



# LAW NOTES

from the Law Offices of  
**Kay & Andersen, LLC**

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

### *ABOUT TIMELY NOTICE OF CLAIMS*

In Wisconsin, Wis. Stat. §632.26(1) provides that an insured's failure to give notice of a claim within the time specified in the policy does not invalidate coverage if the insured showed that it was not reasonably possible to give the notice within the prescribed time and that notice was given as soon as reasonably possible. The failure to timely give such notice will not bar liability if the insurer was not prejudiced, although "the risk of non-persuasion is upon the person claiming there was no prejudice." Wis. Stat. §632.26(2). Much litigation has arisen over the years in Wisconsin on the issue of an insured's timely notice of a claim. One such recent case is Lewis v. Wolter Brothers Builders, Inc., Appeal No. 2009 AP 2037 (March 24, 2010), found at <http://www.wisbar.org/res/capp/2010/2009ap002037.htm>. The plaintiffs in this case were homeowners who claimed damages arising from water intrusion into their home following heavy rains, which they attributed to defective construction by the builder, Wolter. Although Wolter blamed the developers' grading plan, the plaintiffs demanded that the builder solve the problem. The plaintiffs wrote to Wolter in April, 2007, demanding an appropriate response, followed by another letter in April, 2008 from their attorney, advising that they intended to either file a civil lawsuit or pursue arbitration. In June, 2008, the plaintiffs' insurer notified Wolter that it intended to seek reimbursement from Wolter for \$10,000 in damages it had paid. Wolter did not advise its insurance broker or its carrier of these letters. The plaintiffs filed suit against Wolter in July, 2008. In October, 2008, Wolter's insurance broker came to Wolter's office to discuss an unrelated insurance matter. Although Wolter representatives later testified that the meeting was to discuss the plaintiffs' lawsuit, the broker stated that the Wolter representatives only mentioned that they were having a problem with one of the homeowners and the matter was not tendered for a defense. In November, 2008, other homeowners in the same subdivision filed suit against Wolter, the developer and other parties. Wolter's counsel sent copies of the complaints in the lawsuits to

Wolter's broker on February 12, 2009. Wolter's carriers, Acuity and Continental Western, moved to intervene, bifurcate and stay proceedings. The circuit court subsequently granted summary judgment to the insurers, finding that Wolter had failed to give timely notice to the insurers and thereby substantially prejudiced their defense. The Court of Appeals affirmed. It concluded that by the time Wolter received the April, 2008 letter from the plaintiffs' attorney, Wolter had known for at least a year that the plaintiffs claimed water problems for which they held Wolter at least partly responsible. ¶12. The Court concluded that Wolter was thereby put on notice of an occurrence, triggering its duty to notify the insurers. "Retaining counsel or unilaterally working with the homeowners does not relieve Wolter of its explicit contractual obligation to immediately tender legal papers to the insurers." *Id.* The Court of Appeals concluded that the insurers were prejudiced because by the time they received notice of the claim in February of 2009, critical scheduling order deadlines had passed, including the deadlines for amending pleadings, completing discovery, filing dispositive motions, naming witnesses and providing expert reports, and serving trial exhibits. ¶15. The Court of Appeals concluded that this constituted significant prejudice. *Id.* This decision serves as a reminder to insurers that while Wisconsin law gives some safe harbor to insureds who fail to timely give notice of a pending claim, substantial resulting prejudice to the insurer will justify denial of coverage.

Law Offices of Kay & Andersen, LLC has substantial experience in securing favorable verdicts and settlements for insurance companies and their insureds 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.

### Law Offices of Kay & Andersen, LLC

One Point Place, Suite 201  
Madison, WI 53719

Phone: (608) 833-0077

Fax: (608) 833-3901

Web Site: [www.kayandandersen.com](http://www.kayandandersen.com)

E-mail: [law@kayandandersen.com](mailto:law@kayandandersen.com)

Randall J. Andersen

Robert A. Mich, Jr.

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