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# Unfashionably Late to The Party:

# Notice Prejudice Rule in the United States

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# INTRODUCTION TO THE NOTICE PREJUDICE RULE

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# Notice Prejudice in “Occurrence” based Policies

- Generally, all policies of insurance require prompt notice of a claim in one way or another
- But what constitutes sufficient notice?
- And what happens when an insured’s notice was not prompt?
- Courts across the nation have adopted several different approaches with the majority rule permitting denial of an untimely tendered claim only when the carrier proves the notice was untimely ***and*** the carrier was prejudiced by the late notice.

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# THE VARIOUS STATE RULES

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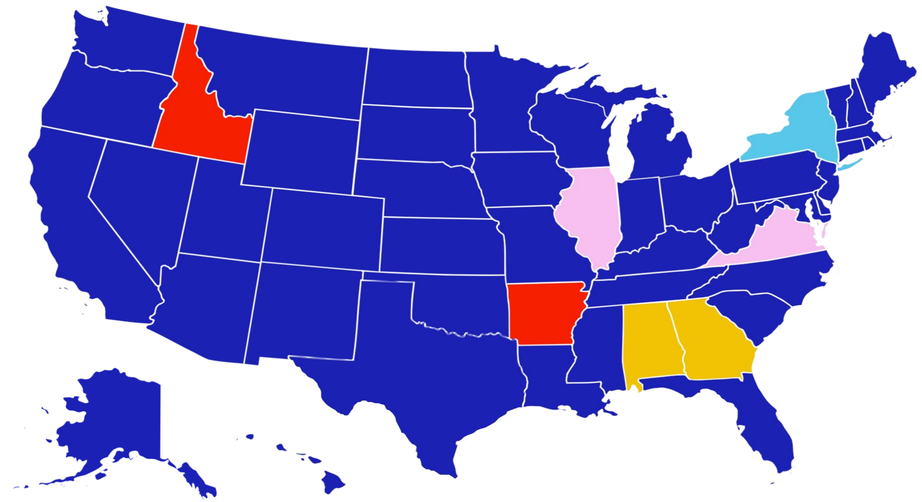
# Overview of the Various Approaches



Late Notice and the Prejudice Requirement

- Favorable to policyholders; the notice-prejudice rule applies
- Either 1) there is a split of authority among the courts as to whether a prejudice standard applies, or 2) a different standard applies to primary and excess policies
- Either 1) the state's highest court rejects a notice-prejudice standard but does hold that prejudice is among a series of factors to be examined when evaluating whether an insured's late notice is excusable, or 2) there is no state appellate authority, but federal authority or lower state court authority is unfavorable to policyholders
- Unfavorable to policyholders; the notice-prejudice rule does not apply
- A notice-prejudice rule has been adopted by the state's highest court and/or by state statute, but with certain exceptions

Saxe Doernberger & Vita, P.C., *Late Notice and the Prejudice Requirement*, October 7, 2024, sourced from https://www.sdvlaw.com/surveys/late-notice-and-the-prejudice-requirement/

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# Majority Rule – Notice and Prejudice

- The Majority Rule adopted in most jurisdictions requires proof of untimely notice *and* resultant prejudice.
  - Version 1: A handful of Courts conclude there exists a rebuttable presumption of prejudice when notice is untimely (Florida, Indiana, Iowa, Ohio, Tennessee, Wisconsin)
    711 P.2d 1066
  - Version 2: Other Courts impose upon carriers the burden of proof as to actual prejudice.

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# Pop-Up Question

- **Under the Majority Rule, what must exist to properly deny a claim?**
  - A - Untimely notice of claim *only*
  - B - Untimely notice of claim *and* resulting prejudice
  - C - Unfair surprise
  - D Violation of Public Policy

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# Minority Rule – No Showing of Prejudice Required

- Arkansas, District of Columbia, and Idaho require no showing of prejudice
  - *Viani v. Aetna Ins. Co.*, 501 P2d 706 (Idaho 1972)
    - Holding: Notice provisions are a condition precedent to insurance coverage, and therefore the insurer could deny coverage on that basis without also needing to demonstrate prejudice.

# Minority Rule – Only Excess Carriers must prove Prejudice

- Alabama rejected a required showing of prejudice when an insured fails to apprise its carrier of a claim, but held that prejudice *does* have to be demonstrated in order for an *excess* carrier to assert the rule in denying coverage.
  - *Midwest Employers Cas. Co. v. East Alabama Health Care*, 695 So.2d 1169 (Ala.1997)
    - Holding: "We find it clear that Midwest and other excess insurers do not have the same duties and responsibilities as primary insurers that form the basis for this Court's adherence to the "no prejudice rule" relating to untimely notice of a claim."

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# Minority Rule – Prejudice Is a Factor of Timeliness

- Illinois and Virginia do not expressly require a finding of prejudice, but permit evidence of an insurer's prejudice as a factor in deciding whether the notice was or was not timely under the policy
  - *MHM Servs. V. Assurance Co. of Am.*, 975 N.E. 2d 1139 (Ill. Ct. App. 2012)
    - Holding: "[t]he factors a court considers when evaluating whether the insured's excuse is valid may include: (1) the specific language of the policy's notice provision; (2) the insured's sophistication in commerce and insurance matters; (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence and reasonable care in ascertaining whether policy coverage is available; and (5) whether the insured's delay caused prejudice to the insurer."

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# UNTIMELY NOTICE

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# When is Notice sufficiently “untimely”

- Case Law Examples are most poignant
  - *Viani v. Aetna Ins. Co.*, 501 P2d 706 (Idaho 1972)(Overruled on separate grounds)
    - Holding: No demand was ever made on insurer to defend insured until after judgment against insured became final.
  - *N. Mgmt. Servs. Inc. v. Navigators Specialty Ins. Co.*, 608 F.Supp.3d 996 (D. Idaho 2022)
    - Holding: Notice to carrier deemed untimely when provided *after* entry of default judgment and after attempts by insured to vacate same
  - *Rentmeester v. Wisconsin Lawyers Mut. Ins. Co.*, 164 Wis. 2d 1 (1991)
    - Holding: Notice provided after one-year requirement within policy constituted untimely notice

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# When is Notice sufficiently "untimely" – *cont.*

- Further Case Law Examples
  - *Sheehan Constr. Co. v. Cont'l Cas. Co.*, 938 N.E. 2d 685 (Ind. 2010)
    - Holding: Insured's failure to notify carrier until after a class-action settlement was reached constituted untimely notice.
  - *P.R. Mallory & Co., Inc. v. American Cas. Co. of Reading, PA.*, 920 N.E.2d 736 (Ind. Ct. App. 2010)
    - Holding: Assuming insured gave notice of claim to insurers in August 2000 -- insured had knowledge of an occurrence before it notified insurers and insured's delay in notifying insurers of occurrence constituted unreasonably late notice, where insured operated an unlined waste disposal site from 1950 to 1963 and another site from 1963 to 1980, received complaints from Indiana State Board of Health regarding pollution in 1969 and 1972, and held board of directors meetings in 1989 and 1991 regarding potential liability for clean up of hazardous wastes.

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# DEMONSTRATING PREJUDICE

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# What Constitutes Prejudice to the Insurer?

- Prejudice to the insurer tends to be a fact-question, making it difficult to establish by way of dispositive motion
- While the analysis of “prejudice” is largely state specific, an insurer must generally demonstrate “a substantial likelihood that with timely notice the insurer would have taken steps settle the claim for less, or taken steps that would have reduced or eliminated insured's liability.”
  - *Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992, 1003

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# What Constitutes Prejudice to the Insurer? – *cont.*

- "The mere inability to investigate the claim thoroughly or to present a defense in the underlying action does not satisfy the prejudice requirement."
  - *Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615
- "Prejudice does not arise merely because a delayed or late notice has deprived the insurance company of the ability to contemporaneously investigate the claim or interview witnesses. The burden is on the insurer to show that, but for the delay in making a prompt investigation and in hiring its own attorney at the early stages, there is a substantial likelihood that it could have prevailed outright in the underlying action or that it could have settled the case for a small sum or a smaller sum than that for which the insured ultimately settled the claim. The insurer's mere assertion that the insured's default interfered with its ability to conduct a thorough investigation and to present a defense assumes 'too lenient a test' for prejudice."
  - *Shell Oil Co. v. Winterhur Swiss Ins. Co.*,12 Cal.App.4th 715 (1993)

# What Constitutes Prejudice to the Insurer? – *cont.*

- *Earle v. State Farm Fire & Cas. Co.*, 935 F.Supp. 1076 (N.D. Cal. 1996)
  - Court concluded that prejudice existed as a *matter of law* where underlying suit was filed in 1993, proceeded through trial in 1994 resulting in a verdict exceeding $10 million, and was not tendered to the insurer until one month after the verdict was entered.
  - State Farm argued (and the Court agreed) that "the Earles' belated tender not only deprived State Farm of any opportunity to affect the outcome of the underlying case, but it also deprived State Farm of the ability to prove that it might have done so."
  - Notably, the Court also gave credence to State Farm's contention that "due to the delayed tender, it cannot possibly quantify the potential benefit to State Farm or the Earles had it been able to participate in litigating the underlying action."
  - State Farm specifically offered evidence that: (1) State Farm would not have been required to reimburse independent counsel at an hourly rate higher than the rate it actually pays attorneys retained by it in the ordinary course of business pursuant to California Civil Code § 2860(c); (2) it would have been allowed to seek reimbursement of fees and costs allocable to noncovered claims, which in this case, is every claim other than the defamation claim; (3) had a special interrogatory been propounded to the jury asking whether the defamation was intentional, there is a substantial likelihood that the jury would have answered in the affirmative (in light of the punitive damages award) and thus State Farm maintains that it would be relieved of the obligation to pay any portion of the judgment pursuant to [citation omitted]; and (4) had a special interrogatory been propounded to the jury asking whether the defamation arose out of Mr. Earle's business operations, there is a substantial likelihood that the jury would have answered in the affirmative, thus relieving State Farm of its obligation to pay the judgment due to the policy's business operations exclusion.

# What Constitutes Prejudice to the Insurer? – *cont.*

- Under Texas law, an excess insurer was held to have been prejudiced by insured condominium association's conduct in notifying it of a slip-and fall lawsuit only after jury had returned an adverse verdict, and, thus, insurer was relieved of its coverage obligations. The court held the insured's late notice caused insurer to lose ability to do any investigation and to conduct its own analysis of case. *Berkley Regional Ins. Co. v. Philadelphia Indem. Ins. Co.* (5th Cir. 2015) 600 Fed. Appx. 230 (applying Texas law).

- Under Maryland law, notice of a claim that was provided post-verdict was held prejudicial as a matter of law. *Washington v. Federal Kemper Ins. Co.*, 60 Md. App. 288, 296-297 (1984).

- Under Washington law, prejudice was held to exist as a matter of law where the insured was aware of the potential for coverage, but did not contact or notify the insurer until after the trial. *Felice v. St. Paul Fire & Marine Insur. Co.*, 711 P.2d 1066 (Wash. App. 1985)

- Under New York law, notice of two judgments against the insured provided to the insurer sixteen years later, was held sufficient to demonstrate late notice and substantial prejudice to the insurer – thereby relieving the insurer of any obligation for liability on the judgments. *Ethicon, Inc. v. Aetna Cas. and Sur. Co.* (S.D. New York 1992) 805 F.Supp. 203, 205-206.

# QUESTIONS?

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# THANK YOU! If you have any questions, please contact the presenters

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