COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2908 **Cir. Ct. No. 2010CV232**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ERIE INSURANCE EXCHANGE,

PLAINTIFF-RESPONDENT,

V.

GENE MCLINN AND JACQUELYN MCLINN,

DEFENDANTS-APPELLANTS,

JERRY WOHLERT, LYNN BOLAND AND KATHLEEN SEBELIUS,

DEFENDANTS.

APPEAL from an order of the circuit court for Grant County: CRAIG R. DAY, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. Gene McLinn and Jacquelyn McLinn appeal an order declaring that they are not permitted to stack underinsured motorist coverage provided by Erie Insurance Exchange, and that Erie is entitled to a setoff. We affirm.

¶2 Erie's complaint sought a judgment declaring that it is entitled to a setoff. The McLinns' counterclaim sought a judgment declaring that the policies can be stacked. The parties filed cross-motions for summary judgment, and the circuit court held in favor of Erie on all issues.

¶3 The essential facts are not disputed. The incident giving rise to the claim occurred in March 2009. The one-year Erie policy period ended in October 2009. The policy contains a so-called "elasticity clause" under which changes in law may affect the policy. It provides, in relevant part: "This policy conforms to the laws of the state in which you reside at the time it is issued. If the laws of the state change, this policy will comply with those changes."

¶4 The appellate arguments center on two statutory changes. An act that was enacted and published in June 2009 amended certain statutes so as to prohibit auto insurance policies from containing anti-stacking clauses or clauses that allow setoffs. *See* 2009 Wis. Act 28, §§ 3168 and 3171, codified as WIS. STAT. § 632.32(6)(d) and (6)(g) (2009-10).[1] The Act provided that these changes would become effective on the first day of the fifth month after publication. 2009 Wis. Act 28, § 9426(2). The effective date was thus November 1, 2009. A

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

separate provision stated that these changes "first apply" to policies "issued or renewed on the effective date of this subsection." 2009 Wis. Act 28, § 9326(6).

¶5 The McLinns argue that these changes have the effect of deactivating the anti-stacking and setoff provisions that appear in their Erie policy. As can be seen from the above material, the Act amending the statutes was passed during the McLinns' policy period, but the effective date was after expiration of the policy. Accordingly, the McLinns acknowledge that the Act itself does not force their policy issued before November 1, 2009, to change. Instead, they argue that the elasticity clause in their policy has the effect of incorporating these changes into the policy, even if the Act did not require that result. Therefore, the issue before us is one of policy interpretation, not statutory interpretation. The parties agree that our first step is to determine whether the policy is ambiguous, and that policy language is ambiguous if it is susceptible to more than one reasonable interpretation. ***Folkman v. Quamme***, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857.

¶6 The McLinns first argue that the laws of the state "changed" in June 2009, during the policy period, when Act 28 was enacted and published. Therefore, they argue, the elasticity clause means that the policy "will comply with those changes." They argue that a reasonable insured would understand a "change" in the law to have occurred when Act 28 was enacted and published.

¶7 We conclude that this provision is not ambiguous. No reasonable insured would understand the policy in that way. The concept of a delay between passage of a bill and the effective date, when the law actually "changes," is sufficiently embedded in the public mind. Over time, there have been numerous well-publicized examples of legislation with a delay between passage and

effectiveness. One recent example is the smoking ban for bars and restaurants, published in June 2009, but not effective until July 5, 2010. 2009 Wis. Act 12, § 84. This is a recent example, but similar delayed changes have occurred in other statutes over the years. Therefore, we conclude that a reasonable insured would understand that law actually "changes" when it becomes effective, not when it is enacted or published.

¶8 The McLinns next argue that, even if the law did not actually "change" until November 2009 (after the policy period), a reasonable insured would not read the policy to say it will not comply with changes after the policy period. Instead, they argue, a reasonable insured would believe, from the language of the elasticity clause, that the policy would comply with changes after the policy period.

¶9 We conclude that this provision is not ambiguous. The clause is stated entirely in terms of the existence of the policy: "*This policy conforms* to the laws of the state in which **you** reside at the time *it is issued*. If the laws of the state change, *this policy will comply* with those changes." (Emphases added.) If the policy period ends without renewal, the "issued" policy cannot "conform" or "comply." The clause speaks of two variables only: a relevant law, and the policy. If the one changes, it affects the other. If the second does not exist, the clause has no effect. It is the same logic, clear to all insureds, by which an accident that occurs outside a policy period is not covered. No reasonable insured would think that a law change would affect the terms of a policy that has expired.

¶10 Furthermore, even if the McLinns are correct that the policy will comply with changes to law after its expiration, they face a further obstacle: after briefing was completed in this appeal, the new statutes they want to rely on were

essentially repealed. In April 2011 those statutes were changed again, and they now permit anti-stacking and setoff clauses. *See* 2011 Wis. Act 14, §§ 23 and 26. These changes became effective on the first day of the seventh month after publication, meaning November 1, 2011. 2011 Wis. Act 14 § 29.

¶11 These newest changes mean that to prevail on this argument, the McLinns must first convince us that the policy will comply with statutory changes after the policy period, but then the McLinns must also find a way to limit that argument so that *only the first set* of statutory changes is incorporated. We are unable to see a principled basis to limit the argument that way. If a reasonable insured would not think the end of the policy period is the stopping point for changes to law, then what is? If the next logical stopping point is the date that a court is applying the law (that is to say, now), that would mean that the law "changed" again on November 1, 2011, and the McLinns' policy must now comply with the newest changes.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.