

FILED
04-22-2026
CIRCUIT COURT
DANE COUNTY, WI
2023CV001310

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 15

DANE COUNTY

WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE

Case No.: 23-CV- 1310

Plaintiff,

v.

WISCONSIN REINSURANCE CORPORATION,
1ST AUTO & CASUALTY INSURANCE COMPANY

Defendants.

**OBJECTION TO THE RECOMMENDATION OF THE SPECIAL LIQUIDATOR FOR
1ST AUTO & CASUALTY INSURANCE COMPANY LIQUIDATION REGARDING
LIQUIDATOR CLAIM NO. 420**

NOW COMES the Cincinnati Insurance Company (hereinafter “Cincinnati”), through its attorneys, Davezyk & Varline, LLC, objecting to the recommendation by the Special Liquidator (hereinafter the “Liquidator”) that Liquidator Claim No. 420 should be closed without payment. This objection is made pursuant to Wis. Stat. § 645.65(1). Cincinnati’s claim must be allowed because Wis. Stat. § 645.68 creates a mandatory obligation to fully pay every valid claim from any remaining assets of a liquidated insurance company, to the extent funds exist. For the following reasons, the Court must REJECT the Liquidator’s recommendation and ORDER that Liquidator Claim No. 420 is APPROVED and assigned as a class 3 claim under Wis. Stat. § 645.68, and paid in the order of the aforementioned statute.

I. BACKGROUND TO CINCINNATI’S RIGHT TO LIQUIDATOR CLAIM NO. 420

On December 11, 2022, Amanda Harrison and her passenger, Christy A. Pekol, Cincinnati’s Insureds, were in a motor vehicle caused solely by Ellawyn Erb, 1st Auto & Casualty Insurance Company’s Insured. As a result of that accident, Amanda Harrison and Christy A. Pekol

filed a suit in Eau Claire County Case No. 2023CV662, naming Cincinnati and Ellawyn Erb a defendants.

As a result of the accident, Cincinnati made a property damage payment to Christy A. Pekol, and submitted a proof of claim to the Liquidator. *Affidavit of Daniel M. McGrath in Support of Cincinnati's Objection to Special Liquidator's Decision* (hereinafter "Aff. of DMM"), ¶ 3, attaching *May 28, 2024 Correspondence from the Special Liquidator* as exhibit A, 1. On May 28, 2024, Cincinnati received notice that this claim had been approved and assigned Liquidator Claim No. 18. *Id.*

After this initial payment, Cincinnati made a second payment, to Christy A. Pekol and Amanda Harrison totaling \$100,683, fully settling Eau Claire County Case No. 2023CV662. *Aff. of DMM*, ¶ 4, attaching *Proof of Claim and Support Documents* as exhibit B, 1. Afterwards, Cincinnati promptly submitted a proof of claim on June 28, 2024, which the Liquidator received on July 1, 2024. *Aff. of DMM*, ¶¶ 4-5, attaching *July 17, 2024 Correspondence from the Liquidator regarding Claim No. 420* as exhibit C, 1.

In its confirmation letter, the Liquidator assigned Claim No. 420 to this claim and indicated that it would follow up with an approved amount and a claims priority number. *Aff. of DMM*, ¶ 5, exhibit C, 1. Over a year and half later, the Liquidator sent its first and only correspondence sent indicating that it had reviewed the claim and "determined that it meets the definition of a class claim under Wis. Stat. § 645.68" but that it would recommend the claim be closed without payment. *Aff. of DMM*, ¶ 6, attaching *February 25, 2026 Correspondence from the Liquidator Regarding Liquidator Claim No. 420* as exhibit D, 1. As a basis for its recommendation, the Liquidator stated "that the Wisconsin Insurance Security Fund closed the claim mentioned above, without payment on February 2, 2026. The claim has been settled within the UM coverage available." *Id.*

As a result of this determination, Cincinnati now files this formal objection with the Court in accordance with Wis. Stat. § 645.65(1). All valid claims under § 645.68 must be paid, and to the extent that the Liquidator recommends non-payment of a valid claim, it has exceeded its role and authority.

II. CHAPTER 645 REQUIRES THE PAYMENT OF ALL VALID CLAIMS, AND THE LIQUIDATOR MUST RECOMMEND ANY VALID CLAIM TO THE COURT

Chapter 645 was promulgated by the Legislature to address the uncertainty that arises should an insurance company become financially unstable or insolvent. The liquidation process was designed in part to “[e]nhance[] efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation[.]” The Chapter was designed for “the protection of the interests of insureds, creditors, and the public generally [. . .] [and] [e]quitable apportionment of any unavoidable loss.” WIS. STAT. 645.01(4). The claims procedure outlined in the chapter against the liquidated estate is an extension of that policy.

As part of this process, Chapter 645 assigns distinct and limited roles to the Liquidator. First, all claims must be submitted through the Liquidator by any claimants. *See* WIS. STAT. § 645.61. The Liquidator then determines whether the claim is valid or not and then assigns a class to the claim. *See* WIS. STAT. §§ 645.71 (requiring that “[t]he liquidator shall review all claims duly filed in the liquidation and shall make all further investigation deemed necessary by the liquidator. [...] The liquidator shall present to the court reports of claims against the insurer with his or her recommendations. [...] The reports shall include the name and address of each claimant, the particulars of the claim and the amount of the claim finally recommended, if any[.]”) and 645.68 (creating claim classes and payment priorities.) Its purpose in the recommendation process is naturally limited by the mandatory language in § 645.68.

The Liquidator’s role is to effectuate the liquidation of the insurance company and has powers that are necessarily tied to the performance of that role. *See generally* WIS. STAT. § 645.46.

It does not have the authority to disregard the priorities outlined in § 645.68, as evidenced by language in the other statutes. *See e.g.* WIS. STAT. 645.46 (8) (“Cooperate with the fund created under ch. 646 in using assets of the estate to transfer policy obligations to a solid assuming insurer, **if the transfer can be arranged without prejudice to applicable priorities under s. 645.68.**”(emphasis added). Notably, not one of the enumerated powers in § 646.46 confers any powers relating to the administration of the claims process or the recommendations. This is because the Liquidator’s role regarding the claims process is only outlined elsewhere in the chapter, and not an inherent broad authority. *See generally* WIS. STATS. §§ 645.60-71. Because the claims process is a creature of statute, those statutes must be interpreted of the overall policies sought to be achieved by the Chapter and in line with their clear meaning.

All valid claims must be paid in accordance with the Wis. Stat. § 645.68. The statute unambiguously mandates in its opening section that “**every claim** in each class **shall be paid** in full or adequate funds retained for the payment before the members of the next class receive any payment.” WIS. STAT. § 645.68 (emphasis added). This clear requirement not only creates a structured order for payment but also establishes an implicit but mandatory obligation upon the Liquidator. The Liquidator’s authority only allows it to “**compound, compromise or in any other manner negotiate** the amount for which claims will be recommended to the court” not *carte blanche* authority to reject a valid claim. WIS. STAT. § 645.71 (emphasis added). By reading this express conferral of discretion to **compromise and negotiate claims**, the classification, prioritization, and mandatory payment under 645.68 become an absolute obligation to recommend all valid claims. When the Liquidator conceded that Claim No. 420 was a class claim, it was bound to recommend that to the Court for payment. *Aff. of DMM*, ¶ 6, *exhibit D*, 1.

III. THE LIQUIDATOR’S RECOMMENDATION EXCEEDED ITS AUTHORITY UNDER CHAPTER 645 BECAUSE IT DENIED A VALID THIRD-PARTY LOSS CLAIM.

The Liquidator’s recommendation must be set aside because Cincinnati’s claim is a valid claim. To have valid claim, first a claimant must have a cause of action against an insurance company in liquidation or its insured that would be covered by a policy. Then, the claimant must have complied with the procedures applicable to it in Chapter 645.

Cincinnati has a claim against both 1st Auto and its insured Ellawyn Erb. For purposes of the statutes, Cincinnati would be a third-party claimant because it is making a claim against the insolvent 1st Auto as a result of its insured’s negligence. WIS. STAT. § 645.64 (1); *Aff. of DMM*, ¶ 4, *exhibit B*, 1. Notably, the statute regarding special provisions applicable to third-party claims and the Order of Distribution statute do not change the prioritization of third-party claims as a class, demonstrating an intent to treat those types of claims, whether a loss claim or other, the same as a first-party claim. Cincinnati’s insurance coverage was triggered by the 1st Auto & Casualty insolvency. *See* WIS. STAT. § 632.32(2)(g)1. Cincinnati paid a total of \$100,683 to its insured under the UM coverage and med pay. *Id.* As a result of this payment, Cincinnati then had a subrogated right to claim against 1st Auto and its insured. “Subrogation occurs when a subrogee ‘steps into the shoes of the subrogor to the extent it has made payment as a result of [an] actionable event.’” Petta v. ABC Insurance Co., 2005 WI 18, 692 NW 2d 639 (Wis. 2005)(emphasis in original removed) *citing* Wilmont v. Racine County, 136 Wis. 2d 57, 63, 400 N.W.2d 917 (1987). Likewise, “[i]n cases under the direct action statute, the plaintiff ‘steps into the shoes of the tortfeasor and can assert any right of the tortfeasor against the insurer.’” Dostal v. Strand, 2023 WI 6, 405 Wis.2d 572, 984 N.W.2d 382 (Wis. 2023), 604 *citing* 7A COUCH ON INSURANCE § 104:13 (3d ed. 2022) (emphasis added).

Because Cincinnati had a cause of action against 1st Auto and its insured, the next step of the analysis then becomes whether Cincinnati complied with the applicable of provisions Chapter

645 when submitting the claim to the Liquidator. The relevant statutes are Wis. Stats. §§ 645.61, 62, and 64 for a third-party claimant. Cincinnati mailed its claim on June 27, 2024, and it arrived by the July 1, 2024 deadline. *Aff. of DMM*, ¶ 5, *exhibit C*, 1. The proof of claim included a letter to the Liquidator outlining the factual basis of the claim, the original claim Cincinnati had filed on May 31, 2024, two checks that had already been issued in the amount of \$10,000 and \$683, a letter Cincinnati's counsel confirming the additional settlement amounts of an additional \$80,000 and \$10,000 to Cincinnati's insured, and a letter from plaintiff's counsel to the circuit court confirming the settlement of Eau Claire County Case No. 23-CV-662. *Aff. of DMM*, ¶ 4, 3-14. As further evidence of what was to be submitted, the Proof of Claim form for both claims was provided by the Special Liquidator. *Compare Aff. of DMM*, ¶ 4 *exhibit B*, 4-6, with *id.* at 7-9. Cincinnati never received any requests for any additional information from the Liquidator. *Aff. of DMM*, ¶ 9. The first correspondence received from the Liquidator confirmed timely receipt of the claim. *Aff. of DMM*, ¶ 5, *exhibit C*, 1. The next correspondence sent by the Liquidator confirmed that the proof of claim "meets the definition of a class claim under Wis. Stat. § 645.68." *Aff. of DMM*, ¶ 6, *exhibit D*, 1. Therefore it appears that Cincinnati complied with all the requirements under the respective statutes, and the Liquidator had no further questions necessary before making its determination.

The Liquidator's denial fails to indicate what class of claim Liquidator Claim No. 420 would be, but by looking at the plain language of § 645.68, this is a loss claim. A "loss claim" is defined as a claim "under [a] polic[y] for losses incurred, including 3rd-party claims." WIS. STAT. § 645.68. As Cincinnati paid \$100,683 pursuant to its policy for losses initially incurred by its insured but then passed to Cincinnati under the policy, it has "stepped into the shoes" of the insured and assumed their loss claims. Thus, Claim No. 420 is a loss claim compensable under section (3).

There are listed “Miscellaneous Subordinated Claims,” but those sub categories go to reinforce that a subordinated UM claim is still primarily under subsection (3) of 645.68. Subsection 8 gives seven different types of subordinated claims that may fall under its class. For the Court, the only two that need to be considered are subsection (a) and (d). Subsection (a) states “Except for claims of the federal government under subs. (3) and (3c), the first \$50 of each claim in the classes under subs. (3) to (6) subordinated under this section.” WIS. STAT. § 645.68 (8)(a), meaning that the first \$50 of any subordinated claim that fell into subsections (3) to (6), demonstrating that the remainder of the subordinated claim would be classified under those subsections. The second relevant subsection would be subsection (d) which included claims filed late. An otherwise payable subrogated claim under the higher priority claims would in fact be classified as class 8 if it were filed late. Again, the implication being that a subrogated claim that is not filed late or explicitly listed can be assigned to a higher priority class.

A key element to the classification of a claim under Wis. Stat. 645.68 is who is the claimant. The statute explicitly states “[t]hat portion of any loss for which indemnification is provided by other benefits or advantages **recovered or recoverable by the claimant** shall not be included in the classes under subs. (3) and (3m)[.]” WIS. STAT. § 645.68 (emphasis added); *see also* Wis. Stat. 645.68(8)(f). This categorization again demonstrates a clear policy and priority of the legislature that all forms of recovery must be exhausted, so that the last in the line are all treated equally as to the distribution of the liquidated insurance company’s assets. As Cincinnati has no benefits or advantages that allow it to recover, it is now last in line. These provision does not apply to it, but still evidence that a subrogated loss claim is no different than a primary loss claim, and that Claim No. 420 falls under subsection 3.

This classification and ordering reinforce the stated policy for “the protection of the interests of insureds, creditors, and the public generally [. . .] **[and]** [e]quitable apportionment of

any unavoidable loss.” WIS. STAT. § 645.01(4). All groups within a category of claims are equal and not to prioritized. WIS. STAT. § 645.68 (“No subclasses shall be established within any class.”) There are other opportunities for individuals and businesses to recover should an insurance company become insolvent, such as WISF or UM coverage as in this case. *See* WIS. STAT. § 646.31(11)(b). However, insurance companies are prohibited access to these alternative sources of recovery. WIS. STAT. § 646.21 (11)(a)(2). Thus, as shown above, the last in line requirement, prioritization schedule, and mandatory payment requirements are all determinations that have already been made by the Legislature, leaving the sole purpose of the Liquidator’s recommendation to indicate what are valid claims and invalid claims.

If the Liquidator’s proffered reason for recommending the denial of Claim No. 420 were permitted, it would create an arbitrary distinction in liability policies as to how the coverage was paid out. But there is no such distinction to be found in 645.68. For example, if the insurer paid for property damage in accordance with its policy obligations, as Cincinnati did in this case in Claim No. 18, it would be an allowable claim. *See Aff. of DMM*, ¶ 3, *exhibit A*. But, if an insurance company makes the payment pursuant to the mandated UM coverage, suddenly it is no longer a class 3 claim. This would not further “[e]nhance[] efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation” but rather create an arbitrary and uncertain process that is subject to the whims of the Liquidator. WIS. STAT. § 645.01 (4)(c). Rather, it would interject uncertainty, subjectivity, and volatility into the process.

To permit the Liquidator to not recommend valid claims would nullify the express language of Wis. Stat. § 645.68 and leave insurance companies that were required to provide coverage without a remedy at law. As a result of 1st Auto’s insolvency and the pending liquidation order, Cincinnati was prohibited from continuing suit against 1st Auto’s insured. *See* WIS. STAT. § 645.49 and *Aff. of DMM*, ¶ 7, attaching *Order for Permanent Injunction* as *exhibit E*. According to its

policy, as a result of paying \$100,683 to its insured, Cincinnati now has a contractual right of subrogation. *Aff. of DMM*, ¶ 8, attaching *the Cincinnati Insurance Policy* as *exhibit F*, 17, “Our Right to Recover Payment”. Cincinnati cannot file a claim against WISF because it qualifies as an insurance entity. The only remedy available to Cincinnati was to file a claim pursuant to § 645.51. The Order of Distribution in Wis. Stat. § 645.68 makes clear that “every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment” not the claims subject to the Liquidator’s preference. WIS. STAT. § 645.68. If the Liquidator can deny valid claims, then Cincinnati is left without a remedy in violation of Wis. Const. Art. I, Section 9.

The Court has express authority to “approve, disapprove or modify any report on claims by the liquidator” according to Wis. Stat. § 645.71 (2). In light of the reasons set forth above, Cincinnati respectfully requests the Court REJECT the Liquidator’s recommendation and ORDER that Liquidator Claim No. 420 is APPROVED and classified as a class 3 claim under Wis. Stat. § 645.68.

IV. CONCLUSION

The Liquidator overstepped its authority when it recommended that Claim No. 420 be closed without payment. The Liquidator’s role in the process is to administer and wind up the business of the insolvent insurance company and recommend all valid claims to the controlling court. The Liquidator here rejected a valid claim contrary to the express language of Wis. Stat. 645.68, and therefore the Court must DISAPPROVE the Liquidator’s recommendation. Further, because Cincinnati’s payment was made pursuant to its UM coverage, it is a loss claim under section (3) and must be classified as so. To do otherwise would leave an innocent party statutorily forced to bear a loss without any form of remedy, which is antithetical to the law.

Dated this 22nd day of April, 2026.

DAVCZYK & VARLINE, LLC
Attorneys for Defendant, The Cincinnati
Insurance Company

Electronically signed by:

By: *Daniel M. McGrath*
Daniel M. McGrath
WI State Bar No. 1118876

ADDRESS:

1400 Merrill Avenue
P.O. Box 1192
Wausau, WI 54402-1192
(715) 675-7777
dmcgrath@dvlawoffice.com