LATE NOTICE, VOLUNTARY PAYMENT, AND LACK OF COOPERATION

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General Liability Conditions – Notice of "Occurrence"

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. . . . [N]otice 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 . . .

CGL Conditions - Notice of Claim

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 receives; 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.**

CGL Conditions - Notice of Suit

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.”

CGL Conditions - Voluntary Payment

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

CGL Conditions - Cooperation

c. You and any other involved insured must:

(3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit.”

Notice of Occurrence/Claim/Suit

Members Mutual Insurance Company v. Cutaia, 476 S.W.2d 278 (Tex. 1972)

- Is duty to forward suit papers "immediately" a condition precedent to coverage?

- No.

Following *Cutaia*

January 26, 1973:

State Board Order 22582

Revision of Texas Standard Provision for Automobile Policies

Amendatory Notice 158L applicable to TX standard auto policy forms written or renewed on and after March 1, 1973

"As respects **bodily injury** liability coverage and **property damage** liability coverage, unless the company is prejudiced by the insured's failure to comply with the requirement, any provision of this policy requiring the insured to give notice of action, occurrence or loss, or requiring the insured to forward demands, notices, summons or other legal process, shall not bar liability under this policy."

Following *Cutaia*

March 13, 1973:

State Board Order 23080

Revision of Texas Standard Provision for GL policies

Amendatory Endorsement to be attached to all GL policies effective on or after May 1, 1973.

"As respects *bodily injury* liability coverage and *property damage* liability coverage, unless the company is prejudiced by the *insured's* failure to comply with the requirement, any provision of this policy requiring the *insured* to give notice of action, *occurrence* or loss, or requiring the insured to forward demands, notices, summons or other legal process, shall not bar liability under this policy."

Material Breach
Hernandez v. Gulf Lloyds (1994)

- Insureds settled liability case for $25,000 without UIM carrier's consent. Insureds sought to recover $100,000 in UIM benefits from Gulf Lloyds.

- Gulf Lloyds denied coverage because the insureds did not obtain consent prior to settlement.

- There was no question that the insureds' damages would exceed all of the potentially available insurance.

Material Breach
Hernandez

Court held that settlement without consent clause is unenforceable unless insurer establishes it has been actually prejudiced.

A fundamental principle of contract law is that when one party commits a **material breach**, the other is excused from performance. "The less the non-breaching party is deprived of the expected benefit, the less material the breach."

What is a Material Breach?

1. Extent to which non-breaching party will be deprived of benefit it could reasonably have anticipated from full performance.
2. Extent to which injured party can be adequately compensated for part of benefit of which it will be deprived.
3. Extent to which party failing to perform or offer performance will suffer forfeiture.
4. Likelihood that party failing to perform or offer performance will cure the failure.
5. Extent to which behavior of the breaching party comports with standards of good faith and fair dealing.

Material Breach
PAJ v. Hanover (2008)

- "An immaterial breach does not deprive the insurer of the contractual coverage obligation."
- *PAJ* applied *Hernandez* to CGL Coverage B.
- Insurer is required to demonstrate prejudice to avoid coverage.

Notice - Claims Made Policies

- In occurrence-based policies, coverage is based upon the triggering event, not the notice.

- In claims-made and reported policies, notice is the event that triggers coverage. Insurers may deny coverage under claims made and reported policies without showing prejudice.

See Pogo Resources, LLC v. St. Paul Fire & Marine Ins. Co., 3:19-cv-2682, 2022 WL 286206 (N.D. Tex. Jan. 31, 2022)*; Komatsu v. United States Fire Ins. Co*., 806 S.W.2d 603 (Tex. App.—Fort Worth 1991, writ denied).

Prodigy (2009)

- Notice-prejudice rule does not apply to a **claims-made** policy when the policy requires the insured, "as a condition precedent," to give notice "as soon as practicable, but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period."

- "As soon as practicable" is not essential part of bargained-for exchange.

Prodigy (2009)

- In *Prodigy*, the insured gave notice within the 90-day cutoff. The insurer was not denied the benefit of the claims-made nature of its policy.

- There is a difference in "as soon as practicable" and a hard cutoff in a claims-made policy.

What is Prejudice?

- Prejudice is a change in position that is adverse to the insurer's interest. It is generally a question of fact. "Late" notice, without more, is not enough.

Some things that may constitute prejudice:

- Notice on the eve of trial, so insurer has impaired ability to investigate
- Late notice/no notice of mediation

PREJUDICE - NO NOTICE

There is a difference when notice is not just late, but is "wholly lacking." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Crocker*, 246 S.W.3d 603 (Tex. 2008).

Default judgments constitute actual prejudice as a matter of law because insurer cannot answer, defend, conduct discovery, and fully litigate merits.

If the insurer can retain counsel in time to successfully overturn a default, there may *not* be prejudice.

Who Has the Burden?

The insurer has the burden to establish prejudice.

Texas law does not presume prejudice. *Comsys Info Tech Servs., Inc. v. Twin City Fire Ins. Co*., 130 S.W.3d 181, 192 (Tex. App.—Houston 2003, pet. denied).

What is the Purpose of Cooperation?

The purpose of cooperation "is to make it possible for the insurer to make a determination regarding coverage and protect itself against fraudulent claims."

Cox Operating, LLC v. St. Paul Surplus Lines Ins. Co., No. H-07-2724, 2012 WL 290027 (S.D. Tex. Jan. 31, 2012).

Cooperation

Insured must cooperate with general liability insurer through several provisions in the policy.

- Cooperate in investigation or settlement of claim or defense against the suit
- Authorize insurer to obtain records and information
- Assist insurer to enforce rights against parties who may be liable to insured

Cooperation

Insured must cooperate with property insurer through additional provisions:

- As soon as practicable, give description of how, when and where loss or damage occurred
- Take all reasonable steps to protect covered property from further damage
- Provide signed, sworn proof of loss
- Provide inventory of damaged and undamaged property
- Permit inspection of property/permit insurer to take samples
- Submit to examination under oath

What Constitutes Non-Cooperation?

- Failure to return phone calls
- Failure to provide information relevant to defense of the claim
- Failure to appear for deposition
- Failure to assist defense counsel with responding to discovery
- Failure to appear at trial

In each of these, consider the context. Failure to return one phone call is not enough. Failure to return any phone calls is different.