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ALERT

Notice-Prejudice Statutes Apply to Claims-Made-and-Reported Policies

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Applying Wisconsin law, the Court of Appeals of Wisconsin has held that the state's late notice-prejudice statutes apply to claims-made-and-reported liability policies and require the insurer to prove prejudice when denying coverage based on late notice, even when the claim is not reported until after the expiration of the claims-made-and-reported policy period. *Anderson v. Aul*, 2014 WL 625676 (Wis. Ct. App. Feb. 19, 2014).

The buyers in a real estate transaction signed a form waiving their right to independent counsel and agreeing to be represented by the seller, who was an attorney. Following closing, the buyers became dissatisfied with the seller's representation and, on December 23, 2009, sent the seller a letter setting forth the reasons for their dissatisfaction. At the time, the seller was insured under a professional liability policy issued for the policy period of April 1, 2009 to April 1, 2010, which afforded coverage for claims both first made and reported during that policy period. The seller did not inform his insurer of the buyer's letter until March 9, 2011, nearly a year after the expiration of the 2009-2010 policy. On March 22, 2012, the buyers filed suit against the seller. The insurer intervened and moved for summary judgment, contending, among other things, that the policy did not afford coverage for the buyers' claim because the claim was not reported during the policy period in which it was made and because the insured made a material false misrepresentation on his renewal application for the 2010-2011 policy by failing to disclose the buyer's letter in connection with that application. The trial court entered summary judgment for the insurer based on the insured's untimely notice and the insured's failure to disclose the claim on his renewal application. The trial court declined to address whether the

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insurer had been prejudiced by the untimely notice, observing that "that's not the standard."

On appeal, the Court of Appeals reversed and remanded for further proceedings. Although the court acknowledged that the insured did not report the claim until 11 months after the policy expired and that the express language of the policy required any claim to be both first made and first reported during the policy period, the court also held that the policy was subject to Wisconsin's two statutes governing "how the timeliness of notice of a claim affects coverage," Wis. Stat. §§ 631.81 and 632.26(2). According to the Court of Appeals, both statutory provisions require an insurer—including an insurer that has issued a claims-made-and-reported policy—to show that it has been prejudiced by an insurer's untimely notice of a claim before denying coverage based on late notice. Thus, the Court of Appeals held that the trial court erred by not considering prejudice. Because the insurer here argued only that it would be prejudiced if it had to cover a claim for which it did not bargain and did not contend "that its ability to investigate, evaluate and defend this claim was impaired by [the insured's] late notice," the Court of Appeals held, as a matter of law, that the insurer had not been prejudiced. The Court of Appeals declined to address any of the other coverage defenses raised by the insurer.

The opinion is available here.