

# The Requirements and Effect of the Notice Condition in the Automobile Liability Insurance Policy

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## THE REQUIREMENTS AND EFFECT OF THE NOTICE CONDITION IN THE LIABILITY INSURANCE POLICY

In this era of large verdicts and claims consciousness, it is difficult to overestimate the importance of the automobile liability insurance contract to the average driver. Both the individual insured and the public are protected by such a contract, since it protects the insured from the financial ravages ensuing from his negligence, and reasonably compensates the injured person for his losses.<sup>1</sup> As in other contracts, there are mutual obligations involved, the importance of whose fulfilling is evident. This article is concerned with one of the primary obligations of the insured: the duty to give notice.

In the customary casualty insurance policy, there are two notice provisions; namely, the notice of accident or occurrence clause, and the notice of claim or suit clause. The language generally requires that:

... in the event of an accident, occurrence or loss, written notice containing the particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents within 20 days following the date of the accident, occurrence or loss; provided, that failure to give such notice within the time specified shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that such notice was given as soon as reasonably possible.<sup>2</sup>

Though the policy provisions vary as to the time when notice of an accident must be given to the insurer, using such terms as "immediate," "prompt," "forthwith," and "within a reasonable time," the courts have not distinguished between them, holding that each of these clauses calls for notice *within a reasonable length of time* under all the facts and circumstances of each particular case.<sup>3</sup>

As a prelude to a detailed analysis of the notice provision, its purpose must be discussed, since it is of fundamental importance to the courts in their construction of the policy language. In essence, the purpose of the notice requirement is to enable the insurer to make a timely and adequate investigation so that he can intelligently evaluate probable

<sup>1</sup> See Horsley, *Timely Notice, Assistance and Cooperation Conditions, Automobile Insurance Problems* 266, 277 (Practising Law Institute 1968). "Private property, which may be accumulated by careful frugality, providence and self denial, may be wiped out because of an instantaneous and perhaps almost venial act or omission. And a person whose well-being, body or property is destroyed as a proximate result may undergo unalleviated suffering and perhaps become a public charge. The role of the liability insurance contract is important and the interest of the public in the fair enforcement of its terms is patent." See also, *Simmon v. Iowa Mut. Cas. Co.*, 3 Ill. 2d 318, 121 N.E.2d 509 (1954).

<sup>2</sup> The Milwaukee Mut. Ins. Co. Policy, Condition 3.

<sup>3</sup> 8 APPELMAN, *INSURANCE LAW AND PRACTICE* § 4724 (2d ed. 1962); 13G COUCH, *CYCLOPEDIA OF INSURANCE LAW* §§ 49.39-49.48 (2d ed. 1965).

liability, settle claims that may be made, and prepare an adequate defense. Thus it is recognized that:

An adequate investigation cannot be made where notice is long delayed because of the possible removal or lapse of memory on the part of the witnesses, the loss of opportunity for examination of the physical surroundings and making photographs thereof for use at the trial, and the possible operation of fraud, collusion or cupidity.<sup>4</sup>

#### *Who May Give Notice*

Any person, including the injured person, may give notice.<sup>5</sup> However, the determination of the party giving notice can be of fundamental importance, since more liberal standards as to "timeliness of notice" are applied when the person giving notice is the injured person or an additional insured under the omnibus provision, as will be discussed in a subsequent section. This liberal position of allowing any person to give notice is part of the trend to regard liability insurance as a contract for the benefit of the injured person, rather than as a private contract between the insurer and the insured.<sup>6</sup> As a consequence, courts are concerned almost exclusively with the question of *whether* notice was given, and do not strictly construe the policy language that notice shall be given by or for the insured." Thus, if the insurer is given notice, this will generally be deemed sufficient, irrespective of the source.<sup>7</sup>

#### *To Whom May Notice be Given*

The policy requires notice ". . . to the company or any of its authorized agents." Since "authorized agents" is not further defined, some discussion of the phrase is necessary. Persons standing in a variety of relations to the insurer have been held to be authorized agents for the purpose of receiving notice.<sup>8</sup> *Hankins v. Public Service Mut. Ins. Co.*<sup>9</sup> discussed the issue quite thoroughly. The policy contained a clause identical to the above, and the insured reported an accident to the person from whom he purchased the policy. An agreement between the insurer and the "agent" characterized the latter as the insurer's "agent" and specified that the insurance company appointed the agent to represent it in the prosecution and conduct of its insurance business in a specified

<sup>4</sup> 8 APPELMAN, INSURANCE LAW AND PRACTICE § 4731 (2d ed. 1962).

<sup>5</sup> *Superior Lloyds v. Boesch Loan Co.*, 130 S.W.2d 1036 (Tex. 1939); *Pallasch v. United States Fid. & Guar. Co.*, 321 Ill. App. 257, 67 N.E.2d 883 (1946). See also, 7 AM. JUR. 2d *Automobiles and Highway Traffic* § 147 (1963).

<sup>6</sup> For a good discussion of the origins of the insurance contract as a private contract between the insurer and the insured, and its development to aid the injured third party, see PATTERSON & YOUNG, CASES AND MATERIALS ON THE LAW OF INSURANCE, Ch. 5 (4th ed. 1961).

<sup>7</sup> *Superior Lloyds v. Boesch Loan Co.*, 130 S.W.2d 1036 (Tex. 1939); *Pallasch v. United States Fid. & Guar. Co.*, 329 Ill. App. 257, 67 N.E.2d 883 (1946); *Simmon v. Iowa Mut. Cas. Co.*, 3 Ill. 2d 318, 121 N.E.2d 509 (1954); *Gregory v. Highway Ins. Co.*, 24 Ill. App. 2d 285, 164 N.E.2d 297 (1960).

<sup>8</sup> Annot., 18 A.L.R.2d 456 (1951).

<sup>9</sup> 63 A.2d 606 (Md. 1949). See also, *Fleming v. Travelers Ins. Co.*, 206 Miss. 284, 39 So. 2d 885 (1949).

territory. It specifically described the agent's duties as procuring and transmitting applications for insurance, collecting premiums, and performing such other duties as may be required by the company from time to time. Holding that the agent was an "authorized agent" of the insured within the policy requirement regarding notice, the court said that the language of the policy was not free from ambiguity and that in its interpretation any doubts arising from the ambiguity of the language should be construed in favor of the insured. Furthermore, the court stated that, if the insurance company did not intend the agent to be understood as an authorized agent, it would have been very simple to have made such a provision in the policy and to have definitely designated the person to whom the notice of the accident should be sent and not leave the language in doubt.

On the other hand, not every seller of insurance is held to be an agent for the purpose of receiving notice or papers. For example, one who independently solicits insurance business, placing such policies as best he can, (commonly known as a "broker") is considered to be an agent of the insured rather than of the insurer.<sup>10</sup> Neither is a claims adjuster an authorized agent of the insurer in the sense that notice of suit given to him is notice to the insurer.<sup>11</sup>

Since the provision is liberally interpreted, however, it would seem that the following general rule would summarize the area: Notice must be given to such a person as to be, in the mind of a reasonably prudent man, so identified with the insurer as to justify assuming that it would reach the proper official or department of the company.

#### *Nature of Notice*

Liability policies generally require written notice. However, the trend is away from requiring strict compliance with this written nature if the insurer, acting on oral notice, is able to make a complete investigation.<sup>12</sup> As to the content of the notice, policies generally require notice

<sup>10</sup> *Lumbermen's Mut. Cas. Co. v. Stamell Constr. Co.*, 192 A.2d 616 (N.H. 1963). The court so held despite the fact that the broker had relayed notice on other occasions. *See also*, *Arthur v. London Guar. & Acc. Co.*, 78 Cal. App. 2d 198, 177 P.2d 625 (1947). *Cf. Hinson v. Zurich Ins. Co.*, 196 So. 2d 827 (La. App. 1967).

In Wisconsin, however, a broker would be considered to be an agent of the insurer by statute. Wis. Stat. § 209.047 (1965): "Every person who solicits, negotiates or affects insurance of any kind . . . shall be held to be an agent of such insurer to all intents and purposes, unless it can be shown that he receives no compensation for such services."

<sup>11</sup> *Bethlehem Steel Co. v. Continental Cas. Co.*, 208 F.Supp. 54 (E.D. Pa. 1958); *Alexander v. Standard Acc. Ins. Co.*, 122 F.2d 995 (10th Cir. 1941).

<sup>12</sup> *Alexander v. Standard Acc. Ins. Co.*, 122 F.2d 995 (10th Cir. 1941); 7 AM. JUR. 2d *Automobiles and Highway Traffic*, § 146 (1963); Annot., 18 A.L.R.2d 451 (1951); *Hankins v. Public Service Mut. Ins. Co.*, 63 A.2d 606 (Md. 1949); *Arthur v. London Guar. & Acc. Co.*, 78 Cal. App. 2d 198, 177 P.2d 625 (1947). However, mere oral notice, without more and not resulting in an adequate investigation, is generally held insufficient compliance. *See Warren v. Merchants Mut. Ins. Co.*, 276 N.Y.S.2d 275 (1966).

containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses. . . .

The purpose of this provision is to enable the insurer to determine whether a claim is likely to be made and, if it is, its nature and extent both as to the occurrence facts and damages or injuries.<sup>13</sup> Generally, courts are concerned with substance rather than form in this area and, as a consequence, any writing which furnishes sufficient information is generally deemed adequate. That "sufficient information" involves some degree of specificity cannot be doubted. Thus, sending an SR-21 form (the statutory prescribed notice which must be given to the Motor Vehicle Department when there is property damage of a certain amount or a personal injury involved) has been held not to be sufficient notice unless it sets forth all of the information which the language of the policy requires.<sup>14</sup> As stated in a recent case:

The notice provision was not complied with since it did not give the address of the injured party or the names or addresses of witnesses and it did not give the time of the accident nor its precise location.<sup>15</sup>

An insured need not conduct a broad inquiry to ascertain details; however, he must furnish information as to how the accident occurred, and the degree of damages and injuries involved, with the "reasonable man" standard applied to determine diligence.

There is also a technical point involved: the requirement of written notice implies that the notice may be mailed, but the language "written notice shall be given" also implies receipt of the notice. Hence, notice sent by unregistered mail but not received is insufficient.<sup>16</sup>

#### *Effect of Notice*

In most liability policies, the notice requirement is explicitly made a condition precedent to the insurer's liability, and is generally expressed as a "condition" in the policy.<sup>17</sup> Though notice is a condition precedent to the insurer's liability, it must be noted that we are dealing with a condition subsequent to the contract, and are assuming the existence of a valid, enforceable contract in existence on occurrence of the stated event.

As a general rule, when a requirement for notice is made a condition precedent to recovery, compliance with the condition is indispensable to fix liability under the policy.<sup>18</sup> When there is no specific provision

<sup>13</sup> *Charleston Laundry Co. v. Ohio Farmers Indem. Co.*, 89 F. Supp. 649 (D.C. W. Va. 1950).

<sup>14</sup> *Southwestern Fire & Cas. Co. v. Kovar*, 227 Miss. 386, 86 So. 2d 356 (1965).

<sup>15</sup> *White v. Transit Cas. Co.*, 402 S.W.2d 212 (Tex. Civ. App. 1966).

<sup>16</sup> *Heimbecher v. Johnson*, 258 Wis. 200, 45 N.W.2d 610 (1951).

<sup>17</sup> *E.g.* The Northwestern Nat'l. Ins. Co. policy, wherein the first sentence in the policy states that the agreement is "subject to all the terms of this policy."

making the notice requirement a condition precedent to recovery, there is a conflict of opinion as to whether the insurer must be able to prove that he was prejudiced in order to claim the defense of noncompliance with a policy provision.<sup>19</sup> The majority rule is that the insurer need not show prejudice.

It is unquestioned that a failure to satisfy the requirements of this clause by timely written notice vitiates the contract as to both the insured and the plaintiff recovering a judgment against him.<sup>20</sup>

The minority position, on the other hand, is that the insurer must show that he has been prejudiced by the delay in giving notice.<sup>21</sup>

Between the majority and minority views is the California and Wisconsin position which is primarily concerned with the burden of proof. In both of these jurisdictions, there is a rebuttable presumption (created by statute in Wisconsin,<sup>22</sup> and by decision in California<sup>23</sup>) that the insurer is prejudiced by delay in giving notice.

#### *Timeliness of Notice*

The policy provisions dealing with the required time for giving

<sup>18</sup> *Londus v. Northern Ins. Co. of New York*, CCH 1967 Auto Ins. Cases § 5612 (Ariz. June 30, 1967).

<sup>19</sup> An example of prejudice: such delay in notice which prevents the insurer from examining the damaged auto, interviewing witnesses, etc.

<sup>20</sup> *Mason v. Allstate Ins. Co.*, 12 App. Div. 2d 138 (N.Y. 1960). See, *United States Fid. & Guar. Co. v. Von Bargaen*, 7 App. Div. 2d 872, aff'd. 7 N.Y.2d 932 (1960). See also, 7 AM. JUR. 2d *Automobiles and Highway Traffic* § 141 (1949) wherein it is stated: "Moreover, the modern trend, although there is some authority to the contrary, is toward considering the policy requirement as to giving notice a condition precedent even if the policy does not contain an express statement to this effect, and to deny recovery under the policy in the case of non-compliance with such requirement."

<sup>21</sup> *State Farm Mut. Auto. Ins. Co. v. Cassinelli*, 216 P.2d 606 (Nev. 1950); *Kennedy v. Dashner*, 319 Mich. 491, 30 N.W.2d 46 (1946); *Leach v. Farmer's Auto Interins. Exch.*, 213 P.2d 920 (Idaho 1950); *Gibson v. Colonial Ins. Co.*, 92 Cal. App. 2d 33, 206 P.2d 387 (1949); *Burbank v. Nat. Cas. Co.*, 43 Cal. App. 2d 773, 111 P.2d 740 (1941); *Abrams v. Am. Fidelity & Cas. Co.*, 186 P.2d 999 (Cal. App. 1948); *Rowoldt v. Cook Co. Farmers Mut. Ins. Co.*, 305 Ill. App. 93, 26 N.E.2d 903 (1940); *Preferred Acc. Ins. Co. v. Castellano*, 148 F.2d 761 (2d Cir. 1945); *McPherson v. St. Paul Fire & Marine Ins. Co.*, 350 F.2d 563 (5th Cir. 1965); *American Ins. Co. v. Rural Mut. Cas. Co.*, 11 Wis. 2d 405, 105 N.W.2d 798 (1960); *Cooper v. Government Employees Ins. Co.*, 237 A.2d 870 (N.J. 1968). The trend is toward making prejudice a prerequisite to an insured's defense based on failure to give timely notice. However, *Oregon Farm Bureau Ins. Co. v. Safeco Ins. Co. of America*, 438 P.2d 1018 (Ore. 1968) shows that this trend is not overpowering, as it expressly upheld the majority rule after considering the contrary trend.

<sup>22</sup> Wis. Stat. §204.34(3) (1965) ". . . Failure to give such notice shall not bar liability under such policy of insurance, agreement of indemnity or bond as provided in subsection (1) if the 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." The development of Wisconsin law regarding the subject matter of this statute is illustrated in the following cases: *Kurz v. Collins*, 6 Wis. 2d 538, 95 N.W.2d 365 (1959); *Stippich v. Morrison*, 12 Wis. 2d 331, 107 N.W.2d 125 (1961); *Kohls v. Glassman*, 29 Wis. 2d 324, 139 N.W.2d 37 (1966); *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 449 (1966).

<sup>23</sup> *Purefoy v. Pacific Auto Indem Exch.*, 5 Cal.2d 81, 53 P.2d 155 (1935). "But respondent argues with convincing force herein, that the lapse of time which removes the opportunity for prompt investigation, also destroys the possibility of showing prejudice arising from delayed inquiry. Where witnesses are inter-

notice vary in their language; "immediately," "promptly," "forthwith," "as soon as practicable," and "within a reasonable time" are examples.<sup>24</sup> However different the language, each of these provisions have been interpreted to mean the same thing: "Notice must be given with reasonable promptness under the circumstances."<sup>25</sup>

The number of cases interpreting this provision is legion, and although no general rules are possible in the area of "timeliness," the *ad hoc* determination which must be made in each case is facilitated by keeping the following two factors uppermost in mind: (1) The purpose of the notice provision is to insure the carrier adequate opportunity to make a timely and adequate investigation; (2) Has the late notice prejudiced the insurer in his defense?

That the circumstances particular to each case are controlling is evident when one considers that a delay in giving notice for 10 days has been held to be unreasonable<sup>26</sup> while a three year delay has been held to be reasonable under certain circumstances.<sup>27</sup> Two examples of the controlling influence of circumstances are: (1) The insured had an accident and notified his collision insurer three days later. Eight weeks later he settled with another insurer. Six weeks after this (107 days after the date of injury), the insured notified his liability insurer of the accident and attempted to get medical reimbursement. The court granted Summary Judgment for the insurer: "As a matter of law, the failure to give notice for 107 days did not constitute the giving of notice 'as soon as practicable' after the accident;"<sup>28</sup> (2) The insured was a passenger in his car which was being driven by his cousin. The insured was knocked unconscious in the ensuing accident, and, as a consequence, was forced to rely on his cousin to supply the required information. The

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viewed after lapse of time, during which they either may have forgotten the facts, or been approached solely by representatives of the injured party, it virtually becomes impossible to learn what facts, favorable to defendant, could have been ascertained through prompt inquiry. We are impelled to the conclusion that prejudice must be presumed in such situations."

<sup>24</sup> Some jurisdictions have statutes limiting the insurer's ability to deny coverage based on an alleged lack of "timeliness of notice." Witness Wis. Stat. § 204.29(7) (1965) "(1) : No licensed accident or casualty insurance company in Wisconsin shall limit the time for the service of any notice of injury to less than twenty days. . . ." See also, Wis. Stat. § 204.30(2) which requires, among other things, that an insured's notice be deemed sufficient, even if after the time specified, if it is given "as soon as practicable." See also, Parrish v. Phillips, 229 Wis. 429, 282 N.W. 551 (1938), holding that when a statute provides a minimum number of days which must be allowed for the giving of notice, a provision in an automobile liability policy requiring notice "as soon as practicable" means as soon as practicable after the expiration of the minimum days provided by statute for the giving of notice.

<sup>25</sup> Home Indem. Co. v. Ware, 285 F.2d 852 (3rd Cir. 1960).

<sup>26</sup> Hass Tobacco Co. v. American Fidelity Co., 226 N.Y. 343, 123 N.E. 755 (1919), cited with approval in Curreri v. Allstate Ins. Co., 37 Misc. 2d 557, 236 N.Y.S. 2d 719 (1963). See also, Gullo v. Commercial Cas. Ins. Co., 226 App. Div. 429, 235 N.Y.S. 584 (1929), where 13 days was held to be untimely.

<sup>27</sup> H. H. Hall Const. Co. v. Employers Mut. Liability Ins. Co. of Wis., 435 Ill. App. 2d 62, 193 N.E.2d 51 (1963).

<sup>28</sup> Allen v. Western Alliance Ins. Co., 349 S.W.2d 590 (Tex. 1961).

cousin was evasive and uncooperative, but finally filled out the form 65 days after the collision. The court held that notice was timely.<sup>29</sup>

If the injured party, or an additional insured, is the party giving notice, a more liberal interpretation of "timeliness" is applied. For example, where a tractor-trailer was involved in an accident in another state, and extreme difficulty and fraud prevented the injured party's attorney from learning the identity of the trailer's true owner and the insurer involved, notice given 16 months after the accident was held to be reasonable and "as soon as practicable."<sup>30</sup> And where the injured party attempted fruitlessly to locate the insured and his carrier for 7 months, and then secured counsel who by diligent effort made such identification after 2 months, notice given at that time was deemed to be reasonable under the circumstances.<sup>31</sup> Though courts are more lenient in applying the "timeliness" standard when an additional insured or the injured party is the party giving notice, it must be remembered that notice remains a condition precedent to the insurer's liability. The rationale supporting this position is that the insured has a contractual obligation to give notice, as well as having the machinery for giving notice indicated in his policy contract. This is in contrast to the injured party, who does not know the identity of the carrier, the policy number, nor the location of the carrier. Thus, whether notice by the injured person will be considered to be timely is dependent upon the opportunity to give notice available to him. It must be noted that while an injured person is under no obligation to give notice of an accident to the insurer, he does have the right to fulfill the condition when the insured's failure to do so would preclude recovery under the policy terms. States with direct-action statutes granting an independent right to an injured person to proceed directly against the insurer are thus recognizing that the injured person should not be dependent upon prompt notice being given to the insurer by the person who caused the injury.

It also must be noted that notice requirements of the policy can be modified by statute, such as general financial responsibility statutes which may, under certain circumstances, prescribe that the liability of

<sup>29</sup> *State Farm Mut. Auto. Ins. Co. v. Douglas*, CCH 1966 Auto. Ins. Cases § 5221 (Va. June 13 1966). *See also*: *Employers Cas. Co. v. Vargas*, 159 So. 2d 875 (Fla. D.C. 1964) (45 days, held sufficient); *Allstate Ins. Co. v. Alford*, 218 N.Y.S.2d 313 (1961) (65 days, held sufficient); *Atlantic Nat'l. Ins. Co. v. Johnson*, 178 Co. 2d 733 (Fla. App. 1965) (8 months, held insufficient); *Lane v. Anchor Cas. Co.*, 355 S.W.2d 90 (Tex. Civ. App. 1962) (18 days, held insufficient); *Hendry v. Grange Mut. Cas. Co.*, 372 F.2d 222 (5th Cir. 1967) (4 months, held sufficient); *Kohls v. Glassman*, 29 Wis.2d 324, 130 N.W.2d 37 (1966) (3 years, held insufficient); *Certified Indemnity Co. v. Thun*, CCH 1968 Auto. Ins. Cases § 5881 (Colo. April 1, 1968) (73 days, held insufficient).

<sup>30</sup> *E.g. Lauritano v. American Fidelity Co.*, 3 App. Div. 2d 564, aff'd., 4 N.Y.2d 1028 (1958).

<sup>31</sup> *Safeguard Ins. Co. v. Trent*, 275 N.Y.S.2d 671 (1966); *Nelli v. Nat'l. Surety Corp.*, 229 N.Y.S.2d 174 (N.Y. App. 1962). For a similar holding regarding an additional insured, *see Cinq-Mars v. Travelers Ins. Co.*, CCH 1966 Auto Ins. Cases § 5145 (R.I. April 7, 1966).

the insurer under a motor vehicle liability policy shall become absolute whenever a loss covered by such policy occurs, provided that the statutory procedures have been complied with.<sup>32</sup>

Consistent with the interpretation of the previously discussed language in the policy, courts do not construe this portion of the notice requirement strictly, and are willing to find legally acceptable excuses for delay in giving notice to the insurer. Some of the more frequently offered reasons for delay are discussed below.

1. The insured may be excused for failure to give prompt notice when it is shown that he had no knowledge of the occurrence and that reasonable inquiry would not have given him such knowledge.<sup>33</sup> The most common instance in which this excuse comes to the fore is when an omnibus insured has an accident and does not tell the named insured. In this instance it has been held that:

There is no coverage to the omnibus insured because of his breach of the policy, but coverage will continue as to the named insured unless a separate breach on his part can be shown after he acquired either knowledge of the accident or of claims being made against him.<sup>34</sup>

2. Notice to the wrong insurer generally will not excuse one for failing to give notice "as soon as practicable."<sup>35</sup> However, this position is not universal.<sup>36</sup>
3. A claim by the insured that he was unaware of coverage or of the notice requirement is generally held not to be a legally acceptable excuse.<sup>37</sup>
4. The insured's belief that he was not liable is generally considered to be an insufficient excuse for delay as a matter of law.<sup>38</sup>

<sup>32</sup> *E.g.* Ill. Safety Responsibility Law, ILL. REV. STATS. Ch. 95½, § 58K, which presently exists as ILL. REV. STAT., Ch. 95½, § 7-317 (Supp. 1967), referring to those policies which are filed with, and accepted by, the Secretary of State as proof of financial responsibility: "the liability of the insurance carrier under any such policy shall become absolute whenever loss or damage covered by such policy occurs. . . ."

Regarding compulsory automobile insurance jurisdictions, *see* Allstate Ins. Co. v. Manger, 213 N.Y.S.2d 901 (1961) which held that under the New York Compulsory Insurance Law, the rights of the injured party are not fixed at the time of the accident, but may be defeated by the failure of the insured or the injured party to notify the insurer of the accident as soon as practicable. *See also*, Annot., 31 A.L.R. 2d 645 (1953).

<sup>33</sup> Allstate Ins. Co. v. Alford, 218 N.Y.S.2d 313 (1961). However, courts are not prone to make such a finding, as illustrated in Hurlbutt v. Liberty Mut. Ins. Co., 271 N.Y.S.2d 426 (1966). As to the issue of whether knowledge of an omnibus insured, as an agent, will be imputed to the named insured, *see* American Southern Ins. Co. v. England, 260 F. Supp. 55 (D.C. S.D. 1966).

<sup>34</sup> Campbell v. Continental Cas. Co. of Chicago, 170 F.2d 669 (8th Cir. 1948).

<sup>35</sup> Annot., 6 A.L.R.2d 661 (1949).

<sup>36</sup> Nat'l. Grange Mut. Ins. Co. v. Malone, 15 N.Y.2d 1025, 260 N.Y.S.2d 177 (1965). The insurer was given notice some 80 days after the accident. The insured's excuse: her broker had switch carriers from Allstate to Nat'l. Grange shortly before the accident, and she gave notice to Allstate. The court held this to be an acceptable excuse for delay.

<sup>37</sup> American Assurance Co. v. Mariani, 130 N.Y.S.2d 755 (1954); Acosta v. Roach, 172 N.Y.S.2d 116 (1958); Pimpinella v. Swift & Co., 253 N.Y.S. 159 (1930).

<sup>38</sup> Century Indem. Co. v. Serafine, 311 F.2d 676 (7th Cir. 1963); Hurlbutt v.

A doctrine necessarily interwoven with the issue of permissible delay in giving notice is the "Trivial Occurrence" Rule that a mere trivial occurrence does not give rise to a duty to report. "Thus, notice need not be given when there is a mere touching of bumpers without claim of injury or visible damage or a minor scratch on a fender."<sup>39</sup>

The following quote is offered as an excellent summary of the "timeliness of notice" problem:

Notwithstanding notice is required "immediately," "promptly" forthwith," "as soon as practicable" or "within a reasonable time," all of which terms are substantially identical in meaning, the insured cannot be held to an obligation to give what might amount to instantaneous notice and his failure to do so does not abrogate the policy. While ordinarily the question of reasonable notice is one of fact for the jury, when the facts are undisputed and the interest is certain, the question of what is a reasonable time may be a matter of law, subject, however, to the construction that the expressions used all call for notice to be given with reasonable dispatch and within a reasonable time *in view of all the circumstances*.<sup>40</sup> (emphasis supplied)

#### *Waiver of Notice*

Waiver or estoppel is applicable to an insurer on the matter of notice and thus an insurer may lose its right to reject coverage under these doctrines.<sup>41</sup> Contract provisions requiring waivers to be endorsed upon the policy do not apply to notice of the accident and it is not necessary that prejudice result to the party in whose favor the waiver operates.<sup>42</sup> Furthermore, if an insurer receives late notice and intends to deny cover-

Liberty Mut. Ins. Co., 271 N.Y.S.2d 426 (1966); *Yorkshire Indem. Co. v. Roosth*, 252 F.2d 650 (5th Cir. 1958); *Ambrosius Industries, Inc. v. Liberty Mut. Ins. Co.*, 149 F. Supp. 24 (W.D. Ky. 1959); *Atlantic Nat'l. Ins. Co. v. Johnson*, 178 So. 2d 733 (Fla. App. 1965).

<sup>39</sup> *Bass v. Allstate Ins. Co.*, 187 A.2d 28 (N.J. 1962). Two illustrations of the application of this doctrine: (1) *Francis v. Maryland Cas. Co.*, ... F.2d ... (2d Cir. 1967): Shortly after an accident, the father of the injured boy informed the insured that no claim would be made for the injuries to his son. Relying on this statement, the insured gave no notice of the accident to his insurer until suit papers were served. Applying Connecticut law, the court found the delay in giving notice would be excused if a reasonably prudent person would not believe that either an injury had been suffered, or that as a result thereof, liability may have been incurred. (2) *United States Fid. & Guar. Co. v. Gable*, 220 A.2d 165 (Vt. 1966). The insurer had issued a liability policy to the lessor. The lessee notified the lessor that she had fallen downstairs in the leased premises, but had not received medical treatment. The lessee also inquired as to whether the lessor had insurance coverage. However, the lessee never again contacted the lessor on any aspect of the claimed fall, and was seen shortly thereafter shovelling snow. The court held that "... delay in notice is generally held excusable in the case of an accident which is trivial and results in no apparent harm or which furnished no ground for an insured, acting as a reasonable and prudent man, to believe that a claim for damage will arise."

<sup>40</sup> *Horsley, Timely Notice, Assistance and Cooperation Conditions*, *Automobile Insurance Problems* 275 (Practising Law Institute New York 1968).

<sup>41</sup> See 2 LONG, *THE LAW OF LIABILITY INSURANCE*, § 17.14 (1966) for a good discussion of the distinction between waiver and estoppel.

<sup>42</sup> A standard provision relating to changes provides as follows:

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or

age upon this ground, he has a duty to so advise the insured, or he may later be estopped from denying coverage on this ground.<sup>43</sup> Thus, an insurer's delay of four months in disclaiming liability as a result of its own failure to timely investigate an accident or communicate with its insured, waived the defense of the insured's failure to give timely notice of the accident.<sup>44</sup>

Even where the insurer denies liability on another ground, it cannot defend because of failure of the insured to give timely notice because, by assuming the defense of action, the insurer has done nothing to give the insured an opportunity to correct the deficiency in the notice, and thus the insurer has waived lack of notice.<sup>45</sup> Several rules have arisen to deal with particular circumstances:

1. If a non-waiver agreement is made or a defense is interposed under reservation of rights, and the inadequacy of the notice is assigned as a ground for requesting the non-waiver agreement or serving the reservation of rights, defense of the action generally does not then constitute a waiver as to notice.<sup>46</sup> However, if no such reference is made to the lack of proper notice, interposing a defense will constitute a waiver.<sup>47</sup>
2. An offer of compromise and settlement by the insurer has been held to constitute a waiver, but denial of liability after notice of loss was past due does not constitute a waiver or estoppel.<sup>48</sup>

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estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the president, a vice president, secretary or assistant secretary of the company, provided, however, changes may be made in the written portion of the declarations by a manager or general agent of the company when initiated by such manager or general agent.

LONG, note 41½ *supra* at § 13.08, n.2d. Regarding the court's disdain for applying the written endorsement requirement to the notice of accident provision, see Magarick, *The Application and the Declarations in Standard Automobile Policy*, 479 *Ins. L. J.* 741, 747 (1962).

<sup>43</sup> *Pendleton v. American Fire & Cas. Co.*, 317 F.2d 96 (10th Cir. 1963); *German Ins. Co. v. Ward*, 90 Ill. 550 (1951).

<sup>44</sup> *Cohen v. Atlantic Nat'l. Ins. Co.*, CCH 1966 *Auto. Ins. Cases* § 5003 (N.Y. Nov. 29, 1965).

<sup>45</sup> *Coulter v. American Employers' Ins. Co.*, 333 Ill. App. 2d 631, 78 N.E.2d 131 (1948); *See also*, Annot., 18 A.L.R. 2d 487 (1951).

<sup>46</sup> *Gregory v. Highway Ins. Co.*, 24 Ill. App. 2d 285, 164 N.E.2d 297 (1960); *See also*, Annot., 38 A.L.R. 2d 1151 (1954). However, courts may not give credence to the "reservation of rights" letter, as evidenced by *Sneed v. Concord Ins. Co.*, 237 A.2d 289 (N.J. App. 1967), wherein the court held that such a letter did not bar the application of the doctrine of estoppel since the insured was not given the opportunity to reject or accept the insurer's proposition of controlling the action while reserving its rights as to policy defenses.

<sup>47</sup> *Hickey v. Wis. Mut. Ins. Co.*, 238 Wis. 433, 300 N.W. 364 (1941). The *Hickey* facts: The insurer, knowing that notice of the accident had not been given within the terms of the policy, nevertheless investigated, preparing for trial, and tried the case, merely informing the insured that it might have a policy defense because of an alleged misrepresentation in securing the policy. Immediately before trial, the insured was induced to sign a nonwaiver of policy defenses which did not refer to lack of notice. The court held that the conduct of the insurer amounted to a waiver of the defense of untimely notice.

<sup>48</sup> *Buysee v. Connecticut Fire Ins. Co.*, 240 Ill. App. 324 (1926).

However, these cases do not indicate that an auto insurer may not defend the insured and still reserve its defenses on the policy in regard to coverage or forfeiture.<sup>49</sup> But they do recommend that an insurer send a reservation of rights letter to the insured, setting out the provision breached, and indicating the prejudicial effect. Then the insurer can generally safely defend, upon stating that such defense does not constitute a waiver of the reservation.<sup>50</sup> As an alternative to the reservation of rights letter or notice, the insurer could secure a signed non-waiver agreement. Such an agreement is clearly more desirable, since it indicates conscious reflection by the insured on the question of waiver.<sup>51</sup> However, the signed non-waiver agreement is somewhat impractical, as people will generally assent to a reservation notice by silence but will tend to shy away from an affirmative signing.

That courts are not overly reluctant to find a waiver of the policy written notice requirement is indicated in *Brown v. State Farm Mut. Auto. Liab. Ins. Co.*<sup>52</sup> In this case the policy provided for written notice but the insurer also issued a "Members Identification Card" directing that accidents be reported to the insurer's agent and that "if anyone is injured, phone the nearest insurer's agent." The court found that a jury question existed as to whether the insurer had waived the policy requirement of written notice by the issuance of such a card. An "agency by estoppel" has also been established in a recent case.<sup>53</sup>

#### *Notice of Claim or Suit*

The language of typical auto liability policies requires

If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative. If, before the company makes payment of loss under Part IV, the insured or his legal representative shall institute any legal action for bodily injury against any person or organization legally responsible for the use of an automobile involved in the accident, a copy of the summons and complaint or other process served in connection with legal action shall be forwarded immediately to the company by the insured or his legal representative.<sup>54</sup>

Thus, the insured's second obligation to give notice: Notice of claim or suit. The same theory supports this second notice requirement: the insurer is entitled to know that an action has been instituted against the

<sup>49</sup> *Hickey v. Wis. Mut. Ins. Co.*, 238 Wis. 433, 300 N.W.2d 364 (1941); *Sanderfoot v. Sherry Motors, Inc.*, 33 Wis. 2d 301, 147 N.W.2d 255 (1967).

<sup>50</sup> As a *caveat*, however, see *Sneed v. Concord Ins. Co.*, note 45 *supra*, for the risks involved in such a "reservation of rights" procedure.

<sup>51</sup> *Curtis, Duty to Defend and Insurer's Rights and Obligations in Reserving Rights; Non-Waiver Agreements and Disclaimer*, 367 (Practising Law Institute N.Y. 1968).

<sup>52</sup> 104 S.E.2d 673 (S.C. 1958).

<sup>53</sup> *Hinson & v. Zurich Ins. Co.*, 196 So. 2d 827 (La. App. 1967). See also, *Boshek v. Great Lakes Mut. Ins. Co.*, 19 Wis. 2d 514, 120 N.W.2d 703 (1963).

<sup>54</sup> *E.g.* The Milwaukee Mut. Ins. Co. policy, Condition 3.

insured, so that he has the opportunity to prepare and interpose a timely defense. This notice of claim or suit provision is sometimes thought to be more important than the notice of accident requirement, since the insurer is more directly exposed to prejudice and will be subjected to a default judgment unless a defense is interposed within the time authorized.

Generally, the same rules apply here as apply in the duty to give notice of accident provision; the nature, effect, and timeliness of notice sections discussed earlier apply with equal validity in the notice of suit provision. Thus, although the policy language indicates "immediate notice," it has been interpreted to mean notice within a reasonable time,<sup>55</sup> and failure to comply with this provision can mean failure to fulfill a condition precedent to the insurer's liability, with the same split of authority as to whether prejudice is required as was discussed before.<sup>56</sup>

However, the question of waiver is interpreted much more strictly in this latter notice requirement. As to waiver, courts generally require "a positive, intentional surrender of a known right." Thus, a recent case held that "mere knowledge by the insurer that process had been served upon the insured is not enough to constitute waiver."<sup>57</sup> However, once it can be shown that the insurer had an opportunity to defend, the insurer will not be able to disclaim coverage, even though the insured failed to turn over process.<sup>58</sup> And when the insurer assumes defense of action, there is clearly a waiver of the suit paper provision.<sup>59</sup>

An interesting waiver question arises in relation to the recent development of the "long-arm" process statutes, whereby in some jurisdictions a non-resident motorist may be served via service of the Secretary of State. Although there is a dearth of case law on point, one case held that, in the absence of an express disclaimer that the insurer would not be liable for judgments obtained under such suit without actual receipt of the summons by the insurer, the insurer must be held to have assumed the risk.<sup>60</sup>

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<sup>55</sup> *Continental Cas. Co. v. Lester*, 204 N.Y.S.2d 843 (1960).

<sup>56</sup> *Jefferson Realty Co. v. Employers' Liab. Assur. Corp.*, 149 Ky. 741, 149 S.W. 1011 (1912); *Crockrell v. Farmers Mut. Ins. Co.*, CCH 1968 Auto. Ins. Cases § 5877 (Mo. April 1, 1968).

<sup>57</sup> *Clemmons v. Nationwide Ins. Co.*, CCH 1966 Auto. Ins. Cases § 5217 (N.C. June 16, 1966). *See also*, *Lomont v. State Farm Mut. Auto. Ins. Co.*, 151 N.E.2d 701 (Ind. 1958); *Boyer v. American Cas. Co.*, 333 F.2d 708 (2d Cir. 1964). Consistent with this philosophy is the holding in *Potter v. Great American Indem. Co.*, 55 N.E.2d 198 (Mass. 1944), that when an insured gives notice of the accident in compliance with the policy provision, an insurer does not have a duty to check whether a suit has been filed. *But cf.* *Frank v. Nash*, 71 A.2d 835 (Penn. 1950).

<sup>58</sup> *Cohen v. East Coast Ins. Co.*, 283 N.Y.S.2d 371 (1967); *Alabama Farm Bureau Mut. Cas. Co. v. Harris*, CCH 1967 Auto. Ins. Cases § 5523 (Fla. April 11, 1967).

<sup>59</sup> 7 AM. JUR. 2d *Automobiles and Highway Traffic* § 188 (1963).

<sup>60</sup> *Staples v. Southern Fire & Cas. Co.*, 289 S.W.2d 512 (Ky. 1956). For a discussion of the problem of non-resident service as affecting the notice of accident provision, *see* *Aufderhar v. American Employees Ins. Co.*, 331 F.2d 681 (8th Cir. 1964).