



If you have questions or would like further information regarding Duties of the Insured, please contact:

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## ILLINOIS LAW MANUAL

### CHAPTER XI INSURANCE COVERAGE AND DEFENSES

#### B. THE DUTIES OF THE INSURED TO COOPERATE AND REPORT A CLAIM

##### 1. Duty to Give Notice of Claim

##### a. Basic Law

The insured's duties regarding notice of a claim are contained in the "Conditions" sections of the policy. A typical section provides:

##### **Section I - Conditions provides in pertinent part:**

2. **Your Duties After Loss.** After a loss to which this insurance may apply, you shall see that the following duties are performed:
  - a. give immediate notice to us or our agent. Also notify the police if the loss is caused by theft. Also notify the credit card company or bank if the loss involves a credit card or bank fund transfer card;
  - ...
  - d. as often as we may reasonably require:
    - (1) exhibit the damaged property;
    - (2) provide us with records and documents we request and permit us to make copies;
    - (3) submit to and subscribe, while not in the presence of any other **insured**:
      - (a) statements; and

- (b) examination under oath, and
- (4) produce employees, members of the **insured's** household or others for examination under oath to the extent it is within the **insured's** power to do so; and. . .

## SECTION II

- 3. **Duties After Loss.** In case of an accident or occurrence, the insured shall perform the following duties that apply.

You shall cooperate with us in seeing that these duties are performed;

- a. give written notice to us or our agent as soon as practicable, which sets forth:
  - (1) the identity of the policy and **insured**;
  - (2) reasonably available information on the time, place and circumstances of the accident or **occurrence**; and
  - (3) names and addresses of any claimants and available witnesses;
- b. immediately forward to us every notice, demand, summons or other process relating to the accident or **occurrence**;

\* \* \*

### b. Analysis

Illinois law recognizes that timely notice is not merely a technical requirement, but a valid prerequisite to coverage. Such a requirement is a condition precedent of the policy, a breach of which relieves the insurer of any duty to defend or indemnify. Country Mutual Ins. Co. v. Livorsi Marine, Inc., (2006), 222 Ill. 2d 303. The duty to give notice arises when the insured knows or should know that a claim or lawsuit might ensue. The duty to notify arises on the day the insured receives information regarding an alleged incident which potentially might be covered under the insurance policy. The key element of the duty to notify is the appearance to a reasonably prudent person that

a claim potentially covered by the policy may be brought against the insured and not the appearance that the insured, in fact, may be liable. The test is whether any reasonably prudent person could foresee a lawsuit and would either contact his attorney or his liability carrier. Id.

Among the factors to be considered in determining if the insured acted reasonably in giving notice are: presence or absence of the insured's sophistication in the world of commerce and insurance; awareness on part of the insured that an occurrence, as defined by policy, has taken place; and, once aware of an occurrence, diligence with which the insured ascertains whether policy coverage is available. American Family Mut. Ins. Co. v. Blackburn, 208 Ill. App. 3d 281 (1991).

The presence or absence of prejudice to the insurer is one factor to consider when determining whether a policyholder has fulfilled any policy condition requiring reasonable notice. Once it is determined that the insurer did not receive reasonable notice of an occurrence or a lawsuit, the policyholder may not recover under the policy, regardless of whether the lack of reasonable notice prejudiced the insurer. Country Mutual Ins. Co. v. Livorsi Marine, Inc., 222 Ill. 2d at 317.

It is not necessary that the insured be the person advising the insurer of the occurrence. Any responsible person may be the source of the information to the insurer. The courts will allow the insured to rely upon actual notice that the insurer received irrespective of the source. Cincinnati Companies v. West American Ins. Co., 183 Ill. 2d 317 (1998). The issue of the insurer's duties upon receipt of notice and related topics will be addressed later in this chapter. Late notice may not be raised as a

defense to the estoppel doctrine (addressed later in this chapter). Employers Ins. of Wausau v. Ehlco Liquidating Trust, 186 Ill. 2d 127 (1999).

The key element in determining whether the insured has given timely notice is whether a reasonable person would believe that a claim covered by the policy may be brought against the insured. For example, in Brotherhood Mut. Ins. Co. v. Roseth, 177 Ill. App. 3d 443 (1988), the court determined that notice given two years after the incident had taken place was timely. An accidental shooting had taken place between friends away from the insured premises. The insured remained friends with the victim and had no idea that a claim would be brought against him. Just before the limitations period expired, the victim sued the insured. The insured then gave notice. The court found that notice was timely because the insured had no reason to believe that a claim would be brought against him and that a claim for damages resulting from the shooting off the premises would be covered by his homeowners policy. The court further held that the insured's belief that the policy did not cover the type of injury sustained was reasonable based upon the insured's lack of sophistication. The court noted that the standard used in determining an insured's sophistication is based on his experience not only in the world of commerce, but also of insurance.

In contrast, notice was found to be unreasonable where the insured had fatally stabbed his son and failed to give notice for more than four years after the occurrence and three years after suit was filed against the insured. The court found that the insured's failure to advise his insurer of the fact that he had been served with summons and complaint was unreasonable. American Family Ins. Co. v. Blackburn, 208 Ill. App. 3d 281 (1991).

Illinois courts appear to be increasingly willing to enforce notice provisions and find no coverage due to late notice where a business entity faces potential liability but fails to promptly notify its insurer. See i.e. Montgomery Ward & Co., Inc. v. Home Ins. Co., 753 N.E.2d 999 (1<sup>st</sup> Dist. 2001) (eight-month to one-year delay before notifying liability insurer of potential claim did not satisfy policy requirement for insured to give notice “as soon as practicable”).

## **2. Duty to Cooperate**

### **a. Basic Law**

There is a significant difference between the courts’ treatment of the “Notice” condition as opposed to the “Cooperation” condition. While the absence of prejudice to the insurer is not a condition that excuses the requirement of reasonable notice, the lack of substantial prejudice to the insurer prevents a denial of coverage for a violation of the “cooperation clause.” The basic purpose of the cooperation clause is to protect the insurer’s interests and to prevent collusion between the insured and the injured party. Waste Management, Inc. v. International Surplus Lines Ins. Co., 144 Ill. 2d 178 (1991).

While the cases do not set forth a concrete definition of substantial prejudice, substantial prejudice most often requires a complete lack of communication which results in a finding of liability and entry of a money judgment against the insured. See i.e. American Country v. Bruhn, 289 Ill. App. 3d 241 (1997). Where the insured still has an opportunity to cure any breach, no prejudice will likely be found. See i.e. Crowell v. State Farm Fire & Cas. Co., 259 Ill. App. 3d 456, 631 N.E.2d 418 (1994). To show that it was substantially prejudiced, the insurer must demonstrate that it was actually

hampered in its defense of the underlying primary action by the insured's violation of the "cooperation clause." Hoel v. Crum & Forster Ins. Co., 51 Ill. App. 3d 624 (1977).

**b. Analysis**

The insured's failure to advise the insurer of the lawsuit and to give a statement concerning the accident, despite the insurer's letters to the insured advising that suit was to be filed, was substantially prejudicial to the insurer's defense of the underlying case and constituted a breach of the cooperation clause. Safeco Ins. Co. v. Treinis, 238 Ill. App. 3d 541 (1992). However, the giving of a false statement by the insured to his insurer was not a breach of the "cooperation clause" because the insurer had enough information to conduct its investigation of the underlying case. State Farm Mut. Auto Ins. Co. v. McSpadden, 88 Ill. App. 3d 1135 (1980).

An insured's duty to submit to examination under oath in making a first-party property claim applied only to the named insureds and not to their children, even though coverage extended to them. State Farm Fire & Cas. Co. v. Micelli, 164 Ill. App. 3d 874 (1987).