BY CHARLES H. BARR

Now You Tell Me:

Application of Notice-Prejudice Rules to Pure Claims-Made Liability Policies

Whether an insurance carrier can deny coverage to a policy holder under a pure claims-made policy due to late notice in the absence of prejudice is unclear in many states. Wisconsin courts have distinguished between claims-made-and-reported policies and pure claims-made policies, but many courts in other parts of the U.S. have not, thus causing considerable confusion.

Can a liability carrier deny coverage solely because the insured gave the carrier late notice of the claim, even if the lateness does not impair the carrier's investigation and defense of the claim? The question is important not only to the insured and the insurer but also to a third-party claimant who could be left holding the bag if the insured blows the reporting deadline.[1]

The answer depends on the events, whether one or more, that trigger coverage under the policy. The answer is probably "no" if the trigger is the event that gives rise to liability — that is, the "wrongful" conduct — regardless of when the claim based on that liability is made.[2] This is an "occurrence" policy; it insures against the occurrence of the event that results in liability. The occurrence policy is the type of liability policy that has been around the longest. Automobile insurance is the most common example of a currently available occurrence policy.[3]

On the other hand, if the triggers of coverage are a claim against the insured and the insured's reporting of the claim to the insurer, regardless of when the event giving rise to liability occurred, the answer is probably "yes": the insured forfeits coverage because of late notice even in the absence of prejudice to the insurer.[4] This is a "claims-made-and-reported" policy, a type of liability policy that has gained market prominence since the late 1960s.[5] A claims-made-and-reported policy is said to allow the insurer to avoid "tail liability" and "close the books" at the end of the policy period, which increases certainty in rate setting and results in lower premiums. Professional liability policies, including those insuring lawyers, are generally claims-made-and-reported policies.[6]

A third category of liability policies exists — a second type of claims-made policy — under which the single coverage-triggering event is the making of the claim against the insured for which coverage is sought. (Typically, the claim is "made" when the insured receives notice of its existence in a manner specified by the policy — for example, "service of a complaint or similar pleading ...."[7]) This is variously termed a "pure claims-made," a "general claims-made," or simply (and too vaguely) a "claims-made" policy.[8] This policy type, which has been used to insure against liability in various contexts such as fiduciary responsibility, directors' and officers' liability, and employer's liability, is of more recent advent and is less common than claims-made-and-reported policies.[9] Nonetheless, there have been enough pure claims-made policies to foment litigation about the consequences of an insured's late claim reporting.

This article examines whether a carrier can deny coverage under a pure claims-made policy due to late notice in the absence of prejudice. From a nationwide perspective, the answer is much more uncertain than it is with respect to the other two types of liability policies. To address the issue, a court first must distinguish between claims-made-and-reported policies and pure claims-made policies, which Wisconsin courts have done but courts in many other jurisdictions have not. The failure of those other courts to draw that line has engendered considerable confusion, as illustrated by a 2024 opinion of the U.S. Court of Appeals for the First Circuit.

Time Limits for Reporting and Notice-Prejudice Rules

Liability policies specify a time limit for the insured, or someone in the insured's position, to give the carrier notice of a claim. Sometimes the time limit relates to the end of the policy period (for example, that date or 30, 60, or 90 days thereafter),[10] and sometimes it is described more amorphously

(for example, "as soon as practicable" or "promptly").[11] Frequently, policies contain both varieties of time limit for reporting a claim.[12]

A notice-prejudice rule preserves coverage despite the insured's failure to report the claim to the carrier within the time specified by the policy, unless the carrier was prejudiced by the delay.[13] More than three dozen states have had a notice-prejudice rule in effect at one time or another.[14] Most of them are common-law rules; Wisconsin is one of the few states to have codified notice-prejudice rules in statutes.[15] Wis. Stat. section 632.26(2), the notice-prejudice rule likely to be relevant to a liability policy under Wisconsin law,[16] provides as follows: "Failure to give notice as required by the policy … does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice."[17] Whether an insurer can deny coverage because of late reporting of a claim in the absence of prejudice depends on whether a notice-prejudice rule applies to the policy under governing law.

Under Wisconsin law, a finding of prejudice to the insurer must be based on "a *serious* impairment of the insurer's ability to investigate, evaluate, or settle a claim, determine coverage, or present an effective defense, resulting from the unexcused failure of the insured to provide timely notice."[18] Prejudice might not be apparent and the notice-prejudice rule might thereby be in play unless 1) the insured has proceeded (or defaulted) to such an extent in defense of the claim as to have foreclosed an option that the insurer would and the insured should reasonably have used, or 2) crucial evidence has been lost because of the delay.

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Clear Skies Over Wisconsin

The Wisconsin Supreme Court held in *Anderson v. Aul* that Wisconsin's notice-prejudice statutes do not apply to claims-made-and-reported policies.[19] The *Anderson* court distinguished not only between occurrence policies and claims-made policies but also between the two types of claims-made policies: pure claims-made and claims-made-and-reported.[20] In addition, the court discussed two kinds of time limit for reporting a claim, their purposes, and the types of liability policies in which they appear:

1) The requirement to report the claim "'as soon as practicable' or within a stated period," which "maximize[s] the insurance company's 'opportunity to investigate, set reserves, and control or participate in negotiations with the third party asserting the claim against the insured'" and can appear in any of the three types of liability policies; and

2) The requirement to report the claim during the policy period, which "is directed to the temporal boundaries of the policy's basic coverage terms" and is unique to claims-made-and-reported policies.[21]

***Anderson* Insurance Policy.** The policy in *Anderson* was a legal malpractice policy issued by Wisconsin Lawyers Mutual Insurance Co. (WILMIC). The policy identified itself as a claims-made-and-reported policy and stated in six separate instances that its coverage was limited to claims both made against the insured and reported to the carrier by the insured during the policy period, leaving no doubt that it was a claims-made-and-reported policy.[22] Key among those instances, in light of the purpose of the reporting requirement unique to claims-made-and-reported policies – that is, to temporally delimit coverage – was the initial grant of coverage.[23] Application of the notice-prejudice statutes[24] to the policy would expand that grant, an intention the court declined to ascribe to the Wisconsin Legislature.[25]

Although *Anderson* did not address whether the Wisconsin notice-prejudice statutes apply to pure claims-made policies, its distinctions between pure claims-made and claims-made-and-reported policies in terms of their respective initial coverage grants and coverage-triggering events, as well as its distinction between the purposes of the reporting requirement found in all types of liability policies and the reporting requirement unique to claims-made-and-reported policies, imply that the answer is "yes." Wis. Stat. section 632.26(2) on its face applies to all Wisconsin liability policies, and the *Anderson* court considered the notice-prejudice issue with respect to claims-made-and-reported policies "a difficult and close question of statutory interpretation …."[26] A Wisconsin court is unlikely to override that statute on the basis of a reporting requirement not "directed to the temporal boundaries of the policy's basic coverage terms …."[27] Overriding the statute in that event would in effect *restrict* the initial coverage grant by converting a pure claims-made policy to a claims-made-and-reported policy.

A notice-prejudice rule preserves coverage despite the insured's failure to report the claim to the carrier within the time specified by the policy, unless the carrier was prejudiced by the delay.

***Grigg* Insurance Policy.** Thus, in *Grigg v. Aarrowcast Inc.*, which involved a pure claims-made policy containing a corresponding kind of reporting requirement, the Wisconsin Court of Appeals relied on

Anderson to hold that the notice-prejudice rule applied.[28] This answer followed so clearly from the *Anderson* analysis that the *Grigg* court relegated its discussion of the issue to a footnote in the multi-issue case. (Decision of the issue nonetheless was necessary to the result and therefore not dictum.) Other published decisions that have distinguished between pure claims-made and claims-made-and-reported policies are in accord.[29]

***Braketown* Insurance Policy.** In a recent case, *Braketown USA Inc. v. Markel Insurance Co.*, the Wisconsin Court of Appeals was presented with the issue of whether the answer differs if the policy expressly describes the reporting requirement as a condition precedent to coverage, which the policy in *Grigg* did not.[30] The court did not reach the issue because it concluded that reporting in that case was timely.[31]

Although the issue therefore remains undecided in Wisconsin, the supreme court held more than 50 years ago that timely reporting of a claim to the insurer "is a condition precedent in fact to liability whether or not expressly so stated ...."[32] Indeed, the notice-prejudice rule "mandates that the notice provisions of the [p]olicy be treated as covenants, not conditions," even if the reporting requirement uses the words "condition precedent."[33] Failure of a condition precedent excuses performance, but breach of a covenant by one party does not excuse the other party's performance if the breach is immaterial – that is, in the absence of prejudice.[34]

Claims-Made Fog Elsewhere

The *Anderson* court observed that "[c]ourts and commentators often imprecisely use the term 'claims-made' when they are in fact referring to pure claims-made policies or claims-made-and-reported policies."[35] Courts exhibiting such imprecision have generally held that notice-prejudice rules are inapplicable to "claims-made" policies. In some cases, the policy is identifiable (albeit sometimes tentatively) as a claims-made-and-reported policy, such that those decisions accord with *Anderson* and the weight of authority nationwide.[36] In other cases the policy is similarly identifiable as a pure claims-made policy, so those decisions conflict with *Grigg*.[37]

Massachusetts Cases. A line of cases decided under Massachusetts law, which like Wisconsin has a notice-prejudice statute, is an example of how failure to discern that there are two types of claims-made policies can drive a court off the analytical rails when it encounters a pure claims-made policy.

In 1990, the Massachusetts Supreme Judicial Court held in *Chas. T. Main Inc. v. Fireman's Fund Insurance Co*. that the state's notice-prejudice statute does not apply to what it called "claims-made" policies.[38] The brief (three pages in the Northeastern Reporter 2nd) but frequently cited opinion did not quote any policy provision but did observe that a "claims-made policy covers the insured for claims made during the policy year and reported within that period or a specified period thereafter regardless of when the covered act or omission occurred."[39] In the policy at issue in *Chas. T. Main*, there was a "specified period" after the end of the policy period – a 60-day "bubble" – during which the insured could report a claim.[40]

If the Massachusetts high court described the policy accurately, it was a claims-made-and-reported policy, and therefore the court's holding was consistent with *Anderson*. Its analysis also tracked that of *Anderson*, albeit in summary form.[41] Indeed, the *Anderson* court cited *Chas. T. Main* with approval and recounted its reasoning in almost as much detail as did the *Chas. T. Main* court itself.[42] Although *Anderson* described a claims-made-and-reported policy as one under which a claim must be reported to the carrier by the end

of the policy period – period, full stop; there is no mention of a bubble – its reasoning applies with equal force to any reporting time limit related to the end of the policy period (whether or not it includes a bubble), as long as that time limit appears in the initial coverage grant and compliance with it is the final act necessary to trigger coverage.

The overly general description of the policy in *Chas. T. Main* led to trouble when the Massachusetts Supreme Judicial Court revisited the notice-prejudice issue seven years later in *Tenovsky v. Alliance Syndicate Inc*.[43] Although the *Tenovsky* opinion was as short as the *Chas. T. Main* opinion, it did quote the relevant policy provisions. The initial coverage grant included "a claim for damages because of the 'bodily injury' or 'property damage' ... first made against any insured during the policy period .... A claim by a person or organization seeking damages will be deemed to have been made when notice of such claim is received and recorded *by any insured or by us, whichever comes first*."[44] A separate section of the policy prescribing conditions of coverage stated that "in the event that a claim is made against the insured, the insured must ensure that the insurer receives 'prompt written notice' of the claim."[45]

There can be no doubt that the court was describing a pure claims-made policy. Reporting the claim to the insurer was *not* a coverage trigger, and the reporting requirement was characteristic of one designed to facilitate the insurer's investigation and disposition of the claim and not to serve as an element of the initial coverage grant. The court referred to the policy, however, merely as a claims-made policy and equated it with the policy in *Chas. T. Main*: "The policies in both cases purported to be, and were, claims-made policies." The court then reasoned that the reporting requirements in those policies were substantially equivalent as far as the notice-prejudice issue is concerned:

"Surely, 'prompt' notice of 'claims made' requires that notice to the insurer be given no later than sixty days following the expiration of the policy period. The policy in this case, then, calling for promptness in notification, is not materially different from the policy considered in *Chas. T. Main., Inc., supra*. Both policies require that the claim, the insured event, be reported to the insurer during the term of the policy or at least promptly after its expiration. It is apparent from the language of the Alliance policy, just as it is apparent from the policy considered in *Chas. T. Main., Inc.,* that the purpose of both policies' notice provision is to produce 'fairness in rate setting' by 'minimizing the time between the insured event and the payment.'"[46]

The court thus concluded: "This case is controlled by *Chas. T. Main, Inc*."[47]

The *Tenovsky* court's imprecision in describing the policy in that case led to its failure to appreciate the distinction between claims-made-and-reported and pure claims-made policies. The court treated a pure claims-made policy as a claims-made-and-reported policy, thereby depriving itself of a straightforward opportunity to analyze whether the notice-prejudice statute should apply to the former, as in *Grigg* (benefiting from *Anderson's* analysis). In particular, the *Tenovsky* court disregarded the fact that the reporting requirement was not part of the initial coverage grant, which, along with the language of the reporting requirement itself, implies that the reporting requirement's purpose was not "directed to the temporal boundaries of the policy's basic coverage terms" but was to facilitate the insurer's investigation.

It is possible that pure claims-made policies were not in circulation by 1990 or 1997 to the extent necessary to create awareness that claims-made-and-reported policies are not the only type of claims-made policy. But this was not the situation in September 2024, when the *Chas. T. Main* and *Tenovsky* analysis guided the First Circuit's holding in *Stormo v. State National Insurance Co*.[48] The *Stormo* three-judge panel, with one judge dissenting in part and concurring in part, ruled that the Massachusetts notice-prejudice statute did not apply to what it termed, predictably enough, a "claims-made" policy.[49]

The policy in that case contained two separate notice provisions:

"One of the notice provisions – which I shall refer to as the 'within-policy-period' notice provision – appears in

the section of the policy that defines the scope of this policy's coverage. It provides that, within sixty days of the policy period's end, the insured must provide the insurer with notice of any claim made against the insured within the policy period. The other notice provision – which I shall refer to as the 'prompt-written' notice provision – appears in the section of the policy that identifies the insured's responsibilities prior to receiving payment, rather than the section outlining what is covered. It requires the insured to provide the insurer with 'prompt-written' notice of any claim against the insured, without regard to when that claim was made against the insured."[50]

This was on its face a claims-made-and-reported policy with a 60-day reporting bubble, as in *Chas. T. Main*. As the courts in both *Chas. T. Main* and *Anderson* pointed out, it is not unusual for a claims-made-and-reported policy to have separate reporting provisions with different purposes – one in the initial coverage grant that is directed to the temporal boundaries of coverage and the other to facilitate investigation.[51]

The facts and policy in *Stormo*, however, threw the First Circuit a curve, as only the separate opinion makes clear. The claim against the insured was made *after* the policy period expired, which alone typically would disqualify the claim for coverage, but because the policy contained a "single claim" provision,[52] that claim was treated as having been made within the policy period because it was "'related' to a prior within-the-policy-period claim," which the insured had timely reported.[53] Not only did the parties agree that the "single claim" provision applied, but also the carrier did not argue that the "within-policy-period" (plus 60 days) reporting provision applied (given that it was impossible to report the claim within that time).[54] Thus, the "coverage dispute turn[ed] on whether the insurer [was] required to show that it was prejudiced by the undisputed violation of the 'prompt-written' notice provision."[55]

That set of facts – which incidentally illustrates one among several reasons that a claims-made-and-reported insurer cannot count on "closing the books" at the end of the policy period[56] – in effect transformed a claims-made-and-reported policy into a pure claims-made policy for the purpose of deciding whether the notice-prejudice statute applied. The only operative reporting requirement was not part of the initial coverage grant, reporting under that provision was not a coverage-triggering event, and the language of the reporting requirement was not of the "within-the-policy-period" kind – all characteristics of a pure claims-made policy. The plaintiffs, who had obtained a legal malpractice judgment of over $5 million against the policyholder,[57] contended that because the operative reporting requirement was "prompt written notice" and not one related to the end of the policy period, the notice-prejudice statute applied.[58]

To the majority in *Stormo*, however, the policy was simply a "claims-made" policy as described in *Chas. T. Main*.[59] The majority rejected the plaintiffs' argument on the authority of *Tenovsky*, which had foreclosed use of the notice-prejudice statute in a "claims-made" policy with the same "prompt written notice" reporting requirement.[60] Because neither the plaintiffs nor the court distinguished between the two types of claims-made policies, neither realized that the "prompt written notice" reporting requirement, standing alone, is characteristic and an indicator of a pure claims-made policy. If the *Anderson/Grigg* analysis is correct, this pure claims-made policy was indeed subject to the notice-prejudice rule.[61]

Conclusion

Pure claims-made policies stake out a middle ground: They resemble claims-made-and-reported policies in that they insure against the making of a claim rather than the event giving rise to liability, but they resemble occurrence policies in that reporting the claim to the insurer is not an element of the initial coverage grant and does not trigger coverage. Under Wisconsin law, the notice-prejudice rule applies to a pure claims-made policy, and that should be true even if the policy characterizes the reporting requirement as a condition precedent to coverage.

Lawyers for insurers can advance colorable arguments that *Grigg* was wrongly decided.[62] But Wisconsin courts have squarely addressed the issue by drawing a bright line between pure claims-made and claims-made-and-reported policies. They have a clear analytical edge over courts that have not drawn that line and that consequently have muddled or fumbled the issue. **WL**

ENDNOTES

[1]*See Anderson v. Aul*, 2015 WI 19, ¶ 80, 361 Wis. 2d 63, 862 N.W.2d 304 ("the Andersons can be viewed as being victimized twice; first they were allegedly harmed by Attorney Aul's negligence in representing them and now they are harmed by Attorney Aul's failure to abide by the WILMIC policy's reporting requirement."); *Stormo v. State Nat'l Ins. Co.*, 116 F.4th 39, 51 (1st Cir. 2024) (plaintiffs, who obtained legal malpractice judgment of over $5 million against insured attorney, could not collect from his professional liability carrier because attorney failed to report claim timely) (petition for cert. filed); *Simundson v. United Coastal Ins. Co.*, 951 F. Supp. 165, 166, 167-68 (D.N.D. 1997) (in wrongful-death action, plaintiff entered into settlement agreement whereby inspection and consulting company confessed judgment "on condition that recovery be sought only from available insurance coverage"; no coverage because of insured's failure to report claim timely).

[2]*See* Jeffrey P. Griffin, *The Inapplicability of the Notice-Prejudice Rule to Pure Claims-Made Insurance Policies*, 42 Conn. L. Rev. 235, 255 (2009).

[3]*See Gulf Ins. Co. v. Dolan, Fertig & Curtis*, 433 So. 2d 512, 514 (Fla. 1983); *Anderson*, 2015 WI 19, ¶¶ 23, 30, 361 Wis. 2d 63; Griffin, *supra* note 2, at 239-40.

[4]*See Sherwood Brands Inc. v. Great Am. Ins. Co.*, 418 Md. 300, 324, 13 A.3d 1268 (2011) (citing 3 Jeffrey E. Thomas, *New Appleman on Insurance Law* § 10.01[7]-[b] (2010)).

[5]*See Anderson*, 2015 WI 19, ¶¶ 26, 30, 85-97, 361 Wis. 2d 63; Griffin, *supra* note 2, at 251-55.

[6]*See Anderson*, 2015 WI 19, ¶ 32 & n.25, 361 Wis. 2d 63; Griffin, *supra* note 2, at 244-45.

[7]*Sherwood Brands*, 418 Md. at 304-05 (definition of "Claim" with reference to notice to insured of its existence). *But see Thoracic Cardiovascular Assocs. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 181 Ariz. 449, 451-52, 456, 891 P.2d 916 (Ct. App. 1994) (policy provided "claim is made on the date [the insured] first report[s] an incident or injury" to carrier; no coverage under claims-made-and reported policy where suit was filed within policy term but process not served on insured until after end of same).

[8]*See Anderson*, 2015 WI 19, ¶ 25, 361 Wis. 2d 63 ("pure claims-made"); *Pension Tr. Fund for Operating Engineers v. Federal Ins. Co.*, 307 F.3d 944, 955 (9th Cir. 2002) (applying California law) ("general claims-made"); *Grigg v. Aarrowcast, Inc.*, 2018 WI App 17, ¶ 65 n.20, 380 Wis. 2d 464, 909 N.W.2d 183 ("claims-made").

[9]*TRT Dev. Co. v. ACE Am. Ins. Co.*, 566 F. Supp.3d 118, 124 n.2 (D.N.H. 2021); Griffin, *supra* note 2, at 246. For examples of the kinds of liability insured against, see *Pension Trust*, 307 F.3d at 946 (fiduciary responsibility policy); *Grigg*, 2018 WI App 17, ¶ 1, 380 Wis. 2d 464 (directors' and officers' liability policy); *Braketown USA Inc. v. Markel Ins. Co.*, No. 2021AP2591, 2023 WL 5543863, ¶ 11 (unpublished limited precedent opinion not citable per Wis. Stat. § 809.23(3)) (employer's liability policy).

[10]*See, e.g.*, *Anderson*, 2015 WI 19, ¶¶ 35-41, 361 Wis. 2d 63 (end of policy period); *Lexington Ins. Co. v. Rugg & Knopp Inc.*, 165 F.3d 1087, 1089 (7th Cir. 1999) (applying Wisconsin law) (30 days after end of policy period); *Stormo*, 116 F.4th at 51 (60 days after end of policy period); *Braketown*, 2023 WL 5543863, ¶ 14 (90 days after end of policy period).

[11]*See*, e.g., *Grigg*, 2018 WI App 17, ¶ 65 n.20, 380 Wis. 2d 464 ("as soon as practicable"), *Stormo*, 116 F.4th at 44 ("prompt written notice").

[12]*See*, e.g., *Grigg*, 2018 WI App 17, ¶ 65 n.20, 380 Wis. 2d 464 (policy "required notice 'as soon as practicable,' which could occur up to a certain time after the termination of the policy period ...."); *Braketown*, 2023 WL 5543863, ¶ 14 ("'as soon as practicable ..., but in no event later than' ninety days after expiration of the policy period in which the claim is made ....").

[13]*See Anderson*, 2015 WI 19, ¶ 4, 361 Wis. 2d 63.

[14]*Sherwood Brands*, 418 Md. at 328 (citing *Prince George's Cnty. v. Local Govt. Ins. Tr.*, 388 Md. 162, 183 n.9, 879 A.2d 81 (2005)).

[15]*See* Wis. Stat. §§ 631.81(1), 632.26(2). *See also* Md. Code Ann., Ins. § 19-110; Mass. Gen. Laws ch. 175, § 112; N.Y. Ins. Law § 3420(a)(5). Missouri adopted a notice-prejudice rule by regulation (*see* Mo. Code Regs. Ann., tit. 20, § 100-1.020(1)(D)) and Texas did so by administrative order (*see* Texas State Bd. of Ins. Order No. 23080 (Mar. 13, 1973)).

[16]Wis. Stat. section 631.81(1) is a notice-prejudice rule pertaining to "notice or proof of loss," as opposed to notice of a claim under a liability policy, and therefore applies only to policies, such as property insurance, that require the insured to furnish the carrier notice or proof of loss within a specified time after the loss. *See Shugarts v. Mohr*, 2018 WI 27, ¶¶ 38-42, 380 Wis. 2d 512, 909 N.W.2d 402 (holding Wis. Stat. section 631.81(1) inapplicable to underinsured motorist policy that required proof of "claim," not proof of "loss").

[17]*Cf.* Md. Code Ann., Ins. § 19-110 (expressly imposing on insurer burden of proving prejudice); *Pilgrim Ins. Co. v. Molard*, 73 Mass. App. Ct. 326, 336, 897 N.E.2d 1231 (2008) (construing Massachusetts notice-prejudice statute to impose on insurer burden of proving prejudice); *Dritsanos v. Mt. Hawley Ins. Co.*, 180 A.D.3d 753, 755, 118 N.Y.S.3d 664 (2020) (New York notice-prejudice statute imposes on insurer burden of proving prejudice) (dictum); *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 648 (Colo. 2005) (adopting rule that there is a presumption of prejudice if insured provides notice after disposition of liability case, insured has burden of going forward with evidence to dispel presumption, and it is then up to insurer to go forward with evidence actual prejudice existed; otherwise no presumption of prejudice and insurer must prove prejudice).

[18]*Neff v. Pierzina*, 2001 WI 95, ¶ 44, 245 Wis. 2d 285, 629 N.W.2d 177 (emphasis added).

[19]*Anderson*, 2015 WI 19, ¶ 104, 361 Wis. 2d 63; *see also id.* ¶ 106 & n.1 (Ziegler, J., concurring) (disagreeing with statutory construction

methodology in Chief Justice Abrahamson's "lead opinion" and pointing out that concurring opinion was in fact majority opinion, to which four of seven justices subscribed); *id.* ¶ 1 n.1 (also identifying concurring opinion as majority opinion).

[20]*See id.* ¶¶ 22-33.

[21]*See id.* ¶¶ 24-30.

[22]*See id.* ¶¶ 34-41.

[23]*See id.* ¶ 39.

[24]The court did not distinguish between the effects of Wis. Stat. sections 631.81(1) and 632.26(2). As discussed (*see supra* note 16), the latter is the notice-prejudice statute of more probable relevance to a liability policy.

[25]*See Anderson*, 2015 WI 19, ¶ 82, 361 Wis. 2d 63; *see also id.* ¶ 110 (Ziegler, J., concurring). *But see Sherwood Brands*, 418 Md. at 326 n.21 (concluding in *dictum* that Maryland's notice-prejudice statute applies to claims-made-and-reported policies). *See also TRT Dev.*, 566 F. Supp. 3d at 128 (applying New Hampshire notice-prejudice rule to claims-made-and-reported policy when insured reported claim during policy period but failed to provide notice within time specified in separate reporting requirement); *Prodigy Commc'ns Corp. v. Agricultural Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 375 (Tex. 2009) (same regarding Texas notice-prejudice rule).

[26]*See Anderson*, 2015 WI 19, ¶ 48, 361 Wis. 2d 63.

[27]*See id.* ¶ 22 n.10, ¶ 23 n.11, ¶ 27 n.16, ¶ 32 n.25, ¶ 87 n.81 (citing Griffin article but nonetheless distinguishing pure-claims from claims-made-and-reported policies so as to hold that notice-prejudice rule does not apply to latter but imply that it does apply to former).

[28]*See Grigg*, 2018 WI App 17, ¶ 65 n.20, 380 Wis. 2d 464.

[29]*See Sherwood Brands*, 418 Md. at 304-05, 333 (type of claim involved in that case was subject to pure claims-made type of reporting requirement, while other types of claims were subject to claims-made-and-reported type of reporting requirement); *Pension Tr. Fund*, 307 F.3d at 955-56. *See also Employers Reinsurance Corp. v. Landmark*, 547 N.W.2d 527, 531 (N.D. 1996) ("A variation of the 'claims made' policy is a 'claims made and reported' policy. While a '"claims made" policy implicitly allows reporting of the claim to the insurer after the policy period, as long as it is within a reasonable time, ... a "claims made and reported" policy imposes the additional condition that the insured report the claim to the insurer within the policy period, or within a specified time after learning of the claim ....'" (citation omitted) (dictum). *See also* Griffin, *supra* note 2, at 255-69 (discussing published and unpublished opinions that have addressed application of notice-prejudice rules to pure claims-made policies).

[30]*See Braketown*, 2023 WL 5543863, ¶ 14; Brief of Appellant at 35-37, *Braketown* (No. 2021AP2591), acefiling.wicourts.gov/document/eFiled/2021-AP001591/476085 (last visited Jan. 26, 2025).

[31]*See Braketown*, 2023 WL 5543863, ¶ 15.

[32]*State Bank of Viroqua v. Capitol Indem. Co.*, 61 Wis. 2d 699, 709, 214 N.W.2d 42 (1974); *see also Sherwood Brands*, 418 Md. at 330-31 (stating that rule that reporting claim to insurer is condition precedent to coverage in all policies, whether or not those words are used, is "general rule followed by courts throughout the country" (internal citation omitted)).

[33]*Sherwood Brands*, 418 Md. at 331. *See also id.* at 310-12; *Anderson*, 2015 WI 19, ¶¶ 65-68, 361 Wis. 2d 63 (describing similar origins of notice-prejudice statutes in Maryland and Wisconsin); *Allen v. Ross*, 38 Wis. 2d 209, 212, 156 N.W.2d 434 (1968) (applying notice-prejudice rule to occurrence policy notwithstanding language that "full compliance with all terms of this policy," including reporting requirement, was "condition precedent" to action against insurer).

[34]*See Sherwood Brands,* 418 Md. at 331.

[35]2015 WI 19, ¶ 22 n.10, 361 Wis. 2d 63; *see also* Griffin, *supra* note 2, at 262 n.163 ("The failure of courts to specify which type of claims-made policy is at hand in a particular case may have led to some of the confusion in articulating whether the notice-prejudice rule should apply to pure claims-made policies.")

[36]*See Sletten v. St. Paul Fire & Marine Ins. Co.*, 161 Ariz. 595, 597-98, 780 P.2d 428 (Ct. App. 1989); *Burns v. International Ins. Co.*, 929 F.2d 1422, 1423, 1425 (9th Cir. 1991) (applying California law); *Gulf Ins.*, 433 So. 2d at 515-16; *Hasbrouck v. St. Paul Fire & Marine Ins. Co.*, 511 N.W.2d 364, 367-69 (Iowa 1993); *Chas. T. Main Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862, 865-66, 551 N.E.2d 28 (1990); *Title One Inc. v. National Union Fire Ins. Co.*, 2009 WL 3059144, *3-*4 (E.D. Mich. Sep. 24, 2009); *Insurance Placements Inc. v. Utica Mut. Ins. Co.*, 917 S.W.2d 592, 594, 597 (Mo. App. 1996); *Bianco Prof'l Ass'n v. Home Ins. Co.*, 144 N.H. 288, 296, 740 A.2d 1051 (1999); *Zuckerman v. Nat'l Union Fire Ins. Co.*, 100 N.J. 304, 306, 324, 495 A.2d 395 (1985); *DiLuglio v. New England Ins. Co.*, 959 F.2d 355, 356, 359 (1st Cir. 1992) (applying Rhode Island law); *Textron Inc. v. Liberty Mut. Ins. Co.*, 639 A.2d 1358, 1361, 1364-66 (R.I. 1994); *see also Simundson*, 951 F. Supp. at 167 (impossible to determine from opinion type of claims-made policy involved but *Anderson*, 2015 WI 19, ¶ 86 & n.79, characterized it as claims-made-and-reported policy). *But see Lexington Ins.*, 165 F.3d at 1089 (pre-*Anderson* case construing Wisconsin notice-prejudice statutes as written and holding them applicable to "claims-made" policy, which was in fact claims-made-and-reported policy).

[37]*See Craft v. Philadelphia Indem. Ins. Co.*, 2015 CO 11, ¶ 15, 343 P.3d 951; *Craft v. Philadelphia Indem. Ins. Co.*, 560 Fed. Appx. 710, 711 (10th Cir. 2014) (describing policy's notice requirement); *Tenovsky v. Alliance Syndicate Inc.*, 424 Mass. 678, 679-80, 681, 677 N.E.2d 1144 (1997); *President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, 77 F.4th 33, 36, 39 (1st Cir. 2023) (applying Massachusetts law); *Stormo*, 116 F.4th at 47 (applying Massachusetts law); *Templo Fuente De Vida Corp. v. National Union Fire Ins. Co.*, 224 N.J. 189, 194, 207-10, 129 A.3d 1069 (2016); *ISCO Indus. Inc. v. Great Am. Ins. Co.*, 2019-Ohio-4852, ¶¶ 4-5, 29-41, 148 N.E.3d 1279; *Ace Am. Ins. Co. v. Underwriters at Lloyds & Cos.*, 939 A.2d 935, ¶ 2 n.1, ¶ 11 (Pa. Super. 2007), *aff'd without opinion*, 601 Pa. 95, 96, 971 A.2d 1121 (2009); *4th St. Investments LLC v. Dowdell*, 340 Fed. Appx. 99, 100-01 (3rd Cir. 2009) (applying Pennsylvania law); *Union Planters Bank N.A. v. Continental Cas. Co.*, 478 F.3d 759, 766-67 (6th Cir. 2007) (applying Tennessee law); *see also Financial Res. Network Inc. v. Brown & Brown Inc.*, 867 F. Supp.2d 153, 165-66, 184-85 (D. Mass. 2012) (court mischaracterized pure claims-made policy as claims-made-and-reported policy).

[38]406 Mass. at 865-66.

[39]*Id.* at 864-65.

[40]The information about the policy came not from the opinion in *Chas. T. Main* but from a later opinion that relied on it. *See Tenovsky*, 424 Mass. at 680.

[41]*See Chas. T. Main*, 406 Mass. at 864-66.

[42]*See Anderson*, 2015 WI 19, ¶¶ 91-93, 361 Wis. 2d 63.

[43]424 Mass. 678.

[44]*Id.* at 679-80 (emphasis added).

[45]*Id.* at 680.

[46]*Id.* at 681.

[47]*Id.*

[48]116 F.4th 39.

[49]*See id.* at 49; *cf. Gargano v. Liberty Int'l Underwriters Inc.*, 572 F.3d 45, 47, 51 (1st Cir. 2009) (holding Massachusetts notice-prejudice statute inapplicable to policy expressly identified as, and which in fact was, claims-made-and-reported policy, requiring in initial coverage grant that claim be made and reported to insurer within policy period).

[50]*Id.* at 51 (Barron, Ch. J., dissenting in part and concurring in judgment in part).

[51]*See Chas. T. Main*, 406 Mass. at 864; *Anderson*, 2015 WI 19, ¶¶ 26-27, 361 Wis. 2d 63.

[52]*See* Charles H. Barr, *Two Wrongs Don't Make a Right to Coverage: 'Single Claim' Provisions in Liability Policies*, 97 Wis. Law. 14 (Oct. 2024).

[53]*See Stormo*, 116 F.4th at 51.

[54]*See id.* at 52; *cf.* Wis. Stat. § 632.26(1)(b).

[55]*Stormo*, 116 F.4th at 51.

[56]*See, e.g.*, Wis. Stat. § 632.26(1)(b) (excusing late reporting when timely notice is "not reasonably possible," as long as long as insured reports "as soon as reasonably possible"). One can imagine many scenarios that would invoke this provision, and there is no authority that it does not apply to claims-made policies.

[57]*See Stormo*, 116 F.4th at 43.

[58]*Id.*

[59]*See id.*

[60]*See id.*

[61]*See also President & Fellows of Harvard Coll.*, 77 F.4th at 36, 39 (holding Massachusetts notice-prejudice statute inapplicable to "claims-made" policy that was pure claims-made policy, with reporting requirement materially equivalent to that in *Grigg*).

[62]*See, e.g.*, *Craft*, 2015 CO 11, ¶¶ 31-32 ("date certain" reporting requirements define temporal boundaries of basic coverage terms, whereas more amorphous reporting requirements such as "promptly" or "as soon as practicable" facilitate insurer's investigation and defense of claim); *cf. Anderson*, 2015 WI 19, ¶ 28, 361 Wis. 2d 63 (requirements to report claim "as soon as practicable" *or* "within a stated period" facilitate insurer's investigation and defense of claim). **WL**