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The Role of Prejudice in Resolving Insurance Condition Clause Disputes: The Good; The Bad; The Ugly

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I. INTRODUCTION

Insurance policies are generally considered contracts of adhesion.[1] The phrase contract of adhesion describes a standardized contract that is imposed and drafted by a party of superior bargaining

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1. *See, e.g.*, Travelers Ins. Co. v. Jones, 529 So. 2d 234, 239 (Ala. 1988); Att'ys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C., 370 P.3d 1101, 1108

strength and offered to a subscribing party on a take it or leave it basis.[2] The conclusion that a contract is one of adhesion is "merely the beginning and not the end of the analysis insofar as enforceability of its terms is concerned."[3] Rather, the enforceability of an adhesion contract is contingent upon whether the terms are beyond the reasonable expectations of an ordinary person, are oppressive, or are unconscionable.[4] Even in jurisdictions adhering to the view that insurance contracts are not adhesion contracts, courts recognize there exists an increased risk that insurers may intentionally, or even inadvertently, exploit insureds.[5] Courts in these jurisdictions, like those in which insurance policies are viewed as adhesive in nature, view insurance contracts with a critical eye because: (1) insurance policies "are 'not the result of bargaining and are often imposed on a take-it-or-leave it basis'";[6] and (2) "insureds are generally not highly sophisticated in the art of reading insurance policies."[7]

The conditions section of an insurance policy describes the rules of conduct and obligations required for coverage.[8] Because the

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(Alaska 2016); Parker v. S. Farm Bureau Cas. Ins. Co., 935 S.W.2d 556, 567 (Ark. 1996); Stoms v. Federated Serv. Ins. Co.,125 A.3d 1102, 1108 n.31 (Del. 2015); Allstate Ins. Co. v. Pruett, 186 P.3d 609, 614 (Haw. 2008); Grossman v. Thoroughbred Ford, Inc., 297 S.W.3d 918, 921 & n.2 (Mo. Ct. App. 2009); Cont'l Cas. Co. v. Kinsey, 499 N.W.2d 574, 578 (N.D. 1993); Century Sur. Co. v. Jim Hipner, LLC, 377 P.3d 784, 787 (Wyo. 2016).

2. *See, e.g.*, Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886, 893–94 (Ill. App. Ct. 2003); Meyer v. State Farm Fire & Cas. Co., 582 A.2d 275, 278 (Md. Ct. Spec. App. 1990); E. Ford, Inc. v. Taylor, 826 So. 2d 709, 716 (Miss. 2002); Kelker v. Geneva-Roth Ventures, Inc., 303 P.3d 777, 783 (Mont. 2013); Wallace v. Nat'l Bank of Commerce, 938 S.W.2d 684, 687 (Tenn. 1996).

3. Coon v. Nicola, 21 Cal. Rptr. 2d 846, 851 (Cal. Ct. App. 1993).

4. *See, e.g.*, *Hutcherson*, 793 N.E.2d at 893–94; *Meyer*, 582 A.2d at 278; *Kelker*, 303 P.3d at 781; *Wallace*, 938 S.W.2d at 688.

5. *See, e.g.*, Bailey v. Lincoln Gen. Ins. Co., 255 P.3d 1039, 1049 (Colo. 2011); Schmidt v. Midwest Family Mut. Ins. Co., 426 N.W.2d 870, 874 (Minn. 1988).

6. *Bailey*, 255 P.3d at 1049 (quoting Hulzar v. Allstate Ins. Co., 952 P.2d 342, 344 (Colo. 1998)).

7. *Id.* (quoting State Farm Mut. Ins. Co. v. Nissen, 851 P.2d 165, 167 (Colo. 1993)).

8. *See, e.g.*, Ogunsuada v. Gen. Accident Ins. Co. of America, 695 A.2d 996, 999–1000 (R.I. 1997) (describing an example of a cooperation clause that is a condition precedent to the insurer's liability).

conditions section is directed at the insured, accident victims and third parties cannot recover under an insurance policy unless the insured could recover if he were to sue his insurer.[9] Furthermore, an insurer can assert against an accident victim or third party any substantive defense based on the terms of the policy that it could have asserted against its own insured.[10] Consequently, if an insured fails to comply with policy conditions, the insurer can deny the claim of any party seeking the benefits of the policy.[11]

The provisions relevant to the insured's duties following a loss or occurrence are a significant aspect of the conditions section. Typically these provisions purport to obligate the insured to: notify the insurer as soon as practical of the loss, occurrence, or filing of suit; provide copies of all documents and information requested, such as any demands, notices, summonses or legal papers received in connection with the claim or suit; submit to an examination under oath; submit a sworn proof of loss; authorize the insurer to obtain records and other information; submit to an independent medical examination; obtain the insurer's consent before settling with the tortfeasor; comply with time limitations on suits; and cooperate with the insurer in the investigation, settlement of the claim, or defense against the suit.[12]

This article examines the legal consequences that flow out of an insurance company's denial of coverage based on an insured's failure to comply with policy conditions. Specifically, this article examines the various methods used by courts to strike a balance between the

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9. *See* Am. Guar. & Liab. Ins. Co. v. Chandler Mfg. Co., 467 N.W.2d 226, 228–29 (Iowa 1991); Kennedy v. Dashner, 30 N.W.2d 46, 47 (Mich. 1947); *Ogunsuada,* 695 A.2d at 999–1000; Burr v. Lane, 517 P.2d 988, 993–94 (Wash. Ct. App. 1974).

10. *See Am. Guar. & Liab. Ins. Co.*, 467 N.W.2d at 228–29; Johnston v. Sweany, 68 S.W.3d 398, 400–01 (Mo. 2002); *Ogunsuada*, 695 A.2d at 1000; *Burr*, 517 P.2d at 994.

11. *See Ogunsuada*, 695 A.2d at 999–1000.

12. *See* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION, 207–10, 475–76 (5th ed. 2010); INS. SERV. OFFICE, HOMEOWNERS 3 – SPECIAL FORM (1999), http://www.iii.org/sites/default/files/docs/pdf/HO3_sample.pdf (providing an example of a HO 00 03 10 00 homeowners policy); ISO PROPS., COMMERCIAL GENERAL LIABILITY COVERAGE FORM (2006), http://www.independentagent.com/Education/VU/SiteAssets/Documents/ISO/CG/CG00011207.pdf (providing an example of a CG 00 01 12 07 commercial general liability insurance policy).

principle of freedom of contract and policy norms associated with resolving condition clause disputes. Section II.A. discusses the conditions precedent/conditions subsequent approach to resolving conditions disputes. It explains how historically the traditional condition precedent/condition subsequent analysis impeded the development of contract law, especially in the context of condition clause disputes.

Section II.A examines the modern day functional approach to contractual interpretation as employed in the insurance contract context. Section II.A.i. discusses the prejudice rule (i.e. notice-prejudice rule), which is the primary tool used by courts to resolve insurance disputes that arise out of an insured's failure to comply with a condition clause. Section II.A.ii. explains how prejudice, as a factor in determining the legal consequences of an insured's breach of an insurance policy condition, has led to the recognition of three distinct rules. Section II.A also illustrates the three legal implications of prejudice to the insurer with select cases.

The law regarding insurance condition disputes is in an irreconcilable state. Any attempt at comparing the law among the states would be useless because the holdings arise in different insurance contexts, involve differently worded provisions, and are justified by different rationales, often with historical significance unique to the particular jurisdiction in question. Consequently, Section II.B examines the extent to which States, individually, have integrated the prejudice rule into their condition clause jurisprudence. Section II.B provides a state-by-state survey of the extent to which the prejudice rule has been incorporated into the law as it relates to condition clause disputes.

Section II.C. provides a qualitative and quantitative evaluation of prejudice rule jurisprudence. Section II.C. performs this service by classifying the law of the respective states as good, bad, or ugly. These classifications are based on several variables consisting of: (1) whether the prejudice rule has been adopted; (2) the extent to which it has been applied to condition provisions other than notice conditions; (3) express restrictions or limitations on the application of the prejudice rule; and (4) who has the burden of proving or disproving prejudice.

Section II.C concludes that a majority of jurisdictions require insurers to prove that they were actually prejudiced by the insured's noncompliance. In jurisdictions classified as good, the law is characterized by: (1) recognition of the rule's applicability to most, if not all,

condition provisions; (2) absence of express restrictions on expanding the doctrine's application; and (3) allocation of the burden of proof on the insurer.

In jurisdictions classified as bad, prejudice jurisprudence is restricted in its application to two or fewer condition provisions. The law in these jurisdictions also expressly recognizes that the rule is not applicable beyond specific condition provisions and/or specific types of policies. Many of the jurisdictions whose law is classified as bad also allocate the burden of disproving prejudice to the insured, thus recognizing a presumption of prejudice in favor of the insurer.

In jurisdictions classified as ugly, the law continues to adhere to the strict or literal interpretation approach to resolving insurance contract disputes. These jurisdictions engage in the traditional condition precedent/condition subsequent analysis, which favors the drafter of the policy. Consequently, if the condition constitutes a condition precedent, which in most instances it will, or expresses the consequences of an insured's failure to comply, coverage is void regardless of whether the insurer was prejudiced.

II. CONDITION PRECEDENT VS. CONDITION SUBSEQUENT

Early authorities generally held that "the effect of the failure to give notice and forward suit papers depends upon the wording of the policy."[13] A summary of the law provided that:

> Provisions making the furnishing of proofs of loss within a stipulated time a condition precedent to liability on the part of the insurer, or providing for forfeiture for failure to file within that time, will ordinarily be given effect, provided a satisfactory excuse for the noncompliance or delay in compliance is not given. There is, however, a conflict of opinion on the question whether[] . . . the provision in the usual form of policy, that notice and proofs of loss must be made within a certain time, is a condition precedent so far as giving notice or furnishing proofs of

13. State Farm Mut. Auto. Ins. Co. v. Cassinelli, 216 P.2d 606, 609 (Nev. 1950), *abrogated by regulation*, NEV. ADMIN. CODE § 686A.660 (enacted in 1980), *as recognized in* Las Vegas Metropolitan Police Dept. v. Coregis Ins. Co., 268 P.3d 958 (Nev. 2011).

> loss in the prescribed time is concerned. Some courts hold that the failure to comply with the policy within the period specified defeats a recovery on the policy[.] [The more generally accepted rule, however, is that] the requirements of an insurance policy that the insured shall give notice and furnish proofs of loss within a certain time are conditions precedent to the right to sue, [but] failure to comply with such requirements within the time stipulated does not avoid the policy or work a forfeiture in the absence of a stipulation in the policy to that effect.[14]

While it used to be common in contract law to speak of conditions precedent and conditions subsequent, the trend in recent years is to abolish the concept of conditions subsequent and instead ask whether the occurrence or non-occurrence of the event in question discharges an existing duty.[15] Many courts require specific language discharging the duty in the case of non-occurrence of an event in order to consider the provision in question a condition; this often happens in the form of a provision declaring that a failure to comply with the contract will make the agreement null and void.[16] In other words, if the policy expressly provided that "literal and strict compliance with the requirements of a condition" was of the essence of the contract and a condition precedent to recovery, then a failure to comply prevented recovery.[17] While no specific language was required to be used in defining the effects of a failure to comply with a condition, the language used had to be sufficient to define the policy provision as a condition precedent.[18]

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14. 29A AM. JUR. *Insurance* § 1380 (1960).

15. RESTATEMENT (SECOND) OF CONTRACTS § 224 cmt. e (AM. LAW INST. 1981).

16. *See, e.g.*, Phoenix Mut. Life Ins. Co. v. Aetna Ins. Co., 59 S.W.2d 517, 518 (Tenn. 1933).

17. *Cassinelli*, 216 P.2d 610.

18. *Id.* at 615. During the same period, a contrary view was followed in other jurisdictions. Therein, a failure to comply with a condition requiring immediate written notice of an accident did not preclude recovery if either the policy did not expressly provide that non-performance would cause a forfeiture or the breach caused injury to or prejudiced the insured. *Id.* at 610.

Under the strict compliance approach to condition clause interpretation, the presence or absence of prejudice to the insurer was immaterial: "[t]he rationale underlying the strict contractual approach is that courts should not presume to interfere with the right to freedom of contract by redrafting insurance policy provisions where the parties' intent is clearly and unambiguously expressed."[19] A contemporary application of this archaic approach to resolving condition disputes can be found in *Fireman's Fund Insurance Co. v. Care Management, Inc.*[20]

Fireman's Fund involved a wrongful death lawsuit filed on June 15, 2006, by Carol Henson as the special administrator of the estate of Mamie Denton—deceased.[21] Named as defendants were Care Management, Inc., Southwest Nursing Home, Inc., and Health Care Organizations—respondents/appellees.[22] Two years later, on September 26, 2008, the attorney for Respondents, Care Management, Inc., wrote a letter to a claims representative of Medical Liability Mutual Insurance Company and two other insurance companies inquiring about the possibility of coverage.[23] He also included a copy of the June 15, 2006, complaint and informed the claims representative that the case was scheduled for a final hearing on October 7, 2008.[24] This letter was the first time that Respondents informed Petitioners about either the lawsuit or the claim of the Denton estate.[25]

The federal district court in *Fireman's Fund* explained that, while there is a long line of cases in which the Eighth Circuit had interpreted Arkansas law as holding that an insurance company need not show it was prejudiced by a delay in notice when notice is a condition precedent to an insurer's recovery, the Eight Circuit in its most recent decision noted that "the state of Arkansas law on the subject leaves room for doubt."[26] The federal district court thus concluded that it was

19. Central Nat'l Ins. Co. v. Prudential Reinsurance Co., 241 Cal. Rptr. 773, 785 (Cal. Ct. App. 1987).

20. Fireman's Fund Ins. Co. v. Care Mgmt., Inc., 361 S.W.3d 800, 800 (Ark. 2010).

21. *Id.* at 802.

22. *Id.* at 800.

23. *Id.* at 802.

24. *Id.*

25. *Id.*

26. *Id.* at 803.

necessary to inquire of the Arkansas Supreme Court whether the Eighth Circuit had properly interpreted Arkansas law.[27]

In *Fireman's Fund*, the Arkansas Supreme Court accepted and, for sake of clarity, reformulated the certified question as:

> When an insurance policy provides that the giving of notice of a claim as soon as practicable is a condition precedent to recovery, and the insured fails to give the insurer notice of the claim as soon as practicable, must the insurer prove that it was prejudiced by the failure to give timely notice in order to avoid coverage?[28]

According to the Arkansas Supreme Court:

> [W]here an insurance policy provides that the giving of notice of a loss, claim, or lawsuit is a condition precedent to recovery, the insured must strictly comply with the notice requirement, or risk forfeiting the right to recover from the insurance company. The insurance company need not show that it was prejudiced by any delays in or lack of notification. However, if the notice provision is not a condition precedent, the insured does not automatically forfeit the right to recover. Instead, the insurance company must show that it was prejudiced by noncompliance with the terms of the policy. The insurance company may be prejudiced if delay is unreasonable.[29]

The court, though acknowledging the existence of a more modern view that requires a showing of prejudice more frequently, declined to overturn its long line of precedent because, "[i]n Arkansas, a condition precedent is still a condition precedent."[30]

It has been said that:

> A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. As such, a condition precedent may

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27. *Id.*
28. *Id.* at 801.
29. *Id.* at 803.
30. *Id.* at 803 n.1.

> relate either to the formation of contracts or to liability under them. 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. Although no words in particular are necessary for the existence of a condition, such terms as "if", "provided that", "on condition that", or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. In the absence of such a limiting clause, whether a certain contractual provision is a condition, rather than a promise, must be gathered from the contract as a whole and from the intent of the parties. However, where the intent of the parties is doubtful or where a condition would impose an absurd or impossible result then the agreement will be interpreted as creating a covenant rather than a condition.[31]

A condition precedent is one that must be performed before the contract becomes effective.[32] However, the right to demand performance of a condition precedent must be exercised in a reasonable manner.[33] Conditions subsequent pertain not to the attachment of risks at the inception of the contract but to the insurance policy after the risks have attached and during its existence.[34] Pursuant to the condition precedent/condition subsequent analysis, the clauses that compose the conditions section of the policy are classified as one or the other.

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31. Progressive Cty. Mut. Ins. Co. v. Trevino, 202 S.W.3d 811, 814–15 (Tex. Ct. App. 2006) (citations omitted).

32. State Farm Mut. Auto. Ins. Co. v. Curran, 135 So. 3d 1071, 1078 (Fla. 2014); *see also* Stephens & Stephens XII, LLC v. Firemen's Fund Ins. Co., 180 Cal. Rptr. 3d 683, 697 n.13 (Cal. Ct. App. 2014) ("[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises." (citation and internal quotations omitted)).

33. Brizuela v. CalFarm Ins. Co., 10 Cal. Rptr. 3d 661, 668 (Cal. Ct. App. 2004); Hodnett v. Arbella Mut. Ins. Co., 1996 Mass. App. Div. 131, 132 (Mass. Dist. Ct. 1996).

34. *Curran*, 135 So. 3d at 1078.

A. The Functional Approach to Conditions Clause Interpretation

Some courts that no longer embrace the strict contractual view of insurance policy interpretation reject the theory that the language of the provision is dispositive of whether it is a condition precedent or a condition subsequent. According to these courts, the dispositive factor in determining whether a provision is a condition precedent or subsequent is the purpose of the provision.[35] Thus, it has been said:

> Simply put, the scope of the condition precedent which will relieve an insurer of its obligations under an insurance contract, is only as broad as its purpose: to protect the ability of the insurer to defend by preserving its ability fully to investigate the accident. If, under the circumstances of a particular case, the purpose of protecting the insurer's ability to defend has been frustrated, the insurer has no duty under the contract.[36]

Within the matrix of the functional approach, courts have developed two doctrines, that of enforcing the reasonable expectation of the insured and the notice-prejudice rule, to combat problems inherent in allowing insurance companies to deny coverage based solely on an insured's failure to comply with a notice condition contained in an insurance policy.[37] The reasonable expectation doctrine is an interpretative rule used to construe an insurance policy as it would be understood by an ordinary insured.[38] The notice-prejudice rule, by contrast, excuses an insured from fulfilling an unambiguous contractual condition—the notice requirement—where the insurer was not prejudiced by the untimely notice.[39]

The notice-prejudice rule is based on the contractual principle of non-material breach. Thus, to the extent that a breach of a policy condition would cause disproportionate forfeiture, courts can excuse

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35. *See* Foremost Ins. Co. v. Raines, No. COA15–978, 2016 WL 1009327, at *5 (N.C. Ct. App. Mar. 15, 2016).

36. *Id.* (citation omitted).

37. *See* Mabrat v. Allstate Ins. Co., No. 12–1293, 2012 WL 6209884, at *3–6 (E.D. Pa. Dec. 12, 2012) (analyzing application of the reasonable expectation doctrine and notice-prejudice rule).

38. *Id.* at *3.

39. *Id.* at *4.

the breach of that condition unless its occurrence was a material part of the contract.[40] Alternatively, pursuant to the notice-prejudice rule, when a condition would impose an absurd or impossible result, the agreement could be interpreted as creating a covenant rather than a condition.[41]

Many courts have applied the notice-prejudice rule to other condition provisions contained in insurance policies. Consequently, the notice-prejudice rule is frequently referred to as the prejudice rule. Prejudice, as a factor in determining the legal consequence of an insured's breach of an insurance policy condition, has resulted in the recognition of three distinct rules.[42] The first "takes the position that prejudice to the insurer is not an important element; that it is immaterial."[43] In jurisdictions that follow this view, the insured's failure to comply with a policy condition results in violation of a valid covenant, which in turn results in loss of coverage because all breaches of conditions are material.[44] The second is that an unexcused breach of a condition raises a presumption of prejudice to the insurer.[45] The insured must successfully rebut the presumption in order to recover under the policy.[46] The third rule is that no presumption of prejudice results.[47] It is up to the insurer to demonstrate substantial prejudice growing out of the insured's noncompliance before it is relieved of liability under the policy.[48] Under the second and third rules, a breach is material so as to preclude coverage only when the insurer is prejudiced thereby.[49]

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40. Estate of Gleason v. Cent. United Life Ins. Co., 350, 355 P.3d 349 (Mont. 2015).

41. PAJ, Inc. v. Hanover Ins. Co., 243 S.W.3d 630, 636 (Tex. 2008).

42. Finstad v. Steiger Tractor, Inc., 301 N.W.2d 392, 397 (N.D. 1981).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

1. Prejudice to the Insurer

i. Proof of Actual Prejudice Required

The functional approach has increasingly been recalibrated in response to the premise that compliance with a condition precedent, in appropriate circumstances, should be excused to avoid a disproportionate forfeiture. An early description of the circumstances warranting such relief provided:

> Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier . . . . Where the line is to be drawn between the important and the trivial cannot be settled by a formula. In the nature of the case precise boundaries are impossible. The same omission may take on one aspect or another according to its setting . . . . The question is one of degree, to be answered, if there is doubt, by the triers of the facts, and, if the inferences are certain, by the judges of law . . . . We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal enforcement is to be implied by law as a condition.[50]

This logic has influenced many courts to reconsider their views regarding the legal effect of a breach of a condition clause. For example, in *Aetna Casualty & Surety Co. v. Murphy,*[51] the sole issue before the court was whether an insured who belatedly gave notice of an insurable claim could nevertheless recover on the insurance contract by

50. Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (citations omitted).

51. Aetna Cas. & Sur. Co. v. Murphy, 538 A.2d 219 (Conn. 1988).

rebutting the presumption that his delay prejudiced the insurer.[52] The *Murphy* court began its analysis of the issue by acknowledging that:

> We are confronted, in this case, by a conflict between two competing principles in the law of contracts. On the one hand, the law of contracts supports the principle that contracts should be enforced as written, and that contracting parties are bound by the contractual provisions to which they have given their assent. Among the provisions for which the parties may bargain are clauses that impose conditions upon contractual liability. If the occurrence of a condition is required by the agreement of the parties, rather than as a matter of law, a rule of strict compliance traditionally applies. On the other hand, the rigors of this traditional principle of strict compliance has been increasingly been tempered by the recognition that the occurrence of a condition may, in appropriate circumstance, be excused in order to avoid a "disproportionate forfeiture."[53]

In determining whether, under the circumstances of the case, there was a need to avoid a disproportionate forfeiture, the *Murphy* court identified three considerations as crucial.[54] First, the contractual provisions in dispute were contained in a contract of adhesion to which the parties had no occasion to bargain about the consequences of a breach.[55] Second, the enforcement of the provision operated as a forfeiture because the insured would lose his coverage despite having dutifully paid premiums.[56] Third, the insurer's legitimate purpose of guaranteeing itself a fair opportunity to investigate accidents and claims (i.e. purpose of notice provision) can be protected "without the forfeiture that occurs from presuming, irrebuttably, that late notice invariably prejudices the insurer."[57]

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52. *Id.* at 219.
53. *Id.* at 221 (citations omitted).
54. *Id.* at 222.
55. *Id.*
56. *Id.*
57. *Id.*

The court in *Murphy* concluded that an insured's noncompliance with a notice provision created a rebuttable presumption of prejudice to the insurer.[58] This holding was subsequently reconsidered by the Connecticut Supreme Court in *Arrowood Indemnity Co. v. King.*[59] Therein, the court shifted the affirmative burden of proving actual prejudice to insurers.[60]

Courts have further leveled the playing field by applying the notice-prejudice rule to other condition provisions, in addition to refining the premise in terms of the degree of prejudice—material/substantial—and standards pursuant to which it is to be evaluated. For example, in *Belz v. Clarendon America Insurance Co.*,[61] "[t]he question on appeal rests on whether this portion of the Clarendon policy is a notice provision, a cooperation clause, or a no-voluntary payment provision."[62] According to the court, notice provisions and cooperation clauses are material to the risks assumed by the insurer.[63] Consequently, an insurer is not relieved of its obligations under the policy unless it was substantially prejudiced by the insured's breach of the condition. A no-voluntary-payment provision, however, is not material and can be enforced without a showing of prejudice.[64] Thus, "[u]nder California law, an insured's breach of a notice provision or a cooperation clause does not excuse the insurer's performance unless the insurer can show that it suffered prejudice; a breach of a no-voluntary-payment provision does not require a showing of prejudice."[65]

Concluding that the conditions in dispute constituted a notice provision, the *Belz* court rejected the presumption of prejudice option[66] and proceeded to an explanation of substantial prejudice. Accordingly, to establish substantial prejudice in the context of a breach of a cooperation clause, the insurer, at a minimum, must demonstrate that in the absence of the insured's breach there was a substantial likelihood the

58. *Id.* at 224.
59. Arrowood Indem. Co. v. King, 39 A.3d 712 (Conn. 2012).
60. *Id.* at 727.
61. Belz v. Clarendon Am. Ins. Co., 69 Cal. Rptr. 3d 864 (Cal. Ct. App. 2007).
62. *Id.* at 869.
63. *Id.* at 869–70.
64. *Id.* at 870–71.
65. *Id.* at 869.
66. *Id.* at 872.

trier of fact would have found in its favor.[67] The standard in the notice provision context requires the insurer to show that but for the delay caused by the insured's breach there was a substantial likelihood that it could have prevailed in the action brought against insured or that it could have settled the case for a small sum or a smaller sum than that for which the insured settled the claim.[68]

ii. Breach of a Condition Raises a Presumption of Prejudice

While there is universal agreement that public policy considerations should play a role in insurance contract interpretation, questions regarding the method and extent to which it should be infused continue to perplex courts throughout the country. Nowhere is this truer than in the world of insurance condition clause disputes. Some jurisdictions have elected to strike a balance between the interests of insurers and insureds in the performance of conditions by modifying and applying the functional approach in a manner that avoids per se results.

In jurisdictions that adhere to the view that breach of a condition clause raises a presumption of prejudice, different presumptions arise depending on the type of condition breached. Consequently, the initial inquiry consists of defining the disputed condition as either a condition precedent or condition subsequent. Disputed condition provisions are construed as being either material to the agreement, i.e. a condition precedent, or not material to the agreement, i.e. condition subsequent.[69] The condition precedent/condition subsequent analysis, however, is tempered because neither a breach of a condition precedent nor a breach of a condition subsequent results in an automatic forfeiture of insurance benefits absent prejudice to the insurer.

A classic illustration of the presumption of prejudice approach can be found in *State Farm Mutual Automobile Insurance Co. v. Curran.*[70] In *Curran*, the issue on appeal was "whether the breach of such [compulsory medical examination] a provision precludes recovery under the policy as a matter of law without regard to whether the breach

67. *Id.* at 873.

68. *Id.* at 874.

69. *See, e.g.*, Bankers Ins. Co. v. Macias, 475 So. 2d 1216, 1218 (Fla. 1985); Roberts Oil Co. v. Transamerica Ins. Co., 833 P.2d 222, 230 (N.M. 1992).

70. State Farm Mut. Auto. Ins. Co. v. Curran, 135 So. 3d 1071 (Fla. 2014).

resulted in actual prejudice to the insurer."[71] The court began its analysis by determining whether the compulsory medical examination ("CME") provision was a condition precedent or condition subsequent to recovery. The court ultimately concluded that the CME provision constituted a condition subsequent.

Because the CME provision was not a condition precedent to coverage, prejudice was a necessary consideration. Nevertheless, as explained by the court, different presumptions arise depending on which condition has been breached. Specifically, if the insured breaches a notice provision (condition precedent), prejudice to the insurer is presumed but may be rebutted.[72] However, if a cooperation clause (condition subsequent) has been breached, the insurer must show that it was substantially prejudiced by a material breach. Thus, a rebuttable presumption of prejudice results from a breach of a condition precedent.[73] Rebutting the presumption requires evidence that the insurer was not in fact prejudiced. Consequently, even where there has been a substantial and material breach of a condition precedent by the insured, the insurer is not per se discharged if the insured can show an absence of substantial prejudice to the insurer.[74]

B. Resolving Condition Clause Disputes in the Modern Era

Alabama

An insurer's duty to indemnify or to evaluate the validity of a claim does not arise until the insured has complied with the terms for submitting claims.[75] Consequently, Alabama decisional law has long recognized the technical distinctions between policies in which post-loss duties are expressly made conditions precedent and those in which there is no express provision making the insured's compliance grounds for denial of coverage or a condition precedent. Where the terms are

71. *Id.* at 1076.
72. *Id.* at 1075.
73. *Id.*
74. *See* Roberts Oil Co. v. Transamerica Ins. Co., 833 P.2d 222 (N.M. 1992).
75. United Ins. Co. v. Cope, 630 So. 2d 407, 412 (Ala. 1993).

expressly made conditions precedent, the failure of the insured to comply releases the insurer from its contractual obligations without regard to whether it was prejudiced by the insured's breach.[76]

Alabama's no prejudice rule has been extended to submission to examinations under oath where the provision constitutes a condition precedent.[77] The no prejudice rule has been deviated from in only four instances. First, regarding excess carriers, Alabama case law concludes that:

> The rationale for not requiring a showing of prejudice is based on the premises that a primary insurer must have timely notice in order to form an intelligent estimate of its rights and liabilities, to afford it an opportunity for investigation, to allow it to participate in the litigation and to prevent fraud. At least one court, however, has recently recognized that the nonprejudice rule serves no purpose between an insured and its excess insurer because the "re-insurer is not responsible for providing a defense, for investigating the claim or for attempting to get control of the claim in order to effect an early settlement." Instead, the policy between an insured and an excess insurer should be governed by general contract law which requires demonstrable prejudice before a breach will excuse performance.[78]

76. *See* Pittman v. State Farm Fire & Cas. Co., 868 F. Supp. 2d 1335, 1349 (M.D. Ala. 2012); Travelers Indem. Co. v. Miller, 86 So. 3d 338, 342 (Ala. 2011); State Farm Mut. Auto. Ins. Co. v. Hanna, 166 So. 2d 872, 877 (Ala. 1964); Ala. Farm Bureau Mut. Cas. Ins. Co. v. Mills, 123 So. 2d 138, 142 (Ala. 1960); Am. Fire & Cas. Co. v. Tankersley, 116 So. 2d 579, 582 (Ala. 1959).

77. *See* Nationwide Ins. Co. v. Nilsen, 745 So. 2d 264, 267 (Ala. 1998); Akpan v. Farmers Ins. Exch., Inc., 961 So. 2d 865, 868–69 (Ala. Civ. App. 2007).

78. Midwest Emp'rs Cas. Co. v. E. Ala. Health Care, 695 So. 2d 1169, 1171 (Ala. 1997) (citations omitted).

Consequently, excess carriers are required to plead and show prejudice.[79] Second, Alabama decisional law has carved out an exception to the no prejudice rule in uninsured motorist cases.[80] According to this exception:

> [T]he insured must, at a minimum, put on evidence showing the reason for not complying with the insured's notice requirement. This prerequisite satisfied, the insurer may then demonstrate that it was prejudiced by the insured's failure to give timely notice. If the insurer fails to present evidence as to prejudice, then the insured's failure to give notice will not be a bar to his recovery. When the insurer puts on evidence of prejudice, however, the reasonableness of the failure to give notice then becomes a question of fact for a jury to decide.[81]

Third, "a material and substantial failure to cooperate relieves an insurer of its duty to cover and defend . . . . The 'test for determining what is material and substantial . . .' amounts to a 'requirement of prejudice to the insurer.'"[82] The rationale for the prejudice requirement is that cooperation provisions, as conditions precedent to the insurer's obligations, impose broad, vague requirements, which, in the absence of legally applied standards, would put into doubt the contractual obligations between insurer and insureds.[83] By contrast, a requirement that an insured give notice of his claim, for instance, is specific and thus lends itself to objective proof.[84] Finally, under the required by

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79. *Id.*

80. State Farm Mut. Auto. Ins. Co. v. Burgess, 474 So. 2d 634, 637 (Ala. 1985).

81. *Id.*

82. Williams v. Ala. Farm Bureau Mut. Cas. Ins. Co., 416 So. 2d 744, 746 (Ala. 1982) (citing Home Indem. Co. v. Reed Equip. Co., 381 So. 2d 45, 48 (Ala. 1980) (holding that under Alabama law an insured's noncooperation must be "material and substantial resulting in prejudice to the insurer")). *But see* U.S. Fire Ins. Co. v. Watts, 370 F.2d 405, 409 (5th Cir. 1966) (stating, in dicta, that under Alabama law when "cooperation is a condition precedent to an action against the insurance company, there need be no showing of prejudice.").

83. *Home Indem. Co.*, 381 So. 2d at 49 n.3.

84. *Id.*

law exception, an insured's failure to comply with a condition expressed in the policy does not bar the injured party's suit against the insurer when the insured was legally obligated to carry such insurance for the protection of the public.[85] This exception applies where a statute affirmatively precludes the enforcement of policy conditions, including specifically the one upon which the insurer relies.[86]

Alaska

Alaska courts have dispensed entirely with the condition precedent/condition subsequent dichotomy. Rather, the effects of an insured's breach of a condition provision, including time limit on commencement of suits clauses, notice of loss clauses, proof of loss clauses, and cooperation clauses, are evaluated on the basis of whether the clause's application in a particular case furthers the purpose for which it was included in the policy.[87] As cited by the *Estes* Court, "[w]hen enforcement does not serve the reasons for the provision's inclusion in the policy, the insured's reasonable expectation that coverage will not be arbitrarily denied must be given effect."[88] This approach is premised on the fact that: "'An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured.' An insured is charged with knowledge of these conditions not because he has read or understood them, but because business utility so demands."[89]

Thus, where the purpose of the provision is to avoid prejudice, the insurer must establish that it was prejudiced by the insured's breach.[90]

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85. *See* Am. S. Ins. Co. v. Dime Taxi Serv., Inc., 151 So. 2d 783, 786–87 (Ala. 1963); Emp'rs Ins. Co. v. Johnston, 189 So. 58, 63 (Ala. 1939).

86. *See* Miller v. Visionary Home Builders, Inc., No. 12-0706-WS-B, 2013 WL 5176376, at *4–*7 (S.D. Ala. Sept. 13, 2013) (discussing required by law exception).

87. *See* Estes v. Alaska Ins. Guar. Ass'n, 774 P.2d 1315, 1318 (Alaska 1989).

88. *Id.*

89. *Id.* at 1317 (citations omitted).

90. *See* McDonnell v. State Farm Mut. Auto. Ins. Co., 299 P.3d 715, 729 (Alaska 2013).

Arizona

In Arizona, an insured's failure to comply with a condition clause does not constitute a valid defense where the enforcement of the clause would result in a forfeiture.[91] Prejudice to the insurer, as a consequence of the insured's breach of the condition, is a key factor in determining whether a forfeiture would result from the enforcement of the condition.[92] The Court in *Zuckerman v. Transamerica Insurance Co.* stated that "[i]n the absence of such a showing, it is fair to say that the purpose for which the insurer was given permission to insert the clause will not be served by its enforcement."[93] Arizona courts have applied the prejudice rule broadly when (a) the insurance policy is a contract of adhesion, (b) the clause in question forms part of the policy conditions requiring notice of loss and proof of claims be filed within certain time periods, and (c) enforcement of the provision would result in a technical forfeiture, unrelated to the merits of the claim.[94]

This rule is premised upon the adhesive nature of condition clauses. Therefore, it is applicable to all condition provisions in an occurrence policy.[95] The prejudice rule, however, should not be interpreted as making condition provisions unenforceable. Rather, as explained by the court in *Zuckerman v. Transamerica Insurance Co.*:

> We do not write a contract for the parties by holding these provisions unenforceable under all circumstances. We do apply to the limitation provision, as we have applied to others, a rule that the conditions will be enforceable despite their adhesive nature unless it is inequitable to enforce them. Where the conditions do no more than provide a trap for the unwary, the insurer will be estopped to raise them.[96]

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91. *See* Zuckerman v. Transamerica Ins. Co., 650 P.2d 441, 448 (Ariz. 1982).

92. *Id.*

93. *Id.*

94. Carrington Estate Planning Servs. v. Reliance Standard Life Ins. Co., 289 F.3d 644, 647 (9th Cir. 2002).

95. *Zuckerman*, 650 P.2d at 448.

96. *Id.*

Most assuredly, an insured's breach of a policy condition can be a defense to an action on the policy. However, in order to constitute a valid defense, the insurer must prove that the insured's breach was both material and substantially prejudiced it.[97]

Occurrence policies are distinguishable from claims-made policies. The purpose of a specific condition in a claims-made policy can be different from that of an equivalent provision in an occurrence policy. Consequently, the notice-prejudice rule for late notice does not apply in claims-made insurance policies because the role of notice to the insurer is fundamentally different in the two types of policies.[98]

Arkansas

Arkansas courts are committed to enforcing the plain language of insurance policies where it is clear and unambiguous.[99] Therefore, the first issue to be addressed in the context of a condition dispute is whether the language of the contract creates a condition precedent.[100] Arkansas has long recognized the validity of conditions precedent in insurance contracts.[101]

Where an insurance policy, expressly or by implication, provides that a condition constitutes a condition precedent to recovery, the

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97. *See* Holt v. Utica Mut. Ins. Co., 759 P.2d 623, 627 (Ariz. 1988); *see also* Lindus v. N. Ins. Co., 438 P.2d 311, 315 (Ariz. 1968); U.S. Fid. & Guar. Co. v. Powercraft Homes, Inc., 685 P.2d 136, 141–42 (Ariz. Ct. App. 1984).

98. 11333 Inc. v. Certain Underwriters at Lloyd's, London, No. CV–14–02001–PHX–NVW, 2015 WL 1578501, at *6 (D. Ariz. Apr. 9, 2015).

99. *See* Ingram v. Life Ins. Co., 354 S.W.2d 549, 550 (Ark. 1962); Barnett v. Sw. Life Ins. Co., 601 S.W.2d 604, 607 (Ark. Ct. App. 1980).

100. *See* Am. Gen. Life Ins. Co. v. First Am. Nat'l Bank, 716 S.W.2d 205,207–08 (Ark. Ct. App. 1986).

101. AIG Centennial Ins. Co. v. Fraley-Landers, 450 F.3d 761, 763 (8th Cir. 2006).

> A condition precedent is "an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." Unlike a mere contract term, the breach of which must be material before it excuses another party from performing, one party's failure to fulfill a condition precedent entirely excuses any remaining obligations of the other party.

Id.

insured must strictly comply or risk forfeiture of coverage.[102] Pursuant to this rule, the insurer need not show that it was prejudiced by the insured's noncompliance.[103] This rule applies to all condition provisions that constitute conditions precedent.[104] If, however, the provision constitutes a condition subsequent, the insured's breach does not automatically result in a forfeiture of coverage.[105] While there might be sound reasons for applying the notice-prejudice rule to notice provisions in an occurrence policy, those reasons do not apply with equal force to a notice provision in a claims-made policy.[106]

California

According to the Court of Appeals:

> California has a strong public policy against "technical forfeitures." Since forfeitures are not favored, "conditions in a contract, will if possible be construed to avoid forfeiture. This is particularly true of insurance contracts. And where . . . the condition is express and cannot be avoided by construction, the court may, in a proper case, excuse compliance with it or give equitable relief against its enforcement."[107]

The foregoing passage does not accurately depict California's law regarding the legal effect of an insured's breach of a condition clause. Rather, the practical implication is that California law recognizes two distinct standards to be used in assessing the enforceability

102. *See* Kimbrell v. Union Standard Ins. Co., 207 F.3d 535, 537 (8th Cir. 2000); Fireman's Fund Ins. Co. v. Care Mgmt., Inc. 361 S.W.3d 800, 803 (Ark. 2010).

103. *Fireman's Fund*, 261 S.W.3d. at 803.

104. *Id.* at 803–04.

105. *See id.*

106. *See* Campbell & Co. v. Utica Mut. Ins. Co., 820 S.W.2d 284, 288 (Ark. Ct. App. 1991).

107. Henderson v. Farmers Grp., Inc. 148 Cal. Rptr. 3d 385, 396 (Cal. Ct. App. 2012) (citations omitted); *see also* O'Morrow v. Borad, 167 P.2d 483, 487 (Cal. 1946).

of forfeiture clauses.[108] Those standards being the usual rules of contract interpretation (i.e. notice-prejudice rule) and equity.[109]

California decisional law, in the occurrence policies context, recognizes that an insured's breach of a notice provision or a cooperation clause does not excuse the insurer's performance unless the insurer can show that it suffered substantial prejudice.[110] The rule, however, is not premised on the fact that notice provisions and cooperation clauses are typically viewed as conditions precedent.[111]

In California, the notice-prejudice rule is restricted to noncompliance with notice clauses and cooperation provisions.[112] It has, however, been applied to reinsurers.[113] An insurer cannot circumvent the notice-prejudice rule by adding language to its policy stating that insufficient notice will result in exclusion of coverage, whether the insurer is prejudiced or not.[114]

The notice-prejudice rule has been found unsuitable for application to claims-made and reported policies.[115] This conclusion is based on the fact that claims-made and report policies are drastically

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108. *See generally* Root v. Am. Equity Specialty Ins. Co., 30 Cal. Rptr. 3d 631 (Cal. Ct. App. 2005).

109. *See id.*

110. *See* Belz v. Clarendon Am. Ins. Co., 69 Cal. Rptr. 3d 864, 872 (Cal. Ct. App. 2007).

111. *See, e.g.*, Billington v. Interinsurance Exch., 456 P.2d 982, 990 (Cal. 1969) (stating that a cooperation clause can be a condition precedent or condition subsequent); *O'Morrow*, 167 P.2d at 487; *Henderson*, 148 Cal. Rptr. 3d at 384–95; *Belz*, 69 Cal. Rptr. 3d at 869.

112. Insua v. Scottsdale Ins. Co., 129 Cal. Rptr. 2d 138 (Cal. Ct. App. 2002).

113. *See* Ins. Co. v. Associated Int'l Ins. Co., 922 F.2d 516 (9th Cir. 1990).

114. *See* Steadfast Ins. Co. v. Casden Props., Inc., 837 N.Y.S.2d 116, 117 (N.Y. App. Div. 2007) (applying California law and holding that because California had adopted the notice-prejudice rule, an endorsement that waived the prejudice requirement for untimely notice was void as against public policy).

115. *See* Root v. Am. Equity Specialty Ins. Co., 30 Cal. Rptr. 3d 631 (Cal. Ct. App. 2005).

different from both typical claims-made policies and occurrence policies.[116] To apply the notice-prejudice rule to a claims-made and reported policy would convert it into a pure claims-made policy, giving the insured a better policy than he purchased.[117]

As an alternative to the notice-prejudice rule, "the court may, in a proper case, excuse compliance . . . or give equitable relief against its enforcement" if necessary to avoid a forfeiture.[118] There are no bright lines for determining the application of the equitable excusal of a condition standard.[119] However, "[e]quities vary with the peculiar facts of each case. Sometimes—indeed most of the time—it will not be equitable to excuse the non-occurrence of the condition. "[120]

Colorado

In *Clementi v. Nationwide Mutual Fire Insurance Co.*,[121] Colorado adopted the notice-prejudice rule in the context of uninsured motorist insurance. In *Clementi*, the court rationalized its departure from the traditional approach by noting that it failed to recognize: "(1) the adhesive nature of insurance contracts, (2) the public policy objective of compensating tort victims, and (3) the inequity of the insurer receiving a windfall" and the insured not receiving policy benefits due to a mere technicality.[122] In light of these considerations, the court devised a two-step formula for determining whether the insurer had been prejudiced by noncompliance with a notice provision.

First, a preliminary determination of whether the insured's notice was timely had to be made. In making this determination the timing of the notice and the reasonableness of any delay are to be considered.[123] Second, if the court concludes that notice was untimely and that the delay was unreasonable, it should turn to the question of

116. *See id.;* Pac. Emp'rs Ins. Co. v. Superior Court, 270 Cal. Rptr. 779 (Cal. Ct. App. 1990).

117. *See supra* note 94.

118. *Root*, 30 Cal. Rptr.3d at 642.

119. *Id.* at 647.

120. *Id.*

121. Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223 (Colo. 2001).

122. *Id.* at 229.

123. *Id.* at 231.

whether the insurer was prejudiced by the delay.[124] In *Clementi*, the court stated that "once it has been established that an insured has unreasonably provided delayed notice to an insurer, an insurer may only deny benefits if it can prove by a preponderance of the evidence that it was prejudiced by the delay."[125] The presumption of prejudice having been expressly rejected, the insurer bears the burden of demonstrating actual prejudice.[126]

The notice-prejudice rule has been extended to notice provisions in liability policies.[127] Where the insured does not provide notice until after he has settled the suit, however, the two-step formula for determining whether the insurer was prejudiced does not apply. Instead, the delay in providing notice is deemed "unreasonable as a matter of law and the insurer is presumed to have been prejudiced."[128] The insured then must be afforded an opportunity to rebut the presumption of prejudice.[129] If successfully rebutted, the burden shifts back to the insurer to show actual prejudice.[130]

The notice-prejudice rule applies to notice provisions and cooperation provisions[131] when framed as a condition precedent to coverage in an occurrence liability policy.[132] Because of the conceptual difference between claims-made liability policies and occurrence policies, the notice-prejudice rule has not been extended to date in certain notice requirements contained in claims-made insurance policies.[133] As stated by *Craft,* "[i]n a claims-made policy, the date-certain notice requirement defines the scope of coverage. Thus, to excuse late notice in violation of such a requirement would rewrite a fundamental term

124. *Id.*

125. *Id.* at 232.

126. *Id.* at 231.

127. *See* Friedland v. Travelers Indem. Co., 105 P.3d 639 (Colo. 2005).

128. *Id.* at 643.

129. *Id.*

130. *Id.* at 648.

131. *See* Brooks v. Haggard, 481 P.2d 131 (Colo. App. 1970).

132. MarkWest Energy Partners v. Zurich Am. Ins. Co., No. 15CA0770, 2016 WL 3885262, at *29 (Colo. App. July 14, 2016).

133. *See* Craft v. Phila. Indem. Ins. Co., 343 P.3d 951, 958 (Colo. 2015).

of the insurance contract."[134] The notice-prejudice rule is also inapplicable to no-voluntary-payment or consent-to-settle provisions.[135] These clauses are viewed not as mere technicalities but fundamental terms defining the limits and extent of coverage.[136]

Connecticut

In addition to waiver and estoppel,[137] the notice-prejudice rule, which has only been applied in the context of occurrence policies,[138] is the only exemption from the strict application of condition precedent principles of contract law. Consequently, outside of notice; cooperation; examination under oath; and production of document clauses,[139] provisions that are specified as conditions precedent in the policy, or expressly provide for forfeiture, are strictly enforced.[140]

Connecticut initially adopted a version of the notice-prejudice rule recognizing that a presumption of prejudice arose out of the insured's noncompliance with a notice provision.[141] However, Connecticut subsequently changed course and adopted the actual prejudice model of the notice-prejudice rule, which placed the burden of proof

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134. *Id.* at 953.

135. *See* Travelers Prop. Cas. Co. of Am. v. Stresscon Corp., 370 P.3d 140, 143 (Colo. 2016).

136. *Id.* at 144.

137. *See* Afifi v. Standard Fire Ins. Co., No. NNHCV116017083S, 2013 WL 541383 (Conn. Super. Ct. Jan. 15, 2013).

138. Given the purpose and function of the reporting requirement in a claims-made policy, such reporting requirements are strictly construed; consequently, the notice prejudice rule that may be applied to occurrence policies does not apply to a claims-made-and-reported-policy. The application of the prejudice rule to claims-made-and-reported-policies would negate the purpose of the claims-made policy by creating insurance coverage for which the parties did not contract. *See* Elberton Cotton Mills, Inc. v. Indem. Ins. Co. of N. Am., 145 A. 33 (Conn. 1929); Palkimas v. State Farm Fire & Cas. Co., 91 A.3d 532 (Conn. App. Ct. 2014); D&M Screw Mach. Prods., LLC v. Tabellione, No. CV126017117S, 2014 WL 1187893 (Conn. Super. Ct. Feb. 24, 2014); Gulf Ins. Co. v. Murdock Claim Mgmt. Corp., No. HHDX04CV044022252S, 2009 WL 2872511 (Conn. Super. Ct. Aug. 9, 2009).

139. *See* Chi. Title Ins. Co. v. Bristol Heights Assocs., 70 A.3d 74 (Conn. App. Ct. 2013); Geico General Ins. Co. v. Nazarian, No. FSTCV094015635S, 2010 WL 1565465 (Conn. Super. Ct. Mar. 17, 2010).

140. *See Elberton Cotton Mills, Inc.*, 145 A. 33; *Palkimas*, 91 A.3d 532.

141. *See* Aetna Cas. & Sur. Co. v. Murphy, 538 A.2d 219 (Conn. 1988).

on the insurer to show that actual prejudice resulted from the insured's breach.[142]

Delaware

In *State Farm Mutual Automobile Co. v. Johnson,*[143] the Delaware Supreme Court adopted the notice-prejudice rule in the context of a notice clause contained in an automobile liability policy. After a careful examination of the authority supporting irreconcilable positions and dissimilar lines of reasoning, the court concluded "that the proper answer to the question is found in those cases which express the view that an insured's breach of the notice provision, without prejudice to the insurer, will not relieve the company of its liability under the policy."[144] In adopting the notice-prejudice rule, the court in *Johnson* observed that:

> [W]e now follow New Jersey's lead in recognizing ". . . 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 its terms because of a business utility rather than because he read or 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." It is an adhesion contract, not a truly consensual agreement.[145]

Due to this reasoning, where the language of the notice provision was negotiated, the rationale of *Johnson* is inapplicable.[146] Because the requirement of proving prejudice is based on the fact that most insurance policies are adhesion contracts, when the insured has the power and bargained for the terms of the contract, the adhesion

142. *See* Arrowood Indem. Co. v. King, 39 A.3d 712 (Conn. 2012).

143. State Farm Mut. Auto. Co. v. Johnson, 320 A.2d 345 (Del. 1974).

144. *Id.* at 346.

145. *Id.* at 347 (citation omitted).

146. *See* Nat'l Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co., No. 87C-SE-11, 1992 WL 22690 (Del. Super. Ct. Jan. 16, 1992).

contract rationale does not apply and the insurer need not prove that prejudice resulted from the insured's breach of a notice condition.[147]

The insurer's burden of proving prejudice, in the context of an insured's noncompliance with a notice provision, can be met by proving that: (1) "evidence which could have reasonably been developed by prompt investigation cannot be developed as a result," or (2) "the claim could reasonably have been resolved if prompt notice had been given."[148] According to the court, "[t]his requires a showing, as a matter of undisputed fact, that evidence lost as a result of lost documents or witnesses is unavailable from any other source."[149]

It is not clear whether an assistance and cooperation clause constitutes a condition precedent or condition subsequent.[150] Nevertheless, a substantial breach of a cooperation clause by an insured, if proven, provides an insurer with a legitimate defense.[151] While Delaware courts have not required a showing of prejudice as a consequence of a breach of an assistance and cooperation clause, at least one commentator has expressed the view that prejudice may be a factor in determining the materiality of the breach.[152] Interestingly, an insured's noncompliance with a consent to settle clause does not relieve the insurer of its obligations under the policy in the absence of proof of prejudice.[153] But, allegations of a breach create a rebuttable presumption of prejudice, which shifts the burden to the insured to prove that the insurer was not prejudiced as a result of the breach.[154]

The purpose of a condition clause is important in determining whether the notice-prejudice rule should be applied to other types of condition clauses.[155] As pointed out in *State Farm Mutual Automobile Co. v. Johnson,* the purpose of the notice requirement was to avoid

147. *See* E.I. DuPont de Nemours & Co. v. Admiral Ins. Co., No. 89C-AU-99, 1995 Del. Super. LEXIS 631 (Del. Super. Ct. Oct. 27, 1995).

148. *Id.* at *15.

149. *Id.* (citation omitted).

150. *Id.* at *23–25.

151. *See* Harris v. Prudential Prop. & Cas. Ins. Co., 632 A.2d 1380 (Del. 1993).

152. *E.I. DuPont de Nemours*, 1995 Del. Super. LEXIS 631, at *23.

153. *See* Bryant v. Fed. Kemper Ins. Co., 542 A.2d 347 (Del. Super. Ct. 1988).

154. *See* E.I. DuPont de Nemours & Co. v. Admiral Ins. Co., No. 89C-AU-99, 1995 Del. Super. LEXIS 631 (Del. Super. Ct. Oct. 27, 1995).

155. *See* Brandywine One Hundred Corp. v. Hartford Fire Ins. Co., 405 F. Supp. 147 (D. Del. 1975).

prejudice to an insurer in handling a claim.[156] For this reason the failure of the insured to give notice operates as a defense only where the insurer is actually prejudiced. In contrast, prejudice is not a paramount concern in the context of a policy limitation on the commencement of suit: "It is, therefore, unlikely that a Delaware Court would require an insurer to prove prejudice before effectively asserting as a defense the delay by an insurer in instituting an action beyond the time limitation of the policy."[157]

District of Columbia

In the District of Columbia, in the absence of a statute to the contrary, a condition precedent must be strictly complied with before coverage vests; prejudice to the insurer is immaterial for breach of a notice provision expressly made a condition precedent in the policy.[158]

Florida

An insured's breach of a conditions clause does not result in the automatic forfeiture of insurance benefits. Instead, the effects of a breach of condition on coverage depends upon the classification of the condition as either a condition precedent or condition subsequent. Accordingly, a presumption of prejudice, which may be rebutted by the insured, arises out of the breach of a condition precedent.[159] By comparison, breach of a provision deemed to be a condition subsequent does not cause a forfeiture of coverage unless the insurer proves that the insured's failure to comply constituted a material breach that caused it substantial prejudice.[160] While cooperation clauses and compulsory medical examination clauses are treated as a condition subsequent, notice of loss or claim provisions and sworn proof of loss provisions are viewed as conditions precedent.[161] However, Florida courts

156. State Farm Mut. Auto. Co. v. Johnson, 320 A.2d 345, 347 (Del. 1974).

157. *Brandywine*, 405 F. Supp. at 151.

158. *See* Greenway v. Selected Risks Ins. Co., 307 A.2d 753 (D.C. 1973).

159. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Curran, 135 So. 3d 1071 (Fla. 2014); Soronson v. State Farm Fla. Ins. Co., 96 So. 3d 949 (Fla. Dist. Ct. App. 2012).

160. *See supra* note 159.

161. *See, e.g.*, *Curran*, 135 So.3d 1071; Bankers Ins. Co. v. Macias, 475 So. 2d 1216 (Fla. 1985); Hunt v. State Farm Fla. Ins. Co., 145 So. 3d 210 (Fla. Dist. Ct. App.

have distinguished notice clauses in the context of claims-made versus occurrence policies. Consequently, noncompliance with a notice clause in a claims-made policy is strictly enforced.[162]

Georgia

Conditions may be precedent or subsequent. A condition precedent must be performed before the policy becomes absolute and obligatory upon the insurer.[163] Therefore, a forfeiture of insurance coverage may result when an insured fails to satisfy a condition precedent to coverage under the contract. On the other hand, the breach of a condition subsequent can destroy the insured's rights under the policy or give rise to a right to damages to the insurer. As observed by the court in *McDuffie v. Criterion Casualty Co.*:[164]

> The law favors conditions to be subsequent rather than precedent and to be remediable by damages rather than by forfeiture. Further, where the rules of construction will allow, equity seeks always to construe conditions subsequent into covenants and to relieve against forfeitures. No precise technical words are necessary to create a condition subsequent. Neither are precise technical words necessary to create a covenant. However, words such as "on condition that," "if," and "provided," are words of condition, and in the absence of indication to the contrary, the employment of such words in a contract creates conditions precedent.[165]

When an insured fails to comply with a condition precedent to coverage, a forfeiture of insurance may result.[166] For example, an insured who cannot show justification for failing to comply with a notice

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2014) (stating that sworn proof of loss is a condition precedent); *Soronson*, 96 So.3d 949.

162. *See* Gulf Ins. Co. v. Dolan, 433 So. 2d 512 (Fla. 1983).

163. *See* Lankford v. State Farm Mut. Auto. Ins. Co., 703 S.E.2d 436 (Ga. Ct. App. 2010).

164. McDuffie v. Criterion Cas. Co., 449 S.E.2d 133 (Ga. Ct. App. 1994).

165. *Id.* at 135–36 (citation omitted) (internal quotation marks omitted).

166. *See* Plantation Pipeline Co. v. Stonewall Ins. Co., 780 S.E.2d 501 (Ga. Ct. App. 2015).

provision that is expressly made a condition precedent to coverage is not entitled to the protection afforded by the policy, even if the insurer suffered no harm from the delay in notice.[167] Conversely, if the notice provision is not expressly made a condition precedent to coverage, the insured's failure to comply will result in a forfeiture only if the insurer proves that it was prejudiced as a result of the insured's breach.[168] However, the insured must first prove "that he complied with the notice provision or demonstrate justification for failing to do so."[169]

Georgia law regarding the cooperation clause is more animated. A denial of coverage for an insured's failure to cooperate is only justified where the insurer establishes: "(a) that it reasonably requested the insured's cooperation in defending against the plaintiff's claim, (b) that the insured wilfully or intentionally failed to cooperate, and (c) that the insured's failure to cooperate prejudiced the insurer's defense of the claim."[170] Further, "[o]nce the insurer presents evidence that it was entitled to [deny] coverage, the burden shifts to the [claimant] to establish that the insured's failure to cooperate was justified."[171]

In the uninsured motorist context, the insured has the burden of proving these requirements.[172] An uninsured motorist insured, in proving prejudice, may rely on a presumption that a tortfeasor's total absence from trial prejudiced his insurer.[173]

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167. *See id.*

168. *See* Progressive Mountain Ins. Co. v. Bishop, 790 S.E.2d 91 (Ga. Ct. App. 2016) ("Policy language that merely requires the insured to give notice of a particular event does not be itself create a condition precedent. A general provision that no action will lie against the insurer unless the insured has fully complied with the terms of the policy will suffice to create a condition precedent."). *Id.* at 117–18 (citation omitted).

169. *Id.* at 118.

170. *See* Travelers Home & Marine Ins. Co. v. Castellanos, 773 S.E.2d 184, 186 (Ga. 2015).

171. *See* Vaughan v. ACCC Ins. Co., 725 S.E.2d 855, 858 (Ga. Ct. App. 2012).

172. *See Castellanos*, 773 S.E.2d 184.

173. *Id.* at 187.

Hawaii

In *Boardman v. Firemen's Fund Insurance Co.*,[174] the court concluded that condition provisions, such as notice and proof of loss clauses that state a specific time and expressly made conditions precedent in the policy, must, if not waived, be strictly complied with. However, in *Standard Oil Co. of California v. Hawaiian Insurance,*[175] the Hawaii Supreme Court in dicta stated that:

> The function of the notice requirements 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.[176]

Hawaii has no precedent directly on point regarding the relevance of prejudice in determining the legal consequences of a breach of specific condition provisions, such as notice clauses, cooperation clauses, consent to settle clauses, or sworn proof of loss clauses. However, a lower federal court determined that a submission to examination under oath clauses constitutes a condition precedent, breach of which releases the insurer from its contractual obligations regardless of prejudice.

Idaho

In *Leach v. Farmer's Automobile Interinsurance Exchange,*[177] Idaho adopted the prejudice rule in the context of notice and cooperation clauses contained in an automobile liability policy: "[I]n the absence of waiver or estoppel, a substantial breach of such conditions, resulting in prejudice to the insurer, will relieve it of responsibility to

174. Boardman v. Firemen's Fund Ins. Co.,14 Haw. 21, 24 (Haw. 1902).

175. Standard Oil Co. of Cal. v. Hawaiian Ins. & Guar. Co., 654 P.2d 1345 (Haw. 1982).

176. *Id.* at 1348 n.4.

177. Leach v. Farmer's Auto. Interinsurance Exch., 213 P.2d 920 (Idaho 1950).

the insured and injured third parties."[178] In other words, "[v]iolations of conditions by the assured will not release the insurer unless it is prejudiced by the violation."[179] The *Leach* rule is also applicable to consent to settle clauses.[180] Thus, breach of a notice, cooperation, or consent to settle condition is an affirmative defense that must be plead and proved by the insurer.[181]

Twenty-two years after *Leach,* the court in *Viani v. Aetna Insurance Co.,*[182] addressed the issue of whether a total failure by an insured to comply with a notice of suit condition, which is expressly made a condition precedent to recovery, completely relieves the insurer of liability under the policy. After distinguishing *Leach*, the court declared the settled law in Idaho to be that originally announced in its pre-*Leach* opinion of *Berg v. Associated Employers Reciprocal & Illinois Indemnity Exchange:*[183] "That is, '(a)t least a reasonable or substantial compliance with the provisions of the contract relating to the furnishing of the information therein required is a condition precedent to the maintenance of any action under a contract of the kind involved.'"[184] In the absence of reasonable compliance or circumstances excusing strict compliance, the insurer has a complete defense to coverage, regardless of whether it was prejudiced. According to the court:

> That rule is not harsh; it allows the insured opportunity to offer various excuses for non-compliance as well as a factual determination as to whether notice was given "as soon as practical" or "immediately" depending on the specific language of the condition. As applied in the *Leach* decision, *supra*, there is flexibility built into the rule which allows for substantial performance of the

178. *Leach*, 213 P.2d at 923; *accord* Union Warehouse & Supply Co. v. Ill. R.B. Jones, 917 P.2d 1300 (Idaho 1996).

179. *Leach*, 213 P.2d at 923.

180. *See* Bantz v. Bongard, 864 P.2d 618 (Idaho 1993).

181. *Leach*, 213 P.2d at 923–24; *accord Union Warehouse & Supply Co.*, 917 P.2d 1300.

182. Viani v. Aetna Ins.Co., 501 P.2d 706 (Idaho 1972); *overruled on other grounds by* Sloviaczek v. Estate of Puckett, 565 P.2d 564 (Idaho 1977).

183. Berg v. Associated Emp'rs Reciprocal & Ill. Indem. Exch., 279 P. 627 (Idaho 1929).

184. *Viani*, 501 P.2d 706 at 711 (quoting Berg v. Assoc. Emp'rs Reciprocal, 279 P. 627, 628 (1929)).

> condition. On the other hand, the rule has some firmness. It not only recognizes the legitimate business interests of insurers but it also recognizes, and gives effect to, the express provisions of the insurance contract which we are admonished to do by statute.[185]

While prejudice to the insurer is immaterial where the insured completely fails to comply with the condition, the insurer must still prove that the insured breached the condition precedent of notice.[186] However, substantial performance is all that is required to satisfy policy conditions precedent and valid excuses from the insured are relevant in determining substantial compliance.[187] Consequently, in the absence of a total failure, whether the insured failed to comply with a condition precedent is a question of fact.[188]

Illinois

Illinois law does not differentiate between notice of suit and notice of occurrence provisions.[189] Both are treated as conditions precedent to recovery. Consequently, when the insured fails to comply with notice requirements, the insurer may be relieved from its duty to defend and indemnify the insured under the policy.[190] The insured, in order to comply with the insurance policy notice requirement, need only provide notice within a reasonable time.[191] Whether notice has been given in a reasonable time depends on the facts and circumstances

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185. *Viani*, 501 P.2d 706 at 711.

186. *See* Hoffman v. Or. Mut. Ins. Co., No. CIV. 1:11–120 WBS, 2012 WL 1981484 (D. Idaho May 29, 2012).

187. *See* AXIS Surplus Ins. Co. v. Lake Dev. LLC, No. CV–07–505–E–BLW, 2008 WL 4238966 (D. Idaho Sept. 10, 2008); State v. Bunker Hill Co., No. 83–3161, 1987 WL 6320 (D. Idaho Jan. 30, 1987).

188. *See Hoffman*, 2012 WL 1981484; *AXIS Surplus Ins. Co.*, 2008 WL 4238966; *Bunker Hill Co.*, 1987 WL 6320. The *Leach* rule controls where there has been substantial compliance by the insured. *See, e.g.*, Union Warehouse & Supply Co. v. Ill. R.B. Jones, 917 P.2d 1300 (Idaho 1996); Farley v. Farmers Ins. Exch., 415 P.2d 680 (Idaho 1966).

189. *See* Country Mut. Ins. Co. v. Livorsi Marine, Inc., 856 N.E.2d 338 (Ill. 2006).

190. *See* Amco Ins. Co. v. Erie Ins. Exch., 49 N.E.3d 900 (Ill. App. Ct. 2016).

191. *See Country Mut. Ins.*, 856 N.E.2d 338.

of the case. It is the failure of the insured to give reasonable notice that results in a forfeiture of coverage.

Several factors are considered in determining whether an insured's delay in notifying the insurer is reasonable:

> [T]he specific language of the policy's notice provision; (2) the degree of the insured's sophistication in commerce and insurance matters; (3) the insured's awareness of a lawsuit that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer.[192]

Prejudice is merely one factor in determining whether the insured provided reasonable notice. Consequently, if it is determined that the insured did not provide reasonable notice of an occurrence or a lawsuit, the coverage afforded by the policy is forfeited, regardless of whether the lack of reasonable notice prejudiced the insurer.[193] Similarly, prejudice to the insurer is irrelevant in the context of a claims-made policy.[194]

Breach of a cooperation clause also constitutes a substantive defense to an insurance policy.[195] However, an insurance company must prove that it was prejudiced by its insured's failure to cooperate in order to defeat its contractual obligations.[196] It has been suggested that an insurer is not automatically entitled to be relieved of its policy obligation because of an insured's failure to comply with a proof of loss condition or refusal to submit to an examination under oath.[197] Instead, the court should order the insured to comply, and in the event of the insured's continued refusal, the insurer is entitled to avoid its contractual duties upon proof of prejudice.[198]

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192. *Amco Ins. Co.*, 49 N.E.3d at 908.

193. *Country Mut. Ins.*, 856 N.E.2d at 346.

194. *See* Cont'l Cas. Co. v. Cuda, 715 N.E.2d 663 (Ill. App. Ct. 1999).

195. M.F.A. Mut. Ins. Co. v. Cheek, 340 N.E.2d 331, 334 (Ill. App. Ct. 1975).

196. *Id.*

197. Koclanakis v. Merrimack Mut. Fire Ins. Co., 709 F. Supp. 801, 807 (N.D. Ill. 1988).

198. *Id.*

Indiana

An unreasonable delay in providing notice about an accident or the filing of a suit is presumed to prejudice the insurer's ability to prepare an adequate defense.[199] This presumption means that if the delay in giving the required notice is unreasonable, the victim or the insured has the burden of rebutting the presumption with evidence that the insurer was not actually prejudiced.[200] Because the notice requirement is a condition precedent, which is material to and of the essence of the contract, noncompliance relieves the insurer of its liability under the policy.[201]

Both notice provisions and cooperation clauses are conditions precedent to recovery.[202] However, they are neither equivalent nor serve the same objectives.[203] "Failure to cooperate can come about in many ways, some of which may be technical and inconsequential, thereby resulting in no prejudice to the insurance company."[204] Consequently, "[a]n insurance company must show actual prejudice resulted from an insured's noncompliance with the policy's cooperation clause before it can avoid liability under the policy."[205]

Duties in the event of loss provisions are also conditions precedent that must be complied with before coverage attaches.[206] The insured's noncompliance with any of the duties contained in the duties enumerated in the event of loss clause provisions voids coverage without regard to whether the insurer was prejudiced.[207] In Indiana, outside

199. Sheeshan Constr. Co. v. Cont'l Cas. Co., 938 N.E.2d 685, 689 (Ind. 2010) (quoting Miller v. Dilts, 463 N.E.2d 257, 265 (Ind. 1984)).

200. *Id.*

201. Ind. Ins. Co. v. Williams, 463 N.E.2d 257, 263–64 (Ind. 1984).

202. *Id.* at 265.

203. *Id.*

204. *Id.*

205. *Id.*

206. Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am., 178 F. Supp. 3d 745, 760 (S.D. Ind. 2016).

207. *Id.*

of cooperation clauses, "prejudice is not a necessary consideration in determining the enforceability of other insurance provisions."[208]

Iowa

Provisions made conditions precedent in an insurance policy are enforceable.[209] In the absence of waiver or estoppel, an unexcused failure to substantially comply with any express condition precedent defeats coverage.[210] When an insured seeks to recover the benefits afforded by an insurance policy, she must prove substantial compliance with its terms.[211] Additionally, "[w]here a third party seeks to establish coverage, the burden shifts to the insurer to [prove] noncompliance."[212] If it is proven that the insured failed to substantially comply with the policy conditions, the party claiming coverage must prove that performance was excused or waived or that noncompliance did not prejudice the insurer.[213] If excuse or waiver is not proved, a rebuttable presumption that the insurer was prejudiced arises and the claimant is not entitled to policy coverage.[214] However, if the presumption is successfully rebutted, the burden of proof shifts to the insurer to prove actual prejudice.[215]

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208. Morris v. Econ. Fire & Cas. Co., 848 N.E.2d 663, 666 (Ind. 2006) (citing Miller v. Dilts, 463 N.E.2d 257, 265 (Ind. 1984)) (refusing to submit to an examination under oath condition); *see also* Emp'rs Mut. Cas. Co. v. Skoutaris, 453 F.3d 915 (7th Cir. 2006); Patterson v. State Farm Mut. Auto. Ins. Co., No. 1:05-CV-1782-DFH-TAB, 2006 WL 1877002 (S.D. Ind. July 6, 2006).

209. Bruns v. Hartford Accident & Indem. Co., 407 N.W.2d 576, 579 (Iowa 1987).

210. Polich v. Prudential Fin. Inc., 646 F.3d 1116, 1118 (8th Cir. 2011); Am. Family Mut. Ins. Co. v. Petersen, 679 N.W.2d 571, 585 (Iowa 2004); Henderson v. Hawkeye-Security Ins. Co., 106 N.W.2d 86, 90–91 (Iowa 1960).

211. Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637, 641 (Iowa 2000) (quoting Am. Guar. & Liab. Ins. Co. v. Chandler Mfg. Co., 467 N.W.2d 226, 228 (Iowa 1991)).

212. *Id.*

213. *Id.*; *see also Petersen*, 679 N.W.2d at 585; Am. Guar. & Liab. Co. v. Chandler Mfg. Co., 467 N.W.2d 226, 228 (Iowa 1991).

214. *Kelly*, 620 N.W.2d at 641; *Am. Guar. & Liab. Co.*, 467 N.W.2d at 228.

215. Met-Coil Sys. Corp. v. Columbia Cas. Co., 524 N.W.2d 650, 654 (Iowa 1994).

The purpose of notice provisions in claims-made policies differ significantly from that of notice provisions in occurrence policies.[216] A liberal construction of a notice provision in a claims-made policy would create unbargained-for coverage that exposes the insurer to a risk broader than that provided for in the policy.[217] Therefore, an insured's breach of a notice provision contained in a claims-made policy results in a forfeiture of coverage regardless of whether the insurer was prejudiced.[218]

Kansas

Where an insurance policy does not expressly or by implication create a condition precedent or does not provide for an express forfeiture as a consequences of an insured's noncompliance, breach by the insured does not void coverage unless the insurer demonstrates prejudice.[219] This being said, one might conclude that where the condition is an express condition precedent or the policy provides for express forfeiture, the insured's failure to comply would result in a forfeiture of coverage. However, Kansas law does not favor forfeitures.[220] Consequently, where notice, proof of loss, or requests for submission to examination under oath provisions constitute conditions precedent, Kansas decisional law recognizes that a failure to satisfy the condition does not bar recovery unless the insurer proves prejudice.[221] This is especially true if the purpose of the condition precedent is to avoid prejudice to the insurer. The rationale followed in the context of notice provisions contained in occurrence policies is inapplicable to notice

216. Hasbrouck v. St. Paul Fire & Marine Ins. Co., 511 N.W.2d 364, 368 (Iowa 1993).

217. *Id.* (quoting Zuckerman v. Nat'l Union Fire Ins. Co., 495 A.2d 395, 406 (N.J. 1985)).

218. *Id.*

219. Phico Ins. Co. v. Providers Ins. Co., 888 F.2d 663, 668–69 (10th Cir. 1989); *see also* Farm Bureau Mut. Ins. Co. v. Eighmy, No. 73,550, 1996 Kan. App. Unpublished LEXIS 256, at *8–9 (Kan. Ct. App. Mar. 29, 1996).

220. Nat'l Union Fire Ins. Co. v. FDIC, 957 P.2d 357, 364 (Kan. 1998).

221. *Id.* at 368; *see also Eighmy*, 1996 Kan. App. Unpublished LEXIS 256 at *9.

provisions contained in claims-made policies.[222] However, this issue has not been expressly considered by Kansas' high court.

Kentucky

"In the field of insurance law recognition frequently has been given to the principle that an insurance company may not rely upon a noncompliance by the insured with a condition of the policy if the company has sustained no prejudice by reason of the noncompliance."[223] First applied to notice provisions in uninsured motorist coverage, the rule has been extended to notice provisions in liability insurance policies in general.[224] The burden of proof is allocated to the insurer to prove that it has been substantially prejudiced by the insured's breach of the policy condition.[225]

It has been predicted that the notice-prejudice rule would not be extended to claims-made-and-reported polices that unambiguously require timely notice or first party equine property insurance.[226] It has also been suggested that because the purpose of a notice provision is to prevent prejudice to the insurer, the notice-prejudice rule should be extended to other policy conditions sharing that purpose.[227] Therefore, a showing of prejudice is required before an insurance provider will be permitted to defeat liability where an insured fails to submit a proof of loss or submit to an examination under oath.[228]

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222. LaForge v. Am. Cas. Co., No. 92-1250-PFK, 1992 U.S. Dist. LEXIS 18924, at *8 (D. Kan. Nov. 19, 1992); Am. Inst. of Baking v. Int'l Ins. Co., No. 88-4027-O, 1989 WL 7885, at *2 (D. Kan. Jan. 27, 1989).

223. Newark Ins. Co. v. Ezell, 520 S.W.2d 318, 321 (Ky. 1975).

224. Jones v. Bituminous Cas. Corp., 821 S.W.2d 798, 803 (Ky. 1991).

225. *Id.*

226. C.A. Jones Mgmt. Group, LLC v. Scottsdale Indem. Co., No. 5:13-CV-00173-TBR-LLK, 2016 WL 3460445, at *5–7 (W.D. Ky. June 21, 2016); Hiscox Dedicated Corp. Member, Ltd. v. Wilson, 246 F. Supp. 2d 684, 693–94 (E.D. Ky. 2003).

227. Cincinnati Ins. Co. v. Taylor, No. 1:01CV-102-M, 2003 WL 1742148, at *4 (W.D. Ky. Mar. 26, 2003).

228. *Id.*

Louisiana

In *Jackson v. State Farm Mutual Automobile Insurance Co.*,[229] the Supreme Court of Louisiana observed that "[e]ach case involving delayed notices must stand upon its own facts and circumstances."[230] Some Louisiana appellate courts, in reliance on the court's analysis and rationale in *Jackson*, have concluded that insurance policy clauses should be interpreted in light of their function and in view of the fundamental purpose of the insurance policy to provide coverage "rather than to defeat it by applying technically a clause designed merely to protect the insurer from prejudice. . . ."[231] In light of the shared function and fundamental purpose that exist between notice of accident provisions and notice of suit provisions, the latter is subject to the same rules of construction as the former. That being true, unless the insurer proves that it was actually prejudiced by the insured's failure to provide timely notice, it is not relieved of its obligations under the policy.[232] Some appellate courts have applied this rule regardless of whether the notice provision was expressed as a condition precedent in the policy.[233]

Louisiana decisional law has identified various factors as relevant in determining whether late notice will operate to relieve a liability insurer of its obligations under its policy:

> (1) the time frame specified by the policy for notice of an accident, occurrence, claim, or lawsuit; (2) when the insured first discovered the occurrence or injury or that a claim would be made; (3) the length of the delay in notice to the insurer, and the time of notice relative to trial of a lawsuit on the claim; (4) whether the insured substantially complied with the time and form of notice required by the policy; (5) whether the claim is a direct action by the injured person against the insurer under the

229. Jackson v. State Farm Mut. Auto. Ins. Co., 29 So. 2d 177 (La. 1946).

230. *Id.* at 179.

231. Miller v. Marcantel, 221 So. 2d 557, 560 (La. Ct. App. 1969).

232. *Id.* at 559; *see also* Kinchen v. Dixie Auto. Ins. Co., 343 So. 2d 263, 265 (La. Ct. App. 1977).

233. *See* Mansour v. State Emps. Grp. Benefit Program, 694 So. 2d 1096 (La. Ct. App. 1997).

> Louisiana Direct Action Statute, La. R.S. 22:1269 (formerly La. R.S. 22:655), and when the injured person discovered the existence and identity of the insurer; (6) whether the insurer has suffered actual prejudice to its defense of the claim because of the delay in notice; (7) the good faith of the insured and the injured person; (8) whether the insured was an average policyholder, inexperienced in the law or Insurance claims procedure; and (9) the existence of any special circumstances, such as fraud or collusion.[234]

The Fifth Circuit Court of Appeals, relying upon its own interpretation of Louisiana law, reasoned that the applicable rule regarding the effects of an insured's breach of a notice provision depends upon whether the provision is an express condition precedent in the policy.[235] Accordingly, "[w]hen timely notice is an express condition precedent to coverage, 'Louisiana law enforces provisions of insurance contracts which require notice as a condition precedent *without* also requiring the insurer to make a particular showing of prejudice.'"[236] The exception only applies where the language of the policy makes the notice provision an express condition precedent.[237]

Where an insured fails to comply with the express condition precedent of forwarding suit papers, the insurer is relieved of its contractual obligations without regard to whether it was prejudiced.[238] Cooperation clauses are also treated as conditions precedent.[239] Consequently, the breach of a cooperation clause constitutes a valid defense to coverage under the policy. However, the failure to cooperate must

234. State v. Nat'l Union Fire Ins. Co., 56 So. 3d 1236, 1247–48 (La. Ct. App. 2011).

235. Anco Insulations, Inc. v. Nat'l Union Fire Ins. Co., 787 F.3d 276, 283–84 (5th Cir. 2015).

236. *Id.* at 284.

237. Homestead Ins. Co. v. Zar, No. 93-03675, 1994 WL 83729, at * 2 (5th Cir. Feb. 25, 1994); Gulf Island, IV v. Blue Streak Marine, 940 F.2d 948, 956 (5th Cir. 1991).

238. Hallman v. Marquette Cas. Co., 149 So. 2d 131, 135 (La. Ct. App. 1963).

239. Broussard v. Broussard, 84 So. 2d 899, 901–02 (La. Ct. App. 1956).

be substantial and material in some respect.[240] In effect, the requirement imposes upon the insurer a duty to prove prejudice.[241]

Maine

In Maine, insurance forfeitures are disfavored because: "(1) insurance policies are contracts of adhesion, (2) the insured has paid the premiums for coverage, and (3) insurance coverage furthers broader public policy aims."[242] Consequently, an insurer, in order to avoid its obligations under the policy because of an insured's noncompliance with a notice provision, must show that the notice provision was breached and that it was actually prejudiced by the insured's delay.[243] Even if the insurer was prejudiced by the insured's breach of condition, an insured can defeat coverage defenses by offering a valid excuse or justification for the failure to comply.[244] The prejudice rule has been extended to refusals to submit to an examination under oath for a valid reason,[245] refusals to submit to independent medical examinations,[246] and proof of loss provisions where the consequences of noncompliance are not expressly stated in the policy.[247]

240. *Id.* at 901.

241. *Id.* at 903; *see also* Freyou v. Marquette Cas. Co., 149 So. 2d 697, 699–700 (La. Ct. App. 1963).

242. Vanhaaren v. State Farm Mut. Auto. Ins. Co., 989 F.2d 1, 4 (1st Cir. 1993).

243. *See* Ouellette v. Me. Bonding & Cas. Co., 495 A.2d 1232, 1235 (Me. 1985).

244. *Vanhaaren*, 989 F.2d at 5.

245. *See* Marquis v. Farm Family Mut. Ins. Co., 628 A.2d 644, 649 (Me. 1993).

246. *See Vanhaaren*, 989 F.2d at 6.

247. *See* Me. Mut. Fire Ins. Co. v. Watson, 532 A.2d 686, 688 (Me. 1987).

Maryland

In Maryland, the prejudice rule pertinent to notice provisions and cooperation provisions arises from statute[248] and common law.[249] The common law rule imposes a prejudice requirement on entities not expressly defined as an insurer under the statute. In other words, an entity may not disclaim coverage to its insured for a failure to give notice or cooperate under the policy provision without a showing of prejudice, even if the entity does not technically fit the statutory definition of an insurer.[250] Accordingly, an insurer must show prejudice only if it raises a failure to cooperate defense or a defense based on lack of notice.[251]

Neither the statutory nor the common law prejudice rule is applicable to condition provisions outside of notice and cooperation clauses.[252] Consequently, an insurer need not show prejudice in order to deny coverage to an insured who breached a condition precedent contained in an insurance policy.[253] Furthermore, the statutory prejudice rule is applicable exclusively to liability policies purchased for the protection of third parties.[254]

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248. Maryland law states:

> An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer.

MD. CODE ANN. INS. § 19-110 (LexisNexis 2011).

249. *See* Woznicki v. GEICO Gen. Ins. Co., 115 A.3d 152 (Md. 2015).

250. *See* Prince George's Cnty v. Local Gov't Ins. Tr., 879 A.2d 81, 96–97 (Md. 2005).

251. Phillips Way, Inc. v. Am. Equity Ins. Co., 795 A.2d 216, 219 (Md. Ct. Spec. App. 2002) (citing GEICO v. Harvey, 366 A.2d 13, 13 (1976)).

252. *See Woznicki*, 115 A.3d 152, 175–84; *Phillips Way Inc.*, 795 A.2d 216, 219; Himelfarb v. Hartford Fire Ins. Co., 718 A.2d 693, 697 (Md. Ct. Spec. App. 1998).

253. Watson v. U.S. Fid. & Guar. Co., 189 A.2d 625, 625–28 (Md. 1963); *Phillips Way Inc.*, 795 A.2d 216, 218–21; *Himelfarb*, 718 A.2d 693, 696–97.

254. *See* Phillips v. Allstate Indem. Co., 848 A.2d 681, 691 (Md. Ct. Spec. App. 2004).

The statutory notice-prejudice rule also applies to claims-made policies in which the act triggering coverage takes place during the policy period, but the insured failed to comply with the policy's notice requirement.[255] Here, the notice provisions are treated as covenants, which if not complied with constitute a breach of the contract for purposes of the statutory prejudice rule. Conversely, the statutory prejudice rule does not apply to claims-made policies in which the event triggering coverage does not occur until expiration of the policy period.[256] In such a case, the failure to satisfy the condition precedent of notice does not constitute a breach of the policy as contemplated by the statute.[257]

Massachusetts

In Massachusetts, the prejudice rule pertinent to notice provisions in liability policies arises from statute.[258] Notice provisions are not construed as conditions precedent to coverage under an insurance policy. Consequently, an insurer must prove that the notice provision was breached and that it was prejudiced thereby in order to avoid its contractual obligations.[259] Requests for submissions to examination under oath conditions, if reasonable, are strictly construed as conditions precedent.[260] Therefore, an insured's wilful, unexcused refusal to submit to an examination under oath,[261] their refusal to submit to an independent medical examination,[262] or in appropriate circumstances,

255. Sherwood Brands, Inc. v. Great Am. Ins. Co., 13 A.3d 1268, 1288 (Md. 2011).

256. *Id.*

257. *Id.*

258. *See* MASS. GEN. LAWS ANN. ch. 175, § 112 (West 2011).

259. Boyles v. Zurich Am. Ins. Co., 36 N.E.3d 1229, 1237 (Mass. 2015); Johnson Controls, Inc. v. Bowes, 409 N.E.2d 185, 188 (Mass. 1980).

260. Mello v. Hingham Mut. Fire Ins. Co., 656 N.E.2d 1247, 1250 (Mass. 1995); Hanover Ins. Co. v. Cape Cod Custom Home Theater, Inc., 891 N.E.2d 703, 707 (Mass. App. Ct. 2008).

261. *See* Borjeson v. Pilgrim Ins. Co., No. 20051377B, 2005 WL 3722420, at *3 (Mass. Jan. 28, 2005) (citing *Mello*, 656 N.E. 2d at 1247); *Cape Cod Custom Home Theater,* 891 N.E.2d at 707, 706–07.

262. *See* Bailey v. Metro Prop. & Cas. Ins. Co., No. 01-307B, 2002 Mass. Super. LEXIS 227, at *5–6 (Apr. 27, 2002) (citing *Mello*, 656 N.E. 2d at 1247).

their failure to cooperate[263] constitutes a material breach of policy provisions and relieves the insurer of liability regardless of whether it was prejudiced.

The court in *Bailey* stated: "In matters such as untimely notice, consent to settlement agreements and, under certain circumstances, where the insured's duty to cooperate is implicated, an insurance company must demonstrate that it has been prejudiced by a claimant's failure to comply strictly with the terms of the contract."[264] The same proof of prejudice requirement applicable to notice provisions applies to voluntary payment clauses.[265] However, it has been suggested that this rule does not apply to fidelity bonds because they are different from liability policies.[266]

Notice provisions in claims-made-and reported policies serve a different purpose than notice provisions in occurrence policies.[267] In the former type of policy, a notification provision is of the essence of the contract. Consequently, a notice requirement in a claims-made-and reported policy is to be strictly enforced, without exception for lack of prejudice.[268]

Michigan

In Michigan, where coverage is optional and not statutorily required, the policy language controls the interpretation of the contract.[269] While conditions precedent are valid and enforceable, Michigan courts do not construe provisions as such unless compelled by the language of the policy.[270] This does not mean that every breach of a

263. *See Borjeson*, 2005 Mass. Super. Lexis 632 at *3; *Cape Cod Custom Home Theater*, 891 N.E.2d at 706.

264. *Bailey*, 2002 Mass. Super. LEXIS 227, at *6 (citing Darcy v. Hartford Ins. Co., 554 N.E.2d 28, 33 (Mass. 1990).

265. Liberty Mut. Ins. Co. v. Black & Decker Corp., Nos. 04-10655 & 04-10968, 2005 U.S. Dist. LEXIS 661, at *7 n.3 (D. Mass Jan. 13, 2005).

266. FDIC v. Ins. Co. of N. Am., 105 F.3d 778, 785–86 (1st Cir. 1997).

267. Catlin Specialty Ins. Co. v. Am. Superconductor Corp., No. 12–2314–BLS1, 2014 WL 840693, at *44–45 (Mass. Jan. 29, 2014).

268. *Id.* at *5.

269. Defrain v. State Farm Mut. Auto. Ins. Co., 817 N.W.2d 504, 509 (Mich. 2012).

270. Yeo v. State Farm Ins. Co., 555 N.W.2d 893, 895 (Mich. Ct. App. 1996).

condition precedent acts as an absolute bar to recovery. For example, where a request to submit to an examination under oath provision is expressed as a condition precedent in the policy, the insured's breach does not operate as a forfeiture of coverage but merely suspends the right to recover until the examination is conducted.[271] Likewise, noncompliance with a cooperation clause, expressed as a condition precedent in the policy, operates as a defense to coverage only where the lack of cooperation was substantial and prejudiced the insurer.[272]

The significance of the policy language has proven extremely important in the development of Michigan's condition clause jurisprudence. While notice of accident and notice of suit provisions are subject to the same rules of interpretation,[273] the language of the respective provisions determines the legal consequence that attaches to the insured's noncompliance. For example, a notice provision requiring "immediate" or "prompt" notice is construed as requiring notice within a reasonable time.[274] Thus, prejudice to the insurer is relevant in determining whether the notice was provided in a reasonable time. Consequently, there is no forfeiture of coverage unless the insurer proves that it was prejudiced as a result of the delay.[275] Notice provisions setting forth a specified time within which notice is to be provided are subject to a different rule of interpretation. In the uninsured motorist context, these provisions are deemed valid and enforceable without regard to whether the insurer was prejudiced by the insured's noncompliance.[276] It has also been suggested that the notice-prejudice rule is

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271. *Id.*; Thomson v. State Farm Ins. Co., 592 N.W.2d 82, 88–89 (Mich. Ct. App. 1998).

272. *See* Allen v. Cheatum, 88 N.W.2d 306, 311 (Mich. 1958); Leach v. Fisher, 74 N.W.2d 881 (Mich. 1956).

273. *See* Wendel v. Swanberg, 185 N.W.2d 348 (Mich. 1971).

274. *See* Koski v. Allstate Ins. Co., 572 N.W.2d 636, 639 (Mich. 1998); *Wendel*, 185 N.W.2d at 352.

275. *See Koski*, 572 N.W.2d 636, 639; *Wendel*, 185 N.W.2d at 353; *see also* Aetna Cas. & Sur. Co. v. Dow Chem. Co., 10 F. Supp. 2d 800, 813 (E.D. Mich. 1998) (discussing relevant factors in determining whether an insurer is prejudiced by an insured's untimely notice).

276. DeFrain v. State Farm Mut. Auto. Ins. Co., 817 N.W.2d 504, 506–07 (Mich. 2012); *see also* Jackson v. State Farm Mut. Auto. Ins. Co., No. 246388, 2004 WL 2239502, at *12 (Mich. Ct. App. Oct. 5, 2004) (Griffin, J., dissenting), *vacated,* 698 N.W.2d 400 (Mich. 2005) (validating dissent below in finding notice provision clear and unambiguous).

not applicable to notice provisions contained in claims-made policies.[277]

Minnesota

In Minnesota, the legal consequences of an insured's breach of a notice of loss provision, notice of claims provision, or proof of loss provision depends upon whether the provision is expressed as a condition precedent in the policy. Where expressly stated as conditions precedent to coverage, an insured's failure to comply with either provision will bar coverage, regardless of whether the insurer is prejudiced.[278] Where, however, said provisions are not expressly stated as conditions precedent in the policy, the insurer may not escape its contractual duties unless it proves that it has suffered actual prejudice from the insured's failure to comply.[279] Thus, it has been said that "[l]ate notice defeats coverage only if there is prejudice to the insurer or notice is actually a condition precedent to coverage (i.e. the policy is a 'claims made' policy)."[280]

The legal effect of an insured's breach of a cooperation clause does not depend on the policy language. Instead, the insured's breach of said clause must be material and substantial. The insurer must also prove that it was actually prejudiced by the insured's failure to comply.[281] An insured's breach of a suit limitation clause, unless the clause

277. *See* Schubiner v. New England Ins. Co., 523 N.W.2d 635, 636 (Mich. Ct. App. 1994).

278. Micheals v. First USA Title, LLC, No. A14–0931, 2015 WL 1514018, at *6 (Minn. Ct. App. Apr. 6, 2015); Knudson v. St. Paul Fire & Marine Ins. Co., 555 N.W.2d 21 (Minn. Ct. App. 1996); Sterling State Bank v. Va. Sur. Co., 173 N.W.2d 342, 346 (Minn. 1969).

279. Reliance Ins. Co. v. St. Paul Ins. Co., 239 N.W.2d 922, 924–95 (Minn. 1976); Farrell v. Neb. Ind. Co., 235 N.W. 612. 613–14 (Minn. 1931); State v. Associated Med. Assur. Ltd, No. 27-CV-08-1912, 2010 Minn. Dist. LEXIS 42, at *20–21 (Minn. D. Ct. July 26, 2010).

280. Fifth Third Mortg. Co. v. Lamey, No. 12–2923 (JNE/TNL), 2013 WL 1976042, at *5 (D. Minn. May 13, 2013) (quoting Winthrop & Weinstine, P.A. v. Travelers Cas. & Sur. Co., 187 F.3d 871, 874 (8th Cir.1999)).

281. White v. Boulton, 107 N.W.2d 370, 371–72 (Minn. 1961); Juvland v. Plaisance, 96 N.W.2d 537, 540 (Minn. 1959).

conflicts with a specific statute or is unreasonable in length, absolves the insurer of its policy obligation even in the absence of prejudice.[282]

Mississippi

In Mississippi, insurers are free to express notice conditions as conditions precedent to recovery and provide that failure to comply with any obligations under the policy voids coverage.[283] Obviously, where the policy does not provide that notice of accident or claim is a condition precedent to recovery; the insured's breach of the notice requirement does not void coverage unless the insured was prejudiced thereby.[284] Significantly, even where the policy expresses notice as a condition precedent, coverage is not per se forfeited if the insured offers a reasonable excuse for noncompliance and the insurer is not prejudiced.[285]

Missouri

> Regardless of whether technical conditions for recovery under an insurance policy are viewed as conditions precedent or conditions subsequent, the ultimate issue is whether the insured's failure to comply constitutes a material breach of the policy conditions . . . . The key circumstance to be considered is whether the insurance company has suffered prejudice because of the breach.[286]

In Missouri, noncompliance with most conditions precedent in an insurance policy will not defeat recovery unless the insurer proves

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282. L & H Transport, Inc. v. Drew Agency, Inc., 403 N.W.2d 223, 225–26 (Minn.1987).

283. *See* S. Guar. Ins. Co. v. Dean, 172 So. 2d 553, 557–58 (Miss. 1965); Capital City Ins. Co. v. Ringgold Timber Co., 898 So. 2d 680, 681–82 (Miss. Ct. App. 2004).

284. *See* Commercial Union Ins. Co. v. Dairyland Ins. Co., 584 So. 2d 405, 407–09 (Miss. 1991).

285. *See* Jackson v. State Farm Mut. Auto. Ins. Co., 880 So. 2d 336, 341 (Miss. 2004); Harris v. Am. Motorist Ins. Co., 126 So. 2d 870, 873 (Miss. 1961).

286. Duntze v. Liberty Mut. Ins. Co., No. 63763, 1994 WL 199556, *4 (Mo. Ct. App. May 24, 1994) (Crahan, J., concurring in part and dissenting in part.) (citing Greer v. Zurich Ins. Co., 441 S.W.2d 15, 31–32 (Mo. 1969)).

that it was prejudiced by the insured's breach.[287] Accordingly, an insured's breach of a condition provision relating to notice of accident, claim, or suit; submission of sworn proof of loss; cooperation; failure to forward suit papers; failure to obtain insurer's consent; or refusal to submit to examination under oath does not preclude recovery under the policy unless the insurer demonstrates that it was prejudiced by the insured's noncompliance.[288]

Regarding claims-made policies, notice during the policy period is of the essence and material to the policy.[289] Consequently, companies that provide claims-made policies are not required to prove prejudice to avoid coverage when notice of the claim is not provided during the policy period.[290]

Montana

Any provision for which valuable consideration is given that defeats coverage violates Montana public policy.[291] Montana's anti-forfeiture laws recognize that a contract provision involving a forfeiture "must be strictly interpreted against the party for whose benefit it is created."[292] It is also statutorily recognized that a party in danger of forfeiting the benefits of a contract due to a failure to comply with a provision in the contract "may be relieved from the obligation upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."[293] No compensation

287. Pannell v. Mo Ins. Guar. Ass'n, 595 S.W.2d 339, 348 (Mo. Ct. App. 1980).

288. *See, e.g.*, Johnston v. Sweany, 68 S.W.3d 398, 401 (Mo. 2002) (en banc) (discussing failure to cooperate); Tresner v. State Farm Ins. Co., 913 S.W.2d 7, 11 (Mo. 1995) (discussing failure to cooperate); Nichols v. Preferred Risks Group, 44 S.W.3d 886, 896–97 (Mo. Ct. App. 2001) (discussing failure to submit to examination under oath); *Duntze*, 1994 WL 199556, at *3 (discussing failure to forward suit papers and failure to obtain insurer's consent); *Pannell*, 595 S.W.2d 339, 347–48 (discussing failure to submit sworn proof of loss and failure to provide notice of accident and suit).

289. *See* Wittner, Poger, Rosenblum & Spewak, P.C. v. Bar Plan Mut. Ins., No. 70655, 1997 WL 597407, at *7 (Mo. Ct. App. Sept. 16, 1997).

290. *See Duntze*, 1994 WL 199556.

291. Estate of Gleason v. Cent. United Life Ins. Co., 350 P.3d 349, 354 (Mont. 2015).

292. MONT. CODE ANN. § 28-1-408 (2011).

293. MONT. CODE ANN. § 28-1-104 (2011).

for the failure to comply is required to avoid forfeiture if the aggrieved party does not suffer harm except in cases of a grossly negligent, willful, or fraudulent breach of duty.[294] The anti-forfeiture statutes "are particularly applicable to situations involving failures to comply with time limitations."[295]

Montana's common law also recognizes that an insured who fails to comply with a notice provision does not forfeit coverage unless the insurer is prejudiced by the failure.[296] The common law rule reaffirms Montana's "commitment to upholding the 'fundamental protective purpose' of an insurance contract and ensures that a non-material, technical breach of a notice provision will not deprive the insured of coverage for which valuable consideration has been paid."[297]

Nebraska

An insurer cannot assert the insured's breach of an insurance policy's notice, cooperation, or request to submit to an examination under oath provisions as a defense, unless it demonstrates that it suffered prejudice or harm as a result of the breach.[298] In the context of a notice provision, an insurer proves prejudice by showing that it did not receive notice in time to meaningfully protect its interest.[299] An insured's failure to provide material information during an examination under oath constitutes a material breach.[300] An insured's subsequent offer to comply with the request for information does not cure the breach.[301]

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294. *Estate of Gleason*, 350 P.3d at 355.

295. *Id.*

296. *See* Atl. Cas. Ins. Co. v. Greytak, 350 P.3d 63, 67 (Mont. 2015); *Estate of Gleason*, 350 P.3d at 355.

297. *Estate of Gleason*, 350 P.3d at 356.

298. *See* Mefferd v. Sieler & Co., 676 N.W.2d 22, 28 (Neb. 2004); Wright v. Farmers Mut., 669 N.W.2d 462, 466 (Neb. 2003).

299. *Mefferd*, 676 N.W.2d at 28.

300. *Wright*, 669 N.W.2d at 466.

301. *Id.* at 467.

Nevada

Both the statutory[302] and common law[303] of Nevada recognize that when an insurer denies coverage because an insured failed to provide timely notice of the claim, the insurer must prove that notice was late and that it was prejudiced thereby. The court in *Las Vegas Metropolitan Police Department v. Coregis Insurance Co.* stated: "Prejudice exists 'where the delay materially impairs an insurer's ability to contest its liability to an insured or the liability of the insured to a third party.'"[304] Nevada law, outside the notice context, enforces conditions precedent and precludes coverage when a breach of such a condition occurs, irrespective of prejudice to the insurer.[305] Consequently, an insured's breach of an express condition precedent requiring: cooperation; submission to an independent medical examination; production of documents, records or information; or forwarding of suit papers precludes recovery under the policy, regardless of whether the insurer was prejudiced.[306]

New Hampshire

A material and substantial breach of a notice provision or a cooperation clause destroys the insured's right to recover under the policy.[307] Whether a notice provision has been complied with is a question of fact that depends on prejudice to the insurer caused by the delay as well as the length of and reason for the delay.[308] An insured's failure to provide timely notice is not a material breach unless it prejudiced

302. NEV. ADMIN. CODE § 686A.660(4).

303. Las Vegas Metro. Police Dep't v. Coregis Ins. Co., 256 P.3d 958, 960 (Nev. 2011).

304. *Id.* at 965.

305. *See* S.B. Corp. v. Hartford Accident & Indem. Co., No. 95-15788, 1996 WL 632514 (9th Cir. Oct. 30, 1996); Joseph v. Hartford Fire Ins. Co., No. 2:12–CV–798 JCM (CWH), 2014 WL 4829061, at *3 (D. Nev. Sept. 30, 2014).

306. *See supra* note 305.

307. *See* Sutton Mut. Ins. Co. v. Notre Dame Arena, 237 A.2d 676 (N.H. 1968) (construing notice provision); Emp'rs Mut. Cas. Co. v. Nelson, 241 A.2d 207 (N.H. 1968) (construing cooperation clause).

308. *See Sutton Mut. Ins. Co.*, 237 A.2d at 678–79.

the insurer.[309] "A delay that frustrates the purpose of the notice provision to afford adequate opportunity for investigation is prejudicial"[310] and excuses the insurer from performance. Similar rules of construction are applied in the context of cooperation clause disputes.[311]

Requests for submission to examination under oath provisions are construed as conditions precedent to recovery under the policy.[312] Therefore, insurers are not required to prove actual prejudice resulted from the insured's unexcused refusal to submit to an examination under oath.[313] Proof of prejudice to the insurer is also immaterial in the context of noncompliance with notice requirements contained in claims-made policies.[314] The *Bianco* court stated: "Claims-made policies necessarily include a presumption that the insurer suffers prejudice when the insurer does not receive timely notice of the claim during the policy period, preventing the insured from seeking coverage under subsequent policies."[315]

New Jersey

The public interest requires that insurance companies show appreciable prejudice to forfeit coverage for an insured's breach of a policy's notice condition.[316] The appreciable prejudice rule has been applied to notice provisions in various other contexts, including cases involving both excess insurance and reinsurance, despite the fact that reinsurance agreements are not contracts of adhesion.[317] The rule has

309. *See* Krigsman v. Progressive N. Ins. Co., 864 A.2d 330, 335 (N.H. 2005).
310. Lumbermens Mut. Cas. Co. v. Oliver, 335 A.2d 666, 668–69 (N.H. 1975).
311. *See Nelson*, 241 A.2d 207.
312. *See Krigsman*, 864 A.2d at 332.
313. *Id.* at 334.
314. *See* Bianco P.A. v. Home Ins. Co., 740 A.2d 1051, 1057 (N.H. 1999).
315. *Id.*
316. *See* Cooper v. Gov't Emps. Ins. Co., 237 A.2d 870, 874 (N.J. 1968).
317. *See* Gazis v. Miller, 892 A.2d 1277 (N.J. 2006).

also been applied in the context of cooperation conditions[318] and adequate defense and investigation conditions,[319] as well as to discovery policies.[320] The appreciable loss rule is not applicable to proof of loss provisions; consequently, an insured's failure to provide timely proof of loss precludes recovery under the policy.[321] It also does not apply to notice provisions contained in claims-made policies[322] or livestock mortality insurance policies.[323]

New Mexico

An insurer must prove that it was substantially prejudiced as a result of its insured's breach of a condition before it will be relieved of its obligations under an insurance policy.[324] This rule applies to any condition provision designed to protect the insurer from prejudice.[325] Pursuant to this rule, proof that an insured breached a condition creates a rebuttable presumption of substantial prejudice.[326] The rule has been applied to cooperation provisions; voluntary payment provisions; notice provisions;[327] consent-to-settle provisions;[328] misrepresentation

318. *See* Hager v. Gonsalves, 942 A.2d 160, 163 (N.J. Super. Ct. App. Div. 2008); Solvents Recovery Serv. v. Midland Ins. Co., 526 A.2d 1112, 1114–15 (N.J. Super. Ct. App. Div. 1987).

319. *See, e.g.*, State Nat'l Ins. Co. v. Cnty. of Camden, 10 F. Supp. 3d 568, 580–82 (D. N.J. 2014).

320. *See* Resolution Tr. Corp. v. Moskowitz, 868 F. Supp. 634, 638–639 (D. N.J. 1994).

321. Resolution Tr. Corp. v. Moskowitz, No. 93–2080, 1994 WL 475811, at *15–20 (D. N.J. Aug. 31, 1994).

322. *See* Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 129 A.3d 1069, 1081 (N.J. 2016); Zuckerman v. Nat'l Union Fire Ins. Co., 495 A.2d 395, 406 (N.J. 1985).

323. *See* Stables v. Am. Live Stock Ins. Co., 493 A.2d 584, 586 (N.J. Super. Ct. App. Div. 1985).

324. *See* Roberts Oil Co. v. Transamerica Ins. Co., 833 P.2d 222, 231 (N.M. 1992).

325. *See id.* at 234.

326. *See* State Farm Mut. Auto. Ins. Co. v. Fennema, 110 P.3d 491, 495 (N.M. 2005); *Roberts Oil*, 833 P.2d at 23 (citing Eldin v. Farmers All. Mut. Ins. Co., 890 P.2d 823, 828).

327. *Roberts Oil*, 833 P.2d at 232.

328. *Fennema*, 110 P.3d at 494.

provisions; and concealment provisions.[329] The rule, however, has not been extended to fraud conditions.[330]

The presumption of prejudice, if not rebutted, allows the jury to infer that the insurer was substantially prejudiced. The insured may rebut the presumption by presenting evidence that the insurer was not substantially prejudiced.[331] The insurer, however, retains the burden of persuasion on the issue of substantial prejudice.[332]

New York

Express conditions precedent, in insurance contracts, "must be literally complied with" before there can be a recovery under the policy.[333] As stated in *Indian Harbor Insurance. Co. v. City of San Diego*:

> New York courts have long recognized a "no-prejudice" rule governing strict compliance requirements in liability insurance contracts: where such contracts require notice of claims "as soon as practicable," the courts have held that "the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract. No showing of prejudice is required."[334]

The rule has been applied in primary and excess insurance cases "in which courts have determined that the notice provisions in those contracts created conditions precedent, and the insured's failure to give prompt notice of a claim relieved the insurer of proving actual prejudice."[335]

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329. Eldin v. Farmers All. Mut. Ins. Co., 890 P.2d 823, 827 (N.M. Ct. App. 1994).

330. *Id.* at 826–27.

331. *See* State Farm Mut. Auto. Ins. Co. v. Fennema, 110 P.3d 491, 495 (N.M. 2005); Roberts Oil Co. v. Transamerica Ins. Co., 833 P.2d 222, 231 (N.M. 1992).

332. *See Fennema*, 110 P.3d at 495; *Roberts Oil*, 833 P.2d at 234.

333. *See* Sulner v. G.A. Ins. Co., 637 N.Y.S.2d 144, 145 (N.Y. App. Div. 1996).

334. Indian Harbor Ins. Co. v. City of San Diego, 972 F. Supp. 2d 634, 648 (S.D.N.Y. 2013).

335. Conergics Corp. v. Dearborn Mid-West Conveyor Co., No. 653724/2012, 2015 N.Y. slip op. 31002(U), at *14 (N.Y. Sup. Ct. June 4, 2015); *see also* Argo Corp.

New York's no-prejudice rule further recognizes that where the policy language requires the insured to give notice as soon as practical after an occurrence, notice had to be provided within a reasonable time under the circumstances.[336] Consequently, in the absence of a valid excuse, an insured's noncompliance with the notice provision precluded coverage regardless of whether the insurer was prejudiced.[337] Thus, New York's common law rule was that a notice provision in a primary or excess insurance policy constituted a condition precedent to filing a claim, which the insurer could disclaim for late notice without a showing of prejudice.[338]

In essence, the common law rule recognizes that a presumption of prejudice arises if the insured failed to give prompt notice.[339] The common law rule also applied to conditions precedent requiring the filing of proof of loss forms,[340]cooperation,[341] or notice in a reinsurance insurance policy.[342] One exception to this rule provides that a Supplementary Uninsured/Underinsured Motorist ("SUM") carrier that received timely notice of a claim cannot disclaim SUM benefits based on late notice of a legal action unless it demonstrated that it had been prejudiced by the delay in notice of the suit.[343] The no-prejudice rule has also been rejected in the context of reinsurance policies.[344]

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v. Greater N.Y. Mut. Ins. Co., 827 N.E.2d 762 (N.Y. 2005) (refusing to abandon no-prejudice rule).

336. *See* Zimmerman v. Peerless Ins. Co., 926 N.Y.S.2d 124, 126 (N.Y. App. Div. 2011).

337. *See* Sec. Mut. Ins. Co. v. Acker-Fitzsimons Corp., 293 N.E.2d 76, 78–80 (N.Y. 1972).

338. *See Argo*, 827 N.E.2d at 765.

339. *See* CIH Int'l Holdings, LLC v. BT United States, LLC, 821 F. Supp. 2d 604, 611 (S.D.N.Y. 2011).

340. *See* N.Y. Cent. Mut. Fire Ins. Co. v. Daley, 709 N.Y.S.2d 849, 849 (N.Y. App. Div. 2000).

341. *See* Allstate Ins. Co. v. United Int'l Ins. Co., 792 N.Y.S.2d 549, 551 (N.Y. App. Div. 2005); Utica Mut. Ins. Co. v. Gruzlewski, 630 N.Y.S.2d 826, 827 (N.Y. App. Div. 1995).

342. *See* Pac. Emp'rs. Ins. Co. v. Glob. Reinsurance Corp. of Am., 693 F.3d 417, 421 (3rd Cir. 2012).

343. *See* Rekemeyer v. State Farm Mut. Auto. Ins. Co., 828 N.E.2d 970, 974 (N.Y. 2005).

344. Unigard Sec. Ins. Co. v. N. River Ins. Co., 594 N.E.2d 571, 571 (N.Y. 1992). *But see Pac. Emp'rs. Ins.*, 693 F.3d at 421 (applying the no-prejudice rule

Since January 17, 2009, Insurance Law Section 3420 has required insurance companies to show prejudice as a condition to denying coverage based on late notice of a claim if the notice is provided within two years of the time it was due.[345] If notice is provided more than two years after it was due, an insured must show a lack of prejudice.[346] Further, "an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise."[347]

North Carolina

Express conditions precedent are construed "in accord with [their] purpose[s] and the reasonable expectation of the parties."[348] The law in North Carolina is that "the good faith breach by an insured of a condition precedent in an insurance policy does not void the policy unless the insurer can show that it was prejudiced by the breach."[349] Consequently, an insured's failure to comply with a notice, cooperate, or consent-to-settle condition does not relieve the insurer of its contractual obligations unless the insurer proves that it was materially prejudiced thereby.[350] As stated by the court in *Great American I*: "This equitable approach to the interpretation of notice requirements in insurance contracts has the advantages of providing coverage whenever in the reasonable expectations of the parties it should exist and of

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where the notice provision in a reinsurance policy is an express condition precedent to recovery).

345. *See* Conergics Corp. v. Dearborn Mid-West Conveyor Co., No. 653724/2012, 2015 N.Y. slip op. 31002(U), at *8 n.1 (N.Y. Sup. Ct. June 4, 2015); Ramlochan v. Scottsdale Ins. Co., No. 702183/13, 2015 N.Y. slip op. 30830(U), at *2 (N.Y. Sup. Ct. Apr. 7, 2015).

346. N.Y. INS. § 3420 (a)(4)–(5) (West, Westlaw through 2017).

347. N.Y. INS. § 3420 (c)(2)(B) (West, Westlaw through 2017).

348. *See* Great Am. Ins. Co. v. C.G. Tate Constr. Co. (*Great American I*), 279 S.E.2d 769, 771 (N.C. 1981).

349. Huggins v. Hartford Ins. Co., 650 F. Supp. 38, 40 (E.D.N.C. 1986).

350. *See* Great Am. Ins. Co. v. C.G. Tate Construction Co. (*Great American II*), 340 S.E.2d 743 (N.C. 1986) (involving notice; consent-to-settle; and cooperation conditions); *Great American I*, 279 S.E.2d at 771 (involving notice; consent-to-settle; and, cooperation conditions); Greco v. Penn Nat'l Sec. Ins. Co., 721 S.E.2d 280 (N.C. Ct. App. 2012) (involving cooperation condition).

protecting the insurer whenever failure strictly to comply with a condition has resulted in material prejudice."[351] These policy considerations are not applicable to reinsurance insurance policies between insurance companies; consequently, the notice-prejudice rule is not applicable in this limited context.[352]

North Dakota

An insured's failure to provide timely notice or to obtain the insurer's consent to settle a claim, as required by the policy, will result in a forfeiture of coverage only if the insurer can prove that the insured's noncompliance constituted a material breach and caused it appreciable prejudice.[353] The court in *Hasper* stated: "Requiring the insurer to demonstrate actual prejudice 'strikes an appropriate balance between protecting an insurer's interests and avoiding forfeiture of coverage when an insurer has not been harmed.'"[354]

Ohio

An insured's unreasonable delay in providing notice to her insurer creates a rebuttable presumption of prejudice.[355] The presumption of prejudice that arises out of unreasonable delay in providing notice applies to all cases where the insurer is denying coverage based on breach of a notice provision regardless of whether the language of the provision requires "prompt" or "reasonable" notice or contains a specific amount of time.[356] An insurer is released from its policy obligation to provide uninsured or underinsured motorist coverage when it is

351. *Great American I*, 279 S.E.2d at 775.

352. *See* Stonewall Ins. Co. v. Fortress Reinsurers Managers, Inc., 350 S.E.2d 131, 134–35 (N.C. Ct. App. 1986).

353. *See* Hasper v. Ctr. Mut. Ins. Co., 723 N.W.2d 409, 417 (N.D. 2006) (applying notice prejudice rule to consent-to-settle condition); Finstad v. Steiger Tractor, Inc., 301 N.W.2d 392, 398 (N.D. 1981) (applying notice prejudice rule to notice condition).

354. *Hasper*, 723 N.W.2d at 415 (citing State Farm Mut. Auto. Ins. Co. v. Green, 89 P. 3d 97, 104 (Utah 2003).

355. Knox v. Travelers Ins. Co., No. 02AP-28, 2002 WL 31819651, at *5 (Ohio Ct. App. Dec. 17, 2002).

356. Quail Energy Corp. v. Greenwich Ins. Co., No. 14CV-08-8438, 2015 Ohio Misc. LEXIS 13447, at *20 (Ohio Ct. Com. Pl. July 29, 2015).

prejudiced by its insured's: failure to provide notice; failure to obtain consent-to-settle with the tortfeasor; release of the tortfeasor; or breach of any other subrogation related provisions.[357] The insured has the burden of rebutting the presumption of prejudice arising out of a breach of such conditions.[358] It is not clear whether the notice-prejudice rule applies to excess insurance policies; however, it has been suggested that it does.[359]

An insured's failure to comply with a cooperation condition constitutes a valid defense to coverage if the breach is material and substantial, and the insurer is prejudiced thereby.[360] The insurer has the burden of proving that the cooperation clause was breached.[361] Noncompliance with a condition requiring the insured to submit to an examination under oath constitutes a substantial and material breach, completely precluding recovery under the policy.[362] This rule presumes prejudice to the insurer and applies where an insured submits to the examination under oath but refuses to produce material documents or answer material questions.[363]

Oklahoma

The general rule in Oklahoma is that an insured, in order to recover on an insurance policy, must meet the conditions of the policy.[364] However, "[i]nsurance policy provisions requiring notice are liberally construed in favor of the insured" in light of their purpose for being in the contract.[365] Therefore, an insurance company must demonstrate

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

358. *Id.* at 947.

359. *See* Selective Ins. of Se. v. RLI Ins. Co., No. 5:12CV02126, 2016 WL 5118308, at *5 (N.D. Ohio Sept. 21, 2016).

360. Gabor v. State Farm Mut. Auto. Ins. Co., 583 N.E.2d 1041, 1043–44 (Ohio Ct. App. 1990).

361. Harless v. Sprague, No. 23546, 2007 WL 1832021, at *5 (Ohio Ct. App. June 27, 2007).

362. Moore v. State Farm Fire & Cas. Co., Nos. 9200, 9376, 1985 WL 62876, at *4 (Ohio Ct. App. Dec. 3, 1985).

363. *Id.*

364. C.I.T. Fin. Servs. v. McDermitt, 544 P.2d 913, 915 (Okla. Civ. App. 1975) (citing Imperial Fire Ins. Co. v. Cty. of Coos, 151 U.S. 452 (1894); Am. Ins. Co. of Texas v. Brown, 222 P.2d 757 (1950)).

365. Fox v. Nat'l Sav. Ins. Co., 424 P.2d 19, 25 (Okla. 1967).

that it has been prejudiced by an insured's noncompliance with either a notice provision[366] or cooperation clause[367] contained in an insurance contract.

Conditions precedent, such as a request to submit to an examination under oath, are also subject to the prejudice rule.[368] However, an insured's unexcused, wilful refusal to submit to an examination under oath, as required by the contract, constitutes an absolute bar to an action on the policy regardless of whether the insurer has been prejudiced.[369] Furthermore, because claims-made policies require that the event happen and notice of claim be given to the insurance company during the policy period, the notice-prejudice rule does not apply to claims-made policies when the claim is made after the policy expires.[370]

Oregon

Pursuant to Oregon's version of the notice prejudice rule, the first inquiry is whether the insurer was prejudiced by the insured's failure to provide timely notice. If the insurer was not prejudiced in its ability to make a reasonable investigation and adequately protect its interests and that of its insured, it is bound to perform its duties under the contract.[371] In such a case, whether the insured acted reasonably is immaterial; however, if the insurer was prejudiced with respect to its ability to adequately investigate and protect the interests of the parties, the relevant inquiry is whether the insured acted reasonably in failing to provide timely notice.[372] If the insured acted reasonably, the insurer

366. *Id.*

367. *See* State Farm Mut. Auto. Ins. Co. v. Koval, 146 F.2d 118, 120 (10th Cir. 1944).

368. *See* Winters v. State Farm & Cas. Co., 35 F. Supp. 2d 842, 846 (E.D. Okla. 1999).

369. Prince v. Farmers Ins. Co., 790 F. Supp. 263, 267 (W.D. Okla. 1992) (quoting Standard Mut. Ins. Co. v. Boyd, 452 N.E.2d 1074, 1078 (Ind. Ct. App. 1983)).

370. State *ex rel.* Crawford v. Fanie Int'l, 943 P.2d 1099, 1102 (Okla. Civ. App. 1997).

371. *See* Lusch v. Aetna Cas. & Sur. Co., 538 P.2d 902, 905 (Or. 1975) (en banc).

372. *Id.*

is obligated to perform.[373] The burden of proving prejudice in the context of disputes regarding breach of notice conditions, cooperation conditions,[374] or consent-to-settle conditions[375] is on the insurer.[376]

Suit limitation conditions do not serve the same purpose as notice conditions. Consequently, an insured's failure to comply constitutes an affirmative defense. Whether the insurer was prejudiced by an insured's breach of a suit limitation provision is immaterial.[377]

Pennsylvania

An insurance company cannot avoid its obligations under a policy because its insured failed to give timely notice of an accident unless it proves that it was actually prejudiced by the insured's breach.[378] While the burden of proving prejudice belongs to the carrier, "[t]he determination of prejudice is highly 'circumstance dependent.'"[379] The rationale for the rule is that "[a]n insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured. The only aspect of the contract over which the insured can 'bargain' is the monetary amount of coverage."[380] Pennsylvania courts disfavor forfeitures and are reluctant to allow insurance companies to avoid their contractual obligations in the absence of a sound reason for doing so.[381]

The notice-prejudice rule has been applied to conditions requiring the furnishing of suit papers;[382] consent-to-settle conditions;[383]

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373. *Id.*

374. *See* Bailey v. Universal Underwriters Ins. Co., 474 P.2d 746, 757 (Or. 1970).

375. *See* Federated Serv. Ins. Co. v. Granados, 889 P.2d 1312 (Or. Ct. App. 1995).

376. *See Lusch*, 538 P.2d 902.

377. *See* Herman v. Valley Ins. Co., 928 P.2d 985, 990 (Or. Ct. App. 1996).

378. *See* Brakeman v. Potomac Ins. Co., 371 A.2d 193, 195–96 (Pa. 1977).

379. Vanderhoff v. Harleysville Ins. Co., 78 A.3d 1060, 1067 (Pa. 2013) (quoting Nationwide Ins. Co. v. Schneider, 960 A.2d 442, 452 (Pa. 2008)).

380. *Brakeman*, 371 A.2d at 196.

381. *See, e.g.*, *id.* at 197.

382. *See, e.g.*, Strickler v. Huffine, 618 A.2d 430 (Pa. Super. Ct. 1992).

383. *See, e.g.*, Nationwide Mut. Ins. Co. v. Lehman, 743 A.2d 933 (Pa. Super. Ct. 1999).

sworn proof of loss conditions;[384] and cooperation provisions.[385] It does not, however, apply to policy conditions requiring an insured to commence suit against its insurer within a specified time (i.e. limitation of suit condition).[386] Pennsylvania has not extended the *Brakeman* "notice-prejudice" rule beyond the context of occurrence liability policies.[387] Thus, it does not apply to notice conditions in claims-made policies because notice in a claims-made policy is viewed as a condition precedent.[388]

Rhode Island

A requirement in an insurance policy that the insured provide notice to the insurer "as soon as practical" or "immediately" means that the insured should provide notice in a reasonable amount of time.[389] In determining whether notice was provided in a reasonable amount of time, the length of time in giving the notice, the reasons for the delay, and the probable effect on the insurer are relevant considerations.[390] Consideration of the effect of the untimely notice involves the extent, if any, to which the insurer was prejudiced.[391] Pursuant to this analysis, which also applies to consent-to-settle provisions,[392]

384. *See* Perry v. Middle Atl. Lumbermens Ass'n., 542 A.2d 81 (Pa. Super. Ct. 1988); Fishel v. Yorktowne Mut. Ins. Co., 385 A.2d 562 (Pa. Super. Ct. 1978).

385. *See* Paxton Nat'l Ins. Co. v. Brickajlik, 522 A.2d 531 (Pa. 1987); Forest City Grant Liberty Assocs. v. Genro II, Inc., 652 A.2d 948 (Pa. Super. Ct. 1995).

386. *See* Schreiber v. Pa. Lumberman's Mut. Ins. Co., 444 A.2d 647, 649 (Pa. 1982); Petraglia v. Am. Motorists Ins. Co., 424 A.2d 1360, 1364 (Pa. Super. Ct. 1981); *aff'd* 444 A.2d 653 (Pa. 1982).

387. *See* Pizzini v. Am. Int'l Specialty Line Ins. Co., 210 F. Supp. 2d 658, 668 (E.D. Pa. 2002); Ace Am. Ins. Co. v. Underwriters at Lloyds & Cos., No. 0077, 2007 Phila. Ct. Com. Pl. LEXIS 30, at *5 (Pa. Ct. Com. Pl. 2007), *aff'd* 939 A.2d 935 (Pa. Super. Ct. 2007).

388. Lexington Ins. Co. v. W. Pa. Hosp., 318 F. Supp. 2d 270, 275 (W.D. Pa. 2004).

389. Pickering v. Am. Emp'rs Ins. Co., 282 A.2d 584, 592–93 (R.I. 1971).

390. *Id.* at 593.

391. *Id.*

392. *See* Fraioli v. Metro. Prop. & Cas. Ins. Co., 748 A.2d 273 (R.I. 2000).

sworn proof of loss provisions, and the forwarding of suit papers provisions, the insurer has the burden of proving that it was prejudiced by the insured's noncompliance with the notice requirement.[393]

Cooperation provisions, however, are viewed as conditions precedent, breach of which gives an insurer the right to terminate the policy.[394] A breach of a cooperation clause, however, must be material and substantial in order to relieve the insurer of its policy obligations.[395] When the plaintiff is a judgment creditor seeking to recover from a judgment debtor's insurance carrier, the plaintiff must prove: "(1) that the insured substantially complied with the condition precedent cooperation clause, (2) that the insured's failure to cooperate was excused or waived, or (3) that the insured's failure to comply was not prejudicial to the insurer."[396] The insurer does not receive the benefit of the presumption of prejudice, however, until it proves that the insured actually breached the cooperation clause.[397]

The notice-prejudice rule is not applicable to claims-made-and-reported policies for several reasons.[398] First, the reporting requirement operates substantively to define the scope of coverage.[399] Second, application of the notice-prejudice rule would result in an expansion of coverage for the insured and increased risks of exposure to the insurer.[400] Finally, if the policy is a negotiated transaction, the essential rationale for the notice-prejudice rule is absent.[401]

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393. Siravo v. Great Am. Ins. Co., 410 A.2d 116, 118 (R.I. 1980); *Pickering*, 282 A.2d at 592–93.

394. Marley v. Bankers' Indemn. Ins. Co., 166 A. 350, 351 (R.I. 1933).

395. Ogunsuada v. Gen. Accident Ins. Co. of Am., 695 A.2d 996, 999 (R.I. 1997).

396. *Id.* at 1000.

397. *See id.* at 999–1000 (citing Am. Guar. & Liab. Co. v. Chandler Mfg. Co., 467 N.W.2d 226 (Iowa 1991).

398. *See* Textron, Inc. v. Liberty Mut. Ins. Co., 639 A.2d 1358 (R.I. 1994).

399. *Id.* at 1365.

400. *Id.* at 1365–66.

401. *Id.* at 1366.

South Carolina

Because forfeitures of insurance policies are disfavored in South Carolina, notice conditions,[402] cooperation conditions,[403] submission to examination under oath conditions,[404] forwarding of suit paper conditions,[405] and consent-to settle conditions[406] are not construed as strict conditions precedent to suit. Rather, they are viewed as covenants that, in the absence of a showing of prejudice, do not relieve the insurer of its policy obligations.[407] The burden of proving prejudice belongs to the insurer.[408]

South Dakota

South Dakota law requires an insurer to demonstrate that it has been prejudiced by its insured's breach of a notice[409] or sworn proof of loss condition.[410] South Dakota's prejudice jurisprudence has not developed beyond this point at either the state or federal level.

Tennessee

An insured who breaches the notice provision of an insurance policy may nevertheless enforce the policy if the insurer was not prejudiced by the delay.[411] This rule is premised on the policy rationales: (1) that insurance policies are adhesion contracts drafted by the insurer;

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402. *See* Vt. Mut. Ins. Co. v. Singleton *ex rel.* Singleton, 446 S.E.2d 417, 421–22 (S.C. 1994); Squires v. Nat'l Grange Mut. Ins. Co., 145 S.E.2d 673 (S.C. 1965).

403. *See* Puckett v. State Farm Gen. Ins. Co., 444 S.E.2d 523 (S.C. 1994); Crook v. State Farm Mut. Auto. Ins. Co., 112 S.E.2d 241 (S.C. 1960).

404. *See Puckett*, 444 S.E.2d 523.

405. *See Vt. Mut. Ins. Co.*, 446 S.E.2d at 471–72; *Squires*, 145 S.E.2d at 677.

406. *See* Putnam v. Alea London Ltd., No. 2:09–CV–1740–MBS, 2011 WL 489968, at *6–7 (D.S.C. Feb. 4, 2011).

407. *See Vt. Mut. Ins. Co.*, 446 S.E.2d at 421–22; *Squires*, 145 S.E.2d at 677.

408. *Vt. Mut. Ins. Co.*, 446 S.E.2d at 421; *Squires*, 145 S.E.2d at 667.

409. Union Pac. R.R. v. Certain Underwriters at Lloyd's London, 771 N.W.2d 611, 618 (S.D. 2009).

410. Auto-Owners Ins. Co. v. Hansen Hous., Inc., 604 N.W.2d 504, 513 (S.D. 2000).

411. Am. Justice Ins. Reciprocal v. Hutchison, 15 S.W.3d 811, 818 (Tenn. 2000); Alcazar v. Hayes, 982 S.W.2d 845, 856 (Tenn. 1998).

(2) promoting the goals of compensating tort victims; and (3) avoiding the inequity of the insurer receiving a windfall.[412] An insured's failure to provide timely notice, as required by the policy, creates a presumption that the insurer was prejudiced by the delay.[413] The insured may rebut this presumption with credible evidence that the insurer has not been prejudiced.

An insured's breach of a limitation of action condition precludes coverage regardless of prejudice to the insurer.[414] Substantial compliance with a submission to examination under oath condition may be sufficient to preserve an insured's ability to recover under an insurance policy.[415] Where, however, the breach is material, it relieves the insurer of its contractual obligations.[416] The federal courts of Tennessee, however, contrary to this rule, have consistently held that an insured's breach of a cooperation condition or submission to examination under oath condition creates a presumption of prejudice.[417]

Texas

One is excused from performing under a contract only if the other party commits a material breach.[418] The materiality of a breach is determined by weighing:

> (i) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (ii) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (iii) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account

412. *Am. Justice Ins. Reciprocal*, 15 S.W.3d at 816; *Alzacar*, 982 S.W.2d at 850.

413. *Am. Justice Ins. Reciprocal*, 15 S.W.3d at 818; *Alzacar*, 982 S.W.2d at 856.

414. *See* Brick Church Transmission, Inc. v. S. Pilot Ins. Co., 140 S.W.3d 324, 331–32 (Tenn. Ct. App. 2003).

415. *See* Farmers Mut. v. Atkins, No. E2014–00554–COA–R3–CV, 2014 WL 7143292, at *7–8 (Tenn. Ct. App. Oct. 1, 2014).

416. *Id.*

417. *See* Talley v. State Farm Fire & Cas. Co., 223 F.3d 323 (6th Cir. 2000).

418. Hernandez v. Gulf Grp. Lloyds, 875 S.W.2d 691, 692 (Tex.1994).

> of all the circumstances including any reasonable assurances; (iv) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[419]

The extent to which the breach deprived the insurer of the benefits that it could have reasonably anticipated from full performance by the insured is also a very important consideration.[420] In determining the materiality, "[t]he less the non-breaching party is deprived of the expected benefit, the less material the breach."[421] If the insurer is not actually prejudiced by breach of condition, the insured's breach is not material.[422] This analysis is applicable to any condition precedent contained in a liability insurance policy.[423] Furthermore, the insurer has the burden of proving that the breach was material and that it was prejudiced.[424]

In a claims-made policy where the insured gives delayed notice within the policy period, or other specified reporting period, the insurer must show that the insured's failure to provide timely notice prejudiced it.[425] The prejudice rule does not apply to an insured's breach of a claims-made notice provision that provides for a specific time in which notice must be provided.[426] The notice rule is also inapplicable to casualty insurance policies.[427] Consequently, an insured's failure to comply with any condition precedent expressed in a casualty insurance policy voids coverage.[428]

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419. *Id.* at 693 n.2 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. LAW INST. 1981)).

420. *Id.* at 693.

421. *Id.*

422. *Id.*

423. *See, e.g.*, Caddell v. Travelers Lloyds of Texas Ins. Co., No. 06-06-00063-CV, 2007 WL 1574244 (Tex. Ct. App. June 1, 2007); Progressive Cnty. Mut. Ins. Co. v. Trevino, 202 S.W.3d 811, 814 (Tex. Ct. App. 2006).

424. *Hernandez*, 875 S.W.2d at 693.

425. Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co., 288 S.W.3d 374, 382 (Tex. 2009).

426. *See id.* at 381; Nicholas Petroleum, Inc. v. Mid-Continent Cas. Co., No. 05-13-01106-CV, 2015 WL 4456185, at *5 (Tex. Ct. App. July 21, 2015).

427. *See Caddell*, 2007 WL 1574244 at *3.

428. *Id.* at *4.

Utah

The failure to satisfy a condition precedent relieves the insurer of any duty to perform.[429] An insured's breach of a covenant, however, excuses the insurer from its policy obligations only upon proof of materiality or prejudice.[430] Whether a contract provision is a condition precedent or a covenant depends on the intentions of the parties as evidenced by the language of the policy:[431] "Words such as 'on condition that,' 'if,' and 'provided,' are words of condition, which in the absence of evidence to the contrary, create conditions precedent."[432] Further, "where a condition precedent has not been fulfilled, there is no contract or covenant to breach and thus no need to consider materiality or prejudice."[433] Therefore, unless the policy contains a forfeiture clause for noncompliance or express language making the clause a condition precedent, noncompliance or breach by the insured will not defeat coverage absent the insurer showing that it has been substantially prejudiced.[434] Pursuant to the condition precedent/covenant analysis, consent-to-settle provisions are generally viewed as covenants,[435] while exhaustion clauses have been found to constitute conditions precedent.[436]

Vermont

A notice clause should not function as "a technical escape-hatch by which to deny coverage in the absence of prejudice."[437] Consequently, an insurer who seeks to avoid its obligations under a liability insurance policy based on its insured's breach of a notice provision

429. *See* McArthur v. State Farm Mut. Auto. Ins. Co., 274 P.3d 981, 988 (Utah 2012).

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *See* FDIC v. Oldenburg, 34 F.3d 1529, 1546 (10th Cir. 1994).

435. McArthur v. State Farm Mut. Auto. Ins. Co., 274 P.3d 981, 987 (Utah 2012).

436. *Id.* at 989.

437. Coop. Fire Ins. Ass'n v. White Caps, Inc., 694 A.2d 34, 38 (Vt. 1997) (citing Miller v. Marcantel, 221 So. 2d 557, 559 (La. Ct. App. 1969)).

must prove that the breach resulted in substantial prejudice to its position.[438] Application of the prejudice rule in the context of an insured's breach of a cooperation condition predates its application to notice conditions.[439]

An insured's refusal to submit to an examination under oath is not analogous to a failure to cooperate.[440] Rather, an insured's refusal to submit to an examination under oath constitutes a breach of a condition precedent and provides the insurer with a complete defense to coverage, even in the absence of prejudice.[441]

Virginia

Provisions requiring notice of accident, the giving of notice of suit, the forwarding of suit papers,[442] cooperation,[443] and consent-to-settle[444] are conditions precedent to recovery. An insured must substantially comply with conditions precedent or forfeit the benefits of the policy. Prejudice to the insurer is irrelevant where an insured fails to substantially or materially comply with a condition precedent.[445] A statutory exception to the no-prejudice rule exists in the context of an insured's breach of a cooperation clause contained in a liability policy covering a motor vehicle, aircraft, or watercraft.[446]

Washington

Washington law is clear that an insured's failure to substantially comply with conditions precedent will not operate as a bar to recovery absent the insurer demonstrating that it was actually prejudiced by the

438. *Id.* at 38.

439. *See* Am. Fid. Co. v. Kerr, 416 A.2d 163 (Vt. 1980).

440. *See* Progressive Ins. Co. v. Wasoka, 885 A.2d 1166, 1190 (Vt. 2005).

441. *Id.*

442. *See* State Farm Mut. Auto. Ins. Co. v. Porter, 272 S.E.2d 196 (Va. 1980).

443. *See* Miller v. Augusta Mut. Ins. Co., 335 F. Supp. 2d 727 (W.D. Va. 2004).

444. *See* Osborne v. Nat'l Union Fire Ins. Co., 465 S.E.2d 835 (Va. 1996); Woidyla v. GEICO Ins. Co., 65 Va. Cir. 291 (Va. Cir. Ct. 2004).

445. *See Osborne*, 465 S.E.2d at 837; *Porter*, 272 S.E.2d at 199–200.

446. *See* VA. CODE ANN. § 38.2-2204(D) (West 2016).

insured's conduct.[447] More specifically, an insured's failure to substantially comply with a cooperation clause releases the insurance company from its contractual responsibilities where the insurer proves that noncompliance resulted in actual prejudice to its interests.[448] This rule applies to both general and specific cooperation provisions.[449] Actual prejudice requires "'affirmative proof of an advantage lost or disadvantage suffered as a result of the [breach], which has an identifiable detrimental effect on the insurer's ability to evaluate or present its defenses to coverage or liability.'"[450] Proof of loss conditions and consent-to-settle conditions have also been subjected to the prejudice rule.[451] However, the prejudice rule is not applicable to exhaustion requirements contained in excess insurance policies[452] or notice provisions in claims-made policies.[453]

West Virginia

In order to avoid liability under an insurance policy, an insurance company must demonstrate that it was prejudiced by the insured's delayed notice.[454] A notice condition is satisfied when the insurance company receives notice of a potential claim from any source.[455] To be effective, notice from a source other than the insured must be:

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447. *See* Pederson's v. Transamerica Ins., 922 P.2d 126, 131 (Wash. Ct. App. 1996); Spangler v. Ins. Co. of N. Am., 562 P.2d 635 (Wash. Ct. App. 1977); Bronsink v. Allied Prop. & Cas. Ins. Co., No. C09-751MJP, 2010 WL 2342538, at *7 (W.D. Wash. June 8, 2010).

448. *See* Or. Auto Ins. Co. v. Salzberg, 535 P.2d 816, 819 (Wash. 1975) (en banc).

449. *See* Staples v. Allstate Ins. Co., 295 P.3d 201 (Wash. 2013) (en banc).

450. *Id.* at 209 (citing Tran v. State Farm Fire & Cas. Co., 961 P.2d 358, 365 (Wash. 1998) (en banc)).

451. *See* Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 191 P.3d 866 (Wash. 2008) (en banc).

452. *See* Quellos Grp., LLC v. Fed. Ins. Co., 312 P.3d 734, 743 (Wash. Ct. App. 2013).

453. *See* Manufactured Hous. Cmtys. v. St. Paul Mercury Ins., 660 F. Supp. 2d 1208, 1213–14 (W.D. Wash. 2009).

454. *See* State Auto. Mut. Ins. Co. v. Youler, 396 S.E.2d 737, 743 (W. Va. 1990); Dairyland Ins. Co. v. Voshel, 428 S.E.2d 542, 542–43 (W. Va. 1993).

455. Colonial Ins. Co. v. Barrett, 542 S.E.2d 869, 874 (W. Va. 2000).

(1) given to an adjuster or insurance agent acting on behalf of a particular company; (2) sufficient to put the insurance company on notice that the injured party might bring a claim; and (3) given within a reasonable period of time.[456]

A provision in an insurance policy requiring the insured to provide the insurer notice of an accident means that the notice must be provided in a reasonable period of time. Prejudice to the insurer's investigative interests, along with the reason for the delay and the length of delay, are relevant factors in determining the reasonableness of untimely notice in the context of uninsured/underinsured motorist coverage.[457] In cases involving liability claims against an insurer, the analysis consists of the same factors when determining whether the delay in notifying the insurance company will bar the claim against the insurer.

Furnishing of proof of loss is a condition precedent to any right of action by the insured.[458] Consequently, a right of action does not accrue to the insured under the policy until there has been substantial compliance with the requirement.[459] Where an insured substantially complies with the filing of a proof of loss provision, it is not barred from recovering under the policy unless the insurer demonstrates that its investigative interests have been prejudiced.[460]

"Before an insurance policy will be voided because of the insured's failure to cooperate, such failure must be substantial and of such nature as to prejudice the insurer's rights."[461] Similarly, where an insured fails to obtain its insurer's consent to settle prior to settling with a tortfeasor but obtains the full policy limits available under the

456. *Id.* at 875.

457. *Youler*, 396 S.E.2d at 744.

458. *See* Thompson v. W. Va. Essential Prop. Ins. Ass'n, 411 S.E.2d 27, 33 (W. Va. 1991).

459. *Id.* at 30; Petrice v. Fed. Kemper Ins. Co., 260 S.E.2d 276, 278 (W. Va. 1979).

460. *See* Commercial Bank v. St. Paul Fire & Marine Ins. Co., 336 S.E.2d 552 (W. Va. 1985).

461. Charles v. State Farm Mut. Auto. Ins. Co., 452 S.E.2d 384, 389 (W. Va. 1994) (quoting Bowyer v. Thomas, 423 S.E.2d 906, 910 (W. Va. 1992)).

tortfeasor's policy, the insurer must demonstrate that it was prejudiced by the insured's failure to comply.[462]

A provision in an insurance policy requiring the insured to submit to an examination under oath is not a condition precedent to filing a suit for the policy proceeds.[463] Rather, the examination under oath requirement is a mere condition to recovery under the policy.[464] "Thus, the fact that an insured brings suit before submitting to an examination by the insurer does not, in itself, constitute a breach and work a forfeiture of benefits under the policy."[465] However, the insured's refusal to submit to an examination under oath does affect its rights to the insurance proceeds.[466]

Wisconsin

Two Wisconsin statutes govern notice provisions. The first provides:

> Timeliness of notice. 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.[467]

This statute applies to insurance policies in general.[468] Where notice is given more than one year after the policy deadline, a rebuttable presumption of prejudice arises.[469] The second statute provides:

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462. *See* Kronjaeger v. Buckeye Union Ins. Co., 490 S.E.2d 657, 669 (W. Va. 1997).

463. *Thompson*, 411 S.E.2d at 33 (quoting McCullough v. Travelers Companies, 424 N.W.2d 542, 544 (Minn. 1988)).

464. *Id.*

465. *Id.*

466. *Id.*

467. WIS. STAT. ANN. § 631.81(1) (West 2016).

468. Mayville Eng'g Co. v. Vanguard Underwriters Ins. Co., No. 89-1264, 1990 WL 118010, at *2 (Wis. Ct. App. June 5, 1990).

469. *Id.*

> (2) Effect of failure to give notice. Failure to give notice as required by the policy as modified by sub. (1) (b) does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice.[470]

The person claiming that there was no prejudice has the "risk of nonpersuasion."[471] The notice-prejudice rule created in this statute applies to notice conditions contained in all liability policies issued in the state except claims-made-and-reported policies.[472]

An insured's duty of cooperation should not be construed as a technical trap precluding a worthy claimant from recovery.[473] Consequently, an insurer must prove that the insured's breach of a cooperation provision was material and prejudicial.[474] Materiality is broader in scope than prejudice.[475]

Wyoming

In Wyoming, an insurer must be prejudiced by its insured's failure to provide timely notice of an accident or claim.[476] A two-part analysis is used to determine the legal consequences of an insurer's claim of late notice. The first part requires a preliminary determination that an insured's notice was untimely and in violation of the notice requirement contained in the insurance policy.[477] As stated by the Court in *Century Surety Co. v. Jim Hipner, LLC*:

> The question of the timeliness of the insured's delay in providing notice will depend upon a number of factors, including, but not limited to, the language of the notice requirement in the policy, the timing of the notice, the insured's knowledge of the underlying facts and ability

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470. WIS. STAT. ANN. § 632.26(2) (West 2016).

471. *Mayville Eng'g Co.*, 1990 WL 118010 at *2.

472. *See* Anderson v. Aul, 862 N.W.2d 304, 325–26 (Wis. 2015).

473. Dietz v. Hardware Dealers Mut. Fire Ins. Co., 276 N.W.2d 808, 814 (Wis. 1979).

474. *Id.* at 812.

475. *Id.* at 812 n.3.

476. *See* Century Sur. Co. v. Jim Hipner, LLC, 377 P.3d 784 (Wyo. 2016).

477. *Id.* at 791.

> to provide notice, the sophistication of the parties, the type of insurance at issue, and the reasonableness of any delay.[478]

After it is determined that notice was untimely, the issue of whether the insurer was prejudiced by that delay should be addressed.[479] Subsequently, "[i]f the insurer was prejudiced, then the insurer will be relieved of its obligation to provide coverage."[480] An insurer cannot circumvent the notice-prejudice rule by adding language to its policy stating that insufficient notice "will result in exclusion of coverage whether [the insurer] is prejudiced or not."[481] Wyoming, in 2016, became the most recent jurisdiction to adopt the notice-prejudice rule.

C. Analysis: The Good, the Bad, & the Ugly

It is impossible to reconcile prejudice jurisprudence for many reasons. For example, some jurisdictions restrict the rule's application to specific types of insurance policy(s) and specific types of condition provision(s). Within these jurisdictions the language of the specific condition provision may or may not be relevant. Other jurisdictions are guided by the type of policy and the purpose of the specific condition provision when determining whether to apply the prejudice rule. Still other jurisdictions restrict the prejudice rule's application to specific types of policies but apply it across the board to all condition provisions contained therein. The problem is further exacerbated by the fact that, in addition to applying the rule to specific types of insurance policies, some of the foregoing jurisdictions recognize that a breach of certain conditions gives rise to a rebuttable presumption of prejudice, while breaches of others trigger the proof of actual prejudice rule.

There are even jurisdictions that still retain the strict contractual interpretation approach, pursuant to which the prejudice rule does not apply to conditions precedent or breaches of condition that expressly provide for the forfeiture of coverage in the event of breach. Here, the

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478. *Id.*
479. *Id.*
480. *Id.*
481. *Id.* at 792.

language of the condition provision determines the rights of the respective parties.

1. The Good

Certain states, including Alaska, Arizona Connecticut, Idaho, Illinois, Kansas, Kentucky, Missouri, Montana, Nebraska, New Jersey, North Carolina, Pennsylvania, South Carolina, Texas, Washington, West Virginia, and Wisconsin recognize that an insured's failure to comply with a condition contained in an insurance policy will not relieve the insurance company of its contractual obligations unless the company demonstrates that it was actually prejudiced by the insured's noncompliance. In Alaska, Arizona, and Kansas, the effect of a breach of a condition provision depends upon the purpose of the provision in the policy. In Alaska, Arizona, Oregon, South Carolina, and Texas, for the most part, the actual prejudice rule has been applied to all condition provisions contained in occurrence policies.

Rhode Island is included in this category because it applies the actual prejudice rule to almost all condition disputes. An insured's breach of a condition to which it is not applied, for example, cooperation condition, creates a rebuttable presumption that the insurer has been prejudiced. Thus, the insured is provided an opportunity to rebut the presumption of prejudice and avoid forfeiture of coverage under the policy.

Connecticut, Illinois, Kansas, Kentucky, Massachusetts, Missouri, New Jersey, North Carolina, and Oregon also adhere to the actual prejudice rule. Additionally, these jurisdictions apply the rule to most condition provisions.

2. The Bad

The prejudice rule in these jurisdictions is plagued with limitations. For example, in Maine, the actual prejudice rule is applied to all condition provisions unless the consequences of the breach are expressly stated in the policy. In Michigan, however, the insured need only substantially comply with condition provisions. Consequently, prejudice is viewed only as a factor in determining substantial compliance.

In Alabama, California, Colorado, Maryland, Oklahoma, Vermont, and Wisconsin, which adhere to the actual prejudice model, the

prejudice rule has only been applied to an insured's breach of notice and cooperation provisions. In Georgia and Louisiana, the rule has been applied solely to cooperation provisions. Nevada and New Hampshire restrict the prejudice rule's application to notice conditions while South Dakota extends its application to both notice and sworn proof of loss conditions. North Dakota, on the other hand, has applied the doctrine to notice and consent to settle conditions. In these jurisdictions, an insured's breach of a condition, other than that to which the prejudice rule applies, voids coverage and relieves the insurer of its contractual obligations regardless of whether it has been prejudiced by the insured's breach.

Other jurisdictions included in this class, such as Delaware, Florida, Indiana, Iowa, New Mexico, Minnesota, Ohio, and Tennessee recognize that an insured's breach of a condition precedent gives rise to a rebuttable presumption that the insurer was prejudiced. In these states, an insured's breach of a condition subsequent, however, voids coverage only if the insurer demonstrates that it was actually prejudiced by the breach. New York's version of the rebuttal presumption of the prejudice rule is restricted in its application to notice provisions. Thus, in New York, prejudice is irrelevant in determining the legal consequences of an insured's breach of a condition, other than notice conditions.

Delaware, Florida, Indiana, Iowa, New Mexico, Minnesota, Ohio, and Tennessee are included on this list solely because they adhere to a rebuttable presumption of prejudice rule. As one judge stated: "There is no sound reason, in logic or equity, why the insurer should have the benefit of a conclusive presumption. Such an artificial rule has no basis in reality."[482]

3. The Ugly

Jurisdictions such as Arkansas, Hawaii, Mississippi, Virginia and the District of Columbia continue to adhere to the traditional strict contract interpretation approach when resolving condition clause disputes. Accordingly, the dispositive inquiry is whether the condition allegedly breached is a condition precedent or expressly provides for

482. Plasticrete Corp. v. Am. Policyholders Ins. Co., 439 A.2d 968, 973 (Conn. 1981) (Bogdanski, J. dissenting).

forfeiture of coverage. If the condition is expressed as a condition precedent or specifies the consequence of a breach, coverage is lost regardless of whether the insurance company has been prejudiced thereby. For example, "[i]n Arkansas, a condition precedent is still a condition precedent."[483] In addition, "Virginia's underlying policy is to protect Virginia insurers from stale claims."[484] It is also worthy of note that the law in these jurisdictions has been thoroughly repudiated and rejected by a majority of jurisdictions. It has been abandoned by the vast majority of jurisdictions that originally followed it.

III. CONCLUSION

Historically, the doctrines of waiver and estoppel were used by courts to resolve condition clause disputes. However, given the pervasive nature of insurance, its importance to society, and the public's interest therein, it is not surprising that the vast majority of courts throughout the nation have sought to modernize the law applicable to condition clause interpretation in a manner that reflects the importance of the subject. The major inroad in this area has come in the form of the notice-prejudice or prejudice rule.

In this context, the relevant question is whether the rule strikes an appropriate balance between the interests of the insurance company, consumers, and society. In making this determination, courts have engaged in a rather complex analysis that weighs and balances several related factors, including the nature of the underlying risk of harm, the opportunity and ability to prevent the harm, the comparative interests of and the relationship between or among the parties, and, ultimately, based on public policy and fairness, the societal interest in the proposed solution.[485] Thus, the common goal, where the rule is applied, is to determine whether the action of the insured, in not complying with a condition requirement, justifies a forfeiture of coverage. This determination is not made in a vacuum constrained purely by legal principles. Rather, both the problem and proposed solution are evaluated from a subjective and objective perspective.

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483. Fireman's Fund Ins. Co. v. Care Mgmt., Inc., 361 S.W.3d 800, 803 n.1 (Ark. 2010).

484. Peavey Co. v. M/V ANPA, 971 F.2d 1168, 1172 (5th Cir. 1992).

485. The suggested analysis is that used by courts in resolving whether a tort duty should be imposed.

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