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The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice

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THE MATERIALITY OF PREJUDICE TO THE INSURER AS A RESULT OF THE INSURED'S FAILURE TO GIVE TIMELY NOTICE

The question of whether prejudice to the insurer must be shown in order to relieve the insurer of its responsibility under the insurance policy has been the subject of much controversy in recent years.[1] Typically, the insured is involved in some form of automobile accident, but is either unaware of his liability[2] or feels that no liability exists on his part,[3] and thus fails to immediately notify the insurance company. Usually, the insured fails to give notice until such time as a suit for damages is filed. The insurer then claims that as a result of the insured's failure to give timely notice it is put in a prejudicial position. The insurer alleges, therefore, that it would be unfair to compel it to represent the insured in any litigation, or to discharge any judgments against the insured as a result of the accident. The insurer frequently alleges that in the period of time between the accident and the actual receipt of notice by the insurer, the insurer has lost the opportunity to make a thorough investigation[4] and that any statements gathered after the late notice would be tarnished by the passage of time and inhibited by the pressure on any available witnesses from

1. *See generally* 8 J. APPLEMAN, INSURANCE LAW & PRACTICE § 4732 (1962); 13 G. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW 692 (2d ed. 1965); 2 R. LONG, THE LAW OF LIABILITY INSURANCE § 13.04 (1969).

2. Sutton Mut. Ins. Co. v. Notre Dame Arena, Inc., 108 N.H. 437, 237 A.2d 676 (1968) (Defendant rented its ice hockey arena to an ice hockey team, and during the course of a game, a spectator was struck by a puck. A physician, attending the game as a spectator, treated the injured woman and sent her to the hospital. The defendant was not informed of the accident until a few days before he notified the plaintiff insurance company. There was approximately a three and a half month interval between the accident and notice to the plaintiff.).

3. Hartford Accident & Indem. Co. v. Day, 359 F.2d 484 (10th Cir. 1964) (Appellant's insured and two other boys were travelling in three cars at relatively high speeds along a highway and one of the other boy's car struck the appellee's car. Appellant insured's father questioned his son and, contrary to rumors in the insured's town, was satisfied that the three boys were not racing. Subsequently, insured and the other boy not directly involved in the accident were made co-defendants in the complaint, at which time appellant was notified by insured. There was approximately a nine and a half month interval between the accident and notice to the appellant insurance company.).

4. *See, e.g.*, White v. Nationwide Mut. Ins. Co., 245 F. Supp. 1 (W.D. Va. 1965); General Accident Fire & Life Assurance Corp. v. Prosser, 239 F. Supp. 735 (D. Alas. 1965).

the injured's counsel.[5]

The courts, in response to the insurer's allegations and prayers to be relieved of their liability to the insured under the insurance policy, have approached the problem from many angles. Some courts have cast aside black-letter contract law and transformed what might otherwise be an adhesion contract into an instrument, the interpretation of which, is guided more by its purpose than by its seemingly conclusive terms.[6] The majority, however, have refused to abandon their disciplined approach to contract law. While there appears to be a trend towards a more liberal approach in favor of the insured,[7] the plurality of courts still place great emphasis on the sanctity of the policy.[8]

This Comment will analyze the various methods which courts employ when considering the question of prejudice to the insurer and whether this prejudice should be considered as a factor in relieving the insurer of liability to the insured under the insurance contract.

PREJUDICE IMMATERIAL

A strict contractual interpretation of the provision to give notice "as soon as practicable" results in construction of the notice clause as a condition precedent to the insurer's liability to the insured under the policy. Thus, a finding by the trier of facts that the insured has failed to comply with the stipulation will relieve the insurer of responsibility under the policy. The question of prejudice to the insured, therefore, becomes immaterial.[9]

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5. *See, e.g.*, Boston Ins. Co. v. Malone & Hogan Hosp. Foundation, 269 F. Supp. 19 (N.D. Tex. 1966), *aff'd*, 378 F.2d 362 (5th Cir. 1967); Brown v. Security Fire & Indemn. Co., 244 F. Supp. 299 (W.D. Va. 1965); Allstate Ins. Co. v. Hoffman, 21 Ill. App. 2d 314, 158 N.E.2d 428 (1959); Jeanette Glass Co. v. Indemnity Ins. Co. of North America, 370 Pa. 409, 88 A.2d 407 (1952).

6. Miller v. Marcantel, — La. —, 221 So. 2d 557 (1969); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968). *But see* Brown v. Security Fire & Indem. Co., 244 F. Supp. 299 (W.D. Va. 1965).

7. *See generally* Annot., 18 A.L.R.2d 443 (1951); 8 J. APPLEMAN, INSURANCE LAW & PRACTICE § 4732 (1962); 2 R. LONG, THE LAW OF LIABILITY INSURANCE §§ 13.04, 13.05 (1969).

8. *See* cases cited note 9 *infra*.

9. Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966); Sohm v. United States Fidelity & Guar. Co., 352 F.2d 65 (6th Cir. 1965); Lee v. Bituminous Cas. Corp., 330 F.2d 514 (5th Cir. 1964); Lumbermans Mut. Cas. Co. v. Harleysville Mut. Cas. Co., 287 F. Supp. 932 (W.D. Va. 1968); Bruce v. United States Fidelity & Guar. Co., 277 F. Supp. 439 (D. S.C. 1967); American Southern Ins. Co. v. England, 260 F. Supp. 55 (S.D. W.Va. 1966); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Fannin, 257 F. Supp. 1017 (S.D. Ohio 1966); General Accident Fire & Life

The majority of courts favor adherence to this strict contractual interpretation except where the terms of the policy are ambiguous or unemphatic.[10] The rationale put forth by these courts is that, when the parties have entered into a contract in which the terms are expressly stated, courts should be reluctant to interpret their meaning in contradiction to the stipulated intention of the parties. In *Waters v. American Automobile Insurance Co.*,[11] the policy contained a forfeiture clause which stipulated that: "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with the terms of the policy."[12] The court expressed an intention not to alter the unambiguous terms as set down by the parties, citing an early decision[13] which held that ". . . a forfeiture clause in a contract cannot be ignored; if the parties have decided to incorporate it into their contract, the court must give it effect as written."[14] The majority rationalized the harshness of this effect on the insured by noting the necessity of prompt investigations to prevent unavailability of witnesses, loss of information and the possibility of fraudulent or collusive claims. The court, in applying Missouri law and holding the notice provision to be a condition precedent to the liability of the insurer on the insurance policy, then concluded that ". . . only when a provision is ambiguous and susceptible of more than one interpretation should courts construe it to avoid a forfeiture. When a provision is clear it must be given effect."[15] This forfeiture may appear harsh, especially in light of the fact that the insured may be acting in good faith when he fails to give timely notice. Insureds, however, will often unjustifiably delay notice to the insurer in an attempt to discern whether they are liable, rather than placing that burden upon the insurer. They don't want to risk antagonizing the insurer when no actual lia-

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Assurance Corp. v. Prosser, 239 F. Supp. 735 (D. Alas. 1965); Lilly v. Ohio Cas. Ins. Co., 234 F. Supp. 53 (D. Del. 1964); Hartford Accident & Indem. Co. v. Loyd, 173 F. Supp. 7 (W.D. Ark. 1959); Commercial Contractors Corp. v. American Ins. Co., 152 Conn. 31, 202 A.2d 498 (1964); State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 156, 216 P.2d 606 (1950); Lloyd v. Motor Vehicle Accident Indemn. Corp., 27 A.D.2d 396, 279 N.Y.S.2d 593 (1967); Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966); Bonney v. Jones, — Ore. —, 439 P.2d 881 (1968); Underwriters at Lloyds, London v. Harkins, 427 S.W.2d 659 (Tex. Civ. App. 1968); United States Fidelity & Guar. Co. v. Gable, 125 Vt. 519, 220 A.2d 165 (1966); Sears, Roebuck & Co. v. Hartford Accident & Indem. Co., 50 Wash. 2d 443, 313 P.2d 347 (1957).

10. *See, e.g.*, Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966); General Accident Fire & Life Assurance Corp. v. Prosser, 239 F. Supp. 735 (D. Alas. 1965); Underwriters at Lloyds, London v. Harkins, 427 S.W.2d 659 (Tex. Civ. App. 1968).

11. 363 F.2d 684 (D.C. Cir. 1966).

12. *Id.* at 686.

13. Dezell v. Fidelity & Cas. Co., 176 Mo. 253, 75 S.W. 1102 (1903).

14. Waters v. American Auto. Ins. Co., 363 F.2d 684, 687 (D.C. Cir. 1966).

15. *Id.* at 688.

bility exists on their part.

While courts of the majority view apparently base their decisions on strict adherence to contract law, their opinions sometimes reflect a recognition of and concern about possible injustices which result to the insurer by an unreasonable delay in receiving notice. These majority courts note that injustices to the insurer caused by unreasonable delay in receiving notice may cause consequential harm to the public through higher premiums[16] and ineffective insurance administration.[17] The recognition of such public policy considerations, however, appears paradoxical. If a court feels that the insurer will be prejudiced by a delay, it would be more consistent with their recognition of the policy considerations noted above to allow the insured to rebut this judicial presumption or to compel the insurer to prove that prejudice did in fact result.

The court in *Boston Insurance Co. v. Malone*,[18] expressed dissatisfaction with a verdict finding the insurer liable on a policy despite a notice delay of twenty months. The majority illustrated its recognition of relevant policy considerations by stating: "A public liability insurance company could hardly exist on reasonable premiums if its opportunity to investigate and settle possible claims in the early stage was dependent on the biased judgment of their insureds on questions of the matter."[19] Although the insured

16. Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966):
> . . . rulings reflect the fact that efficient and economical liability insurance administration requires early knowledge of the claim in order that proper investigation may be made. Contractual provisions to secure this interest are, thus, to be given effect in the interest of the public as well as that of the insurer.

Id. at 687.

17. Yorkshire Indem. Co. v. Roosth & Genecov Prod. Co., 252 F.2d 650 (5th Cir. 1958): "Insurance companies under the pressure both of traditional schemes of statutory penalties and the general adverse psychological climate in litigation are expected to perform fully and quickly." *Id.* at 656-57.

18. 269 F. Supp. 19 (N.D. Tex. 1966), *aff'd*, 378 F.2d 362 (5th Cir. 1967) (A patient in defendant's hospital was burned through the overuse of a heating pad which he requested from the nurse against doctor's orders. The patient was a diabetic and thus was not allowed to have the heating pad, a fact which the patient knew, but the nurse didn't. The manager of defendant hospital made an investigation and, although he failed to talk to the injured patient or his wife, was satisifed that the harm was clearly the result of the patient's own negligence. Approximately four months after the accident defendant heard a rumor that the patient might sue, but after consultation with the patient's father-in-law, a trustee of defendant hospital, defendant decided the rumor was groundless. Approximately twenty-one and a half months after patient's accident, the defendant hospital was sued and three days later notified the plaintiff insurance company.).

19. *Id.* at 21.

in this case was perhaps biased in ascertaining the extent of its liability, the insured did act in good faith in failing to give timely notice. It, therefore, seems unfair to relieve the insurer of its duty to defend in the absence of proof by the insurer showing that it has suffered prejudice. The insurer is, of course, defending itself as well as the insured since any judgment against the insured must be satisfied by the insurer within the policy limits. However, it seems unjust to allow the insurer to escape liability without proof of actual damages on the part of the insurer, where the insured, acting in good faith, fails to give timely notice.[20] The function of the notice provision is to prevent prejudice to the insurer, and unless prejudice has been proven, the condition precedent has, in essence, been complied with.

Courts which favor a strict interpretation of the insurance contract are unwavering in applying a strict construction to cases where a forfeiture clause is embodied in the policy.[21] Generally, courts are reluctant to interpret the clauses of the contract except where ambiguity is present.[22] The forfeiture clause, unlike many other contractual provisions, is seldom considered to be either unclear or ambiguous.[23] While there are courts which consider the notice provision as a condition precedent regardless of the inclusion of the forfeiture clause,[24] there is a trend to require a showing of prejudice where the policy does not contain such a clause.[25] Contract law is applied, but the terms of the contract are considered

20. Allstate Ins. Co. v. Grillon, 101 N.J. Super. 327, 244 A.2d 322 (Ch. 1968) (court analogized prejudice to laches, since to establish that defense there must be a showing of actual prejudice).

21. State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 156, 216 P.2d 606 (1950). An example of the type of specific forfeiture clause referred to in the text is: "No action shall be against the company unless, as a condition precedent thereto, the insured shall have fully complied with the terms of the policy." *Id.* at 160, 216 P.2d 609. *See generally* Annot., 18 A.L.R.2d 443 (1951).

22. *See* cases cited note 10 *supra*. *See generally* Annot., 18 A.L.R.2d 443 (1951).

23. *See* cases cited note 9 *supra*. *See generally* Annot., 18 A.L.R.2d 443 (1951).

24. *See, e.g.*, Sohm v. United States Fidelity & Guar. Co., 352 F.2d 65 (6th Cir. 1965); Lumbermans Mut. Cas. Co. v. Harleysville Mut. Cas. Co., 287 F. Supp. 932 (W.D. Va. 1968); American Southern Ins. Co. v. England, 260 F. Supp. 55 (S.D. W. Va. 1966). *See generally* State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 156, 216 P.2d 606 (1950); Annot., 18 A.L.R.2d 443 (1951).

25. In Underwriters of Lloyds, London v. Harkins, 427 S.W.2d 659 (Tex. Civ. App. 1968), the court decided that prejudice was immaterial and that no showing of harm was necessary, since the policy had a specific forfeiture clause for failing to comply with a condition precedent. The court went on to say that there was no room for interpretation as the provision was emphatic, but that they might possibly have reached a different conclusion if the policy hadn't contained the specific forfeiture clause. *See also* Leach v. Farmers Auto. Ins. Exch., 70 Idaho 156, 213 P.2d 920 (1950); United States Fidelity & Guar. Co. v. Gable, 125 Vt. 519, 220 A.2d 165 (1966); Sears, Roebuck & Co. v. Hartford Accident & Indemn. Co., 50 Wash. 2d 443, 313 P.2d 347 (1957).

vague and ambiguous, and the intent and purpose of the parties, as opposed to their expressed agreement, thus become important.[26] This theory was adopted by the court in *Miller v. Marcantel*,[27] a decision which reflected the idea that the insurer-insured relationship becomes distorted when the notice provision is inserted in an insurance contract and the insurer pleads that it is to be given effect without a showing of any prejudice. The court then criticized the practice of strict contractual interpretation:

> The function of the notice requirement is simply to prevent the insurer from being prejudiced, not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid up to the policy limits for which premiums were collected.[28]

In *State Farm Mutual Automobile Insurance Co. v. Cassinelli*[29] the question of the effect to be given specific forfeiture clauses was discussed in great detail. Although the discussion was dictum, it reflects the indecision common to most courts in treating this issue. The court found prejudice to be immaterial, but relied upon the majority rule which dictates such a finding if the insurance policy in question contains a forfeiture clause. The court went on to say that the insured's counsel had presented a fair and equitable argument against the application of the strict contract interpretation rule, but that the cases cited in their behalf did not expressly contain forfeiture clauses. The court, therefore, concluded that ". . . it would be presumptuous on our part to establish a rule of law in this state which departs from the overwhelming majority of decisions throughout the United States."[30] This reasoning does not reflect an enlightened or equitable disposition in dealing with injustices, especially since the court recognized the admittedly inequitable rule and failed to exercise an option to remedy an unfair practice.

It is submitted that to make a condition precedent of the notice provision is to ignore reality. Although the purpose of the policy is to protect the insured, insurance carriers are quick to reprimand those who submit claims. Large claims will probably result in the sky-rocketing of the insured's premiums, if not the cancellation of

26. *See, e.g.*, Miller v. Marcantel, — La. —, 221 So. 2d 557 (1969); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968).
27. — La. —, 221 So. 2d 557 (1969).
28. *Id.* at —, 221 So. 2d at 559.
29. 67 Nev. 156, 216 P.2d 606 (1950).
30. Id. at 164, 216 P.2d at 615. *See also* Annot., 18 A.L.R.2d 443 (1951).

his entire policy.[31] Courts point out that a forfeiture of the insured's rights under the policy is to be limited to the particulars of a given incident. That statement, however, fails to recognize the other possible penalties the insured will suffer at the hands of the insurer. It is perhaps the realization of the possible detrimental effects of giving notice that causes many insureds to be reluctant to submit a notice of accident before they are satisfied that they are liable or that a claim will result. It is submitted that if under strict legal concepts this is bad faith on the part of the insured in light of the policy stipulations, he should be excused, for he is caught between the necessity of having adequate insurance coverage and the efforts of insurance companies to punish insureds who demand performance under the insurance contract.

Prejudice Material

The absence of a specific forfeiture clause has generally been regarded as an invitation to the courts to consider the terms of the policy vague and ambiguous and thus enable them to interpret the policy in light of the parties' intentions at the time the insurance contract was completed.[32] This, however, does not relieve the penalties of forfeiture worked upon the insureds by the strict effect frequently given to the specific forfeiture clause, and therefore many jurisdictions, through their decisions and by statutes, have attempted to mitigate these harsh results through various substantive devices.

In some instances, the courts acknowledge the notice provision as a condition precedent; however, upon a showing of the unreasonableness of delay, a rebuttable presumption of prejudice is created in favor of the insurer.[33] Instead of the strict interpretation

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31. *The Cost of Casualties*, Time, (Jan. 26, 1968), at 20-21; *The Business with 103 Million Unsatisfied Customers*, Time, (June 2, 1967), at 63; *The Auto-Insurance-Tangle-Federal Controls on the Way?*, U.S. News & World Report, (Feb. 26, 1968), at 102-04.

32. See text accompanying notes 24-28 *supra*.

33. 8 J. Appleman, Insurance Law & Practice § 4732 (1962):

> Many courts have adopted the rule that it is unnecessary for the company to show that it was prejudiced by the neglect of the insured in order to assert this policy defense, it being frequently stated that prejudice is presumed under these circumstances. This does not mean that upon a showing of delay, alone, the insurer walks out of court free of potential claims. It means rather, that prejudice being a difficult matter affirmatively to prove, it is not required to make such proof. Prejudice may be presumed, with the burden upon the one seeking to impose liability to show that no liability did, in fact, occur—for example that a complete investigation was made by another insurer or by competent persons who turned over the results to the "late notice" insurer.

Id. at 17. See also Canadian Universal Ins. Co. v. Northwest Hosp. Inc., 389 F.2d 559 (7th Cir. 1968); Hartford Accident & Indem. Co. v. Lochmandy Buick Sales, 302 F.2d 565 (7th Cir. 1962); Hubner & Williams Constr. Co. v. London Guar. & Accident Co., 280 F. Supp. 288 (D. Colo. 1967); Neisz v. Albright, 217 So. 2d 606 (Fla. 1969); Sanderfoot v. Sherry Motors, Inc., 33 Wis. 2d 301, 147 N.W.2d 255 (1967) (court applied statute Wis.

view which conclusively relieves the insurer of its liability upon proof of unreasonable delay, rebuttal of the presumption of prejudice by the insured is possible and will dictate a finding that the insurer remains liable under the insurance policy. As a result of this rebuttable presumption device, insurers cannot relieve themselves of responsibility merely by labeling the stipulation a condition precedent and consequently, extreme forfeitures may be avoided.[34] The advantage to the insured in the rebuttable presumption approach, in addition to avoiding inequitable forfeitures, is that the question of prejudice goes to the jury for a determination regarding its presence or absence; whereas, the question of the insurer's liability under the strict contractual interpretation approach is commonly treated as a matter of law to be ruled on by the judge. Allowing the jury to consider the question of prejudice benefits the insured in that juries appear to be more favorable to private individuals in disputes with insurance companies.[35]

Several courts have voiced displeasure with the presumption of prejudice approach, holding that prejudice to the insurer amounts to mere speculation and conjecture.[36] While it is difficult for either party to prove or disprove prejudice, since the insurer chooses to disclaim liability, it should have the burden of justifying the disclaimer.[37] As was stated in *Campbell v. Allstate Insurance Co.*,[38] in light of the social function of the insurance policy ". . . to provide compensation for those negligently injured in automobile accidents through no fault of their own . . . a judicially created presumption of prejudice, whether conclusive or rebuttable, is unwarranted."[39]

Another theory regarding the materiality of prejudice is pre-

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STAT. ANN. § 204.34(3) (1933) which created a presumption of prejudice in favor of the insurer upon a showing of untimely notice).

34. *See, e.g.*, Hubner & Williams Constr. Co. v. London Guar. & Accident Co., 280 F. Supp. 288 (D. Colo. 1967); American Fire & Cas. Co. v. Collura, 163 So. 2d 784 (Fla. 1964).

35. Book Note, 68 HARV. L. REV. 1436 (1955).

36. *See, e.g.*, Lindus v. Northern Ins. Co., 103 Ariz. 160, 438 P.2d 311 (1968); Campbell v. Allstate Ins. Co., 60 Cal. 2d 308, 384 P.2d 155, 32 Cal. Rptr. 827 (1963).

37. Young v. Travelers Ins. Co., 119 F.2d 877 (5th Cir. 1941):

> This speculative or hypothetical prejudice is not the kind of prejudice at which the law looks in construing a clause of this kind. An obligation of the nature of that assumed by the insurer under this policy cannot be wiped out and destroyed on such speculative grounds.

Id. at 880. *See generally* 2 R. LONG, THE LAWS OF LIABILITY INSURANCE § 13.06 (1969).

38. 60 Cal. 2d 308, 384 P.2d 155, 32 Cal. Rptr. 827 (1963).

39. *Id.* at 310, 384 P.2d at 157, 32 Cal. Rptr. at 829 (1963).

sented by courts which avoid the inflexibility of the strict condition precedent concept by construing the question of prejudice to the insurer as one of the factors in determining the reasonableness of delay.[40] If no prejudice to the insurer is shown, the insured's failure to give notice "as soon as practicable" will not necessarily be unreasonable and the insured may be said to have complied with the terms of the policy. By this method, although the burden of proof is substantially on the insured to show compliance with the condition precedent of notice, the insurer is forced to introduce proof of prejudice if it wishes to escape liability under the policy. Thus, the insurer will not be allowed to shun its duties through a presumption of prejudice when, in fact, no prejudice did result.

Construing the question of prejudice as one of the factors in determining reasonableness of delay, while more advantageous to the insured than the presumption standard in that it shifts the burden of proving prejudice to the insurer, has a possible shortcoming as advanced by the court in *Cooper v. Government Employees Insurance Co.*[41] The *Cooper* court criticized the practice of making the question of prejudice one of the factors in determining reasonableness of delay in that it could conceivably make unreasonable a notice which was in fact timely if prejudice somehow resulted to the insurer.[42] Although the reasoning used in *Cooper* has merit, a prior decision[43] had developed a procedure which not only considered prejudice a factor in determining the unreasonableness of delay, but also avoided the pitfall suggested in *Cooper*. In *Young v. Travelers Insurance Co.*,[44] after discarding a suggested presumption in favor of the insurer as being conjectural, the court stated its holding:

> Thus in applying the clause, we think that if it is made to appear that the notice was given reasonably quickly after the occurrence of the accident, it will not be open to the company to prove that a more immediate notice would have been more effective in preparing their defense, for the time provisions of the clause would have been in effect complied with. On the other hand, if it appears that the giving of the notice has been delayed longer than was reasonably required physically to give the notice, then the material question would be whether the delay has caused prejudice.[45]

Young was probably the forerunner of what today is the most

40. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Wabash Fire & Cas. Ins. Co., 264 F. Supp. 637 (D. Minn. 1967); Consolidated Mut. Ins. Co. v. Radio Foods Corp., 108 N.H. 494, 240 A.2d 47 (1968). *See also* Turner Cartage & Storage Co. v. Jefferson Ins. Co., 10 Mich. App. 497, 159 N.W.2d 863 (1968).

41. 51 N.J. 86, 237 A.2d 870 (1968).

42. See text accompanying notes 57-58 *infra*.

43. Young v. Travelers Ins. Co., 119 F.2d 877 (5th Cir. 1941).

44. 119 F.2d 877 (5th Cir. 1941).

45. *Id.* at 880.

liberal approach to the question of the materiality of prejudice to the insurer. Several courts, disgruntled by the great hardships suffered by insureds through loss of insurance coverage[46] and the difficulty in disproving any prejudice to the insurer,[47] established the doctrine that prejudice is both a material inquiry in determining the extent of the insurer's liability to the insured under the policy, and that the burden of proving such prejudice should be on the insurer, not the insured.[48] California has carried this approach one step further by discarding presumptions in favor of the insurer, and ignoring the existence of the specific forfeiture clause in the insurance contract.[49] In Maryland, subsequent to *Watson v. United States Fidelity & Guaranty Co.*[50] which held the insurer relieved from showing prejudice, the legislature enacted a remedial statute. The insurer now has, by reason of the statute,[51] the burden of showing prejudice in cases involving failure to give timely notice. In a decision[52] subsequent to the enactment of the statute, a Maryland court interpreted the legislation as requiring proof of prejudice by the insurer in spite of the existence of a specific forfeiture clause.

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46. Miller v. Marcantel, — La. —, 221 So. 2d 557 (1969).

47. Powell v. Home Indem. Co., 343 F.2d 856 (8th Cir. 1965):

> All notices of accidents which are not given immediately are not necessarily prejudicial to the insurer. Actual prejudice must be shown by the insurance company. Prejudice will not be presumed.

Id. at 860. *See also* Campbell v. Allstate Ins. Co., 60 Cal. 2d 308, 384 P.2d 155, 32 Cal. Rptr. 827 (1963).

48. *See, e.g.*, Bowman Steel Corp. v. Lumbermans Mut. Cas. Co., 364 F.2d 246 (3d Cir. 1966); Miller v. Lindgate Developers, Inc., 274 F. Supp. 980 (E.D. Mo. 1967); Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Processing Corp., 256 F. Supp. 145 (D. Ore. 1966) (applying Ohio law); Lindus v. Northern Ins. Co. of New York, 103 Ariz. 160, 438 P.2d 311 (1968); Campbell v. Allstate Ins. Co., 60 Cal. 2d 308, 384 P.2d 155, 32 Cal. Rptr. 827 (1963); Miller v. Marcantel, — La. —, 221 So. 2d 557 (1969); State Farm Mut. Auto. Ins. Co. v. Hearn, 242 Md. 575, 219 A.2d 820 (1966); Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968); Fox v. National Sav. Ins. Co., 424 P.2d 19 (Okla. 1967).

49. Campbell v. Allstate Ins. Co., 60 Cal. 2d 308, 384 P.2d 155, 32 Cal. Rptr. 827 (1963).

50. 231 Md. 266, 189 A.2d 625 (1963).

51. MD. STAT. ANN. art. 48A, § 482 (1968):

> Where any insurer seeks to disclaim coverage on any policy of motor vehicle liability insurance issued by it, on the ground that the insured or anyone claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving requisite notice to the insurer, such disclaimer shall be effective only if the insurer establishes by a preponderance of affirmative evidence that such lack of cooperation or notice has resulted in actual prejudice to the insurer.

52. State Farm Mut. Auto. Ins. Co. v. Hearn, 242 Md. 575, 219 A.2d 820 (1966)

The New Jersey Supreme Court in *Cooper v. Government Employees Insurance Co.*[53] has, in an in-depth analysis of the situation, presented a rationale regarding prejudice in both a strict and liberal context of contract construction. The *Cooper* court cited *Whittle v. Associated Indemnity Corp.*[54] in which it had been held that where the insured failed to give timely notice under a specific forfeiture clause provision similar to the one in *Cooper,* prejudice to the insurer was immaterial. The *Whittle* court had reasoned ". . . the law does not make a better contract for the parties than they make for themselves,"[55] and that ". . . 'our function' is to 'enforce a contract as written.' "[56] The *Whittle* reasoning, it is submitted, constitutes a naive approach to the insurer-insured relationship in light of the basically adhesion nature of an insurance policy; yet many courts, even today, expound that theory. The court in *Cooper* felt that the *Whittle* approach would result in great injustice to the insured and considered instead the procedure as advanced in *Allstate Insurance Co. v. Campbell,*[57] a later case which considered the question whether prejudice should be a factor in determining the reasonableness of delay in giving notice. The *Cooper* court felt the *Campbell* approach to be also ineffective and stated: "The difficulty with this approach is that the prejudicial factor could unwittingly be turned against the insured if prejudice were permitted to lead to a loss of coverage, notwithstanding that notice was in fact given as soon as practicable."[58]

Having rejected the decisions and rationales of both *Whittle* and *Campbell,* the *Cooper* court offered, as an independent theory, a complete analysis of the situation. The adhesion quality of the contract was first cited:

> Since then we have recognized that the terms of an insurance policy are not talked out or bargained for as in the case of contracts generally, that the insured is chargeable with these terms because of a business utility rather than because he read and understood them, and hence an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as its language will permit.[59]

In addition, the harshness of forfeiture and the social function of insurance were considered as further support for requiring the insurer to prove prejudice, even in those cases where specific forfeiture clauses were involved. The decision emphasized the fact that, in addition to the insured, innocent members of the public

53. 51 N.J. 86, 237 A.2d 870 (1968), discussed previously at notes 41-43 and accompanying text *supra.*

54. 130 N.J.L. 576, 33 A.2d 866 (E. & A. 1943).

55. *Id.* at 581, 33 A.2d at 869.

56. *Id.*

57. 95 N.J. Super. 142, 230 A.2d 179 (Ch. 1967).

58. Cooper v. Government Employees Ins. Co., 51 N.J. 86, 92, 237 A.2d 870, 873 (1968).

59. *Id.* at 93, 237 A.2d at 873-74.

might go uncompensated for their injuries.

> And although the policy may speak of the notice provision in terms of a "condition precedent," as *Whittle* observed, nonetheless, what is involved is a forfeiture, for the carrier seeks on account of a breach of the provision to deny the insured the very thing paid for. This is not to belittle the need for notice of an accident, but rather to put the subject in perspective. Thus viewed, it becomes unreasonable to read the provision unrealistically or to find that the carrier may forfeit the coverage, even though there is no likelihood that it was prejudiced by the breach. To do so would be unfair to the insureds. It would also disserve the public interest for insurance is an instrument of a social policy that the victims of negligence be compensated. To that end, companies are franchised to sell coverage. We should therefore be mindful also of the victims of accidental events in deciding whether a forfeiture should be upheld.[60]

The *Cooper* court then concluded that ". . . the carrier may not forfeit the bargained for protection unless there are both a breach of the notice provision and a likelihood of appreciable prejudice. The burden of persuasion is the carriers."[61] *Cooper*, like *Young*, thus held prejudice to be essential for the insurer to be relieved of its liability. Both decisions, however, insist that the insured's failure to comply with the "condition precedent" of timely notice must be first shown.

Although other courts have followed *Cooper* and have compelled the insurer to prove prejudice in spite of the presence of a specific forfeiture clause,[62] many authorities still do not require any showing of prejudice where a specific forfeiture clause is involved.[63] The greatest breakdown of the strict interpretation ap-

60. *Id.* at 93, 237 A.2d at 874.

61. *Id.* at 94, 237 A.2d at 874.

62. *See, e.g.*, Miller v. Lindgate Developers, Inc., 274 F. Supp. 980 (E.D. Mo. 1967); Lindus v. Northern Ins. Co. of New York, 103 Ariz. 160, 438 P.2d 311 (1968); Miller v. Marcantel, La. , 221 So. 2d 557 (1969); Fox v. National Sav. Ins. Co., 424 P.2d 19 (Okla. 1967).

63. *See, e.g.*, Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966); Sohm v. United States Fidelity & Guar. Co., 352 F.2d 65 (6th Cir. 1965); Lee v. Bituminous Cas. Corp., 330 F.2d 514 (5th Cir. 1964); Lumbermans Mut. Cas. Co. v. Harleysville Mut. Cas. Co., 287 F. Supp. 932 (W.D. Va. 1968); Bruce v. United States Fidelity & Guar. Co., 277 F. Supp. 439 (D. S.C. 1967); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Fannin, 257 F. Supp. 1017 (S.D. Ohio 1966); Lilly v. Ohio Cas. Ins. Co., 234 F. Supp. 53 (D. Del. 1964); Hartford Accident & Indemn. Co. v. Loyd, 173 F. Supp. 7 (W.D. Ark. 1959); Commercial Contractors Corp. v. American Ins. Co., 152 Conn. 31, 202 A.2d 498 (1964); Lloyd v. Motor Vehicle Accident Indem. Corp., 27 A.D. 396, 279 N.Y.S.2d 593 (1967); Clemmons v. Nationwide Mut. Ins. Co., 267 N.C. 495, 148 S.E.2d 640 (1966); Bonney v.

proach has been limited to those policies which do not contain specific forfeiture clauses.[64] Thus, the insured may not anticipate too much relief in the future, for all the insurer need do to have the benefit of absolution from its contractual obligations without a showing of prejudice is to include a specific forfeiture clause in the policy.

Justice Musmanno, of the Supreme Court of Pennsylvania, in a dissent to an early decision[65] holding prejudice to the insurer to be immaterial because the notice provision was considered a condition precedent to the insurer's liability, eloquently stated the plight of the insured:

> To allow an indemnity insurance company to escape responsibility for the very thing it bound itself to anticipate is to lay down a precedent of perilous potentialities. Carrying it into its ultimate ramifications it could endanger faith in what is undoubtedly one of the strongest pillars in the temple of the American way of life, namely, the insurance policy.[66]

Pennsylvania has subsequently altered its decision and now holds the insurer to have the burden of proving prejudice in such cases.[67]

Conclusion

The majority of courts still adhere to an interpretation of the notice provision as a condition precedent to the insurer's liability, especially in policies containing specific forfeiture clauses. Those courts which have discarded the strict contract interpretation approach in favor of theories expounding a presumption of prejudice or a consideration of prejudice as a factor in determining the unreasonableness of delay achieve more equitable results than those following the strict contract interpretation approach. Even those decisions, however, fail to reflect a true insight into the insurer-insured relationship. Not until such time as all of the courts demand a showing of actual prejudice to the insurer will the inten-

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Jones, Ore. , 439 P.2d 881 (1968); State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 156, 216 P.2d 606 (1950). *See generally* Annot., 18 A.L.R.2d 443 (1951).

64. *See, e.g.*, Hubner & Williams Constr. Co. v. London Guar. & Accident Co., 280 F. Supp. 288 (D. Colo. 1967); Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Processing Corp., 256 F. Supp. 145 (D. Ore. 1966); General Accident Fire & Life Assurance Corp. v. Prosser, 239 F. Supp. 735 (D. Alas. 1965); Consolidated Mut. Ins. Co. v. Radio Foods Corp., 108 N.H. 494, 240 A.2d 47 (1968); Underwriters at Lloyds, London v. Harkins, 427 S.W.2d 659 (Tex. Civ. App. 1968); United States Fidelity & Guar. Co. v. Gable, 125 Vt. 519, 220 A.2d 165 (1966); Sears, Roebuck & Co. v. Hartford Accident & Indem. Co., 50 Wash. 2d 443, 313 P.2d 347 (1957). *See generally* Annot., 18 A.L.R.2d 443 (1951).

65. Jeanette Glass Co. v. Indem. Ins. Co. of North America, 370 Pa. 409, 88 A.2d 407 (1952).

66. *Id.* at 420, 88 A.2d at 412.

67. Bowman Steel Corp. v. Lumbermans Mut. Cas. Co., 364 F.2d 246 (3d Cir. 1966); Wiseman v. United States, 327 F.2d 701 (3d Cir. 1964).

tions and expectations held by both of the parties when entering into the insurance contract be given their true effect.

It is submitted that the current views propounded by New Jersey, Pennsylvania, California and Maryland, with regard to the materiality of prejudice to the insurer, are more equitable, conform to the expectations of the insured, promote the social functions of insurance coverage and offer a result consistent with the sometimes punitive restrictions on the submission of claims by the insured to the insurer. The insurer should not be permitted, through the introduction in the policy of forfeiture provisions, to avoid responsibility either to the insured or to the public as a whole.

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