



# LAW NOTES

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

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## What Every Insurer Should Know.....

*ABOUT THE SCOPE OF CLAIM PRECLUSION*

When a claim is litigated or settled, one goal is to prevent the claimant from reasserting the same claim in subsequent proceedings. But can claim preclusion be asserted as a viable defense within the same case? That legal question was recently addressed in Wisconsin in Johnson v. Royal Indemnity Company, Appeal 2008AP1536 (May 27, 2009) (recommended for publication), found at: <http://www.wi.courts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=36586>. Johnson was injured in an automobile accident and filed suit against the other driver’s insurer as well as her own insurance company, Royal. The initial complaint only referenced Royal’s payment of medical benefits on behalf of Johnson. After securing a default judgment against Royal as to any subrogation claim, Johnson learned that the other driver’s policy limits would not cover her damages and she filed an amended complaint against Royal alleging a UIM claim. Once again, Royal did not appear and a default judgment was entered against Royal for \$409,000 plus costs and disbursements. Prior to a hearing on Johnson’s motion to amend the default judgment to correct Royal’s name, Royal filed a notice of appearance and moved for relief from judgment. One of its arguments was that the UIM claim was barred by claim preclusion because the initial default judgment dismissed only the subrogation interest. The Court of Appeals concluded that there was no prior Wisconsin case law directly addressing the issue of whether claim preclusion

could be applied in the same case. The Court of Appeals ultimately rejected Royal’s claim preclusion arguments. It noted several practical problems of expanding the doctrine to apply to claims within the same lawsuit. *Id.*, ¶ 25. For example, Johnson could not have brought her UIM claim against Royal in the initial complaint because she did not know the extent of the other driver’s policy limits and therefore whether the other driver was underinsured. Furthermore, judicial economy would not be served by making plaintiffs sue their own insurance carriers before the facts concerning an alleged tortfeasor’s policy limits and liability are discovered. *Id.* To prevent the application of claim preclusion within a case, parties could feel compelled to keep every claim in the case until the time to amend pleadings has expired, which would not be an efficient result. For these reasons, the Court of Appeals concluded that the doctrine of claim preclusion was not applicable where a party seeks to apply it to two claims timely brought within the same case. *Id.*, ¶ 27.

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.

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