempted to affect the outcome of the litigation, and the Court of Appeals refused to overturn this conclusion. The Court of Appeals also rejected arguments that the arbitration award was procured through undue means or violated public policy. This case reminds insurers that they have an obligation to preserve critical evidence in its original post-accident state until the conclusion of litigation. However, if the evidence is inadvertently damaged or lost, a court or arbitration panel will not necessarily presume that the evidence was unfavorable to the insurer. Because a spoliation ruling will depend entirely on the context of facts, insurers are reminded to maintain complete chain of custody records regarding key evidence and to make every reasonable effort to preserve such evidence.

Kay & Andersen, S.C. has substantial experience in assisting insurance companies and securing favorable verdicts and settlements and has received an AV rating from Martindale-Hubbell. We are also proud to be listed in *Best's Directory of Recommended Insurance Attorneys and Adjusters*. Feel free to contact us with any of your insurance defense needs.

Kay & Andersen, S.C.

One Point Place, Suite 201

Madison, WI 53719

Phone: (608) 833-0077

Fax: (608) 833-3901

Web Site: www.kayandandersen.com

E-mail: law@kayandandersen.com

Robert J. Kay

Randall J. Andersen

Robert A. Mich, Jr.

LAW NOTES is published quarterly. If you have a special legal issue you would like to see covered in a future LAW NOTES by Kay & Andersen, S.C., feel free to contact us.