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INSURANCE LAW UPDATE: TRAPS AND FOIBLES

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It is an axiom of insurance law that an insurance company cannot "create coverage" by waiver or estoppel.[1] This "hornbook" statement of law, however, is often misleading. The case law is clear that "conditions" of the policy are waivable, and in fact are often waived.[2]

I. CONDITIONS

There are several "conditions" of the insurance policy which insurance companies can and do waive often. In general, a "condition" is any provision of the policy requiring an act to be performed by the insured as a prerequisite to payment or coverage under the policy. Most property policies have a separate section called "conditions," containing several numbered sections defined as conditions, and hence, as matters that can be waived by the insurance company, or that it can be estopped to assert. While insurance carriers often argue that it is the policyholder's burden to show compliance with conditions precedent in the policy in order to recover,[3] there is substantial authority that failure of a condition does not BAR recovery, but only requires abatement until the condition is satisfied. See *State Farm Gen. Ins. Co. v. Lawlis*, 773 S.W.2d 948, 949 (Tex. App. – Beaumont 1989, no writ) (per curium) (citing *Humphrey v. Nat'l Fire Ins. Co.*, 231 S.W. 750 (Tex. 1921)). In addition, substantial compliance is usually all that is required in connection with conditions precedent of a policy.[4] Discussion of specific conditions that are commonly encountered follows. A recent exposition and analysis of this area of the law can be found in the Fifth Circuit's opinion in *Cox Operating Co. v. Surplus Lines Ins. Co.*, No. 13-20529 (5th Cir. July 30, 2015)

A. Notice Of Loss

1. Requirement of Notice

Many policies provide that in case of loss, the insured should give prompt written notice of the facts relating to the claim. Note that there is usually no requirement to "make a claim" but only to give "notice of facts." Some policies do not even require that the notice be in writing. Most often the notice is called in to the agent by the insured, and the agent submits an ACORD form to the carrier in writing, in behalf of the insured. As with any other condition, this requirement can be waived by any action by the carrier inconsistent with relying upon it. This could include acknowledging the claim in writing without requesting further written notice, beginning an investigation, or making payment.[5] Again, acceptance of late written notice by the insuror or any conduct by the insurer inconsistent with an intention to rely on such notice to avoid liability

accomplishes a waiver.[6] By analogy to cases involving the condition requiring a proof of loss, many actions by the insuror will waive any requirement of prompt written notice, or else create an estoppel where the insuror cannot rely upon such failure to avoid the claim. Such acts include either recognizing partial liability on the claim or denying liability on the claim on grounds other than the failure to provide notice.[7]

For this reason, it is almost never a good idea for an insured to sign a non-waiver agreement or to fail to object to a unilateral reservation of rights letter.[8]

2. Late Notice

Carriers will sometimes defend on the basis that the insured did not promptly notify the carrier of the loss. There are several responses available to the insured in such circumstances. First, there are excuses for failing to give notice sooner. For example, if it is not reasonably possible to provide notice substantially sooner than it is made, such as an excusable lack of knowledge on the part of the insured that any claim needs to be made, such excuse will generally explain and avoid any defense of late notice. See *Williams v. Travelers Insurance Company*, 220 F.Sup. 411 (WD Tx. 1963). Where no specific time is given in the policy for giving notice or filing proofs of loss, a reasonable time is assumed.[9] This invokes the standard of ordinary prudence.[10] "As soon as practical," or "immediately" requires only that notice be given within a reasonable time in light of all the circumstances.[11] Lack of knowledge by an insured that will excuse the giving of notice or proof of loss can include mental incapacity.[12] It may also include legal minority.[13] Although an insured is not automatically excused by ignorance of the notice requirements of the policy or an inability to read, lack of education in business matters may be considered in determining whether he acted reasonably under all of the surrounding circumstances.[14]

Authorities are not uniform in connection with the effect of an insured's ignorance or lack of understanding as to how his insurance coverage relates to any occurrence or manifestation. Texas courts have held that an insured's ignorance of the existence of a policy, unmixed with his own negligence will constitute an excuse,[15] but federal courts have held that an insured's failure to know he had coverage for a particular type of claim did not constitute a valid excuse for failure to give notice as to such claim.[16] On the other hand, an insured cannot be required to give notice of an accident or forward notice of a claim before he knows of the existence of the policy and the fact that he is covered thereby.[17] The best exposition of the categories of excuse available to an insured is found in *Employers Casualty Company v. Scott Electric Company*, 513 S.W.2d 642 (Tex.App.—Corpus Christi, 1974). That court held that there are four general categories of excuse for failure to give prompt notice to an insurance carrier: (1) the insured's lack of knowledge of the accident (or occurrence); (2) the insured's belief that the accident or occurrence was trivial and no claim could be made; (3) the insured's belief that he was not covered; and (4) insured's illness or incapacity.

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