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Automobile Insurance: Notice of Accident

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RECENT DECISIONS

Automobile Insurance — Notice of Accident — In January 1947, a truck, driven by *A*, veered off the highway and into a ditch in order to avoid colliding with a truck belonging to the insured. *A's* leg was pinned under his overturned truck. *A*, whose injuries appeared negligible, told insured's driver that he was all right and to forget everything. Insured's driver and his superintendent agreed to pay for repair of *A's* truck between them. Plaintiff insurer received its first notice of the accident nearly fifteen months later in the form of a claim from *A*, whose leg had been amputated in the meantime. Plaintiff now seeks a declaratory judgment[1] as to its liability under the policy, which provided:

> "When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all terms of this policy."

The trial court in its findings stated that the insurer's investigation and defence would not be embarrassed or prejudiced, for the insurer had written statements from the only two eye-witnesses to the accident. *Held:* The duty to report the accident as soon as practicable does not mean that every trivial accident that occurs should be reported. "An accident that an ordinarily prudent individual acting reasonably would consider, under all the circumstances, as inconsequential, and which would not afford the basis of any claim, the insured was not bound to report." *Phoenix Indemnity Co. v. Anderson's Groves, Inc. 176 F. (2d) 246 (CCA-5 1949).*

Reasonable notice is generally considered a condition precedent to liability on the part of the insurer, so that failure to give such notice operates to relieve the insurer of liability under the policy.[2] The purpose of the provision is to give the insurer reasonable opportunity to

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[1] New Amsterdam Casualty Co. v. Simpson, 238 Wis. 550, 300 N.W. 367 (1941). In Wisconsin such declaratory judgment is not available to insurer. Statutes 85.93, making insurer directly liable to injured party, and 260.11, allowing insurer to be joined as proper party defendant, make injured party the insurer's principle adversary (rather than a mere asset of the insured) and insurer is not allowed to separate defenses of lack of negligence of insured, and coverage of the driver, both of which, are defenses against the injured party's cause of action. Such procedure might do what declaratory judgments seek to avoid.

[2] 8 Appleman, Insurance Law and Practice, 97; Bachuber v. Boosalis, 200 Wis. 574, 229 N.W. 117 (1930); Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N.W. 69 (1898); Underwood Veneer Co. v. London G & A Co., 100 Wis. 378, 75 N.W. 996 (1898).

investigate while witnesses are available and memories are fresh:[3] that it might affect seasonable settlement, and protect itself against fraudulent claims.[4]

There are, however, recognized exceptions to the rule. These include fraud by the insurer,[5] impossibility,[6] and an ever widening field of excuse. The two principal theories of excuse are, "ignorance of the event",[7] and the doctrine of "trivial occurrence", the principal case being illustrative of the latter. The doctrine is not a new one, and while it is difficult to place its entry into the law, a Nebraska case[8] is ordinarily cited as the root decision. There the court reasoned that "accident" as used in an indemnity policy, meant an occurrence resulting in bodily injury, and excused the condition where there was no apparent injury. New York approved and followed the doctrine in a case where there was no apparent injury,[9] but shortly thereafter refused to expand it where the person was "at least slightly injured."[10] However, in other cases,[11] courts purportedly following the Nebraska case shortly introduced an additional factor which further liberalized the theory of excuse. Even though there are physical facts of apparent injury, if after the accident, there are other facts (mainly the conduct of the injured party) which negative the idea that such injured party will file a claim, then the court ought not say as a matter of law that there was no compliance with the condition.

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[3] Underwood Veneer Co. v. London G & A Co., Supra, note 2; Parrish v. Phillips, 229 Wis. 439, 282 N.W. 551 (1938).

[4] Houran v. Preferred Acc. Ins. Co. of N.Y.., 109 Vt. 258, 195 A. 253 (1937). rise to claim for damages.").

[5] Witt v. Wonser, 198 Wis. 561, 225 N.W. 174 (1929).

[6] See 123 A.L.R. 964 for collected cases on general impossibility.

[7] See annotation, 76 A.L.R. 81 and 123 A.L.R. 966; Vandeleest v. Basten, 241 Wis. 509, 6 N.W. (2d) 667 (1942). The requirement must receive reasonable construction and therefore, it is not the duty of insured to make a report unless he has reasonable grounds to believe that his is a participant in an accident.

[8] Chapin v. Ocean Accident and Guarantee Corp., 96 Neb. 213, 147 N.W. 465 (1914). "If no apparent injury occurred from the mishap, and there was no reasonable ground for believing that bodily injury would result . . . there was no duty."

[9] Melcher v. Ocean Accident and Guarantee Corp., 226 N.Y. 51, 123 N.E. 81 (1919).

[10] Haas Tobacco Co. v. American Fidelity Co., 226 N.Y. 343, 123 N.E. 755 (1919).

[11] McKenna v. Int'l. Indemnity Co., 125 Wash. 28, 215 P. 66 (1923). (Man knocked down had skin taken off leg, but told insured that the accident was his own fault); Southern Surety Co. v. Heyburn, 234 Ky. 739, 29 S.W. (2d) 6 (1930). (Person was thrown 15 ft. and though visibly shocked insisted that She was able to get home unassisted. In this case the court pronounced the "true rule" which is cited with approval in the principal case." . . . notice is . . . essential . . . when there has been such an occurrence or accident as would lead the ordinard prudent and reasonable man to believe that it might give

Authority to the contrary is not lacking. In a leading case, which concedes arguendo, the validity of "ignorance of the event" as excuse, but which absolutely rejects the doctrine of "trivial occurence", it was held that the provision is to be construed in favor of him who has the burden of defense.[12] It is the insurer who is the responsible party, and he should be the judge of whether any particular occurrence might reasonably result in claim. A report of the fact of an accident is all that is contemplated by the condition, and this being peculiarly within the knowledge of the insured, it is his duty to report, if he would hold his insurer, regardless of what was or was not apparent at the time. There is other authority to the same effect.[13]

Although the general rule of construction, that the insurance contract is to be construed most favorably for the insured, should be confined to cases where the provision in question is not clear,[14] it has been held that the clause requiring notice is not precise, and because of this, the material question becomes one of whether the delay or lack of notice has resulted in prejudice to the insurer, who will not be relieved unless he has been so prejudiced.[15] But where notice is made an express condition precedent, it has been said that the doctrine of substantial prejudice has no place in the scheme of construction.[16] Yet it has also been held that there is no necessity for an express forfeiture clause, courts making notice a condition precedent and giving a breach of such condition its common law effect, regardless of the presence of an express "no action" or forfeiture clause.[17]

A Wisconsin statute[18] however, puts prejudice in issue, where there is lack of notice; failure of notice not barring a recovery if the insurer

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[12] Malloy v. Head, 90 N.H. 58, 4 A. (2d) 875, 123 A.L.R. 941 (1939). ". . . it is not the honest or even reasonable belief of the insured which is the test of his duty to report; it is the existence of the known fact of an accident involving himself, his servant, or his property. . . ."

[13] McCarthy v. Rendle, 230 Mass. 35, 119 N.E. 188 (1918); Northwestern Teleph. Exchange Co. v. Maryland Casualty Co., 86 Minn. 467, 90 N.W. 1110 (1902); Duchene v. General Accident Assurance Co., 31 Ont. Week N. 59 (1926).

[14] Home Indemnity Co. of N.Y. v. Std. Acc. Ins. Co., 167 F. (2d) 919 (1948).

[15] Young v. Travelers Ins. Co., 119 F. (2d) 877 (1941).

[16] Malloy v. Head, Supra, note 12.

[17] Underwood Veneer Co. v. London G & A Co., Supra note 2; Houran v. Pfd. Acc. Ins. Co. of N.Y., Supra, note 4.

[18] Wis. Stat. 204.34 (3) (1947). "No policy of insurance . . . shall limit the time for giving notice of any accident . . . to a period less than that provided in subsection (1) of section 204.29. Failure to give such notice shall not bar liability under such policy of insurance, . . . (1) if insurer was not prejudiced or damaged by such failure, but the burden of proof to so show shall be upon the person claiming such liability."
Wis. Stat. 204.29 (1) (1947). "No . . . insurance company in Wisconsin shall limit the time for service of any notice to less than twenty days. . . ."

was not prejudiced thereby. This statute has been construed to "create a presumption that the insurer is prejudiced"[19] by such failure of notice. But where the Wisconsin court excused the condition because of "ignorance of the event",[20] the statute was not considered. Should it accept the doctrine of "trivial occurrence" as an equally valid excuse, the statute might also be by-passed, regardless of the existence of prejudice, as the two doctrines of excuse are based on the same underlying reasoning.

This is but one example of the danger of straining rules of contract construction because of a set of hard facts. Undoubtedly the meaning given to the "notice" clause by the New Hampshire court is the one which is contemplated by the parties at the time of contracting. Under the facts of the principal case, it is quite apparent that the driver and his superintendent considered the occurrence an accident; and it is difficult to say that the insurer was not prejudiced as to possible immediate settlement.

In Wisconsin all motorists are required by statute[21] to report any injury inflicted and any damage exceeding a certain amount. "Injury" is defined by the statute to include one of "a physical nature resulting in the need of first aid", regardless of whether such was given or not. The insurer ought to be entitled to the same information, though he may be deprived of it under the doctrine of "trivial occurrence".

It has been suggested[22] that the judicial effort to circumvent the condition is a result of a present public policy of compensating automobile victims, as a protection to the public rather than the insurer or policy holder; and that such policy is reflected in Compulsory Insurance[23] and Financial Responsibility[24] laws. However true and desirable this might be, the better method would be to leave it to the legislatures,[25] rather than to the courts to render third parties harmless as to defenses against the insured, thus eliminating the need for strained theories of contract construction.

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[19] Parrish v. Phillips, Supra, note 3.
[20] Supra, note 7.
[21] Wis. Stat. 85.141 (6) (1947).
[22] See 17 Kansas City Law Review 63 (1949) (Notice of suit); and 49 Columbia Law Review 280 (1949) (Breach of co-operation clause).
[23] Mass. Gen'l. Laws c. 175 #113 A (1932).
[24] 7 Appleman, Insurance Law and Practice, 62 (1942). Indicates that 33 states and the D. of C. have some form of such law.
[25] See Mass. Gen'l. Laws, c. 175, 113 A (5) (1932). ". . . no violation of the terms of the policy . . . shall operated to defeat or avoid the policy so as to bar recovery . . . by a judgment creditor. . . ."