INSURANCE POLICY NOTICE REQUIREMENTS

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I. INTRODUCTION

This paper will discuss certain issues regarding Texas insurance policy notice requirements including how late notice is determined and when and in what circumstances an insurer is required to prove prejudice in addition to late notice.

II. TYPICAL NOTICE PROVISIONS

This paper will focus on notice provisions contained within occurrence and claims-made policies, though many of the concepts and analyses are applicable to a broad range of insurance policies. The notice provisions found in claims-made policies are usually very similar to the notice provisions found in occurrence policies.

A. OCCURRENCE POLICIES

An "occurrence policy" covers an insured for acts, omissions and/or damages that occur within the policy period, regardless of whether the claim is brought to the attention of the insured or made known to the insured during the policy period. A notice provision found in a typical commercial general liability occurrence policy reads:

Section IV - Commercial General Liability Conditions
***
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,
***
   b. If a claim is made or "suit" is brought against any insured, you must:
***
      (2) Notify us **as soon as practicable**. You must see to it that we receive written notification of the claim or "suit" **as soon as practicable**.
***
"Suit" means a civil proceeding in which damages . . . are alleged.

"Practicable is defined as "feasible" or "capable of being . . . done.". THE AMERICAN HERITAGE COLLEGE DICTIONARY 944, 427 (3d ed. 1993).

B. CLAIMS-MADE POLICIES

A claims-made policy's coverage applies only to injury or damage for which a claim is first made during the policy period. In addition, the injury or damage for which a claim is made must have occurred on or after the retroactive date, if any, shown in the policy declarations. The notice provisions found in typical claims-made policies are usually very similar to the notice provisions found in occurrence policies.

III. DETERMINING WHEN NOTICE IS LATE

There are almost no bright line tests for determining late notice and thus the particular facts surrounding any alleged incidence of late notice are key in determining whether or not notice was given within a reasonable time frame.

A. LATE NOTICE IN GENERAL

Insurance policies usually require notice to be "prompt," "immediate" or "as soon as practicable." However, these policies fail to precisely define the period within which such notice must be provided. Such lack of specificity has lead Texas courts to determine that these policies should be construed as requiring notice "within a reasonable time." *Stonewall Insurance Co. v. Modern Exploration, Inc.*, 757 S.W.2d 432, 435 (Tex. App.-Dallas 1988, no writ). What is a "reasonable time" depends on the facts and circumstances in each particular case, *Employers Cas. Co. v. Scott Elec. Co.*, 513 S.W.2d 642, 646 (Tex. Civ. App.-Corpus Christi 1974, no writ). Thus, the determination of whether an insured's notice is late or not comes down to a reasonableness issue to be determined by the trier of fact (i.e. a jury if one has been requested, or the court if a jury has not been requested). However, when the facts are undisputed, as is many times the case, the court itself can rule on the notice issue as a matter of law (thus taking away the need for a factual determination by a jury). There are numerous instances where courts have done just this; concluding that delays of two months to six years violated a policy's notice requirement. *See, e.g.*, *Ridglea v. Lexington Ins. Co.*, 398 F.3d 332, 335 (5th Cir. 2005) (six years late notice unreasonable as matter of law); *Sanderfer Oil & Gas, Inc. v. AIG Oil Rig of Texas, Inc.*, 846 F.2d 319, 325 (5th Cir. 1988) (two years late notice unreasonable as matter of law); *Bolivar County Board of Supervisors v. Forum Insurance Co.*, 779 F.2d 1081, 1084 (5th Cir. 1986) (5 months); *Lowe v. Employers Casualty Co.*, 479 S.W.2d 383 (Tex. Civ. App.-Fort Worth 1972, no writ) (11

months); *Huddleston v. Traders & Gen. Insurance Co*., 476 S.W.2d 418 (Tex. Civ. App.-Texarkana 1971, writ ref'd n.r.e.) (1 year); *Brown v. State Farm Mutual Auto Insurance Co*., 449 S.W.2d 93, 95 (Tex. Civ. App.-Fort Worth 1969, no writ) (150 days); *Continental Insurance Co. v. Jackson*, 446 S.W.2d 125, 126 (Tex. Civ. App.-Waco 1969, writ ref'd n.r.e.) (44 days); *Norman v. St. Paul Fire & Marine Insurance Co*., 431 S.W.2d 391, 395 (Tex. Civ. App.-Beaumont 1968, no writ) (117 days); *Aetna Insurance Co. v. Durbin*, 417 S.W.2d 485, 488-89 (Tex. Civ. App.-Dallas 1967, no writ) (4 months); *State Farm Mutual Auto. Insurance Co. v. Hinojosa*, 346 S.W.2d 914, 915 (Tex. Civ. App.-Waco 1961, writ ref'd n.r.e.) (40 days).

B. EXCUSES FOR LATE NOTICE

There is very little case law in Texas regarding excuses for failure to give timely notice of a claim. In general, any insured may make any excuse for failure to give timely notice. The reasonableness of these excuses will then be judged by the finder of fact as it determines whether late notice was reasonable in light of all the relevant circumstances. In *Scott Elec. Co*., the Corpus Christi court of appeals listed four types of excuses for an insured's untimely notice:

> Ordinarily, under Texas law, there exist four excuses which an insured like Scott could claim for his failure to give notice to the insurer until approximately 13 months after the accident:
>
> (1) Insured's lack of knowledge of the accident [or claim],
>
> (2) Insured's belief that the accident was trivial and no claim would be made,
>
> (3) Insured's belief that he was not covered, and
>
> (4) Insured's illness.

Employers Cas. Co. v. Scott Elec. Co., 513 S.W.2d 642, 646-647 (Tex. Civ.App. – Corpus Christi 1974, no writ). However, evidence of an excuse does not necessarily absolve the insurer from his notice duty. The validity of any of the above referenced excuses is based on their reasonableness in light of **all** of the relevant circumstances. Within this context, the more conscientious and thoughtful an insured is regarding (1) whether an accident has occurred, (2) whether the accident is trivial, (3) whether a claim will be made or not, and (4) whether the accident was covered; the more likely that late notice will be considered reasonable, and hence not a breach of an insurance policy.

In *Scott* the court held that a 13 month delay in notice was "as soon as practicable" since the insured believed he had no liability for the explosion that caused the accident and therefore, believed that no lawsuit would be filed. *Id*. The delay by the insured in *Scott* was excusable because it was reasonable. The delay was reasonable, in large part, because the insured conducted a conscientious investigation of the accident and properly concluded that a claim would, most probably, not be brought. If the insured would have been informed that a claim was going to be brought, he would have been obligated to give notice at such time, but the insured was not informed of any possible claim until the actual lawsuit was filed against it over 13 months after the accident. Thus, because the insured conducted a reasonable investigation and reasonably concluded that no claim would be brought; his failure to give notice until suit was filed, 13 months after the accident, was not untimely or in violation of the policy's notice provision.

Other Texas appellate courts have also excused late notice when, after a dutiful investigation, the insured came to the conclusion that there was no coverage. *See Blanton v. Vesta Lloyds Ins. Co*., 2006 WL 572964, *1 & *6 (Tex. App.-Dallas March 9, 2006, no pet. h.) ("[A]n insured's failure to give notice of an accident or occurrence is excused, that is, there is no duty to report it, when the insured has complied with his full duty to acquaint himself with all the facts surrounding an accident, and it appears from such investigation that the occurrence was of such a nature that it could not reasonably be expected to result in any claim or liability."); *Texas Glass & Paint Co. v. Fid. & Deposit Co*., 244 S.W. 113, 115 (Tex. Comm'n App. 1922, judgm't adopted); *Edwards v. Ranger Ins. Co*., 456 S.W.2d 419, 421 (Tex. Civ. App.-Fort Worth 1970, writ ref'd n.r. e.); *Norman v. St. Paul Fire & Marine Ins. Co*., 431 S.W.2d 391, 396 (Tex. Civ. App.-Beaumont 1968, writ dism'd).

Further, a number of Texas appellate courts have determined that based, in part, upon the fact that the insured did not engage in a reasonable investigation into the accident and/or the possibility of coverage under the policy, that lack of knowledge regarding (1) whether an accident has occurred, (2) whether the accident is trivial, (3) whether a claim will be made, or

(4) whether the accident was covered; does not serve as a valid excuse to late notice. *Norman v. St. Paul Fire & Marine Ins. Co*., 431 S.W.2d 391, 396 (Tex. Civ. App.-Beaumont 1968, writ dism'd) (Only evidence provided by insured as excuse for late notice was that he did not believe the eventual claimant was going to make a claim against him. However, there was no evidence of a proper or conscientious investigation by insured.); *Standard Accident Ins. Co. v. Employers Cas. Co*., 419 S.W.2d 429, 432 (Tex. Civ. App.-Dallas 1967, writ dism'd n.r.e.) (Failure to give notice for over 19 months after accident due to ignorance of coverage as additional insured is not justifiable excuse in light of fact that no investigation or inquiry was made into the circumstances regarding the accident and the insured's possible liability. Further, the insured did not even notify its own insurer until six months after the accident.); *L. Houch v. State Farm Mut. Auto. Ins. Co*., 394 S.W.2d 222 (Tex. App.-Beaumont 1965, writ ref'd n.r.e.) (Failure to give timely notice due to belief that accident was trivial is not justified excuse in light of fact that injured party actually made claim for damages at time of accident.); *Kellum v. Pac. Nat '1 Fire Ins. Co*. 360 S.W.2d 538, 542 (Tex. App.-Dallas 1962, writ ref'd n.r.e.) (Lack "of knowledge of coverage and lack of knowledge that a claim could be made are not good excuses, as a matter of law, for complying with the provisions of the policy concerning notice" when insured had possession of the policy and ample opportunity to read the same and familiarize himself with the terms thereof.).

Thus, it stands to reason that unreasonable coverage determinations or coverage determinations that are based upon inadequate or no investigation whatsoever are less likely to be judged as valid excuses for late notice.

It should be kept in mind that, in the end, the trier of fact has broad latitude to determine when notice is given "within a reasonable time" and what justifications for late notice should affect this analysis of reasonability or not. Further, it is only if there is no fact issue in this regard that a court can make this determination as a matter of law. *Stonewall Insurance Co. v. Modern Exploration, Inc.*, 757 S.W.2d 432, 435 (Tex. App.-Dallas 1988, no writ).

C. APPLICABILITY OF CHAPTER 16.071 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE

Chapter 16.071(a) of the Texas Civil Practice and Remedies Code states that:

> (a) a contract stipulation that requires a claimant to give notice of a claim for damages [cause of action] as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than 90 days is void.

TEX. CIV. PRAC. & REM. CODE 16.071(a). The term "claim for damages" in the above statute has been defined as "cause of action." *Komatsu v. U.S. Fire Ins. Co*., 806 S.W.2d 603, 604 (Tex. App.-Fort Worth 1991, writ denied). Thus, the statute does not relate to the notification of an accident or the like, but only notification of an official cause of action via court litigation for damages against an insured. Though the above statute has been held inapplicable to claims-made policies, its application to general commercial occurrence policies is not yet as clear. *Id*.

Chapter 16.071 forbids insurance policy notice provision from requiring notification within less than 90 days. TEX. CIV. PRAC. & REM. CODE 16.071(a). The notice stipulation found in typical commercial general liability occurrence policies does not require notification within a specific time frame, let alone in less than 90 days, but requires notification within a reasonable time. Depending on the particular facts of a case, a situation may occur when, though notification is given within 90 days, the trier of fact concludes that, in light of the particular circumstances, that notice given within 90 days is unreasonable and thus late. Within this scenario, notification under the policy essentially would have been required within 90 days. Thus, based upon this possible scenario, the argument exists that, in such a circumstance, chapter 16.071(a) of the Texas Civil Practice and Remedies Code would be triggered to void the policy's entire notification provision (because it worked to require notification within less than 90 days, and Chapter 16.071 requires such provisions be voided). It remains to be seen how Texas courts, including the Texas Supreme Court, would respond to such an argument. However, if the argument were successful, it would have the practical effect of providing insureds at least 90 days from the date of service of suit to give notice to their insured.

IV. PREJUDICE

Even if an insured breaches a policy through late notice, in many situations coverage will still exist unless the insurer can prove that it was prejudiced by such late notice. Through the years, courts have handed down many opinions related to what types of policies

require proof of prejudice, what specific portions of these policies require such proof, as well as what evidence is sufficient to prove that an insurer was prejudiced when late notice is found.

A. APPLICABILITY OF PREJUDICE REQUIREMENT

There are only certain policies in which an insurer is required to prove prejudice in addition to late notice in order to defeat an insured's coverage arguments.

1. PREVIOUS GENERAL RULE

Prior to 1973, the general rule was that an insurance company could deny coverage without demonstrating prejudice when the insured breached a notice condition of the policy. In *Members Mut. Ins. Co. v. Cutaia*, 476 S.W.2d 278, 279 (Tex. 1972), the Texas Supreme Court expressed its displeasure with this rule that coverage could be obviated without prejudice to the insurer when the insured had violated the policy's notice condition. In its opinion, the Court invited the Texas State Board of Insurance to rectify this situation.

2. PRESENT PREJUDICE REQUIREMENT

In 1973, the Texas State Board of Insurance passed Board Order No. 23080 which provided that the following endorsement be attached to all general liability policies issued or delivered in Texas:

> [a]s 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, notice, summons or other legal process, shall not bar liability under this policy.

See TEX. INS. CODE ANN. art. 1.01A (Vernon Supp. 2004); *Chiles v. Chubb Lloyds Ins. Co.*, 858 S.W.2d 633, 635 (Tex. App.-Houston [1st Dist.] 1993, writ denied); STATE BOARD OF INSURANCE, REVISION OF TEXAS STANDARD PROVISIONS FOR AUTOMOBILE POLICIES EDITIONS OF APRIL 1955 AND OCTOBER 1966 - AMENDATORY ENDORSEMENT - NOTICE, ORDER NO. 22582 (January 26, 1973) (same prejudice requirement applicable to automobile policies). Today, the liability insurer must be prejudiced by the insured's failure to give timely notice before such a failure will bar bodily injury and property damage liability under a liability policy. *Chiles*, 858 S.W.2d at 635.

The prejudice requirement does not apply to coverages that are not subject to these board orders. *See Chiles*, 858 S.W.2d at 635 (no prejudice requirement applicable under homeowners policy); *see also Assicurazioni Generali, SpA v. Pipe Line Valve Specialties Co., Inc*., 935 F. Supp. 879, 890 (S.D.Tex. 1996) (Board Order 23080 is inapplicable to surplus lines carriers).

3. APPLICABILITY TO PERSONAL INJURY AND ADVERTISING INJURY CLAIMS

A recent case out of the Dallas Court of Appeals holds that a liability insurance company is not required to show that it was prejudiced by its insured's late notice of a lawsuit involving an alleged advertising injury offense. In *PAJ, Inc. d/b/a Prime Art & Jewel v. The Hanover Insurance Company*, 170 S.W.3d 258 (Tex. App.-Dallas, pet filed), PAJ brought suit against Hanover, seeking a declaration concerning Hanover's duty to defend and indemnify PAJ in underlying copyright infringement litigation. In December 1998, Yurman filed suit against PAJ alleging, among other things, that PAJ had infringed Yurman's copyright on products marketed by Yurman. PAJ received notice of this suit on December 8, 1998, but did not notify Hanover until sometime between April and June 1999. The dispositive issue on appeal was whether Hanover was required to show that it had been prejudiced by PAJ's untimely notice in order to rely on that untimely notice as a defense to coverage.

First, the court determined that the notice provision in the liability policy is a condition, rather than a covenant, eliminating any requirement of prejudice. Then, the court acknowledged that the notice provision was not ambiguous. Third, the court held that the State Board of Insurance Board Order that mandated a showing of prejudice in order to bar coverage on the basis of late notice only applied to Coverage A, bodily injury and property damage. The prejudice requirement, according to the court and the plain language of the endorsement, does not apply to Coverage B, personal and advertising injury liability.

Finally, the court distinguished two federal cases that held that regardless of the nature of the claim and coverage involved, a showing of prejudice is required before coverage is forfeited for breach of the notice condition. The court noted that both *Travelers Indem.*

Co. of Conn. v. Presbyterian Healthcare Resources, 2004 WL 389090 (N.D. Tex. Feb. 25, 2004) and *St. Paul Guardian Ins. Co. v. Centrum G.S, Ltd*., 383 F. Supp. 2d 891 (N.D. Tex. 2003) relied heavily on two cases for the proposition that insurance companies must always show prejudice before a breach by the insured will bar coverage. *Hanson Production Co. v. Americas Ins. Co.*, 108 F.3d 627 (5th Cir. 1997) relied upon the Texas Supreme Court decision of *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994). However, the Dallas Court of Appeals recognized that *Hernandez* did not deal with a notice provision or any other condition precedent. *Hernandez* ruled that an insurer could refuse coverage under the policy's settlement-without-consent exclusion only when the insurer was actually prejudiced by the insured's settlement. The Dallas Court of Appeals stated the following difference in provisions:

> We see a significant difference between a policy condition (performance of which is necessary to trigger any obligation for coverage) and a policy exclusion (which operates only after the obligation for coverage is in place). Accordingly, we decline to follow the federal trial court opinions that have equated the two and have created the extra-contractual obligation of an insurer to show prejudice following the insured's failure to perform a condition.

In *PAJ, Inc. d/b/a Prime Art & Jewel v. The Hanover Insurance Company*, 170 S.W.3d 258, 263 (Tex. App.-Dallas, pet filed). The Dallas Court of Appeals also noted that before the policy endorsement requiring prejudice was added to liability policies, failure to perform a notice condition was an absolute defense to coverage. The court held that the prejudice endorsement was limited to claims for bodily injury and property damage and because the endorsement's language had not been broadened over the last thirty years, the court would not imply such a change in the liability policy today.

The significance of this opinion is that it is the only Texas court opinion on the issue. Federal courts have taken *Erie* guesses as to how the Texas Supreme Court would rule on the issue of whether an insurer must show prejudice before denying defense on the basis of late notice on a Coverage B claim. However, the *PAJ* decision is the only published opinion from a Texas court on the issue. This means that the only Texas case on the subject holds that a liability insurer can deny coverage based upon late notice of a lawsuit involving an advertising injury claim.

4. APPLICABILITY TO CLAIMS-MADE POLICIES

Texas courts recognize a difference between notice that is required to trigger a claims-made policy and notice that is a condition of a claims-made policy.

a. TRIGGER NOTICE

Texas courts have uniformly held that an insurer is not required to prove that it was prejudiced when an insured failed to meet the trigger reporting requirements under a claims-made policy. The clear intent and purpose of claims-made policies is to cover periods listed. *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co*., 174 F.3d 653, 659 (5th Cir. 1999) (interpreting Texas law); *Hirsch v. Texas Lawyers' Ins. Exchange*, 808 S.W.2d 561, 565 (Tex. App.-El Paso 1991, writ denied); *Yancey v. Floyd West & Company*, 755 S.W.2d 914 (Tex. App.-Fort Worth 1988, no writ). To require a showing of prejudice for late notice would defeat the purpose of claims-made policies, and in effect, change such a policy into an occurrence policy. *Id*.

b. CONDITION NOTICE

The notice of claims provision is separate and distinct from a "claims-made reporting" provision. An insurance policy requirement that the insured notify the insurer "as soon as practicable" of an occurrence or immediately forward every demand, notice, summons, or other process of a claim or suit being brought against it is a condition precedent to an insurer's liability under the policy. *See Harwell v. State Farm Mut. Auto. Ins. Co*., 896 S.W.2d 170, 173-74 (Tex. 1995); *PAJ, Inc. d/b/a Prime Art & Jewel v. The Hanover Insurance Company*, 170 S.W.3d 258 (Tex. App.-Dallas, pet filed); *Filley v. Ohio Cas. Ins. Co*., 805 S.W.2d 844, 847 (Tex. App.-Corpus Christi 1991, writ denied).

In *Federal Ins. Co. v. CompUSA, Inc*., 2003 WL 173960 (5th Cir. Feb. 11, 2003) the court next held that the insurer is not required to demonstrate actual prejudice for late notice where the policy is a claims-made policy. The court adopted previous Texas decisions that strictly interpret notice provisions in a 'claims-made' policy and held concerning this claims-made policy that the insurerl and insured contractually agreed, as a condition precedent, that written notice of a claim would be made as soon as practicable. The court held that because there is no indication that such a limit on liability violates a Texas

statutory prohibition or public policy, the notice provision must be enforced as written. *Id*. (citing *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co*., 174 F.3d 653, 659 (5th Cir. 1999) (interpreting Texas law)). Thus, the court held that an insurance company may deny coverage under a claims-made policy with only a showing that the insured failed to comply with the notice requirements and without a showing of prejudice.

B. EVIDENCE NECESSARY TO PROVE PREJUDICE

Though the Board Order No. 23080 requires a showing of prejudice, the required endorsement does not include the word "substantial" and therefore, does not require a showing of a certain degree of prejudice. *Members Ins. Co. v. Branscum*, 803 S.W.2d 462, 467 (Tex. App.-Dallas 1991, no writ). Nor does the endorsement explicitly or impliedly impose a duty on the insurer to determine if suit has been filed and served if the insured breaches the notice provision. *Id*.

1. FACT ISSUE

Whether an insurer is prejudiced by delay in notice is generally a question of fact. *See Struna v. Concord Ins. Services, Inc*., 11 S.W.3d 355, 359-360 (Tex. App.-Houston [1st Dist.] 2000, no pet.); *Duzich v. Marine Office of Am. Corp*., 980 S.W.2d 857, 866 (Tex App.-Corpus Christi 1998, pet. denied); *see also Members Ins. Co. v. Branscum*, 803 S.W.2d 462, 465-67 (Tex.App.-Dallas 1991, no writ).

2. MATTER OF LAW

Although little authority exists to explain what constitutes sufficient prejudice to relieve an insurer of liability under Texas law, *see Filley v. Ohio Cas. Ins. Co*., 805 S.W.2d 844, 847 (Tex. App.-Corpus Christi 1991, no writ); *see also Kimble v. Aetna Cas. & Sur. Co*., 767 S.W.2d 846, 849 (Tex. App.-Amarillo 1989, writ denied), courts that have addressed the issue have been quite specific and definitive in holding that prejudice occurs under the following circumstances:

> (1) when the insurer, without notice or actual knowledge of suit, receives notice after entry of default judgment against the insured;
>
> (2) when the insurer receives notice of the suit and the trial date is fast approaching, thereby depriving it of an opportunity to investigate the claims or mount an adequate defense;
>
> (3) when the insurer receives notice of a lawsuit after the case has proceeded to trial and judgment has been entered against the insured; and
>
> (4) when the insurer receives notice of a default judgment against its insured after the judgment has become final and nonappealable.

See St. Paul Guardian Ins. Co. v. Centrum G.S. Ltd. 383 F. Supp. 2d 891, 903 N.D. Tex. 2003); *Harwell v. State Farm Mut. Auto. Ins. Co*., 896 S.W.2d 170 (Tex. 1995); *Liberty Mut. Ins. Co. v. Cruz*, 883 S.W.2d 164 (Tex. 1993) (notice was not given until after a default judgment was entered); *Weaver v. Hartford Acc. & Indem. Co*., 570 S.W.2d 367 (Tex.1978); *Ohio Cas. Group v. Risinger*, 960 S.W.2d 708 (Tex. App.-Tyler 1997, writ denied); *P.G. Bell Co. v. U.S. Fid. & Guar. Co*., 853 S.W.2d 187 (Tex. App.-Corpus Christi 1993, no writ); *Filley v. Ohio Cas. Ins. Co*., 805 S.W.2d 844 (Tex. App.-Corpus Christi 1991, no writ) (prejudice was established after a full trial on the merits); *Members Ins. Co. v. Branscum*, 803 S.W.2d 462 (Tex. App.-Dallas 1991, no writ); *Kimble v. Aetna Cas. & Sur. Co*., 767 S.W.2d 846 (Tex. App.-Amarillo 1989, writ denied) (no notice was given until after the entry of judgment); *Ratcliff v. Nat'l County Mut. Fire Ins. Co*., 735 S.W.2d 955 (Tex. App.-Dallas 1987, writ dism'd); *Wheeler v. Allstate Ins. Co*., 592 S.W.2d 2 (Tex. App.-Beaumont 1979, no writ). Under such circumstances, Texas courts may hold that prejudice exists as a matter of law, and that the insurer has no duty to defend or indemnify its insured.

a. THE EXCEPTION

There is an exception to the general rule that an insurer is prejudiced as a matter of law when it receives notice of the suit after a default judgment has already been entered against the insured. This exception states that when the insurer has actual knowledge that the insured has been served with the lawsuit it is not released from the prejudice requirement. *Ohio Cas. Group v. Risinger*, 960 S.W.2d 708, 714 (Tex. App.-Tyler 1997, writ denied); *Allstate Ins. Co. v. Pare*, 688 S.W.2d 680 (Tex. App.-Beaumont 1985, writ ref'd n.r.e); *Crocker v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2005 WL 1168429, *6 (W.D. Tex. May 12, 2005).

In 2005, a Federal Western District of Texas court handed down the *Crocker* decision. *Crocker v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2005 WL 1168429, *6 (W.D. Tex. May 12, 2005). The

Crocker court determined that even though the insured did not give notice of a lawsuit filed against it until after a default judgment was entered, based on the fact that the insurer had actual knowledge of the lawsuit (though not from the insured), the insurer was not relieved from proving prejudice.

In *Crocker* the insurer argued against coverage because of late notice. A key issue in the *Crocker* opinion was whether the insurer was aware that the insured had been served in the underlying lawsuit. The facts in the trial court decision revealed that:

1. Counsel for the underlying plaintiff informed the carrier in writing that the insured had been served, and
2. Documents uncovered in discovery also indicate that the insurer knew that its insured had been served, knew that the insurer was required to defend him, and even provided that the counsel designated to defend another party would represent its insured as well.

In light of these facts and other evidence submitted by the insured, the court concluded that the insurer had actual knowledge of the suit against the insured, and thus, the insurer was forced to prove prejudice even in light of a default judgment.

A similar issue was raised by the Tyler Court of Appeals in its 1997 *Risinger* opinion. *Ohio Cas. Group v. Risinger*, 960 S.W.2d 708, 713 (Tex. App.-Tyler 1997, writ denied) In *Risinger*, like *Crocker*, the insured argued that a finding of prejudice was not required in order for the insurer to escape coverage based on late notice when notice was not given until after a default judgment was taken against the insured. In *Risinger*, the court again had to deal with whether the insurer had actual knowledge that its insured was served, because if so the insurer would be forced to prove prejudice. The facts developed during the trial were that:

3. Ohio Casualty, the insurer, had actual knowledge of the filing of the lawsuit against its insured because Risinger (underlying plaintiff / claimant) sent it a complimentary copy of the petition;
4. Ohio Casualty's agent periodically reviewed the trial court's file;
5. Frink (the insured's registered agent) was served in September of 1989;
6. Ohio Casualty's agent was in constant contact with Risinger's attorney concerning settlement negotiations, mediation, etc., before and after suit was filed and Frink was served;
7. Frink's return on the citation showing service was filed in the court's file on the date of service; and,
8. Ohio Casualty's agent reviewed the file on numerous occasions after the Sheriff filed Frink's return with the District Clerk.

Based on such, and especially in light of the fact that the insurer's agent reviewed the court's file that contained the proof of service for the insured proving that the insured had been "officially" sued, the insurer was determined to have actual knowledge that the insured was served and thus the insurer was forced to prove prejudice even though the insurer gave no notice of suit prior to the default judgment.

In 1985, the Beaumont Court of Appeals handed down the *Pare* case. *Allstate Ins. Co. v. Pare*, 688 S.W.2d 680 (Tex. App.-Beaumont 1985, writ ref'd n.r.e). In *Pare*, the insurer was informed by plaintiff's attorney that a lawsuit had been filed against its insured, but was given no further specifics regarding the lawsuit (though the claim had been previously investigated by the insurer). A default judgment was subsequently taken against the insured. After the judgment, the insured gave notice of the suit to the insurer. The court ruled that the insured's failure to forward suit papers did not preclude coverage and further that the insurer was not prejudiced, implying that the insurer should have taken proactive action to investigate the lawsuit.

V. CONCLUSION

Determining late notice and prejudice are fact intensive endeavors that are not aptly susceptible to predictable bright line tests. However, based on analysis of the existing case law, many times it is possible to make valid predictions regarding whether a fact finder would conclude that late notice or prejudice exists. Further, with respect to the prejudice requirements, case law also assists insurers in knowing which policies or portions of policies require proof of prejudice thus allowing insurers to better determine the best course of action when late notice issues arise. Hopefully, as time goes by and new court opinions come forth, the predictability of the applicability and existence of late notice and prejudice will only

increase; which will hopefully serve to save all parties time, energy, and fiscal outlays.