It's Too Late Baby Now It's Too Late: New Developments with the Notice/Prejudice Rule in Late Notice Cases in Both Claims Made and Occurrence Policies[1]

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INTRODUCTION

Courts have wrestled with late notice provisions for decades, and recent decisions from around the country raise new questions about their scope. To understand how the law has reached its current state, one must first understand the background on notice provisions, including why they exist and how, historically, courts have interpreted the provisions. Indeed, how courts interpret notice provisions has changed over time. It is also important to understand what constitutes proper notice and under what circumstances late notice may jeopardize coverage. As with all policy provisions, what makes notice "late" or incomplete often is policy-language dependent and may differ from policy to policy, especially between occurrence and claims made policies. Additionally, different jurisdictions have interpreted the same notice provisions differently, and over time, a majority and minority approach has emerged. Namely, the majority approach is to require a showing of prejudice before late notice will preclude coverage, while a minority of jurisdictions still deems timely notice, under certain policy language, to be a condition precedent for coverage.

This article discusses the purpose of notice exclusions and what the current legal landscape means for the interpretation of notice provisions. This article also considers how case law has shifted in 2017, including seemingly contradictory positions in different states concerning whether an insurer must be prejudiced by late notice for claims-made policies. Finally, this article also explores cases addressing whether notice provided to brokers is binding upon an insurer, including a recent Alabama decision.[7]

I. NOTICE PROVISIONS IN INSURANCE POLICIES: THE WHAT, WHY, WHEN, AND HOW.

A. What Is Notice?

As a threshold, one must understand what "notice" is before exploring why it is required

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[7] *S. Cleaning Services, Inc. v. Essex Ins. Co.*, 209 So. 3d 446 (Ala. 2016).

for coverage under a policy. Notice is the providing of information to an insurer to alert the insurer of a claim. Notice enables the insurer to promptly investigate the facts surrounding a claim, prepare a defense (if necessary for a third-party claim), and determine the prudence of payment, settlement, or some other resolution.[8] Timely notice is important because it can aid in the rapid, early evaluation of a claim while facts and memories are still "fresh" and can result in the settlement or resolution of a claim at a lower cost to the insurer.[9] Further, timely notice can aid in detecting and thwarting fraudulent claims or identifying patterns that may be harming the insured.[10] As discussed further, an insured's failure to provide timely notice can defeat coverage.[11] Given this potential consequence, it is important to understand when notice is required, what information is required, how notice should be given, and by and to whom notice should be given.

B. Rationale for, and Development of, Notice Provisions

1. Why Notice Provisions Exist.

It would be a rare occasion to find an insurance policy without a notice provision. That's because the insurer is at a significant disadvantage when it comes to information about the insured.[12] That disadvantage stems from the insurer's relationship with the insured. "[T]he insurer must rely on the insured or other interested parties to provide all details that affect the insurance relationship," starting with the application and continuing throughout the policy period and until after a loss has occurred.[13]

Because information from the insured is critical to the insurer responding after a loss, notice provisions play a key role in the post-loss landscape. For first-party losses, notice means that the insurer is potentially liable. First-party policies therefore typically require that the insured give notice that a loss has occurred, sufficient proof of the loss, and an accurately stated amount of the loss.[14]

For third-party claims, notice means that the insured is potentially or actually liable to a claimant. The insurer depends on the insured for notice of an allegedly wrongful act, occurrence, or claim, as well as information on the claimant's demand or suit. Notice also allows the insurer to participate in litigation and control the defense and settlement if the duty to defend is implicated.[15]

Notice provisions also have other uses for specific types of insurance. For example, a fidelity policy requires timely notice so that "the insurer [has] a suitable opportunity to exercise its

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[8] *Laquer v. Citizens Prop. Ins. Corp.*, 167 So. 3d 470, 473 (Fla. Dist. Ct. App. 2015); *Se. Express Sys. v. S. Guar. Ins. Co.*, 224 Ga. App. 697, 701, 482 S.E.2d 433, 436 (1997).
[9] *Id.*
[10] *Laquer*, 167 So. 3d at 473.
[11] *Allstate Ins. Co. v. Airport Mini Mall, LLC*, 265 F. Supp. 3d 1356 (N.D. Ga. 2017) ("Failure to comply with such a notice provision bars coverage"); *Laquer*, 167 So. 3d at 473 ("An insured's failure to give timely notice under such a provision is a legal basis for the denial of recovery under the policy.") (internal quotations omitted).
[12] Steven Plitt, et al., 13 *Couch on Insurance* § 186:1.
[13] *Id.*
[14] *Id.*
[15] *Travelers Indem. Co. of Conn. v. Miller*, 86 So. 3d 338, 347 (Ala. 2011).

rights under the policy, including the opportunity to limit its liability to the insured, to preserve evidence, and to recover stolen property."[16]

In all instances, prompt notice of a loss or claim gives the insurer an opportunity to investigate while the facts, and potential witnesses' memories, are still fresh.[17] Notice also gives the insurer an opportunity to determine whether and to what extent coverage exists under the policy.[18] And prompt notice allows insurers to establish adequate reserves for losses and calculate future premiums.[19] Notice also gives insurers the possibility to detect "[a] pattern of losses that the insured has yet to pinpoint as fraudulent" as those patterns "might be better analyzed by independent experts provided by the insurer."[20]

2. Courts Historically Treated Notice as a Condition Precedent, Requiring Strict Enforcement with Policy Provisions or Forfeiture of Coverage.

Although notice provisions have long existed in insurance policies, their legal treatment has evolved. At common law, insurance contracts, like other contracts, were examined to determine whether a requirement was a "condition precedent" or merely a "stipulation" or "representation."[21] An immaterial or technical breach of a stipulation or representation did not excuse performance under a contract.[22]

But no excuse could justify breaching a condition precedent. "Conditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty."[23] The failure to satisfy a condition precedent meant that the contract never came into existence.[24] That harsh result led some courts to adopt rules to avoid forfeiture as an outcome. One such rule was to construe a provision as a covenant rather than a condition precedent unless the parties' clearly intended to create a condition precedent.[25] But by using the phrase "condition precedent," the language in the contract could be used to prove the parties' intent.[26] And with that magic language, the party seeking to avoid its obligations under the contract could argue that failure to enforce the condition precedent would unfairly rewrite the policy.[27] As insureds and insurers jostled, the law continued to develop.

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[16] *In re Prime Commercial Corp.*, 187 B.R. 785, 802 (Bankr. N.D. Ga. 1995) (citing *F.D.I.C. v. Aetna Cas. & Surety Co.*, 744 F. Supp. 729, 734 (E.D. La.1990)).
[17] Eugene R. Anderson, Richard G. Tuttle, and Susannah Crego, *Draconian Forfeitures of Insurance: Commonplace, Indefensible, and Unnecessary*, 65 Fordham L. Rev. 825, 834 (1996).
[18] *Id.*
[19] *West Bend Co. v. Chiaphua Indus., Inc.*, 112 F. Supp. 2d 816, 822 (E.D. Wis. 2000), *aff'd* 11 F. App'x 616 (7th Cir. 2001) (quoting Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 4.02[a] (10th Ed. 2000)).
[20] *In re Prime Commercial Corp.*, 187 B.R. at 803.
[21] 13 *Couch on Insurance* § 186:5.
[22] *See U.S. Fine Ins. Co. v. Producciones Padosa, Inc.*, 835 F.2d 950, 954 (1st Cir. 1987).
[23] *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976) (citations omitted).
[24] *Id.*
[25] *Id.*
[26] *See Members Mut. Ins. Co. v. Cutaia*, 476 S.W.2d 278 (Tex. 1972).
[27] *Id.* at 281 ("Our conclusion is, however, that on balance it is better policy for the contracts of insurance to be changed by the public body charged with their supervision, the State Board of Insurance, or by the Legislature, rather than for

3. The Majority View in the Modern Era Has Looked Beyond the Historic Reasoning, Generally Taking a More Forgiving Look at Notice.

In more recent times, opinions on notice have shifted further. Fewer courts strictly enforce notice as a condition precedent. Instead, the majority view, as discussed in Section III below, is that late notice must prejudice the insurer to allow the insurer to escape liability for coverage.[28] These courts have recognized that forfeiting coverage for late notice in the absence of prejudice might lead to a windfall for the insurer.[29] Where courts follow the majority approach, sometimes a statute assigns the insurer the burden to prove prejudice to win a late-notice defense.[30] In others, courts have proclaimed that public policy supports denying coverage only if the insurer has been prejudiced.[31]

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this Court to insert a provision that violations of conditions precedent will be excused if no harm results from their violation.")

[28] *See, e.g.*, *Sherwood Brands, Inc. v. Great Am. Ins. Co.*, 13 A.3d 1268, 1270 (Md. 2011); *Stresscon Corp. v. Travelers Prop. Cas. Co. of Am.*, 2013 COA 131, ¶ 26 (Colo. Ct. App. 2013) ("Colorado does not strictly enforce notice-of-claim language in insurance policies unless the lack of notice from the insured prejudiced the insurer."), *rev'd on other grounds by* 370 P.3d 140 (Colo. 2016); *Ansul, Inc. v. Emp'rs Ins. Co.*, 2012 WI App 135, ¶ 24 (Wis. Ct. App. 2012) (notice provided within one year of time required by policy only defeats coverage if the insurer is prejudiced) (citing Wis. Stat. § 631.81); *Chartis Specialty Ins. Co. v. RCI/Herzog*, No. C11-0437JLR, 2012 U.S. Dist. LEXIS 87803, 2012 WL 2389999, at *10 (W.D. Wash. June 25, 2012) (insurer must "show that the late notice … caused it actual and substantial prejudice") (quotation omitted); *State v. Nat'l Union Fire Ins. Co.*, 56 So. 3d 1236, 1246 (La. Ct. App. 2011) (noting that strict enforcement of notice provision would avoid the "fundamental protective purpose" of insurance contracts); *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636-37 (Tex. 2008) ("We hold that an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay.").

[29] *See Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 789, 802 (Ky. 1991).

[30] *E.g.*, Md. Code Ins. § 19-110 (insurer must establish late notice resulted in actual prejudice); Mass. Gen. Laws ch. 175, § 112 ("An insurance company shall not deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of an occurrence, incident, claim or of a suit founded upon an occurrence, incident or claim, which may give rise to liability insured against unless the insurance company has been prejudiced thereby."); N.Y. Ins. Law § 3420(a)(5) (barring invalidation of a claim for occurrence-based liability policies issued or delivered in New York when late notice did not prejudice insurer); Nev. Admin. Code 686A.660(4) ("No insurer may, except where there is a time limit specified in the insurance contract or policy, require a claimant to give written notice of loss or proof of loss within a specified time or seek to relieve the insurer of the obligations if the requirement is not complied with, unless the failure to comply prejudices the insurer's right."); Mich. Comp. Laws § 500.3008 (All liability insurance policies must contain "a provision that failure to give any notice required to be given by such policy within the time specified therein 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 notice was given as soon as was reasonably possible."); Wis. Stats. §§ 631.81(1) ("Provided notice or proof of loss is furnished as soon as reasonably possible and within one year after the time it was required by the policy, failure to furnish such notice or proof within the time required by the policy does not invalidate or reduce a claim unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limit.") and 632.26(1)(b) ("Every liability insurance policy shall provide … [t]hat failure to give any notice required by the policy within the time specified does not invalidate a claim made by the insured if the insured shows that it was not reasonably possible to give the notice within the prescribed time and that notice was given as soon as reasonably possible.")

[31] *E.g.*, *Grazis v. Miller*, 892 A.2d 1277, 1282 (N.J. 2006) (holding that the public policy of the state favors "protecting automobile accident victims, notwithstanding technically late notice"); *Friedland v. Travelers Indem. Co.*, 105 P.3d 639 (Colo. 2005) (noting that the notice-prejudice rule for liability policy supports the "strong public policy in favor of protecting tort victims," which is "a fundamental purpose of insurance coverage"); *Sherlock v. Perry*, 605 F. Supp. 1001, 1004-05 (E.D. Mich. 1985) (statutory notice-prejudice rule applied to claims-made policy). *Cf. James River Ins. Co. v. Brick House Title, LLC*, Case No. PWG-16-3464, 2017 WL 5126154, at *5 (Nov. 6, 2017) (Maryland's notice-prejudice statute did not apply when insured first gave notice of a wrongful act or potential claim after policy period

Courts in a handful of states have taken a different approach, shifting the burdens or presumptions when notice is late. In Florida, for example, breach of a notice provision creates a rebuttable presumption that the insurer has been prejudiced.[32] In declining to follow the "modern trend" described above, Florida courts have required the insured to rebut a presumed prejudice due to late notice.[33] Indiana, Ohio, and Michigan courts have also followed approaches similar to Florida.[34]

Some other states still follow what has become the minority approach that an insurer need not show prejudice to deny coverage for late notice.[35] This minority view is also discussed further in Section III below.

4. The Dual Purpose of Notice Provisions in Claims-Made Policies and Public Policy Arguments for and against Those Provisions.

Unlike an occurrence policy, a claims-made policy requires that the claim be made during the policy period. Also unlike an occurrence policy that can have a long tail—the time between the "occurrence" and the claim being made—the tail on claims-made policies is short. Claims-made policies are discussed in more detail in Section IV.A. below. But a few points are made here about the history and development of claims-made notice provisions.

First, claims-made policies were introduced to allow an underwriter to more accurately price a risk, avoiding the disconnect between the premium charged and the claim costs, which may have increased drastically with the lag between the "occurrence" and reported claim. An insurer, "faced with an unlimited tail that extends beyond the policy period," is prevented "from making a precise calculation of premiums based upon the cost of the risks assumed."[36] The result is that

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had expired); *Sherwood Brands*, 13 A.3d at 1288 (holding that Md. Code Ins. Art. § 19–110 did not apply to claims-made policy when notice was a condition precedent to coverage).

[32] *Wheeler's Moving & Storage, Inc. v. Markel Ins. Co*, No. 11-80272-CIV, 2012 U.S. Dist. LEXIS 125726, 2012 WL 3848569, at *5 (S.D. Fla. Sept. 5, 2012).

[33] *See id.; see also Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985).

[34] *Burlington Ins. Co. v. PMI Am., Inc.*, 862 F. Supp. 2d 719, 735 (S.D. Ohio 2012) (insured's unreasonably late notice presumably prejudiced the insurer); *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984) (same); *DeFrain v. State Farm Mut. Ins. Co.*, 817 N.W.2d 504, 505 (Mich. 2012) (declining to read prejudice requirement into uninsured motorists policy that required 30 days' notice after an accident). *Cf. Koski v. Allstate Ins. Co.*, 572 N.W.2d 636 (Mich. 1998) (requiring insurer to prove prejudice if insured does not comply with policy provision requiring notice "immediately" or "within a reasonable time").

[35] *See Emp'rs Mut. Cas. Co. v. Smith Const. & Dev., LLC*, 949 F. Supp. 2d 1159, 1169 (N.D. Ala. 2013) (noting that Alabama law is only concerned with whether delay in giving notice was reasonable, and specifically the length of reason for delay; prejudice to the insurer is immaterial); *Fireman's Fund Ins. Co. v. Care Management, Inc.*, 361 S.W.3d 800, 801 (Ark. 2010) (answering certified question by holding that insurer need not prove that it was prejudiced by late notice); *Harford Ins. Group v. Liberty Mut. Ins. Co.*, 311 A.2d 506 (D.C. Ct. App. 1973) (prejudice to insurer not relevant to late notice); *Country Mut. Ins. Co. v. Livorsi Marine, Inc.*, 856 N.E.2d 338 (Ill. 2006) (declining to adopt notice-prejudice rule in case where notice was unreasonably late); *State Farm Fire and Cas. Co. v. Walton*, 423 S.E.2d 188 (Va. 1992) (insurer need not show prejudice from insured's late notice that resulted in a breach both "substantial and material"). *See also Indian Harbor Ins. Co. v. City of San Diego*, 586 F. App'x 726, 728 (2d Cir. 2014) (noting the change in N.Y. Ins. Law § 3420 that precludes insurers from denying coverage for late notice absent prejudice under a policy issued or delivered after the 2009 change in law) .

[36] *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 399 (N.J. 1985) (international quotations omitted).

"occurrence policy premiums have proven to be grossly inadequate to cover the inflationary increase in the cost of settling claims asserted years later."[37]

Second, the type of claims-made policy can and often does matter. Within the general category of claims-made policies, a distinction can be made between whether a policy is purely "claims made" or "claims made and reported." With a pure claims-made policy, the claim must be made during the policy period, but the claim might be reported after the policy has expired. By contrast, claims-made-and-reported policies typically require reporting during the policy period, possibly giving a short window within which to report claims that are made at or near the end of the policy period.

Last, the differences in notice provisions for claims-made policies have led some courts to balk at applying the law and reasoning used for occurrence-based policies to claims-made policies. That hesitation is rooted in an understanding that requiring "an insurer on a claims-made policy [to] show that it was prejudiced by its insured's failure to report a claim within the policy period or a stated period thereafter would defeat the fundamental concept on which claims-made policies are premised."[38] But such sweeping statements do not apply merely because a policy is written on a claims-made basis. Language in the policy and state law both influence how courts interpret notice provisions in claims-made policies.[39] "It is a dangerous (but not uncommon) over-simplification to say flatly that the notice-prejudice rule does not apply to claims-made policies."[40] For example, "[t]he notice-prejudice rule may very well apply where an insurer seeks to deny coverage on the grounds that the insured provided notice during the policy period, but not 'as soon as practicable' after the claim was made."[41]

Still, courts are more inclined to strictly enforce notice provisions in claims-made policies. And courts have refused requests to rewrite notice clauses in claims-made policies on public policy grounds. A case before the Colorado Supreme Court provides one such example. In that case, the court held "that the notice-prejudice rule does not apply to a date-certain notice requirement in a claims-made insurance policy."[42] The court also found that a public policy rationale for the notice-prejudice rule did not justify overlooking the terms in the claims-made policy.[43] Insureds also have tried but failed to convince courts to read a notice-prejudice rule into a claims-made policy on public policy grounds in other states.[44]

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[37] *Id.* (citations and internal quotations omitted).
[38] *Chas. T. Main, Inc.*, 551 N.E.2d 28, 30 (Mass. 1990).
[39] Jeanne H. Unger, *Basic Principles of Insurance Coverage*, 12 (Sept. 2016) (paper presented at DRI Young Lawyers Coverage and Claims Professionals Training).
[40] Charles Lemley and Kimberly Ashmore, *Late is Enough – or Not: Analyzing the Notice-Prejudice Rule*, ABA Insurance Coverage Litigation (2016) (cited in Unger, *Basic Principles of Insurance Coverage*).
[41] *Id.*
[42] *Craft v. Phila. Indem. Ins. Co.* 343 P.3d 951, 953 (Colo. 2015), *opinion after certified question answered*, 599 F. App'x 846 (10th Cir. 2015).
[43] *Id.*
[44] *See, e.g., James & Hackworth v. Cont'l Cas. Co.*, 522 F. Supp. 785, 786 (N.D. Ala. 1980) (holding that enforcing a claims-made policy's notice provision did not contravene Alabama public policy as expressed in statutes of limitation); *Gulf Ins. Co. v. Dolan*, 433 So. 2d 512 (Fla.1983) (notice after the policy expired); *Zuckerman*, 495 A.2d at 313-14 (The court held that notice outside the policy period violated the claims-made policy's terms and that "[m]any courts have held that 'claims made' policies do not offend public policy." (citations omitted)); *Templo Fuente v. Nat'l Union Fire Ins. Co.*, 129 A.3d 1069 (N.J. 2016) (notice given within policy period but not "as soon as

But public policy arguments on the notice-prejudice rule can result in inconsistent outcomes. Consider two cases on Wisconsin law. In the first case, the Seventh Circuit Court of Appeals rejected public policy arguments advanced by the insurer and held that Wisconsin's statutory notice-prejudice rule applied to a claims-made policy.[45] With no controlling state authority on point, the court declined to rule that Wisconsin public policy required a different outcome.[46] The Wisconsin Supreme Court, however, did subsequently address the state's public policy. And that court held that the statutory notice-prejudice rule did not apply to a claims-made-and-reported policy.[47]

These divergent cases illustrate two points. First, federal courts will often avoid unresolved questions on public policy that state courts might decide. Second, courts might take different views on the same issues. Not surprisingly, venue and which state's laws apply can determine the outcome. The insurer and insured would thus both be wise to carefully consider those issues before making claims staked on public policy.

B. Different Types of Notice Provisions Found in Policies.

1. Does the Language Matter?

Considering the different rules and reasoning that courts have applied, does the language in the policy matter? After all, "a useful approach is to ask what the purpose of notice is and when it would be reasonable for an insurer to expect notice and when it would be a burden on the insured to provide it."[48] Because of language considerations, the type of insurance policy at issue is not the end of the inquiry. "Rather than begin with general 'rules' concerning notice, it is appropriate to begin with the [p]olicy."[49] "Ultimately, classification of the . . . policy is irrelevant" to whether the insured gave timely notice.[50] And to decide that issue, a court must first consider the policy language.

2. Typical Examples of Language in Occurrence and Claims-Made Policies.

Of course insurance policy language comes in all different types. And as the times have changed, so has the language in insurance policies. The Texas Supreme Court observed, in looking back to one of its earlier cases in the 1970s, that an older policy had stated that "no action shall lie against the company unless, *as a condition precedent thereto,* the insured shall have fully complied

practicable"); *Chas. T. Main*, 551 N.E.2d at 866; *Esmailzadeh v. Johnson and Speakman*, 869 F.2d 422, 424-25 (8th Cir. 1989) (agreeing with the district court's assessment that Minnesota public policy supported applying notice provisions in claims-made policy where claim was made in first policy period but not reported until second policy period); *Simundson v. United Coastal Ins. Co.*, 951 F. Supp. 165 (D.N.D. 1997) (declining to find that claims-made policy's notice provision violated North Dakota public policy when the North Dakota Supreme Court had not previously considered the issue).

[45] *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1093 (7th Cir. 1999) (interpreting Wis. Stat. § 632.26(1)).

[46] *Id.* at 1094.

[47] *Anderson v. Aul*, 862 N.W.2d 304 (Wis. 2015). See the further discussion of *Aul* in Section IV *infra*.

[48] *In re Prime Commercial Corp.*, 187 B.R. at 802.

[49] *Id.* at 801.

[50] *See Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80, 86 n.3 (Minn. Ct. App. 2002).

with all the terms of this policy."[51] But in confronting a similar dispute before it some 35 years later, the court noted that "the 'as a condition precedent' language [had been] deleted from the standard CGL [commercial general liability] policy following our decision in *Cutaia*," and was not in the policy before it.[52]

Indeed, notice provisions that refer to notice as a "condition precedent" are less widespread. Even though "condition precedent" has left the standard CGL policy, it can still be found in claims-made or other non-standard policies. But as the insurance industry has more widely adopted the standard Insurance Services Office (ISO) CGL policy, many disputes on notice involve the same or very similar language. Standardization of policies means too that insurers often employ similar language, requiring the insured give notice "immediately," "promptly," "as soon as practicable," or "as soon as possible."

The ISO CGL policy uses those phrases in the Commercial General Liability Conditions. That policy section states in part:

> **2. Duties In The Event Of Occurrence, Offense, Claim Or Suit**
>
> **a.** You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
>
> **(1)** How, when and where the "occurrence" or offense took place;
>
> **(2)** The names and addresses of any injured persons and witnesses; and
>
> **(3)** The nature and location of any injury or damage arising out of the "occurrence" or offense.
>
> **b.** If a claim is made or "suit" is brought against any insured, you must:
>
> **(1)** Immediately record the specifics of the claim or "suit" and the date received; and
>
> **(2)** Notify us as soon as practicable.
>
> You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
>
> **c.** You and any other involved insured must:
>
> **(1)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";[53]

Other policies, even claims-made policies, use language that echoes the ISO policy. One such example is the following:

> A. **Notice of claim, claim incident or suit**

[51] *PAJ*, 243 S.W.3d at 636 (quoting *Cutaia*, 476 S.W.2d at 278) (emphasis in original).
[52] *Id.*
[53] ISO CG 00 01 (04 13), § IV Commercial General Liability Conditions.

1. As a condition of this insurance coverage, **you** shall, within this **policy period**:
   a. give **us** written notice of any **claim** or **claim incident**; and
   b. immediately forward to **us** every demand, notice, summons or other process received directly by **you** or by **your** representatives, in the event suit is brought against **you.**

2. The written notice of a **claim** or **claim incident** shall include the:
   a. date or dates of the alleged **wrongful act**, error or omission; and
   b. injury or **damages** that have resulted or may result; and
   c. circumstances by which **you** first became aware of such alleged **wrongful act**.[54]

But this provision, departing from ISO language, also includes a reference to notice being a "condition of this insurance coverage."

Claims-made policies also often include language on when a claim must be reported. Sometimes the timing is the same for all claims, as in the following example:

> The following conditions must be satisfied:
>
> . . .
>
> 3. claim is made against insured during the policy period; [and]
> 4. the insured must report the claim to the company, in writing, as otherwise provided in this policy within the policy period or within the thirty (30) day period succeeding the expiration of the policy period.[55]

Another example is:

> The [Insureds] shall, as a condition precedent to their rights under this Policy, give the Insurer notice, in writing, as soon as practicable of any Claim first made against the [Insureds] during the Policy Period, or Discovery Period (if applicable), but in no event later than ninety (90) days after the expiration of the Policy Period, or Discovery Period, and shall give the Insurer such information and cooperation as it may reasonably require.[56]

Other times, the time requirement varies depending on which coverage is at issue in the policy. In the example below, the time for notice depends on which insuring agreement is implicated.

> A. The Insureds shall, as a condition precedent to their rights under this Policy, give the Insurer notice in writing of any Claim . . .

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[54] *Anderson*, 862 N.W.2d at 313–14 (emphasis in original).
[55] *Lexington Ins. Co.*, 165 F.3d at 1090.
[56] *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 376 (Tex. 2009).

(1) as defined in Section III.A.(1) [under the first insuring agreement] which is made during the Policy Period. Such notice shall be given prior to the end of the Policy Period;

(2) as defined in Section III.A.(2) [under the second insuring agreement] which is made during the Policy Period. Such notice shall be given as soon as practicable, but in no event later than ninety (90) days after the end of the Policy Period.[57]

The notice required for the first insuring agreement is claims made and reported during the policy period. But claims under the second insuring agreement may be reported up to 90 days after the policy ends, as long as notice is given "as soon as practicable." The policy also includes the phrase "condition precedent."

As the language in the examples above shows, common language and themes are prevalent in notice provisions. But as case law shows, the notice provisions' meaning and impact has evolved over time.

II. The Form and Timing of Notice.

A. When Is Notice Required?

The standard CGL policy requires notice when the insured learns of an occurrence or an offense which may result in a claim and when the insured learns of a claim or suit related to an occurrence or an offense. A claims-made policy generally requires notice when a claim is made against an insured during the policy period.[58] While it is usually self-evident when an insured should provide notice after receipt of a demand, notice, or legal paper evidencing a claim or suit,[59] the question of when an insured should provide notice of occurrences or offenses can be more complicated.

The circumstances under which an insured is required to provide notice of an occurrence or an offense are best described as lying on a continuum based on when a reasonable and prudent person would believe that a claim for damages would arise.[60] On one end of the continuum are the obvious circumstances where the insured knew of or witnessed an event that resulted in obvious

[57] *Sherwood Brands, Inc.*, 13 A.3d at 1271.

[58] However, if the insured is aware of a potential claim predating the policy period, coverage may be excluded. *James River Ins. Co. v. Brick House Title, LLC*, No. PWG-16-3464, 2017 U.S. Dist. LEXIS 183225 (D. Md. Nov. 6, 2017).

[59] In a standard CGL policy, an insured is required to provide notice of claims or suits when the insured receives information showing that a claim is being asserted or a suit filed, e.g., receipt of a demand letter or service of a lawsuit. Paul R. Koepff, et. al., 4-31 Law of Liability Insurance § 31.19.

[60] *Laquer*, 167 So. 3d at 474 ("Notice is necessary when there has been an occurrence that should lead a reasonable and prudent person to believe that a claim for damages would arise."); *Forshee v. Emp'rs Mut. Cas. Co.*, 309 Ga. App. 621, 623-26, 711 S.E.2d 28, 31-33 (2011)

injury that involved the insured or the insured's property.[61] On the other end of the continuum are trivial events where the insured is unaware that an event resulted in any apparent harm or there is no reasonable basis to believe or foresee that a claim will be made.[62] Determining the dividing line between these two ends of the spectrum is a matter of reasonability and foreseeability.[63]

"[A]n insured is not required to foresee every possible claim, no matter how remote, that might arise from an event and give notice of it to his insurer."[64] "Instead, the law only requires an insured 'to act reasonably under the circumstances.'"[65] Thus, "if a reasonable and ordinarily prudent person would conclude that an event forms no basis for a possible claim, the failure of the insured to give notice of the event is justified and no bar to coverage."[66] The reasonableness of an insured's decision not to give notice of an event is determined based on the facts and circumstances in existence when the event took place and the insured's efforts to investigate those facts and circumstances.[67]

In *Forshee v. Employers Mutual Casualty Co.*, the Court of Appeals of Georgia identified five inquiries that provide a useful guide to evaluate when an event rises to a level where an insured would be required to provide notice: (1) "the nature of the event," (2) "the extent to which it would appear to a reasonable person in the circumstances of the insured that injuries or property damage resulted from the event," (3) "the apparent severity of any such injuries or damage," (4) "whether anyone gave an indication that he intended to hold the insured responsible for the event and resulting injuries[,]" and (5) "the extent to which the insured acknowledged the likelihood that a claim could arise from the event, either by offering compensation to the injured person or asking him to sign a release."[68] In evaluating these inquiries, courts "must make every effort to eliminate the distorting effect of hindsight and to evaluate the conduct of the insured from the perspective of a reasonable person in the same circumstances as those in which the insured found himself."[69]

In *Forshee,* the court vacated a ruling that the insureds, the owners of a convenience store, were required to provide their insurer with notice that a woman fell on their property because the evidence showed that the woman refused medical assistance, did not indicate that she thought the store was responsible for her fall, did not ask for any insurance or contact information for the store, did not provide her contact information, and did not exhibit or later claim any serious injuries.[70]

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[61] *Brit UW Ltd. v. Hallister Prop. Dev., LLC*, 6 F. Supp. 3d 1321, 1329-30 (N.D. Ga. 2014) (insured required to provide notice of an occurrence when the insured's principal witnessed an accident on insured's property, recognized the potential for a lawsuit arising from the accident, visited the claimant in the hospital, and helped make the insured's property accessible for a wheelchair);.

[62] *Forshee*, 309 Ga. App. at 624, 711 S.E.2d at 31 ("Sometimes an event is so trivial or inconsequential that a court properly may conclude as a matter of law that no reasonable person would think that a claim could arise from the event and, therefore, that no notice of the event is required.").

[63] *Id.* at 623-26, 31-33.

[64] *Id.* at 623, 31 (internal quotations omitted).

[65] *Id.*

[66] *Id.* at 623-24, 31.

[67] *Id.* at 624, 31 ("[I]t is the nature and circumstances of 'the accident' or 'the incident' and the immediate conclusions an ordinarily prudent and reasonable person would draw therefrom that determine whether an insured has reasonably justified his decision not to notify the insurer.").

[68] *Id.* at 624, 31-32.

[69] *Id.*

[70] *Id.*

By contrast, in *Maryland Casualty Company v. Salon Ave. Suite 2*, the United States District Court for the Northern District of Georgia applied the *Forshee* factors to hold that an insured salon and its principals breached the policy's notice condition by failing to provide notice of the owner's arrest for spying on the salon's customers, even though the owner discontinued his involvement in the company following the incident and the other owner apologized for the incident and attempted to obtain a release from one of the individuals spied upon.[71]

These knowledge-based principles should not be confused with other instances where an insured attempts to assert its lack of knowledge or exercise of judgment as an excuse for failing to provide timely notice. For example, while "an insured's conclusion as to the trivial nature of an incident" can excuse a failure to provide notice, an insured's unilateral conclusion that it is not liable for an incident cannot excuse a failure to provide notice.[72] An insured's actual or constructive knowledge and subsequent actions can be of critical importance in determining when an insured is required to provide its insurer with notice of an event.

B. What Information Is Required?

The information an insured is required to provide as part of notice to an insurer depends on the event at issue (i.e., an occurrence/offense vs. a demand, notice, or lawsuit) and the operative policy language. The standard CGL notice condition requires insureds to provide notice of occurrences/offenses and demands, notices, and lawsuits. The information to be provided to an insurer in the case of a demand, notice, or lawsuit against an insured is usually self-evident from the methods in which the insured learns of the demand, notice, or lawsuit.[73] That is, if, in writing, the demand, notice, or lawsuit can be transmitted directly to the insurer. With regard to occurrences and offenses, generally, the information provided must be sufficient to identify the insured; the time, location, and circumstances of the occurrence or offense; and the names and address of the injured parties and witnesses.[74] Some courts have held that notice from the insured need only meet provide sufficient detail for the insurer to assess the likeliness of the noticed occurrence or claim.[75]

Changes in policy language can affect the information an insured is required to provide. For instance, prior to the early-1980s, standard CGL policies only required insureds to provide "reasonably attainable information" about the time, place, and circumstances of an "accident" (pre-1966 policies) or "occurrence" (post-1966 policies) and the names and addresses of any injured parties and witnesses as well as forwarding of demands, notices, summons, and other process received.[76] Beginning in the early-1980s, the notice provision in standard CGL policies required

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[71] *Md. Cas. Co. v. Salon Ave. Suite 2*, No. 1:13-CV-3056-TWT, 2014 U.S. Dist. LEXIS 137914, at *10-13 (N.D. Ga. Sept. 29, 2014).

[72] *Airport Mini Mall*, 265 F. Supp. 3d at 1379 ("insured cannot avoid the notice requirement by relying on its subjective belief that it has no liability").

[73] *See St. Paul Fire & Marine Ins. Co. v. Tinney*, 920 F.2d 861, 862-64 (11th Cir. 1991) (forwarding letter from claimant's attorney notifying insured of claim held sufficient notice despite the fact that it did not provide all of the information requested by policy).

[74] *See Republic-Franklin Ins. Co. v. Silcox*, 92 F.3d 602, 604 (7th Cir. 1996) ("The provision of notice fulfills the duty to notify when it enables the insurer to do everything that a reasonable person would do to diminish the risk of liability."); Paul R. Koepff, et. al., 4-31 *Law of Liability Insurance* § 31.09.

[75] *Charleston Laundry Co. v. Ohio Farmers Indem. Co.*, 89 F. Supp. 649 (S.D.W.Va. 1950), *aff'd*, 183 F.2d 682 (4th Cir. 1950); *see also Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 384 P.2d 155, 32 Cal. Rptr. 827 (1963).

[76] Paul R. Koepff, et. al., 4-31 *Law of Liability Insurance* § 31.01.

insureds to provide information concerning how, when, and where an "occurrence" took place and the names and addresses of any injured parties and witnesses as well as written notice of claims or suits and forwarding of demands, notices, summonses, or legal papers received in connection with a claim or suit.[77] More recently, the standard CGL policy requires insureds to provide information concerning how, when, and where the occurrence or offense took place; the names and address of any injured parties and witnesses; and the nature and location of any injury or damage.[78] With regard to claims and suits, the standard CGL policy requires the insured to record the specifics of the claim or suit and the date that information was received, to provide written notice of the claim or suit, and to forward copies of any demands, notices, summonses or legal papers received.[79] The sufficiency of an insured's notice should be judged by the extent to which it provides the general categories of information requested by the particular policy language.[80]

C. How Must Notice Be Given?

How notice should be given is also often policy language dependent. Typically, though, policyholders should endeavor to provide notice that is "express and direct. Constructive notice is not sufficient."[81] Thus, when providing notice, an insured's notice should be governed by the policy's required specifics rather than relying on what the insured believes is public information.[82] Effective notice should be a demand for coverage or a defense for a specific insured or insureds based on a specific event, claim, demand, or suit.[83] Merely inquiring about coverage or providing an insurer with access to information which could show facts relating to a claim is not enough to constitute notice.[84]

Often policies require notice in writing, and when they do, an insured that fails to comply with the requirement of written notice to an insurer may risk being held in breach of a policy's notice condition.[85] At a minimum, providing oral notice rather than notice in writing may create

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *See Rockland Exposition, Inc. v. Great Am. Assurance Co.*, 746 F. Supp. 2d 528, 539 n.9 (S.D.N.Y. 2010).
[81] Allan D. Windt, *Insurance Claims and Disputes* § 1:1 (2013).
[82] *Fed. Ins. Co. v. CompUSA, Inc.*, 239 F. Supp. 2d 612, 616 (N.D. Tex. 2002) (insurer issuing claims made policy did not obtain notice of a lawsuit against its insured when an underwriter downloaded a copy of the insured's Form 10-Q disclosing the existence of the lawsuit); *Physicians Ins. Co. of Wis., Inc. v. Williams*, 128 Nev. 324, 334, 279 P.3d 174, 180 (2012) ("A newspaper article written and published about an event, intended to be read by the general public, does not provide adequate specifics to give notice of a claim under a claims made policy; without more, the insurer would have no way of knowing that a claim for coverage was being made or was expected") (internal quotations omitted).
[83] *Fireman's Fund Ins. Co. v. ACC Chem. Co.*, 538 N.W.2d 259, 262-63 (Iowa 1995) (insurers' yearly inspection of site subject to EPA investigation remediation did not constitute notice of EPA action even if inspections might have revealed presence of pollution); *Knight v. Me. Mut. Fire Ins. Co.*, 651 A.2d 838, 840 (Me. 1994) (general inquiry about the existence of coverage insufficient to provide notice).
[84] *Id.*
[85] *Jamestown Ins. Co. v. Reeder*, 508 F. App'x 306, 308 n.6 (5th Cir. 2013) ("oral notice does not satisfy a contractual provision requiring written notice"); *CompUSA*, 239 F. Supp. 2d at 616 (recognizing that insurers may require written notice and enforcing that requirement); *Eells v. State Farm Mut. Auto. Ins. Co.*, 324 Ga. App. 901, 904, 752 S.E.2d 70, 73 (2013) ("even if the insurer receives oral or other notice that does not comply with the policy's written notice requirement, that notice is insufficient.").

an issue of fact.[86] Accordingly, even when written notice is not required, providing written notice could be viewed as "best practices" for an insured, as it minimizes the risk that a court will find a fact question as to whether notice was actually given to the insurer.

D. By Whom Must Notice Be Given?

Notice typically must be given by an insured or their agent or, in some states, a claimant.[87] For named insureds, this inquiry is generally a straightforward question; however, circumstances can arise when notice is or can be provided by additional insureds and claimants.

The notice condition of the standard ISO CGL policy frames notice of occurrences and offenses, claims, and suits in terms of "you," which is usually defined as "the named insured shown in the Declarations."[88] The only notice requirement that is not stated in terms of "you" is the requirement that "you *and any other involved insured*" forward copies of demands, notices, summonses, or legal papers received in connection with the claim or suit. This language would appear to limit an additional insured's notice obligation to circumstances where the additional insured was in receipt of a demand, notice, summons, or legal paper concerning a claim or suit and absolve the additional insured of providing notice of occurrences and offenses.[89] Some courts, however, have held that, "even if an insurance policy does not require that an additional insured provide notice to the insurer from whom it seeks coverage, an additional insured nonetheless has an implied duty, independent of the named insured, to provide the insurer with the notice required under the policy."[90] Thus, despite the use of "you," when an additional insured is involved, courts have gone both ways, finding that an additional insured may an independent duty to provide notice of occurrences or offenses or, conversely, the ability to rely on the named insured's notice of an occurrence.[91]

Claimants generally have the right to give notice, but, even where they do not have the right to give notice, notice from a claimant may be relevant to determining whether an insurer was

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[86] *Progressive Ins. Co. v. Johnson*, 256 Ga. 713, 352 S.E.2d 760 (1987) (finding fact question as to notice where insured told agent about injuries when there was no mention of a written notice requirement).

[87] Paul R. Koepff, et. al., 4-31 *Law of Liability Insurance* § 31.07; *but see, e.g., California Shoppers Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1 (1985); *Bailey v. Universal Underwriters*, 258 Or. 201 (1970).

[88] *Nat'l Union Fire Ins. Co. v. Liberty Mut. Ins. Co.*, 234 F. App'x 190, 193 (5th Cir. 2007) (recognizing that "you" refers to the named insured).

[89] *Wausau Underwriters Ins. Co. v. QBE Ins. Corp.*, 496 F. Supp. 2d 357, 361 (S.D.N.Y. 2007) ("Because the declarations list Kel-Tech as the named insured, the notice policy applies to them, not to additional insureds.").

[90] *Liberty Ins. Underwriters, Inc. v. Great Am. Ins. Co.*, No. 09 Civ. 4912 (DLC), 2010 U.S. Dist. LEXIS 97722, at *15 (S.D.N.Y. Sept. 17, 2010).

[91] *Id.* (additional insured has independent duty to provide notice of an occurrence); *Travelers Cas. & Sur. Co. v. Stewart*, No. 1:14-cv-0837-AT, 2015 U.S. Dist. LEXIS 180902, at *17-19 (N.D. Ga. Aug. 7, 2015) ("In order to expressly elect coverage as an unnamed additional insured under an insurance policy after being named as a defendant in a suit for damages, the purported insured must typically forward a copy of the complaint and summons to the insurer. Notice of the lawsuit provided to the insurance company by someone other than the purported insured is insufficient to constitute an election of coverage by the additional insured.") (internal citations omitted); *but see Wausau Underwriters*, 496 F. Supp. 2d at 361 ("When an insurance policy places the burden of notice upon a named insured, an additional insured may rely upon the named insured's notice to the insurer for compliance of any notice obligation."); *Leventhal v. Am. Bankers Ins. Co.*, 159 Ga. App. 104, 105-06, 283 S.E.2d 3, 5 (Ga. App. 1981) (employee of named insured entitled to rely on named insured's notice).

prejudiced by an insured's late notice.[92] Regardless, the timeliness of the claimant's notice should be evaluated under the same standard as the timeliness of an insured's notice.[93] Further, as with notice by an insured, notice of an occurrence or offense does not address or excuse the separate requirement to provide notice of claims and suits.[94]

E. To Whom Must Notice Be Given?

The issue of who can receive notice on behalf of an insurer frequently arises when an insured provides notice to a person or entity other than the insurer and that person or entity does not forward notice onto the insurer or otherwise delays notice.[95] In those circumstances, addressing questions of agency and authority may be necessary. These questions are potential pitfalls for unsophisticated insureds in particular, as there is often confusion or misguided assumptions concerning who an insurance intermediary represents.

Thus, the first question to be addressed is whether an insurance intermediary is the insurer's agent or an independent insurance agent or insurance broker. Facts bearing on whether an insurance intermediary is the insurer's agent or an independent insurance agent or broker include whether the insurance intermediary sells insurance for multiple insurers, the reliance between the insured and the insurance intermediary, and any agreements between the insurer and the insurance intermediary.[96] Where an insurance intermediary is an independent insurance agent or broker, courts generally recognize that the independent insurance agent or broker only represents the insured and that notice to an independent insurance agent or broker is insufficient.[97]

However, even if an insurance intermediary is an independent insurance agent or broker, there are certain circumstances where notice to an independent insurance agent or broker may constitute notice to the insurer.[98] The policy may specify that notice can be provided to the insurer or an independent insurance agent, even if the independent insurance agent does not represent the

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[92] Paul R. Koepff, et. al., 4-31 *Law of Liability Insurance* § 31.07.
[93] *Id.* at §§ 31.07, 31.16.
[94] *Id.* at §§ 31.07, 31.16, 31.19.
[95] Allan D. Windt, *Insurance Claims and Disputes* § 1:5 (2013)
[96] *Landmark Am. Ins. Co. v. Deerfield Constr., Inc.*, No. 15 C 1785, 2017 U.S. Dist. LEXIS 5493, at *28 (N.D. Ill. Jan. 12, 2017) ("in determining whether an insurance intermediary is an agent or a broker, Illinois courts consider four factors: (1) who put the agent in motion; (2) who controls the agent's actions; (3) who pays the agent; and (4) whose interest does the agent represent.") (internal quotations omitted); *European Bakers, Ltd. v. Holman*, 177 Ga. App. 172, 174, 338 S.E.2d 702, 704 (1985) (insurance intermediary represented the insured where the insured testified that it considered the intermediary to be the insured's agent and when intermediary "testified that he was an independent insurance agent who represented several insurance companies; . . . selected which insurance company to use; . . . reviewed [the insured's] audits and made recommendations about coverage; . . . knew [the insured] was relying on him [,] . . . acted as [the insured's] adviser on coverage he thought [the insured] needed")
[97] *Owners Ins. Co. v. Gordon*, No. 1:07-CV-0369-JFK, 2008 U.S. Dist. LEXIS 14663, at *28 (N.D. Ga. Feb. 26, 2008) ("Independent insurance agents or brokers are generally considered the agent of the insured, not the insurer."); *Gershow Recycling Corp. v. Transcon. Ins. Co.*, 22 A.D.3d 460, 462, 801 N.Y.S.2d 832, 833 (App. Div. 2005) ("It is well settled that notice to a broker cannot be treated as notice to the insurer since the broker is deemed to be the agent of the insured and not the carrier").
[98] *Lee v. Mercury Ins. Co.*, 808 S.E.2d 116 (Ga. Ct. App. 2017) ("While an independent insurance agent or broker is normally considered the agent of the insured, it can also, depending on the specific facts of each case, be a dual agent for both the insurer and the insured.").

insurer.[99] Additionally, the course of dealing between the insured and the insurer or between the insurer and the independent insurance agent or broker, and prior notice in particular, may estop the insurer from denying an agency relationship and, thus, the sufficiency of notice sent by the insured to the otherwise independent agent or broker.[100] Further, agency agreements may be a source of authority that notice to an independent agent or broker is notice to the insurer.[101]

If an agent is found to be an insured's agent, then the question of authority must be addressed. The key inquiries for authority "are (1) whether and to what extent that agent was authorized to receive notice on behalf of the insurer and (2) whether the agent was acting within the scope of its authority when it received the notice."[102] There may be per se circumstances going either way, such as when notice is provided to a general agent (sufficient)[103] or notice is provided to a soliciting agent (insufficient).[104] Insurers can also manage the authority of its agents by specifying in the policy that notice should only be given to the insurer directly,[105] but, even then, an insurer's agent that does not have authority to receive notice but nonetheless forwards notice onto the insurer should provide the insurer with sufficient actual notice to avoid a late notice problem for the insured.[106]

III. When Does Late Notice Jeopardize Coverage?

As mentioned above, prompt notice of a loss or claim gives the insurer an opportunity to investigate while the facts and potential witnesses' memories are still fresh[107]; gives the insurer an

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[99] *Se. Express Sys.*, 224 Ga. App. at 700, 482 S.E.2d at 435 ("When the terms of the policy or instructions stamped upon the face of a liability policy instruct the insured that it is to provide notice of suit, either to the independent insurance agent or the insurer, such delegation of apparent authority, notwithstanding the independent contractor relationship, will estop the insurer to deny any notice which was given to the independent agent under its instructions.").

[100] *S. Cleaning Serv. v. Essex Ins. Co.*, 209 So. 3d 446, 451-53 (Ala. 2016) (finding fact question concerning independent insurance agent's apparent authority where all communications with the insurer (including prior notice) were routed through the independent insurance agent, the policy identified the independent insurance agent as "agent," and the only contact information listed was for the independent insurance agent); *Ill. Founders Ins. Co. v. Barnett*, 304 Ill. App. 3d 602, 604, 237 Ill. Dec. 605, 607, 710 N.E.2d 28, 30 (1999) ("a course of dealing between an insurer and its broker estops the insurer from denying an agency relationship between the two entities and estops the insurer from denying coverage based on notice sent to the broker.").

[101] *Scottsdale Ins. Co. v. No Punches Pulled Sec., LLC*, No. 1:09-CV-2165-TWT, 2011 U.S. Dist. LEXIS 93512 (N.D. Ga. Aug. 19, 2011) (agency agreement between independent insurance agent or broker and insurer's managing general agent sufficient to impute independent insurance agent or broker's knowledge to the insurer); *S. Cleaning Serv.*, 209 So. 3d at 451-53 (agency agreement did not end inquiry).

[102] Paul R. Koepff, et. al., 4-31 *Law of Liability Insurance* § 31.15.

[103] *Greensboro v. Reserve Ins. Co.*, 70 N.C. App. 651, 321 S.E.2d 232 (1984) (notice to agent working as countersigning agent and general agent for insurer was notice to the insurer).

[104] *Dodds v. Hanover Ins. Co.*, 317 Ark. 563, 880 S.W.2d 311 (1994) (knowledge of insurer's soliciting agent not imputed to insurer); Allan D. Windt, *Insurance Claims and Disputes* § 1:5 (2013) (*quoting id.*)

[105] *See generally Desardouin v. State Farm Fire & Cas. Co.*, No. 126905, 2006 Conn. Super. LEXIS 2743, at *4 (Super. Ct. Sept. 7, 2006) ("An insurance company may, pursuant to policy provisions, restrict the authority and powers of an agent, unless the company has by its words or conduct enlarged the agent's authority.").

[106] *Grinnell Mut. Reinsurance Co. v. Jungling*, 6654 N.W.2d 530, 542 (Iowa 2002) (failure to comply with provision requiring notice directly to the insured excused where insured notified insured's agent who, after consult with the insurer, advised there was no coverage); Allan D. Windt, *Insurance Claims and Disputes* § 1:5 (2013).

[107] Eugene R. Anderson, Richard G. Tuttle, and Susannah Crego, *Draconian Forfeitures of Insurance: Commonplace, Indefensible, and Unnecessary*, 65 Fordham L. Rev. 825, 834 (1996).

opportunity to determine whether and to what extent coverage exists under the policy[108]; and allows insurers to establish adequate reserves for losses and calculate future premiums.[109]

Although notice provisions serve important objectives, a majority of courts decline to strictly enforce notice as a "condition precedent" to coverage. Instead, these courts hold that late notice must prejudice the insurer to permit a denial of coverage.[110] There are, however, a minority of jurisdictions, such as the District of Columbia, Alabama, and Illinois, that strictly enforce notice as a condition precedent to coverage, and no showing of prejudice is required by the insurer to deny coverage.[111] As a further nuance, there are jurisdictions, such as Arkansas, where a showing of "no prejudice" is required unless notice is *not* an express condition precedent to coverage.[112] In those jurisdictions, where notice is not a condition precedent to coverage, the insurer has the burden of proving it was prejudiced by the late notice to deny coverage.[113] The notice-prejudice rules vary even further for claims-made policies, as discussed further below.

Though typically established by judicial rulings, several states have adopted notice-prejudice rules by statute or regulation.[114] For example, New York courts had long held that state law did not require prejudice in order for an insurer to rely upon late notice as a defense to coverage.[115] However, New York enacted New York Insurance Law § 3420, which imposes a notice-prejudice rule for policies issued on or after January 17, 2009. The statutory rule, however, is only applicable to policies issued or delivered in the State of New York.[116]

A. Minority View: Prejudice Not Required to Deny Coverage.

The minority view reasons that timely notice is a condition precedent to coverage and an insured's unreasonable or unexcused failure to timely provide notice of a claim is a breach of the contract. Whether the insurer was prejudiced is immaterial to coverage.[117]

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[108] *Id.*

[109] *West Bend Co. v. Chiaphua Indus., Inc.*, 112 F. Supp. 2d 816, 822 (E.D. Wis. 2000), *aff'd* 11 F. App'x 616 (7th Cir. 2001) (quoting Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 4.02[a] (10th Ed. 2000)).

[110] *See, e.g., Sherwood Brands, Inc. v. Great Am. Ins. Co.*, 13 A.3d 1268, 1270 (Md. 2011); *Stresscon Corp. v. Travelers Prop. Cas. Co. of Am.*, 2013 COA 131, ¶ 26 (Colo. Ct. App. 2013) ("Colorado does not strictly enforce notice-of-claim language in insurance policies unless the lack of notice from the insured prejudiced the insurer."), *rev'd on other grounds by* 370 P.3d 140 (Colo. 2016); *Ansul, Inc. v. Emp'rs Ins. Co.*, 2012 WI App 135, ¶ 24 (Wis. Ct. App. 2012) (notice provided within one year of time required by policy only defeats coverage if the insurer is prejudiced) (citing Wis. Stat. § 631.81); *Chartis Specialty Ins. Co. v. RCI/Herzog*, No. C11-0437JLR, 2012 U.S. Dist. LEXIS 87803, 2012 WL 2389999, at *10 (W.D. Wash. June 25, 2012) (insurer must "show that the late notice … caused it actual and substantial prejudice") (quotation omitted).

111 *See, e.g., Nat'l R.R. Passenger Corp. v. Lexington Ins. Co.*, 445 F. Supp. 2d 37, 43 (D.D.C.2006). *Travelers Indem. Co. v. Miller*, 86 So. 3d 338 (Ala. 2011); *Allstate Ins. Co. v. Walker*, 562 S.E.2d 267, 268 (Ga. Ct. App. 2002);

[112] *Providence of Washington Ins. Co. v. Yellow Cab X Co. of Fayettville*, 331 F. Supp. 286 (W.D. Ark. 1971).

[113] *Id.*

114 *See, e.g.*, Mass Gen. Laws. Ch. 175, sec. 112 (2010); 20 Mo. C.S.R. 100-1.020 (establishing notice-prejudice rule).

[115] *See, e.g., Great Canal Realty Corp. v. Seneca Ins. Co.*, 833 N.E.2d 1196, 1197 (NY 2005) (finding that insured failure to satisfy the notice requirement, a condition precedent to coverage, defeats coverage).

[116] *Indian Harbor Ins. Co. v. City of San Diego*, 586 Fed. Appx. 726 (2d Cir. 2014).

[117] *Hartford Cas. Ins. Co. v. ContextMedia, Inc.*, 65 F. Supp. 3d 570 (N.D. Ill. 2014) (applying Illinois law and finding that prejudice is not vital to a determination that an insured's delay in providing notice of an occurrence to its insurer was unreasonable); *Housing Enter. Ins. Co., Inc. v. AmTrust Ins. Co. of Kansas, Inc.*, 212 F. Supp. 3d 1330 (N.D. Ga.

In jurisdictions where notice is a condition precedent to coverage, the courts will first assess whether the delay in providing notice was unreasonable or unjustified.[118] In *Hartford Insurance Company v. ContextMedia, Inc.*,[119] the court held that the insured's failure to notify Hartford of the threat of litigation alleging several business torts, received over a year prior to the suit filed against it, was unreasonable.[120] The court considered five factors in determining whether notice was provided within a reasonable amount of time: "(1) the specific language of the policy's notice provision, (2) the insured's sophistication in commerce and insurance matters, (3) the insured's awareness of an event that may trigger insurance coverage, (4) the insured's diligence in ascertaining whether policy coverage is available, and (5) prejudice to the insurer."[121] The court further stated that "these factors may be considered and, though relevant, are not individually determinative.[122] The language in the policy required notice "as soon as practicable," and the court reasoned that there was no reason insured could not provide notice when it received a letter that characterized its behavior as egregious and clearly threatened to pursue civil and criminal penalties.[123] Though reasoning that, "prejudice is not vital to a determination of unreasonableness," the court concluded that Hartford did suffer prejudice because it was deprived of the ability to investigate and resolve the claims prior to suit.[124] Though not strictly required, a finding of prejudiced was one of several factors used to asses if the delay itself was reasonable or justified.

B. Majority View: Coverage Denied Only Upon Showing of Prejudice.

The courts in a substantial number of jurisdictions follow the "notice-prejudice rule," which holds that for an insurer to avoid liability on account of late notice requires a showing that the insurer was actually prejudiced by the insured's omission or delay.[125] These courts reason that,

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2016) (Where notice is a condition precedent to coverage under Georgia, the insurer need not show it was prejudiced by that the failure to receive timely notice);*Feld v. Fireman's Fund Insurance Company*, 206 F. Supp. 3d 378 (D.D.C. 2016) (applying Dist. Col. law) (under District of Columbia law, insurer is not required to demonstrate actual prejudice before denying coverage on basis of insured's failure to comply with contractual notice of claim provision).; ***Pittman v. State Farm Fire & Cas. Co***., 868 F. Supp. 2d 1335 (M.D. Ala. 2012) (an insurer does not have to prove prejudice under Alabama law when an insured breaches a condition precedent to coverage.); *Country Mut. Ins. Co. v. Livorsi Marine, Inc*., 222 Ill. 2d 303, 305 Ill. Dec. 533, 856 N.E.2d 338 (2006) (Commercial general liability (CGL) insurer that received delayed notice of lawsuits did not need to prove that it was prejudiced by the delay in order to be relieved of its duty to defend);*Gully & Assocs., Inc. v. Wausau Ins. Cos*. 536 So 2d 816. (La App 1st Cir. 1988) (insurer had no duty to reimburse insured for costs and fees incurred in defense of claim prior to date on which insured notified insurer of claim, notwithstanding contention that insurer was not prejudiced by late notification, where policies required insured to immediately forward demand, summons, notice or other process to insurer, and issue of prejudice to insurer was irrelevant in that insurer was not attempting to deny coverage).

[118] *See, e.g., Travelers Indem. Co. of Conn. v. Miller*, 86 So. 3d 338 (Ala. 2011)(concluding that whether notice of the occurrence or claim was given to the insurer within a reasonable time rests on the reasonableness of the delay, and prejudice to the insurer from any such delay in providing notice is not a factor.);

[119] 65 F. Supp. 3d 570 (N.D. Ill. 2014).

[120] *Id*. at 573.

[121] *Id* at 579.

[122] *Id*.

[123] *Id*. at 579-80.

[124] *Id*. at 583.

[125] *Goddard v. State Farm Mut. Auto. Ins. Co*., 992 F. Supp. 2d 473 (E.D. Pa. 2014), *appeal dismissed*, (3d Cir. 2014) ("[u]nder Pennsylvania law, insured's failure to cooperate with insurer must be substantial, and will only serve as defense where insurer has suffered prejudice because of breach.")*;Estate of Bratton v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 215 F.3d 516 (5th Cir. 2000) (insurer was prejudiced by claimant's extraordinary 19 year delay); *Hudson Spec. Ins. Co. v. Brash Tygr, LLC*, 870 F. Supp. 2d 708 (W.D. Mo. 2012)(when an insured fails to give the

if an insurer is not prejudiced, the aims of the notice provision have not be thwarted.[126] For example, in *Emergency Medical Services, Inc. v. St. Paul Mercury Insurance Co.*,[127] the insurer did not receive notice until after the underlying lawsuit was settled. That court, "declined to further assess the sufficiency of [insured's] notice to St. Paul because even if it were insufficient under the Policy, St. Paul cannot show prejudice due to the lack of notice."[128] The court went on to reason that, because the insured was "not asking to be reimbursed for the amount it paid to settle the Underlying Lawsuit and was only seeking reimbursement of its attorneys' fees and costs, St. Paul could not show it was prejudiced by an inability to choose a trial strategy or challenge liability."[129] Moreover, St. Paul could not demonstrate it would have spent less than the insured defending the lawsuit.[130]

1. When Is an Insurer Prejudiced By Late Notice?

The question of prejudice is generally reserved for the trier of fact. In some jurisdictions the insurer bears the burden of proving that it has been prejudiced by late notice in order to defeat coverage.[131] Other jurisdictions require the policyholder to provide the insurer did not sustain any prejudice.[132] A few courts have taken the view that there is a rebuttable presumption of prejudice raised by such delay, which may be rebutted by an insured's showing of an absence of prejudice.[133]

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requisite notice under Missouri law, an insurer may assert that the failure to give notice is a material breach of the contract; however, an insured will not be barred from recovery based upon the breach of the notice requirement unless the insurer can show it has been prejudiced by the insured's noncompliance with the policy provisions.); *Terhune Homes, Inc. v. Nationwide Mut. Ins. Co*., 20 F. Supp. 3d 1074 (W.D. Wash. 2014) (an insurer has the burden of proving actual and substantial prejudice from the breach of a notice provision); *Tush v. Pharr*, 68 P.3d 1239 (Alaska 2003) (absent prejudice there is no justification for excusing the insurer from its obligations under the policy)); *Navigators Specialty Ins. Co. v. Nationwide Mut. Ins. Co*., 50 F. Supp. 3d 1186 (D. Ariz. 2014) (Under Arizona law, an insurer may only assert untimely notice as a coverage defense when it has been prejudiced by the timing of that notice.); *Assoc. Indem. Corp. v. Dow Chem. Co*., 248 F. Supp. 2d 629 (E.D. Mich. 2003). (liability insurer was prejudiced by insured chemical manufacturer's failure to give timely notice of environmental liability claim); *Leamington Co. v. Nonprofits' Ins. Ass'n*, 615 N.W.2d 349 (Minn. 2000) (submission of proof of loss 17 days after expiration of 60day period during which notice was required to be submitted pursuant to terms of liability policy did not bar recovery under policy, where no prejudice to insurer resulted from delay); *Atlantic Cas. Ins. Co. v. Greytak*, 2015 MT 149, 350 P.3d 63 (Mont. 2015) (liability insurer that does not receive timely notice according to the terms of an insurance policy must demonstrate prejudice from the lack of notice to avoid coverage)

[126] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Co. LLC*, 735 F.3d 539 (7th Cir. 2013) (under Indiana law, an insured's inexcusable failure to comply with the notice provisions in a liability insurance policy allows an insurer to disclaim coverage only if the insurer is harmed, or prejudiced, by the late notice; late notice does create a presumption of harm, thereby shifting to the insured the burden of producing "some evidence," but probably does not shift the burden of persuasion).;

[127] 495 F.3d 999 (8th Cir. 2007).

[128] *Id*. at 1008.

[129] *Id.*

[130] *Id.*

[131] COUCH ON INSURANCE § 193:49 (3d ed. 2013); *see also* *Terhune Homes, Inc. v. Nationwide Mut. Ins. Co*., 20 F. Supp. 3d 1074 (W.D. Wash. 2014) (noting that, under Washington law, an insurer has the burden of proving actual and substantial prejudice from the breach of a notice provision); *Grubaugh v. Central Progressive Bank*, 3 F. Supp. 3d 547 (E.D. La. 2014) (The general rule in Louisiana is that where the requirement of timely notice is not an express condition precedent to insurance coverage, the insurer must demonstrate that it was sufficiently prejudiced by the insured's late notice.)

[132] *See Ferrando v. Auto-Owners Mut. Ins. Co*., 781 N.E.2d 927 (Ohio 2002).

[133] *Milwaukee Guardian Ins., Inc. v. Reichhart* 479 Ill App 3d 1340 (Ill. App. 1985); *Allstate Ins. Co. v. Kepchar* 592 N.E.2d 694 (Ind. App. 1992); *Shelter Mut. Ins. Co. v. Barron*, 615 N.E.2d 503 (Ind. App 1993).

Courts often conclude an insurer has been prejudiced when there is evidence that the outcome or result was different (to the insurer's detriment) from that which the insurer could have achieved had it been timely notified. In *Associated Indemnity Corp. v. Dow Chemical Co.*,[134] the court found prejudice when Dow provided late notice of environmental liabilities to its insurers.[135] The notice provisions in Dow's policies generally required notice to be sent to the insurer "as soon as practicable" after Dow learned of a covered occurrence.[136] After finding that notice was late, the court held that the defendant insurance companies had the burden of demonstrating that there was "actual material prejudice that was caused by the delay."[137] The court concluded the insurers were prejudiced as a result of Dow's late notice, taking into account the following factors: (1) between the time Dow learned of the occurrence and notice to the insurers, Dow kept poor records of many of its remediation efforts at all of its sites, thus preventing the insurers from determining which costs were reasonable; (2) one witness who potentially had information about a particular site had died; (3) several records regarding the release of chemicals at sites were likely discarded due to Dow's record retention policy; and (4) the insurers were prevented from participating in settlement negotiations for environmental claims.[138] The court noted that the insurance companies were essentially foreclosed from guiding the claims and were therefore prejudiced. Conversely, in *Trumble Steel Erectors, Inc. v. Moss*,[139] the insured sought coverage for a claim stemming from a crane accident. Though the insured was prevented from conducing its normal investigative procedures the day of the accident, the insurer was not prejudiced by the insured's late notice because the insurer had "an opportunity to rely on and collaborate with three other investigating entities, [and] it pointed to no significant deficiencies in those investigations other than that they were presumably objective rather than aimed at decreasing liability, and it had the ability to complete its own discovery and investigation soon after legal proceedings against the insured were initiated and well before the trial date."[140]

These examples demonstrate that the question of whether an insurer has been prejudiced is often a highly factual inquiry. Moreover, courts require something more than generalities or assumptions in order to demonstrate prejudice.

IV. Recent Developments with "Late Notice" Case Law for Claims-Made Policies.

While issues with "late notice" have been litigated for decades nationwide, recent cases from New Jersey, Wisconsin, and Maryland illustrate how courts continue to struggle with applying notice provisions. In particular, courts have recently (depending on one's standpoint)

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[134] 248 F. Supp. 2d 629 (E.D. Mich. 2003).
[135] *Id*. at 632-33.
[136] *Id*. at 645.
[137] *Id*. at 647.
[138] *Id*. at 650.
[139] 304 F. App'x 236 (5th Cir. 2008).
[140] *Id.* at 244; *see, also, Keenan Hopkins Schmidt & Stowell Contractors, Inc. v. Cont'l Cas. Co*., 653 F. Supp. 2d 1255 (M.D. Fla. 2009) (under Florida law, CGL insurer was not prejudiced by insured's allegedly late notice of claim, and thus could not rely on late notice to support denial of coverage, given insurer's ability, despite late notice, to investigate claim sufficiently to permit it to deny claim on other grounds.); *Transcontinental Pipe Line Corp. v. National Union Fire Ins. Co. of Pittsburgh, Penn*., 378 F. Supp. 2d 729 (M.D. La. 2005) (finding no prejudice where at the time insurer received notice of litigation against owner, there had been no serious settlement negotiations, and there was no evidence that attorneys representing owner had failed to properly prosecute case).

clarified or muddied the rules governing the application of the "notice-prejudice" rule to claims-made and claims-made-and-reported policies.

For instance, the Supreme Court of New Jersey's recent opinion in *Templo Fuente De Vita Corp. v. National Union Fire Insurance Company of Pittsburgh* represents a rather rigid refusal to apply the "prejudice" requirement for late notice issues involving claims-made policies.[141] There, the supreme court concluded that an insurer was not required to show actual prejudice to deny coverage for a late-reported claim under a "claims-made" policy. The court reached this conclusion even though the claim was reported during the policy period and the insurer was claiming late notice simply due to the insurer's failure to report the claim "as soon as practicable."

In *Templo*, the plaintiffs, Templo Fuente De Vida Corp. and Fuente Properties, Inc., retained Morris Mortgage, Inc. to help them find sources for funding the purchase of property. The plaintiffs entered into a purchase agreement with the seller of the property, and Morris indicated it had located sources of funding, including Merl Financial Group, Inc. The closing date came, but none of the sources of funding identified by Morris, including Merl Financial, was able to fund the loan. The sellers pulled out of the deal as a result. Plaintiffs sued Merl, among other defendants, on February 21, 2006.

Prior to the lawsuit, Merl acquired a $1 million Directors, Officers, and Private Company Liability Insurance Policy from National Union Fire Insurance Company of Pittsburgh, which was in effect from January 1, 2006 through January 1, 2007. The policy was a "claims-made" policy and required as a condition precondition to coverage that the insured provide "written notice to the Insurer of any Claim made against an Insured as soon as practicable." Merl, however, did not provide notice of suit until August 28, 2006, which was within the policy period, but was more than six months after being served with the complaint in the lawsuit. National Union denied coverage, claiming, among other things, that notice was not given to National Union "as soon as practicable." The plaintiffs and Merl entered into a settlement, and Merl assigned its rights under the National Union Policy to the plaintiffs.

The trial court granted summary judgment to National Union, finding that Merl had failed to provide National Union notice of the claims "as soon as practicable." The decision was upheld on appeal. Both the trial and intermediate appellate court rejected the plaintiffs' argument that National Union had to show it was prejudiced as a result of Merl's late notice, noting that the requirement of actual prejudice does not apply to "claims-made" policies.

The New Jersey Supreme Court affirmed the decisions below. The court focused on the distinction between "claims made" and "occurrence" policies, noting that in an "occurrence" policy "notice provisions are written 'to aid the insurance carrier in investigating, settling, and defending claims."[142] However, with respect to "claims-made" policies, "the prompt notice requirement and the requirement that the claim be made within the policy period in 'claims made' policies 'maximiz[e] the insurer's opportunity to investigate, set reserves, and control or participate in negotiations with the third party asserting the claim against the insured' and 'mark

[141] 224 N.J. 189 (2016).
[142] *Id.* at 202-03 (quoting *Zuckerman v. Nat'l Union Fire Ins. Co.*, 100 N.J. 304, 495 A.2d 395 (1985)).

the point at which liability for the claim passes to an ensuing policy, frequently issued by a different insurer, which may have very different limits and terms of coverage.'"[143]

The court noted that the requirement of prejudice was imposed in prior cases in occurrence policies where the "'public interest' required the insurance company to show prejudice to 'forfeit coverage" for an insured's breach of notice provisions of the policy."[144] This requirement "reflected that, for individual members of the public, insurance policies constitute adhesion contracts to which our courts must 'give special scrutiny . . . because of the stark imbalance between insurance companies and insureds in their respective understanding of the terms and conditions of insurance policies.'"[145] As to "claims-made" policies entered between sophisticated parties, however, the requirement of "prejudice" to avoid coverage for "late notice" has no application. In such policies, the policy expressly requires the claim to be asserted during the policy period, and therefore strictly enforcing such term conforms with the "reasonable expectations" of the insured with respect to coverage.[146]

Applying this case law, the court concluded that (1) Merl breached the policy's late notice provision and (2) National Union was not required to show prejudice as a result of this breach.[147] As to whether the late notice provision was breached, the court noted that plaintiffs conceded that Merl did not provide notice "as soon as practicable," and, moreover, plaintiffs failed to show any excuse for Merl's six-month delay in notifying National Union of the claim.[148] As to the issue of prejudice, the court noted that Merl was a sophisticated party that obtained the policy through a broker, who procured the policy on its behalf. Indeed, claims-made policies are treated differently from occurrence policies precisely because the insureds procuring such policies are generally more sophisticated.[149] The equitable concerns governing the requirement of prejudice are inapplicable "where the policy holders are particularly knowledgeable insureds, purchasing their insurance requirements through sophisticated brokers."[150]

The court was careful to note that it was not making "a sweeping statement about the strictness of enforcing the 'as soon as practicable' notice requirement in 'claims made' policies generally," but was instead enforcing "the plain and unambiguous terms of a negotiated Directors and Officers insurance contract entered into between sophisticated business entities.[151] The court recognized that "a different conclusion may have been reached in other jurisdiction, but our jurisprudence has never afforded a sophisticated insured the right to deviate from the clear terms of a 'claims made' policy."[152]

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[143] *Id.* at 203 (quoting *Zuckerman*, 100 N.J. at 323-24).
[144] *Id.* at 203 (quoting *Cooper v. Gov't Emp. Ins. Co.*, 51 N.J. 86, 94, 237 A.2d 870 (1968)).
[145] *Id.* at 204 (citing *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 594, 775 A.2d 1262 (2001)).
[146] *Id.* at 205 (citing *Zuckerman*, 100 N.J. at 324 & *Werner Indus., Inc. v. First State Ins. Co.*, 112 N.J. 30, 32, 548 A.2d 188 (1988)).
[147] *Id.* at 209-10.
[148] *Id.* at 206-07.
[149] *Id.* at 208-09.
[150] *Id.* (internal quotations omitted).
[151] *Id.* at 210 (noting that "We decline plaintiffs' invitation to read the insurance policy at issue as a contract of adhesion, or 'engage in a strained construction to support the imposition of liability' or write a better policy for the insured than the one purchased.'") (quoting *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 238, 948 A.2d 1285 (2008)).
[152] *Id.*

Templo is a remarkable decision in several respects. First, the decision does not distinguish between a failure to report a claim within the policy period and a claim that is timely reported within the policy period, but not reported "as soon as practicable." An argument can be made that a breach of the "as soon as practicable" language is indistinguishable from the breach of analogous notice language commonly found in occurrence policies, such that an insurer should be required to demonstrate prejudice where the claim was otherwise reported within the policy period. Indeed, the Massachusetts Supreme Judicial Court and other jurisdictions have drawn the line here, holding that while language requiring a claim to be reported within the policy period should be strictly construed, a breach of the "as soon as practicable" or other similar requirements should be subject to the requirement of showing prejudice for the insurer to avoid coverage.[153]

The second interesting feature is the court's reliance upon the apparent bargaining position of the parties. Other states apply the "prejudice" requirement irrespective of the apparent negotiating position of the parties in recognition of the fact that the language in insurance policies is often not open to bargaining and is pre-selected by the insurer.[154] But, here, the court declined to apply a bright line rule, suggesting that a "prejudice" requirement is only appropriate if the insured is in an inferior bargaining position from the insured. *Templo* may lead to inconsistent decisions among lower New Jersey courts as to exactly when "prejudice" is required to be demonstrated for a breach of a "as soon as practicable" provision in an insurance policy, resulting on differing applications of policy language depending on the level of sophistication of the insured.

The lengths to which some courts will go in addressing whether the prejudice requirement applies to "claims-made" policies was recently demonstrated in the Wisconsin Supreme Court in *Anderson v. Aul*.[155] In *Aul*, the plaintiffs Melissa and Kenneth Anderson notified their attorney, Thomas Aul, that they were dissatisfied with the legal representation he had provided. They provided written notice to Mr. Aul on December 23, 2009 claiming that he had an unwaivable conflict of interest in connection with his representation of the Andersons in the purchase of commercial property. They contended that they were damaged as a result of Mr. Aul's representation and demanded he pay them $117,125.

At the time he received the letter he was insured under a "claims-made-and-reported" professional liability policy issued by Wisconsin Lawyers Mutual Insurance Company ("WILMIC"), which was in effect from April 1, 2009 to April 1, 2010. The policy required Aul to report the claim during the policy period. Aul, however, did not report the claim to WILMIC until March 2011, well after the policy had expired. Aul was sued in March 2012 and WILMIC moved to intervene and undertook Aul's defense under a reservation of rights. WILMIC also sought a declaratory judgment in the action that its policy did not cover Aul due to Aul's late notice.

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[153] *See, e g., Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862, 865 (1990) (noting that statute requiring showing of prejudice "applies only to the 'as soon as practicable' type of notice and not to the 'within the policy year' type of reporting requirement"); *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 382 (Tex. 2009) (obligation to provide insurer with notice of a claim under claims-made policy "as soon as practicable" was not a material part of the bargained-for exchange and insurer was required to show that it was prejudiced by denial before denying coverage).

[154] *See, e.g., Prodigy Commc'ns Corp.*, 288 S.W.3d at 375-76 (applying prejudice requirement to claim made under policy purchased by company following merger).

[155] *Anderson v. Aul*, 361 Wis. 2d 63, 862 N.W.2d 304 (2015).

The trial court granted WILMIC's motion for summary judgment that there was no coverage because Aul did not report the loss during the policy period. Though the court concluded there was nothing in the record indicating that WILMIC was prejudiced by the late notice, it noted that prejudice is not required to be demonstrated with respect to claims-made policies. On appeal, the court of appeals reversed, noting that both Wisconsin statutory and common law require the trial court to "determine whether untimely notice prejudiced an insurer; the finding of untimeliness is not solely dispositive."[156] The court of appeals concluded that because the untimely reporting of the claim "did not hinder WILMIC's 'ability to investigate, evaluate, settle [the] claim, determine coverage, or present an effective defense," WILMIC had not been prejudiced.[157]

The Wisconsin Supreme Court reversed. The court noted that the requirement that all claims made against WILMIC be reported during the policy period was set forth in multiple locations throughout the policy, including language a capitalized warning in boldface to the insured to report the claim promptly and before the policy expires. The court noted the purpose of this language is to "set the temporal boundaries of the policy's basic coverage terms, that is, to define the limits of the insurer's obligation."[158]

Though Wisconsin has notice-prejudice statutes requiring an insurer to sustain actual prejudice before denying coverage for late notice, the court concluded that the statutes are inapplicable to claims-made policies. The court reached this conclusion notwithstanding the fact the statutes broadly apply to "all insurance policies" and "every liability insurance policy" delivered in Wisconsin, respectively.[159]

While conceding that, "[o]n their face, these statutes can be read to prohibit an insurance company from denying coverage under a liability policy because notice of a claim was given after the end of the policy period, unless the insurance company was prejudiced by the delay," the court concluded that these statutes were nevertheless "not intended to supersede the reporting requirement specific to claims-made-and-reported policies."[160] The court noted that both statutes were enacted in the 1970s when "occurrence liability policies were predominant."[161] These statutes (as well as an earlier statute applying to automotive policies) were enacted as a response to case law from the 1930s, 1950s, and 1960s strictly applying policy notice requirements. Reviewing the legislative history, the court concluded that, in enacting the statutes, the legislature was referring to "the kind of notice provision that enables an insurance company to effectively investigate a claim, not to the reporting requirement in claims-made-and-reported policies."[162] The court noted

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[156] *Id.* at 310.
[157] *Id.*
[158] *Id.* at 316 (internal quotations omitted).
[159] *Id.* at 314-17. *See also* WISCONSIN STAT. § 631.81 (providing that "[p]rovided notice of proof of loss is furnished as soon as reasonably possible and within one year after the time it was required by the policy, failure to furnish such notice or proof within the time required by the policy does not invalidate or reduce a claim ***unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limit***) (emphasis added); Wisconsin Stat. § 632.26 (providing that, for liability insurance policies, "failure to give any notice required by the policy within the time specified does not invalidate a claim made by the insured if the insured shows that it was not reasonably possible to give the notice within the prescribed time and that notice was given as soon as reasonably possible").
[160] *Id.* at 316-17.
[161] *Id.* at 318.
[162] *Id.* at 321.

that the reporting requirement in claims-made-and-reported policies was not designed to assist the insurance company in investigating claims.

Conceding that the legislative history was unclear, the court nevertheless concluded that "if we interpret the notice-prejudice statutes to apply to the reporting requirement specific to claims-made-and-reported policies, we will in effect rewrite the terms such policies" and "frustrate the purpose of claims-made-and reported-policies."[163] Because the court did not "locate anything in the statutory text, the history of claims-made-and-reported policies, the statutory history, or the Committee materials indicating that the legislature intended to invalidate claims-made-and-reported policies," it ultimately concluded that interpreting Wisconsin's notice-prejudice statutes "to rewrite the fundamental terms WILMIC insurance policy would be unreasonable."[164]

While the court concluded the Wisconsin notice-prejudice statutes were inapplicable, it did take time to opine that, even if the statutes applied, WILMIC would still prevail because it was prejudiced by the insured's late notice. "[R]equiring an insurance company to provide coverage for a claim reported after the end of a claims-made-and-reported policy is per se prejudicial to the insurance company because it expands the grant of coverage provided by the insurance policy."[165] Premiums for claims-made-and-reported policies are set lower than those for comparable occurrence policies due to the limitation of coverage to the policy period. Requiring an insurance company to provide coverage for claims not reported within the policy period is prejudicial and would "defeat the fundamental premise of claims-made-and-reported policies."[166]

The *Aul* court's decision is logical and preserves the benefit of the bargain in claims-made-and-reported policies. However, the court engaged in herculean efforts to construe the Wisconsin notice-prejudice statutes as not applying to such policies, particularly given the lack of support for the court's position in the plain language of the statute, as well as the legislative history. And the court also buttressed its conclusion by opining that the breach of a notice provision in a "claims-made" policy is *per se* prejudicial as a matter of law. Given that a factual inquiry is ordinarily required to establish prejudice due to late notice, the court's pronouncement that all late notice is prejudicial under claims-made policies is a remarkable departure from precedent.

Other courts, however, have not been as willing as the Wisconsin Supreme Court to carve out an exemption for claims-made- policies from state notice-prejudice statutes, as highlighted by the Maryland Court of Appeals (Maryland's Supreme Court). In *Sherwood Brands, Inc. v. Great American Insurance Company*, the court concluded that, while a Maryland notice-prejudice statute was inapplicable to situations where a claim is not made within the policy period, the statute's requirement of actual prejudice applies by a "breach" by an insured of the requirement to report a claim during the period prescribed in the policy.[167] In reaching its decision, the Maryland Court of Appeals construed Maryland Code Ann., Ins. § 19-110, which provides that "[a]n insurer may disclaim coverage on a liability insurance policy on the ground that the insured . . . has breached the policy . . . by not giving the insurer required notice only if the insurer establishes . . . that the

[163] *Id.* at 321.
[164] *Id.* at 321, 324-25.
[165] *Id.* at 325.
[166] *Id.*
[167] 418 Md. 300 (2011).

lack of . . . notice has resulted in actual prejudice to the insurer."[168] The insured, Sherwood Brands, sought coverage from Great American under a D&O policy, effective May 1, 2007 to May 1, 2008, which required a claim to be both made or reported within the policy period, except in the case where notification of the claim is through a lawsuit or administrative proceeding filed during the policy period, in which case notice "shall be given as soon as practicable, but in no event later than ninety (90) days after the end of the Policy Period."[169]

Sherwood had a claim filed against it in the Commonwealth of Massachusetts Commission Against Discrimination by a plaintiff on December 11, 2007. That same plaintiff filed a related complaint in the Superior Court a few months later on March 28, 2008. Sherwood, however, didn't report the claim to Great American until October 27, 2008 – more than 90 days after the expiration of the policy. Great American denied coverage due to late notice.

Sherwood had another suit filed against it in an unrelated matter on October 17, 2007 in an Israeli District Court. Service was made on Sherwood in December 2007. Sherwood, however, did not notify Great American of the lawsuit until nearly a year later, on November 6, 2008, which also was more than 90 days after the expiration of the policy. Great American denied coverage for this second claim due to late notice.

Sherwood subsequently filed suit against Great American for coverage for both of these claims. The trial court granted Great American summary judgment on its late notice defense, holding that Great American was not required to show actual prejudice under Section 19-110 of the Maryland Insurance Code to deny coverage for the claims. Sherwood appealed to the Court of Special Appeals, but the Court of Appeals *sua sponte* granted certiorari to address the issue of whether Section 19-110 required a showing of prejudice.[170]

On appeal, Sherwood argued that Section 19-110 applied broadly to all liability policies, regardless of whether they were claims made or claims-made-and-reported policies and required a showing of prejudice. Conversely, Great American contended that the statute didn't apply to claims-made policies like the Great American policy at issue. The Court of Appeals rejected both arguments and instead adopted a middle approach, depending on whether the violation of the notice provision was a "breach" of a policy provision or a non-occurrence of a condition precedent to coverage.

In particular, the Court construed the Maryland notice-prejudice statute as only applying to "breaches" of the policy. Requiring a claim to be made against an insured during the policy period is a "condition precedent" to coverage, the violation of which is not a breach of the policy, but rather the "non-occurrence of a condition precedent" that "merely relieves the other party from performing under the contract/policy."[171] Because there is no "breach" of the policy under this circumstance, the statutory requirement that the insurer demonstrate actual prejudice is inapplicable. However, policy conditions as to when the insured must report the claim to the insurer – i.e., a requirement of notice within 90 days of the expiration of the policy – are not

[168] *Id.* at 303 (quoting MD. CODE ANN. INS. ART. § 19-110).
[169] *Id.* at 305.
[170] *Id.* at 309.
[171] *Id.* at 330.

conditions precedent to coverage and can be "breached" thereby triggering the statutory requirement of actual prejudice.[172] The court accordingly held that Section 19-110 "does not apply . . . to claims-made policies in which the act triggering coverage – usually notice of a claim or suit being filed against and served upon an insured under third-party liability policies – does not occur until after the expiration of the liability policy, as this non-occurrence of the condition precedent to coverage is not a "breach of the policy" as required by the statute.[173] Because the Great American policy's notice provision invoked by Great American involved the timing of the insured's reporting of the claim to Great American, it was not a condition precedent to coverage and Great American was required to demonstrate actual prejudice under the statute.[174]

The line drawing engaged in by the Maryland Court of Appeals is curious. One could easily argue that a breach of a provision requiring an insured to report claims during the policy period is a "condition precedent" to coverage, as it goes to the very heart of what "claims-made-and-reported" policies are about: setting the temporal scope of time during which an insurer will provide coverage for claims made and reported during that period. If the purpose of a "claims-made" policy is for an insurer to "close the books" on a policy year shortly after the policy year ends, the decision in *Sherwood* upends this purpose substantially. Indeed, the decision in *Sherwood* is akin to offering insureds "tail coverage" as a matter of law under claims-made-and-reported policies, where insureds can report a claim well after the reporting period and still be entitled to coverage, unless the insurer is able to come back and demonstrate prejudice. A recent decision by the Court of Appeals bears this out, as the court applied the statute to require an insurer with a claims-made-and-reported policy to demonstrate prejudice where the claim was reported to it more than *two years* after the policy's expiration.[175]

The decisions in *Templo*, *Aul*, and *Sherwood* exhibit the great difficulty courts have in addressing whether an insurer claiming a breach of a notice provision in a claims-made policies is required to show actual prejudice. Each of the courts reached different results based on differing rationales, with some going to extreme lengths in the process. *Templo* suggests no showing of prejudice is ever appropriate for a claims-made policy, provided the party procuring the policy is sophisticated. *Aul* construed two notice-prejudice statutes that on their face arguably apply to claims-made policies as nevertheless not applying to such policies. The *Aul* Court did this in order to uphold the bargain between insureds and insurers with respect to such policies. And *Sherwood* attempted to split the loaf by construing Maryland's notice-prejudice statute as applying to some, but not all, untimely claims.

V. CONCLUSION

Just as the language in notice provisions continue to evolve, so too does notice provision case law. The evolving treatment of notice in the claims-made context continues to pose obstacles for policyholders and insurers alike as both sides try to navigate the what, when, and how of timely notice. These recent 2017 decisions highlight the need for any practitioner to carefully review

[172] *Id.* at 332.
[173] *Id.* at 333.
[174] *Id.* at 332-33.
[175] *See Nat'l Union Fire Ins. Co. v. Fund for Animals*, 451 Md. 431, 451-63 (2017).

each state’s case law and statutes when addressing notice provisions in insurance policies to best advise clients on what to expect and how to proceed.