

TIMELY NOTICE OF AN INSURANCE CLAIM REQUIRED

In a recent decision of the Wisconsin Court of Appeals, the importance of complying with the requirements of a commercial general liability policy issued to a contractor was highlighted.

In Kreckel v. Walbridge Aldinger Company, 721 N.W.2d 508 (Wis.App. 2006), an action was brought against a general contractor, Walbridge, for injuries suffered by Kreckel, a subcontractor's employee. The agreement between the general contractor and the subcontractor required the subcontractor to obtain a commercial general liability policy naming the general contractor as an additional insured and to indemnify the general contractor for any liability arising out of work performed by the subcontractor. The subcontractor did obtain the coverage and named Walbridge, the general contractor, as an additional insured.

While on a project, the subcontractor reached into an electrical transformer box, receiving 15,000 volts of electricity. The subcontractor employee sued Walbridge for negligence. Walbridge tendered defense of the case to its commercial general liability insurance carrier, St. Paul Fire & Marine, which filed an answer on behalf of Walbridge.

The subcontractor contacted its insurance company, CNA, who then contacted St. Paul. CNA was of the opinion that Walbridge was the cause of the employee's injury and demanded reimbursement of the worker's compensation benefits that CNA had also paid to the employee. Thereafter, the parties, through their lawyers, filed many documents and engaged in much discovery and finally a few years later, St. Paul formally tendered Walbridge's defense to CNA, who rejected the tender. Walbridge then filed a third-party action against the subcontractor and CNA claiming indemnification from the subcontractor and asserting that CNA had the duty to defend Walbridge.

Not surprisingly, out of this tangle of claims and counterclaims on the subject of whose

insurance applied, the subcontractor and its insurance carrier, CNA, asserted that Walbridge's tender of defense was untimely and prejudicial and the trial court concluded that neither the subcontractor nor CNA owed any duty to defend, insure or indemnify Walbridge. Walbridge appealed.

The Court of Appeals noted that it was undisputed that the subcontractor had agreed to indemnify Walbridge as the general contractor and that the subcontractor's insurance carrier, CNA, considered Walbridge an additional insured. Thus, the Court noted that the only real issue was whether Walbridge had given timely notice to the subcontractor and CNA, thereby invoking the coverage that the subcontractor had obtained through CNA. If timely notice was not given, a second issue arose, i.e., whether the delay in giving timely notice was prejudicial to the subcontractor.

The Court noted that decisions interpreting timely notice have held that when the insured fails to give notice within one year of the time required by the policy there is a rebuttable presumption that there has been prejudice and the burden of proving that there is no prejudice shifts to the claimant. Without going into the detail of the specific dates, the injury to the subcontractor's employee occurred in September of 2000, but the general contractor, Walbridge, after tendering the subcontractor's employee's lawsuit to Walbridge's insurance carrier, did nothing about tendering the case to the subcontractor and its insurance carrier until April, 2004. Under the terms of the CNA insurance policy covering the subcontractor, Walbridge, as an additional insured, was required to give written notice of any claim or lawsuit to CNA "as soon as practicable." Walbridge's argument was that timely notice was given to CNA because CNA had paid worker's compensation benefits to the subcontractor's employee. It argued that CNA had in fact sought a recovery of the worker's compensation benefits from Walbridge's insurance

carrier in August of 2002. However, the Court concluded that CNA's letter requesting reimbursement of its worker's compensation benefits was a product of a specialist in CNA's worker's compensation department, not the product of a specialist in CNA's general liability department. CNA argued that the mere fact that CNA's worker's compensation department was granting benefits and investigating the WC claim, did not absolve Walbridge of its duty to notify CNA of the negligence claim which would expose CNA under the terms of its general liability insurance contract.

The Court of Appeals agreed with CNA.

The Court reviewed other cases as a guidance to when a claim notice is untimely. It noted that in other cases 22 months between the filing of a lawsuit and a notice to the insurer was untimely, or that an unexplained delay of 3 months constituted untimely notice. In this case, the subcontractor employee filed the negligence claim against Walbridge in February, 2002, and Walbridge's insurance carrier tendered Walbridge's defense to CNA in April, 2004, a delay of approximately 26 months. The Court concluded that such a delay was beyond what the law would allow.

The Court then turned to the question of whether the untimely notice was prejudicial to the subcontractor and its insurance carrier. The Court concluded it was because the amount of time that had lapsed between the accident and the tender of the claim to CNA was so long that witnesses may not be available and memories may be dim. Further, the Court concluded that CNA should have some latitude in securing the investigator and attorney of its choice, and that untimely notice may prejudice an insurer in that it cannot seek an immediate determination of coverage, cannot participate in alternative dispute resolution efforts and cannot select defense counsel and control the defense. In this case, as already explained, the lawyers that were already

involved in the action by the time the subcontractor and its insurance carrier, CNA, was tendered the defense, had done extensive work.

The Court concluded that Walbridge as general contractor had not overcome the presumption of prejudice to the subcontractor and its insurance carrier as a result of not tendering the defense of the subcontractor's employee's claim to the subcontractor promptly.

This case exemplifies nicely the importance of giving timely notice to any insurance carrier that may expect to receive notice of a claim and a tender of defense.

Design professionals should not only discuss a claim filed against it for personal injury or property damage with the design professional's insurance agent, but also with the design professional's attorney in order to cover the full panoply of notice possibilities and obligations.