No. 99807
IN THE SUPREME COURT OF ILLINOIS

COUNTRY MUTUAL INSURANCE COMPANY,	)	
Plaintiff-Appellee,	)	Appeal from the 1st District Appellate Court, Nos. 1-03-2832 and No. 1-03-2912, there heard on appeal from the Cook County Circuit Court, No. 01-CH-19671
vs.	)	
LIVORSI MARINE, INC. and GAFFRIG PERFORMANCE INDUSTRIES,	)	
Defendants-Appellants.	)	

BRIEF OF *AMICI CURIAE* ILLINOIS INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, and NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

STATEMENT OF INTEREST

The Illinois Insurance Association, founded in 1959, is an insurance trade association representing 18 of the largest property and casualty insurance companies in Illinois. The Illinois Insurance Association represents its member companies before the Illinois legislature, executive branch, and media.

The National Association of Mutual Insurance Companies ("NAMIC"), a national trade association, founded in 1895, has more than 1,400 member companies that underwrite 43 percent of the property/casualty insurance premium in the United States. Within Illinois, NAMIC members write 42 percent of the property/casualty insurance premium.

Property Casualty Insurers Association of America (PCI), is a national trade association composed of more than 1,000 member companies that write 40.7 percent of the nation's automobile, homeowners, business, and workers compensation insurance. PCI is an advocate for sound public policy that fosters a healthy and competitive insurance marketplace.

The proposed *amici* represent the insurance industry nationwide and within the state of Illinois. As representative of insurers who issue a considerable number of insurance policies, the proposed *amici* will be directly impacted by the ruling of this Court and, as such, have a significant interest in the outcome of the appeal presently before this honorable Court.

Furthermore, the insurance trade associations have extensive knowledge regarding the insurance industry and the significance of the "no prejudice" rule as presently applied in Illinois. The associations can offer this Court detailed information and analysis concerning the negative impact that would be produced by a change to the Illinois law and application of the "prejudice" rule.

SUMMARY OF ARGUMENT

Appellants and their supporting *amici* attempt to provide this Court with the impression that Illinois jurisprudence is on an unstoppable march toward the adoption of the notice/prejudice rule, which they term the "Modern Rule". This is a mischaracterization of Illinois law.

For over 50 years, Illinois courts have enforced the insurance policy provision requiring policyholders to give notice of a claim or lawsuit. Illinois has not required the insurer to prove prejudice in order to deny coverage to an insured who breached the notice requirement contained within an insurance contract. Appellants are asking this Court to overturn this established and well-reasoned law and apply a prejudice requirement. Application of a prejudice rule will negatively impact the Illinois insurance industry, insurance consumers, and Illinois courts.

The "no prejudice" rule is essential to both the insurance industry and insurance consumers. Timely notice provides the insurer with the opportunity to: 1) make a prompt and thorough investigation; 2) participate in all phases of litigation; 3) avoid fraudulent claims; 4) evaluate risks; 5) prepare suitable financial reserves; 6) make prompt settlements to appropriate injured parties; and 7) minimize litigation and litigation costs. Through timely notice insurers are able to minimize litigation and handle matters in an efficient and cost-effective manner that reduces insurance premium costs for all policyholders.

As articulated below, the "no prejudice" rule is fair, consistent with Illinois public policy, not unduly burdensome for the insureds of this state, and beneficial to the citizens of Illinois.

ARGUMENT

I. ILLINOIS COURT DECISIONS ARE NOT SHOWING A TREND TOWARD A PREJUDICE REQUIREMENT THAT EXCUSES LACK OF REASONABLE NOTICE

Illinois courts are not moving toward the so-called "modern rule" that requires a showing of prejudice before coverage can be denied for failing to comply with the notice requirement.

Through strained analysis and incomplete review of Illinois caselaw, Appellants Livorsi Marine and Gaffrig Performance Industries, along with their supporting *amici*, have attempted to show that Illinois has been sliding toward a prejudice requirement. However, that is not the case, as the Appellate Court noted below. Country Mutual Ins. Co. v. Livorsi Marine, 358 Ill.App.3d 880, 886, 295 Ill.Dec. 665, 670, 833 N.E.2d 871, 876 (1st Dist. 2004) ("We find no such 'modern trend' in Illinois decisions").

In Simmon v. Iowa Mut. Casualty Co., 3 Ill.2d 318, 121 N.E.2d 509 (1954), this Illinois Supreme Court outlined the proper role that prejudice should play in reviewing whether insurance coverage has been lost for lack of reasonable notice to the insurer.

> We are in agreement with the contention that lack of prejudice may be a factor in determining the question of whether a reasonable notice was given in a particular case yet it is not a condition which will dispense with the requirement.

Simmon, 3 Ill.2d at 322, 121 N.E.2d at 511. Therefore, the analysis contains two parts. First, the court will determine if the insured provided reasonable notice. In determining whether notice was reasonable, prejudice may be considered, but is not determinative. Second, when the notice provided to the insurer is held to be unreasonable, prejudice is no longer relevant and insurance coverage may be denied.

This method of analysis as set forth in Simmon stands as the law in Illinois. Although a few Illinois appellate courts have attempted to make slight variations to this rule, no Illinois court has ever refused to deny coverage based on a failure to prove prejudice. On behalf of the Appellee, Country Mutual, the undersigned *amici* seek to confirm the law as stated by this court in Simmon.

Typical insurance policies, such as those at issue in this case, reference two separate instances requiring notice: (1) occurrence/accident and (2) lawsuit. In determining whether an insured gave reasonable notice regarding the occurrence, considerations include whether the

insured was aware "that an occurrence defined by the policy has taken place" and, once aware, whether the insured was diligent in reviewing whether insurance coverage extended to the occurrence. American Family Mutual Ins. Co. v. Blackburn, 208 Ill.App.3d 281, 288, 153 Ill.Dec. 39, 44, 566 N.E.2d 889, 894 (4th Dist. 1991). Whether or not an insured gave notice of a lawsuit promptly depends upon the facts and circumstances of the case. Northbrook Property & Casualty Ins. Co. v. Applied Systems, Inc., 313 Ill.App.3d 457, 464, 246 Ill.Dec. 264, 270, 729 N.E.2d 915, 921 (1st Dist. 2000).

In each instance, occurrence or lawsuit, the practical aspects of notice may differ. For instance, a notice of occurrence is sometimes more difficult for the insured, because the insured may be unsure that an "occurrence" has arisen, or may be aware of what happened, but not aware of the insurance implications that flow from that occurrence. On the other hand, there can be no confusion as to when a lawsuit arises, for each lawsuit begins with the service of the summons and complaint upon the insured. In the instant case, the court below addressed the insureds' obligation to provide notice of a lawsuit. Country Mutual Ins. Co. v. Livorsi Marine, 358 Ill.App.3d 880, 885, 295 Ill.Dec. 665, 668, 833 N.E.2d 871, 874, (1st Dist. 2004) ("[T]his is not a notice of occurrence case. It is a notice of lawsuit case.").

However, regardless of whether a case involves a notice of an occurrence or a notice of lawsuit, Illinois courts have applied the same analysis in reviewing the adequacy of notice. See Northbrook Property & Casualty Insurance Company v. Applied Systems, Inc., 313 Ill.App.3d 457, 465, 246 Ill.Dec. 264, 270, 729 N.E.2d 915, 921 (1st Dist. 2000) ("regardless of the type of notice involved, the courts generally apply the same legal principles in their analyses"). In cases involving a notice of occurrence, Illinois courts have universally refused to require prejudice before allowing coverage to be denied. In cases involving a notice of lawsuit, Illinois courts have never refused to deny coverage for failure by the insurer to prove prejudice. Although some

Illinois appellate courts have stated, in *dicta*, that prejudice may be required, no court has ruled against an insurance company for lack of prejudice.

A. Illinois courts have uniformly refused to consider prejudice when the insured failed to give reasonable notice of an occurrence.

Illinois courts have refused to require proof of prejudice in cases involving a notice of occurrence.[1] Instead, each Illinois court addressing a late notice of occurrence has noted the rule outlined in Simmon v. Iowa Mut. Casualty Co., 3 Ill.2d 318, 121 N.E.2d 509 (1954). According to Simmon, once it is determined that reasonable notice was not provided, prejudice has no relevance and the insurer may deny coverage. Simmon, 121 N.E.2d at 511, 121 N.E.2d at 511.

In contrast to the trend claimed by Appellants, ***every*** Illinois court addressing a late notice of occurrence has agreed that prejudice is not a factor in denying insurance coverage. AAA Disposal Systems, Inc. v. Aetna Casualty and Surety Company, 355 Ill.App.3d 275, 290 Ill.Dec. 704, 712, 821 N.E.2d 1278, 1286 (2nd Dist. 2005) ("it is well settled that an insurer does not have to prove that it was prejudiced by an insured's breach of the notice clause in a policy to be relieved of its duty to pay"); Montgomery Ward and Company Incorporated v. The Home Insurance Company, 324 Ill.App.3d 441, 449, 257 Ill.Dec. 373, 379, 753 N.E.2d 999, 1005 (1st Dist. 2001) ("However, an insurer does not have to prove that it was prejudiced by an insured's breach of the notice clause in a policy in order to be relieved of its duty to pay"); Commercial Underwriters Insurance Company v. Aires Environmental Services, Ltd., 259 F.3d 792, 796 (7th Cir. 2001) (Under Illinois law, "an insurer need not prove that it was prejudiced in order to deny coverage").

[1] Amicus United Policyholders noted that "Illinois courts have not yet extended the prejudice rule to circumstances where notice of an occurrence or accident is at issue." (brief, pg. 13).

B. No Illinois court has ever barred an insurer from denying coverage because of a failure to prove prejudice regarding a late notice of lawsuit.

Illinois courts have never refused to deny coverage because the insurer failed to prove prejudice in a case involving notice of a lawsuit. As outlined below: (1) numerous Illinois courts have confirmed that prejudice is not required in order to deny coverage; (2) the crown-jewel of the Appellants' argument, Rice v. AAA Aerostar, Inc., 294 Ill.App.3d 801, 229 Ill.Dec. 20, 690 N.E.2d 1067 (4th Dist. 1998) did not truly rely on any prejudice analysis, but made its ruling on a wholly different basis; (3) most of the courts citing Rice did not even make a ruling based on the Rice *dicta*; (4) only two Illinois cases have truly made a ruling based upon a prejudice analysis, with both courts finding that the insurance company suffered prejudice as a result of late notice.

1. Many Illinois courts have confirmed the long-standing "no prejudice" rule in reviewing a late notice of lawsuit.

As compared to notice of occurrence disputes, few Illinois courts have addressed the late notice of a lawsuit. Northbrook Property & Casualty Insurance Company v. Applied Systems, Inc., 313 Ill.App.3d 457, 465, 246 Ill.Dec. 264, 270, 729 N.E.2d 915, 921 (1st Dist. 2000) ("We note the majority of published decisions considering the reasonableness of an insured's notice involve alleged late notices of an 'occurrence' or accident, and very few reported cases have addressed the reasonableness of an insured's notice of suit").

In reviewing cases that involve a notice of lawsuit, numerous Illinois appellate decisions have applied the rule outlined in Simmon to bar coverage, without any proof of prejudice, once notice was found to be unreasonable. Northern Insurance Co. of New York v. City of Chicago, 325 Ill.App.3d 1086, 1091, 259 Ill.Dec. 664, 669, 759 N.E.2d 144, 149 (1st Dist. 2001); Northbrook Property & Casualty Insurance Company v. Applied Systems, Inc., 313 Ill.App.3d 457, 466, 246 Ill.Dec. 264, 271, 729 N.E.2d 915, 922 (1st Dist. 2000) ("Absent a valid excuse, the insured's failure to satisfy the notice requirement will generally absolve the insurer of its duties

under the policy"); Continental Casualty Company v. Cuda, 306 Ill.App.3d 340, 350, 239 Ill.Dec. 909, 915, 715 N.E.2d 663, 669 (1st Dist. 1999) ("where the giving of notice is a condition precedent to a right of action against the insurance company, the prejudice resulting from the delay in giving notice is deemed immaterial"); American Country Insurance Company v. Cash, 171 Ill.App.3d 9, 10, 120 Ill.Dec. 834, 835, 524 N.E.2d 1016, 1017 (1st Dist. 1988) ("Prejudice to the insurer is but one factor which may be taken into consideration in making the determination as to the reasonableness of the notice in any given case."); Illinois Insurance Guaranty Fund v. Lockhart, 152 Ill.App.3d 603, 608, 105 Ill.Dec. 572, 575, 504 N.E.2d 857, 860 (1st Dist. 1987) ("Where there has been late notice to an insurer the issue is not whether insurer has been prejudiced, but, rather whether reasonable notice has been given"); Sisters of Divine Providence v. Interstate Fire & Casualty Company, 117 Ill.App.3d 158, 162, 72 Ill.Dec.731, 734, 453 N.E.2d 36, 39 (5th Dist. 1983) ("prejudice, or the lack thereof, is not the factor which determines coverage").

It is important to note that although Illinois courts consider prejudice in determining whether notice was reasonable, that is not the same as requiring proof of prejudice before coverage may be denied for lack of notice. Country Mutual Ins. Co. v. Livorsi Marine, 358 Ill.App.3d 880, 884, 295 Ill.Dec. 665, 668, 833 N.E.2d 871, 874 (1st Dist. 2004) ("Saying that prejudice is a factor to consider…is not the same as saying the insurer cannot deny coverage unless it proves prejudice"). Instead, once notice is found to be unreasonable, prejudice is no longer an issue to be considered.

2. Rice and most of the cases citing to Rice did not rely on a prejudice analysis for their rulings.

Appellants rely heavily on Rice v. AAA Aerostar, Inc., 294 Ill.App.3d 801, 229 Ill.Dec. 20, 690 N.E.2d 1067 (4th Dist. 1998). According to Appellants, Rice was the enlightened decision that chose to adopt the so-called Modern Rule regarding late notice of a lawsuit. See

Country Mutual Ins. Co. v. Livorsi Marine, 358 Ill.App.3d 880, 885, 295 Ill.Dec. 665, 669, 833 N.E.2d 871, 874 (1st Dist. 2004) ("*Rice* is the standard-bearer for the must-prove-prejudice contenders"). However, a closer look reveals that neither Rice nor most of its progeny relied on the Modern Rule for their holdings.

a. The Rice decision was based upon actual notice, not prejudice.

Amici supporting Appellants refer to Rice as having "adopted" (Illinois Tool Works, pg. 3) or as "holding" (Illinois Manufacturers Assoc., pg. 1) that the Modern Rule is applicable. However, this is an exaggeration of the Rice decision, for Rice's holding did not turn in any way on a prejudice analysis, as the court recognized below. Country Mutual Ins. Co. v. Livorsi Marine, 358 Ill.App.3d 880, 295 Ill.Dec. 665, 669, 833 N.E.2d 871, 875 (1st Dist. 2004) ("The *Rice* court did not decide whether [the insurer] was prejudiced by the lack of notice. In fact, prejudice played no role in the court's decision").

In Rice, the court's ruling was solely based upon an analysis of "actual notice",[2] without any prejudice analysis whatsoever. Rice, 294 Ill.App.3d 801, 803, 229 Ill.Dec. 20, 21-22, 690 N.E.2d 1067, 1068-1069 ("insurer's affidavit did not negate the possibility that the insurer had actual notice"). As the Rice court noted:

> [Insurer] may still be liable for the judgment if it had "actual notice" of the lawsuit. "Actual notice" means notice sufficient for the insurer to locate and defend the suit…In the present case [the insurer] was able to conduct a timely and thorough investigation of the insured's claim, because it had notice of the occurrence.

Rice, 294 Ill.App.3d at 807, 229 Ill.Dec. at 24, 690 N.E.2d at 1071. Ultimately, the Rice court reversed and denied summary judgment for the insurer, because its affidavit in support of summary judgment "fail[ed] to negate whether it received 'actual notice.'" Rice, 294 Ill.App.3d at 809, 229 Ill.Dec. at 25, 690 N.E.2d at 1072.

[2] As outlined later in this brief, an actual notice analysis is entirely different than a late notice analysis. In one case, the insurer received sufficient notice, although from a different source. In the other, the insurer received no reasonable notice whatsoever.

The *dicta* upon which Appellants rely so heavily simply noted the Rice court's perceived "uncertainty" about whether prejudice must be shown before coverage may be denied. In one brief sentence, the court noted the "rule" that requires an insurer to show prejudice, but failed to cite to ***any*** Illinois law in support of this supposed rule. After this brief foray into a needless prejudice discussion, it promptly returned, in the very next sentence, to the real issue before the court, *i.e.*, whether the insurer received "actual notice." Rice, 294 Ill.App.3d at 808, 229 Ill.Dec. at 25, 690 N.E.2d at 1072 ("Plaintiff contends that [the insurer] had actual notice of the lawsuit"). Therefore, the Rice holding added little to Illinois jurisprudence, since it was simply an application of established law regarding "actual notice". Accordingly, it is misleading and improper to refer to the Rice *dicta* as "holding" or "adopting" the rule sought by Appellants. See Holton v. Memorial Hospital, 176 Ill.2d 95, 138, 223 Ill.Dec. 429, 448, 679 N.E.2d 1202, 1221 (1997) ("It is axiomatic that statements in a judicial opinion which are not essential to the disposition of a case or logically necessary to the rationale for the disposition are not authoritative")(Heiple, J., concurring).

Furthermore, even the *dicta* noted by Rice lacked legal support, as evidenced by the absence of citation to any Illinois caselaw. Prior to Rice, no Illinois court had made such a statement, even in *dicta*, regarding a proof of prejudice requirement. Yet, the Rice dicta incorrectly referenced a legal requirement that has never been established or recognized by any Illinois court.

b. Most of the cases purporting to follow Rice did not rely on a prejudice analysis.

Like Rice, a number of the cases purportedly relying on Rice failed to base their rulings upon any prejudice analysis. The appellate panel below recognized this fact. Country Mutual Ins. Co. v. Livorsi Marine, 358 Ill.App.3d 880, 886, 295 Ill.Dec. 665, 670, 833 N.E.2d 871, 876 (1st Dist. 2004) ("Close inspection reveals the cases often cited as furthering the *Rice* line of must-

prove-prejudice in notice of lawsuit decisions do not actually rely on the *Rice* dictum for their holdings"). The cases below are each cited by Appellants in support of their position, but each one uses a basis other than prejudice for its ruling.

In Illinois Founders Insurance Co. v. Barnett, 304 Ill.App.3d 602, 237 Ill.Dec. 605, 710 N.E.2d 28 (1st Dist. 1999), the court found that coverage was proper because the insurer received actual notice of the lawsuit, since copies of it had been forwarded to the insurance broker and the insurance company's investigator within two weeks of filing. On that basis, the trial court made a factual finding that the insurer had received actual notice. The court cites to Rice near the end of the eight page opinion in a five sentence paragraph addressing an additional argument by the insurer that it suffered prejudice which negated the actual notice it received. However, the court rejected the argument because the insurer had not raised the argument at trial. Therefore, the Illinois Founders court did absolutely no prejudice analysis, but immediately made it clear that its holding was based solely on the factual finding of actual notice of the lawsuit. Illinois Founders, 304 Ill.App.3d at 609, 237 Ill.Dec. at 610, 710 N.E.2d at 35 ("Based on the totality of the circumstances in this case, we conclude that the circuit court's decision that [the insurer] received actual notice of [the insured's] lawsuit was not against the manifest weight of the evidence.").

In Zurich Insurance Co., v. Walsh Construction Company of Illinois, Inc., 352 Ill.App.3d 504, 287 Ill.Dec. 834, 816 N.E.2d 801 (1st Dist. 2004), the court addressed both a notice of occurrence issue and a notice of lawsuit issue. As to the notice of occurrence, the court noted that "prejudice is not dispositive of the insurer's obligation to defend", but then, without doing any prejudice analysis, concluded that the insured "gave reasonable notice of the occurrences." Zurich Insurance Co., 352 Ill.App.3d at 512, 287 Ill.Dec. at 841, 816 N.E.2d at 808. With regard to the notice of lawsuit, the court noted Rice and other cases that appeared to require proof of prejudice before coverage could be denied. However the court did not perform a prejudice analysis because

"we have already determined that [the insurer] had actual notice of the lawsuits." Zurich Insurance Co., 352 Ill.App.3d at 511, 287 Ill.Dec. at 840-841, 816 N.E.2d at 807-808. Therefore, the decision in Zurich ultimately had little to do with the so-called Modern Rule requiring proof of prejudice.

In Household International, Inc., v. Liberty Mutual Insurance Company, 321 Ill.App.3d 859, 255 Ill.Dec. 221, 749 N.E.2d 1 (1st Dist. 2001), the court noted the Modern Rule in evaluating conflict of law issues, but then concluded that New York law applied. Therefore, it cannot be said that this case turned in any way on Illinois law, particularly Rice or its line of reasoning.

Appellant Gaffrig has misled this Court by mischaracterizing Montgomery Ward and Company Incorporated v. The Home Insurance Company, 324 Ill.App.3d 441, 257 Ill.Dec. 373, 753 N.E.2d 999, (1st Dist. 2001), as a case adopting the prejudice rule and following the lead of the Rice court. (Gaffrig brief, pg. 12). To the contrary, the court in Montgomery Ward clearly rejected the argument set forth in the Rice *dicta* and held that the, "insurer does not have to prove that it was prejudiced by an insured's breach of the notice clause in a policy in order to be relieved of its duty to pay". Montgomery Ward, 324 Ill.App.3d at 449, 257 Ill.Dec. at 379, 753 N.E.2d at 1005.

c. Only two Illinois cases have applied the Modern Rule, with both finding that prejudice was proven by the insurer.

A full review of the cases cited by Appellants and their *amici* reveal that Illinois courts have applied the so-called Modern Rule in ***only two cases***. However, in both cases, prejudice was proven by the insurer and the court ruled that insurance coverage could be denied. Vega v. Gore, 313 Ill.App. 632, 636, 246 Ill.Dec. 562, 565, 730 N.E.2d 587, 590 (2nd Dist. 2000) ("we conclude that [the insurer] demonstrated prejudice as a result of the entry of judgment before receiving

notice"); Cincinnati Insurance Co. v. Baur's Opera House, Inc., 296 Ill.App.3d 1011, 1020, 230 Ill.Dec. 624, 630, 694 N.E.2d 593, 599 (4th Dist. 1998) ("we conclude the 2½ year delay in receiving notice did prejudice [the insurer's] ability to seek contribution").

Illinois courts have never ruled against an insurer for failing to prove prejudice in a late notice context. Therefore, the "sweeping trend" in Illinois law, as represented by Appellants, is not a reality.

II. BY AFFIRMING THE NO PREJUDICE RULE, ILLINOIS WILL BE IN GOOD COMPANY WITH OTHER STATES THAT HAVE UPHELD THAT LONG-STANDING LEGAL POSITION

The other parties have spent much time and energy discussing the decisions of other states, yet court opinions from other jurisdictions are not binding on this court. Rather, this Illinois Supreme Court is charged with reviewing the decision below and making the proper decision based upon Illinois law, as well as the public policy implications important to Illinois and its citizens. AAA Disposal Systems, Inc. v. Aetna Casualty and Surety Company, 355 Ill.App.3d 275, 284, 290 Ill.Dec. 704, 713, 821 N.E.2d 1278, 1287 (2nd Dist. 2005) ("Intervenors and plaintiffs cite numerous cases from our sister states. However, these cases are not binding here and are not persuasive to the extent that they conflict with established Illinois law"). Insurance is an industry that is highly regulated by the individual states. As a result, it is not uncommon for various states to differ in their interpretations of insurance policies and their review of insurance coverage disputes.[3]

[3] For instance, Illinois is known as a unique state for its lack of regulation over insurance rates, thus permitting open competition. See 215 ILCS 5/472.1 (noting July 1, 1998 repeal of insurance rate regulation, pursuant to P.A. 90-732); 215 ILCS 5/460(a) (West 2005) ("Beginning January 1, 1983, a competitive market is presumed to exist"); 22 *Ill.Law & Practice*, Insurance, Sec. 14 (2005) ("It is the express intent of the [Insurance] Code to permit and encourage competition"). In addition, Illinois conflicts with many other states as to whether insurance policies may provide coverage for punitive damages. See Beaver v. Country Mutual Ins. Co., 95 Ill.App.3d 1122, 1123, 51 Ill.Dec. 500, 501, 420 N.E.2d 1058, 1059 (5th Dist. 1981) ("The courts of the various jurisdictions that have considered the question of whether one may insure against liability for punitive damages arising out of one's own misconduct are sharply and about equally divided"); Liability insurance coverage as extending to liability for punitive or exemplary damages, 16 A.L.R.4th 11.

However, in recent years, courts in various states have issued well-reasoned opinions noting that prejudice need not be shown before coverage may be denied.

A. New York (2005)

The state of New York is similar to Illinois in that it has a large population, a well-developed commercial and industrial base, and a combination of both large urban and vast rural areas. On April 5, 2005, New York's highest court acknowledged New York's long-standing rule that an insurer need not prove prejudice before declining coverage for late notice. Argo Corp. v. Greater New York Mutual Insurance Company, 827 N.E.2d 762, 764 (N.Y. 2005) ("For years the rule in New York has been that…the absence of timely notice…is a failure to comply with the conditional precedent… No showing of prejudice is required.").

> The issue in this case is whether a primary insurer can disclaim coverage based solely upon a late notice of lawsuit or must show prejudice. We hold that, under the circumstances of this case, plaintiffs' late notice was unreasonable as a matter of law…and that the ***insurer need not show prejudice***.

Argo, 827 N.E.2d at 763 (emphasis added)(citations omitted). According to the New York court, the rule should be maintained because it (1) protects the insurance company from fraud and collusion; (2) gives the insurer a chance to investigate while the evidence is fresh; (3) allows an early evaluation of possible exposure to establish reserves; and (4) allows early control of claims, which may lead to settlement. Argo, 827 N.E.2d at 764.

B. Virginia (1996)

Virginia courts have embraced the rule that allows insurers to enforce the notice requirement and deny coverage without proving prejudice. Osborne v. National Union Fire Ins. Co., 465 S.E.2d 835, 837 (Va. 1996) ("when an insured fails to comply with a policy provision requiring timely notice of an accident, we have said that 'the insurance company need not show that it was prejudiced by such a violation'"); State Farm Fire & Casualty Co. v. Walton, 423

S.E.2d 188, 192 (Va. 1992) ("If a violation of the notice requirement is substantial and material, the insurance company need not show that it was prejudiced by such a violation").

Appellant Livorsi claims that Virginia's legal position is "being eroded" (Livorsi brief, pg. 10), as a result of the decision in Northern Virginia Funeral Choices v. Erie Ins. Co., 2003 WL 1960687 (March 21, 2003), an *unpublished* decision from the Virginia trial court. First, as an unpublished decision from the trial court, the case has no binding precedential value or legal significance. Robdau v. Commonwealth of Virginia, 543 S.E.2d 602, 604 (Va.App. 2001) ("Unpublished memorandum opinions of this Court are not to be cited or relied upon as precedent except for the purpose of establishing res judicata, estoppel or the law of the case"). Furthermore, the trial court in Northern Virginia did not expand or "erode" Virginia law, but simply applied the analysis required under Virginia law which considers prejudice as a factor in determining materiality. Northern Virginia Funeral Choices v. Erie Ins. Co., 2003 WL 1960687, at *4 (March 21, 2003) ("absence of prejudice is to be considered on the issue of materiality"). The court did not require the insurer to prove prejudice prior to denying coverage.

The materiality inquiry in Virginia is similar to the reasonableness inquiry in Illinois. Under Illinois law, courts consider prejudice in determining whether reasonable notice was given. Simmon, 3 Ill.2d at 322, 121 N.E.2d at 511 ("lack of prejudice may be a factor in determining the question of whether a reasonable notice was given"). Similarly, Virginia courts consider prejudice in determining whether the lack of notice was "material". State Farm Fire & Casualty Co. v. Walton, 423 S.E.2d at 192 ("Although absence of prejudice may have a bearing on the issue of the materiality of the information that an insured should have given, when no notice is given, lack of prejudice is not an issue").

The trial court in Northern Virginia Funeral Choices was clearly aware of this law, for immediately after noting that prejudice may be considered regarding materiality, the court cited

the decision in State Farm Fire and Casualty v. Scott, 372 S.E.2d 383, 384 (Va. 1988), where the Virginia Supreme Court noted that "[w]hen a violation of the notice requirement is substantial and material, the insurer is not required to show that it has been prejudiced by the violation."

Virginia courts have solidly refused to require prejudice before an insurer may deny coverage for inadequate notice, and that rule is certainly not being "eroded", contrary to the claim of the Appellants.

C. Alabama (1995)

Alabama's highest court applied the traditional rule as recently as 1995. In finding that insurance coverage was denied for lack of reasonable notice, the court made no prejudice analysis, and never mentioned the term "prejudice". Haston v. Transam Ins. Services, 662 So.2d 1138, 1141 (Ala. 1995) (holding that lack of reasonable notice denied coverage, without any analysis of prejudice); Correll v. Fireman's Fund Ins. Cos., 529 So.2d 1006, 1009 (Ala. 1988) (noting the "*absence* of the burden upon the insurance company to prove ***prejudice***") (emphasis in original).

D. District of Columbia (1995)

In 1995, the District of Columbia appellate court acknowledged that prejudice is not an issue in reviewing late notice to an insurer. Greycoat Hanover F Street Limited Partnership v. Liberty Mutual Ins. Co., 657 A.2d 764, 768 n.3 (D.C.App. 1995) (noting that the jurisdiction has rejected a requirement of "prejudice to the insurer in order for a late-notice defense to prevail").

E. Georgia (1992)

Amicus Illinois Manufacturers' Association, (brief, pg. 18) incorrectly claims that Georgia's highest court has never addressed the issue. To the contrary, the Georgia Supreme Court acknowledged the traditional rule, which allows the denial of coverage for lack of notice, without requiring any proof of prejudice. Granite State Inc. Co. v. Nord Bitumi U.S., Inc., 422 S.E.2d 191, 194 (Ga. 1992) ("We agree …that [the insured] breached that provision of the policy when it failed to forward…the complaint…, and that the breach relieved [the insurer] of its obligation to defend that suit and of its liability for any judgment resulting from that suit"). In making that ruling, the court cited to Diggs v. Southern Ins. Co., 321 S.E.2d 792, 793 (Ga.App. 1984) (Insured "clearly failed to comply with a condition precedent to coverage, and it is therefore not necessary for the [insurer] to show actual harm").

F. Nevada (1986)

The Nevada Supreme Court found that an insurer need not show prejudice to deny coverage when reasonable notice was not given. State Farm Mutual Automobile Ins. Co. v. Cassinelli, 216 P.2d 606, 616 (Nev. 1950) ("Lack of prejudice, under the terms of the policy, was immaterial"). Appellants maintain that the 1950 decision is outdated and does not reflect current legal trends. (brief of *amicus* Illinois Manufacturers' Association, pg. 18). However, the Nevada Supreme Court addressed the subject again more recently, making the same ruling. Las Vegas Star Tax v. St. Paul Fire & Marine Ins. Co., 714 P.2d 562, 564 (Nev. 1986) ("Under the facts of this case the insurance company cannot be fairly required or expected to *prove* anything") (emphasis in original).

Furthermore, a closer reading of the Cassinelli decision reveals that the arguments before the Nevada court in 1950 were very similar to those before this Court in 2005. Indeed, a blind reading of the opinion would scarcely reveal whether the decision was from 1950 or 2005. In the

Nevada decision, the court: (1) rejected an argument by the insured that only older, outdated cases were refusing to require proof of prejudice; (2) reviewed supposedly contradictory case decisions, many of which were not true conflicts because the decisions were made on a basis other than prejudice; (3) reviewed case authority from other states[4]; and (4) considered public policy considerations such as fading witness memories, fraud avoidance, insurance premium increases, and increased risk to the insurance company. Cassinelli, 216 P.2d at 610-615. Of course, these issues are very similar to those that will be considered by this Court in the instant case.

G. Idaho (1972)

An affirmance by this Court will also be consistent with Idaho court rulings. Viani v. Aetna Ins. Co., 501 P.2d 706, 713-714 (Idaho 1972) (adopting State Farm Mutual Automobile Ins. Co. v. Cassinelli, 216 P.2d 606 (Nev. 1950), which "held that lack of prejudice to the insurer was immaterial where the insured failed to perform the condition precedent of giving notice of the suit"); Sparks v. Transam Ins. Co., 141 F.3d 1179 (9th Cir. 1998) (applying Idaho law)(unpublished table decision).

III. BREACHING THE NOTICE REQUIREMENT IS FUNDAMENTALLY DIFFERENT FROM OTHER DUTIES BREACHED BY THE INSURED

Insurance polices place various duties and responsibilities on both insureds and insurers. Appellants attempt to compare various other duties of the insured, arguing that the notice requirement should be applied in a similar manner. However, a wholesale failure to give notice is fundamentally different from other duties breached by the insured, as an Illinois Appellate Court has recognized:

> Although intervenors and plaintiffs attempt to analogize an insured's duty to provide notice of an occurrence with other obligations of an insured, we are not persuaded…In support of their argument, intervenors and plaintiffs also cite cases regarding an insurer's

[4] Including the Illinois case of Meyer v. Iowa Mutual Ins. Co., 240 Ill.App. 431, 436 (1st Dist. 1926).

> breach of a cooperation clause and cases regarding nonconsensual settlements. Because these cases do not address an insured's breach of the duty to notify an insurer…, the cases are not applicable.

AAA Disposal Systems, Inc. v. Aetna Casualty and Surety Company, 355 Ill.App.3d 275, 290 Ill.Dec. 704, 712-713, 821 N.E.2d 1278, 1286-1287 (2nd Dist. 2005) (citations omitted). It is consistent with both Illinois law and public policy to decline to require proof of prejudice before insurance coverage may be denied for lack of notice, or late notice.

A. Actual notice

When an insurance company receives actual notice of a claim or lawsuit, regardless of the source, the insurer is required to provide coverage. Simmon, 3 Ill.Dec.2d at 323, 121 N.E.2d at 511 ("It does not matter who gives the notice, as long as a notice is given."). Appellants claim that allowing notice from a source other than the insured to fulfill the notice requirement shows that insureds should also be protected from lack of notice where no prejudice is proven. However, receiving timely notice from a separate source is far different from never receiving notice. A situation where the insurer has received notice and had a full opportunity to investigate and participate in the defense of the claim is much different than the instant case, where the insurer was completely deprived of notice for nearly two years.

B. Cooperation

The cooperation clause in the typical insurance policy requires the insured to assist the insurer in the defense of any claims falling under the policy coverage. In M.F.A. Mutual Insurance Co. v. Cheek, 66 Ill.2d 492, 6 Ill.Dec. 862, 363 N.E.2d 809 (1977), this Court determined that prejudice must be shown before an insurer can deny coverage for lack of cooperation. M.F.A Mutual Insurance, 66 Ill.2d at 498-499, 6 Ill.Dec. at 866, 363 N.E.2d at 813.

Appellants claim that, if prejudice is required to deny coverage for a breach of the cooperation clause, then prejudice must also be proven to deny coverage under a failure to give notice.[5]

The cooperation clause and the notice clause cannot be compared. A claim of lack of cooperation involves conduct of the insured ***after the insurance company was aware of the situation***. This is fundamentally different from the total failure to give notice, where an insurance company has no involvement or knowledge of the claim and then, after the fact, is required to prove how it would have benefited from an earlier notice. In sharp contrast, lack of cooperation typically arises when the insurer is already defending the claim, but believes that the insured is somehow hindering the investigation or refusing to help prepare a defense. Illinois Insurance Guaranty Fund v. Lockhart, 152 Ill.App.3d 603, 608, 105 Ill.Dec. 572, 575, 504 N.E.2d 857, 860, (1st Dist. 1987) ("There is an important difference between a notice clause and a cooperation clause").

Illinois courts are consistent with other states in applying a different analysis for lack of notice than for a breach of the cooperation clause. State Farm Mutual Automobile Ins. Co. v. Porter, 272 S.E.2d 196, 199 (Va. 1980) ("Our cases have distinguished between the notice requirements and the cooperation provisions"); Williams v. Alabama Farm Bureau Mutual Casualty Ins. Co., 416 So.2d 744, 746 (Ala. 1982) (test for determining whether the insured failed to cooperate amounts to a requirement of prejudice to the insurer). As the Alabama Supreme Court explained:

> The showing of the prejudice requirement in the one case but not in the other is explainable, however, in this: "Cooperation clauses" 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 insured in nearly every case. On the other hand, the requirement that the insured give

[5] Appellants Livorsi and Gaffrig also reference the "voluntary payment" clause contained in many insurance policies. (Livorsi brief, pg. 20; Gaffrig brief, pg. 15). However, the voluntary payment clause is simply one aspect of the cooperation clause. Pittway Corp. v. American Motorists Insurance Co., 56 Ill.App.3d 338, 346, 13 Ill.Dec. 244, 250, 370 N.E.2d 1271, 1277 (2nd Dist. 1977) (noting that the "usual cooperation clause…provides that the insured shall not make any voluntary payment with the consent of the insurance company").

> timely notice to his insurer is specific and, in most cases, easily complied with. In other words, the former lends itself to subjective proof while the latter is more readily subject to objective proof.

Home Indemnity Co. v. Reed Equip. Co., Inc., 381 So.2d 45, 49 n.3 (Ala. 1980).

C. Reinsurance

Amicus Illinois Manufacturers' Association cites to other state decisions where insurers sought a prejudice requirement regarding late notice to a reinsurer. According to the *amicus*, those insurers "recognize the fairness of the modern approach", with the implication that Country Mutual is trying to deny that same fairness to the insureds in this case. (brief, pg. 22). However, the fact that an insurance company in another state made a particular argument to a court regarding reinsurance certainly has no bearing on the issues before this court.

IV. PUBLIC POLICY FAVORS THE LONG-STANDING ILLINOIS RULE THAT ENFORCES THE NOTICE PROVISION WITHOUT REGARD TO PROOF OF PREJUDICE

There are ample public policy reasons for confirming the no prejudice rule in Illinois.

A. Proving prejudice may be difficult or impossible for an insurer, even though prejudice is sure to exist.

Insurer should not be required to prove prejudice before denying coverage for late notice. Prejudice to the insurer will exist in every situation, but it will often be difficult, or even impossible, to prove. The difficulty lies in proving the outcome of a hypothetical, *i.e.*, would the insurer have been better off if it had received timely notice?

It is important for insurers to be notified and involved in pending claims at a meaningful stage, when it can still protect its interests and investigate the claim. However, it is difficult for either the insurer or the court to determine when the meaningful stage has passed. Particularly it will be difficult to identify the hypothetical result that could have occurred with an earlier notice. The key question is whether the insurer's ability to defend the action was merely delayed or actually hindered by the untimely notice. The insurer will struggle when attempting to establish

the proof required to show prejudice when it is unknown what information would have come to light, what possible defenses may have arisen, or how settlement may have been pursued through earlier involvement. It is unfair to impose this burden upon the insurer, particularly where the need for the proof arose from the insured's own wrongdoing in failing to comply with its simple duties pursuant to the insurance policy.

Courts in other states have acknowledged the insurer's difficulty in proving prejudice that arises from late notice, or lack of notice. Even though courts note that the prejudice surely exists, they admit that establishing proof of prejudice could be a struggle. Home Indemnity Co. v. Reed Equip. Co., Inc., 381 So.2d 45, 49 (Ala. 1980) ("from the insurer's point of view, the prejudice resulting from an insured's failure to give timely notice can be readily assumed though, as a practical matter, it may be difficult to prove"); Unigard, 594 N.E.2d at 575 (New York courts recognize the "presumption of prejudice that applies in the late notice disputes between primary insurers and their insureds"); Argo, 827 N.E.2d at 765 ("[l]ate notice of a lawsuit is so likely to be prejudicial…as to justify the application of the no-prejudice rule"); AXA Marine v. Aviation Ins. Ltd. v. SeaJet Indus. Inc., 84 F.3d 622, 625 (2nd Cir. 1996) ("it is difficult if not impossible, to quantify and to prove in court the prejudice caused by a lost opportunity to associate in the defense of the suit and to settle a claim"); American Insurance Co. v. Fairchild Industries, Inc., 56 F.3d 435, 440 (2nd Cir. 1995) ("An insurer cannot be expected to show precisely what the outcome would have been had timely notice been given").

When addressing an insured's settlement of the lawsuit by the insured without notice to the insurance company, the Nevada Supreme Court noted:

> No insurance company can fairly be called upon under such circumstances to come in and *prove* that the insured's settlement compromise was excessive or that the insurance company would not under all of the contingencies of the injured party's claim have had to pay the settlement sum or more. Under the facts of this case the insurance company cannot be fairly required or expected to *prove* anything. [The insured] certainly will not be allowed to obligate itself to pay [the settlement amount] and then be entitled to require the

> insurance company to pay unless the company can come to court and prove that the settlement figure was too high. Such a position emasculates both the letter and spirit of the insurance contract.

Las Vegas Star Tax v. St. Paul Fire & Marine Ins. Co., 714 P.2d 562, 564 (Nev. 1986) (emphasis in original).

Furthermore, some states that apply the Modern Rule impose a presumption of prejudice that the insured must overcome. Fireman's Fund Ins. Co. v. ACC Chemical, 538 N.W.2d 259, 266 (Iowa 1995); Banker Ins. Co. v. Macias, 475 So.2d 1216, 1218 (Fla. 1985); Aetna Casualty and Surety Co. v. Murphy, 538 A.2d 219, 224 (Conn. 1988); Am Justice Ins. Reciprocal v. Hutchinson, 15 S.W.3d 811, 817-818 (Tenn. 2000). This presumption is acknowledgement of the insurer's difficulty in proving prejudice.

B. Requiring notice is not difficult or burdensome for the insured.

Complying with the policy's clear notice requirement is not difficult to understand, nor is it unduly burdensome for the insured. See Kerr v. Illinois Central Railroad Co., 283 Ill.App.3d 574, 582, 219 Ill.Dec. 81, 87, 670 N.E.2d 759, 765 (1st Dist. 1996) ("notice provisions are valid prerequisites to coverage and not mere technical requirements which the insured is free to overlook or ignore with impunity"); Dixon Distributing Co. v. Hanover Insurance Co., 161 Ill.2d 433, 441, 204 Ill.Dec. 171, 175, 641 N.E.2d 395, 399 (1994) ("courts will not distort the language of a policy to create an ambiguity where none exists"). A lawsuit begins by the service of a complaint and summons, making it abundantly clear when the notice requirement accrues. Taking the next step to forward the complaint to the insurance company is a simple task and the failure to meet this requirement should not be excused without a legitimate reason. Home Indemnity Co. v. Reed Equip. Co., Inc., 381 So.2d 45, 49 n.3 (Ala. 1980) ("the requirement that the insured give timely notice to his insurer is specific and, in most cases, easily complied with").

C. Requiring notice is not harsh, for the insured's late notice may be excused for legitimate reasons.

Under Illinois law, application of the notice requirement without proof of prejudice is not harsh, for Illinois courts allow leeway if the insured has a legitimate excuse for the late notice. Northbrook Property & Casualty Insurance Company v. Applied Systems, Inc., 313 Ill.App.3d 457, 466, 246 Ill.Dec. 264, 271, 729 N.E.2d 915, 922 (1st Dist. 2000) ("Absent a valid excuse, the insured's failure to satisfy the notice requirement will generally absolve the insurer of its duties under the policy"). This provides ample fairness to the insured. It is only when the insured's notice was ***unreasonable*** does the notice requirement work to bar coverage. State Security Ins. Co. v. Burgos, 145 Ill.2d 423, 435, 164 Ill.Dec. 631, 635, 583 N.E.2d 547, 551 (1991) ("provision calling for notice 'as soon as practicable' requires notification to the insurer within a reasonable time. Whether notice was given within a reasonable time is dependent upon all the facts and circumstances").

Other states acknowledge the fairness of such a procedure. Home Indemnity Co. v. Reed Equip. Co., Inc., 381 So.2d 45, 49 (Ala. 1980) ("the apparent harshness of the rule…in large measure has been ameliorated by… modifications…which have looked to the reasonableness of the insured's delay in giving notice to his insurer."); Viani v. Aetna Ins. Co., 501 P.2d 706, 714 (Idaho 1972) ("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" according to the policy requirements).

D. Enforcing the notice requirement encourages prompt, efficient, and inexpensive resolution of liability disputes.

Insurance companies depend upon prompt, efficient, and inexpensive resolution of claims. Insurance companies routinely analyze the merits of a claim, costs of litigation, legal expenses, and potential exposure and balance all factors to determine the most effective and economical course of action. When policyholders are permitted to breach the notice requirement and proceed with litigation independent of the insurer's involvement, policyholders will be tempted to "take their chances" at trial and then look to the insurance company for reimbursement. An insured who is confident of reimbursement at the close of litigation has no incentive to pursue the most efficient and economical resolution of the claim. Insureds should not be allowed to gamble with the money of the insurance company, by incurring defense costs or possible verdicts. See Champion Spark Plug v. Fidelity & Casualty Co. of New York, 687 N.E.2d 785, 792 (Ohio App. 1996) (noting insurer's testimony that the insurance "policy issued by his company is not a reimbursement contract").

As outlined below, a full enforcement of the notice provision, without grafting a prejudice requirement, will help maintain efficient and inexpensive insurance coverage allowing prompt resolution for injured parties.

1. Imposing the prejudice rule will increase insurance costs

Imposing a requirement of prejudice before enforcing the notice requirement will increase insurance costs for all consumers. Currently, Illinois insurance premiums are set according to a risk analysis under current law which requires no proof of prejudice. If prejudice were required, it will increase the costs of insurance in two ways. First, the insurer will be faced with increased litigation expenses when attempting to prove prejudice. This is an expense that arose directly from the insured's breach of its clear duties. Second, insurers will be faced with increased costs associated with covering claims that should have been barred as a result of the policyholder's

failure to provide timely notice. This unnecessary expense will arise where an insurer suffers prejudice but is unable to prove prejudice to a court's satisfaction.

Requiring a showing of prejudice will shift costs from the individual insured who breached the notice provision to consumers at large. Illinois insurance consumers will face increased insurance premiums and insurance will be more costly for everyone. Accordingly, full enforcement of the notice requirement will not provide a "windfall" for insurers. Instead, a weakened notice requirement that allows coverage without proper notice will provide a "windfall" for the breaching policyholders, who are allowed to violate insurance contract provisions and yet receive benefits worth more than the coverage they purchased. This windfall will be at the expense of other insureds who have complied with their notice requirements.

Finally, prompt notice to the insurer decreases insurance expenses by decreasing fraud. When the insurer receives prompt notice, it is able to protect itself against unjustified claims through an opportunity to gather and preserve possible evidence. Delayed notice may hinder the insurer in uncovering insurance fraud, which harms the entire insurance system and increases insurance costs for all consumers.

2. Enforcing the notice requirement assists in prompt resolutions for injured parties.

Enforcement of the clear notice requirement will encourage policyholders to involve insurers at a meaningful stage of the dispute and litigation. Prompt notification of a lawsuit allows the insurer to make a prompt investigation before witness memories fade. Upon prompt investigation, the insurer can review settlement options which may result in a quicker recovery and resolution for the injured party. By delaying notice to the insurance company, the insured may ultimately harm injured parties, who may be delayed in obtaining payment for ongoing medical bills and other damages. In addition, prompt resolution preserves policy limits by

minimizing litigation costs, thereby retaining maximum coverage for additional claims under the same policy.

3. Enforcing the notice requirement allows the insurer to maintain adequate reserves.

Under Illinois law, insurance companies must maintain adequate reserve funds, which insures that the company will have sufficient funds to pay claims that are pending. See 215 ILCS 5/126.22 (West 2005) (outlining minimum insurance reserve requirements). In order to properly evaluate the required reserves, it is important for an insurer to receive prompt notice of any potential claims. To weaken the notice requirement by requiring proof of prejudice will affect the insurer's ability to evaluate its risks which is a necessary precursor to setting its reserve requirements. Moreover, lack of prompt notice, or a forgiveness of late notice, could result in an insurance company having insufficient reserves to pay pending claims. On the other hand, full enforcement of the notice requirement allows an insurer to properly maintain reserves by maintaining a well-defined window of risk exposure. See Argo, 827 N.E.2d at 764 (compliance with notice requirements "allows the carrier to make an early estimate of potential exposure and establish adequate reserves").

4. Prompt notice is required to prevent an insured from misusing the targeted tender doctrine.

Illinois courts recognize the "targeted tender" doctrine which permits an insured to choose among various insurance policies when a claim arises. John Burns Construction Co. v. Indiana Insurance Co., 189 Ill.2d 570, 574, 244 Ill.Dec. 912, 916, 727 N.E.2d 211, 215 (2000) (insureds "had the right to choose which insurer would be required to defend and indemnify it"). Under that doctrine, if an insured is covered under more than one policy, perhaps because of being named as a co-insured on other policies, that insured may choose which insurer will provide a defense and indemnification. Once that choice is made, the chosen insurer may not seek

contribution from the other applicable insurance policies. Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange, 325 Ill.App.3d 970, 976, 259 Ill.Dec. 230, 235, 758 N.E.2d 353, 357 (1st Dist. 2001).

By allowing the "targeted tender" option, courts recognize that insureds have certain rights to make choices about their coverage. Along with such a right to choose, the insureds must also have the responsibility to choose ***promptly***.

It would be incongruous for Illinois courts to allow insureds the right to choose which insurer or insurers must cover a particular claim under the targeted tender doctrine, while at the same time allowing the insureds to delay notifying the insurers that their policies have been targeted for coverage. This would be the result, however, if the notice provision of the policies is weakened by adding a prejudice requirement.

E. The no prejudice rule is consistent with fundamental principles of insurance law.

Acknowledgement of public policy issues concerning insurance law does not mandate the application of a prejudice requirement. Admittedly, courts have recognized that Illinois public policy favors the construction of insurance policies in favor of coverage. M.F.A. Mut. Ins. Co. v. Cheek, 66 Ill.2d 492, 500, 6 Ill.Dec. 862, 867, 363 N.E.2d 809, 814 (1977). Also, courts have recognized that insurance policies are contracts of adhesion and not a result of bargaining between equals. Niagra Fire Ins. Co. v. Scammon, 100 Ill. 644 (1881). However, recognition of these public policy considerations does not mandate the application of a prejudice requirement.

To the contrary, courts have acknowledged the public policy implications of insurance policies while maintaining that prejudice need not be proven before coverage could be denied for lack of notice. In Simmon the Court stated, "Automobile insurance has taken an important position in the modern world. It is no longer a private contract merely between two parties." Simmon, 3 Ill.2d at 322, 121 N.E.2d at 511. Yet, this acknowledgement did not change the

Court's ruling that prejudice need not be proven before coverage could be denied for lack of notice. This view is consistent with established law in other states:

> Prejudice to the insurance company's ability to prepare an adequate defense can therefore be presumed by an unreasonable delay in notifying the company about the accident or about the filing of the lawsuit. This is not in conflict with the public policy theory that the court should seek to protect the innocent third parties from attempts by insurance companies to deny liability for some insignificant failure to notify.

Askren Hub States Pest Control Services, Inc. v. Zurich Ins. Co., 721 N.E.2d 270, 278 (Ind.App. 1999).

In addition, Appellants improperly criticize the court below, claiming that the court erred in failing to acknowledge insurance contracts as contracts of adhesion. There is nothing in the opinion below to indicate that the court disregarded public policy issues relating to insurance contracts. Rather, the court applied the law consistently with Simmon and determined that prejudice need not be proven where the notice was admitted to be unreasonably late. Only after finding that prejudice need not be shown did the court note that the insurance contract and its notice provisions would be applied as written. Country Mutual Ins. Co. v. Livorsi Marine, 358 Ill.App.3d 880, 888, 295 Ill.Dec. 665, 671, 833 N.E.2d 871, 877 (1st Dist. 2004) ("we enforce the contract freely entered into by the parties").

F. A conflict of interest does not eliminate the potential for prejudice or alter the public policy concerns.

Appellants incorrectly assume that prejudice cannot exist where a conflict of interest occurs. In the case at bar, Country Mutual provided insurance coverage for both Livorsi and Gaffrig. As a result of this conflict Country Mutual could not have directly participated in the litigation, however, they could still be prejudiced by the late notice of the lawsuit. Undoubtedly, every case involving late notice presents the potential for prejudice.

Appellants boldly assert that, "Country Mutual had no legitimate interest in investigating the allegations in the lawsuits because it could not participate in either of the defenses of the

parties in those lawsuits." (Gaffrig brief, pg. 9) Illinois Courts have ruled contrary to Appellant's misconception and recognized that public policy concerns remain even when an insurer would have a reduced level of involvement in the litigation. Although a conflicted insurer is not entitled to participate directly in the litigation, the insurer is entitled to select a competent attorney who will be involved in all phases of the litigation. Maryland Casualty Co. v. Peppers, 64 Ill.2d 187, 199, 355 N.E.2d 24, 31 (1976). Additionally, the conflicted insurer is permitted to observe the investigation and discovery phase and protect its own interest. An Illinois court has noted that even an excess insurer has the right to be informed and protect its own interests throughout the litigation. Kerr v. Illinois Central Railroad Co., 283 Ill.App.3d 574, 582, 219 Ill.Dec. 81, 87, 670 N.E.2d 759, 765 (1st Dist. 1996) ("Although generally an excess insurer does not reserve the right to participate in the defense of the claim, this is not tantamount to a surrender by the insurer of its right to protect its own interests").

Although prejudice was not argued below, in the trial court, Country Mutual was deprived of its opportunity to select competent counsel, to observe all phases of the litigation process, and to protect its own interests. When an insurer is deprived of its right to protect its own interests, prejudice may exist in a form that is difficult to prove. Courts have acknowledged these concerns in cases where prejudice is not established by enforcing the notice requirement and allowing insurers to deny coverage when timely notice was not provided. See State Farm Fire & Casualty Co. v. Walton, 423 S.E.2d 188, 192 (Va. 1992) (declining to excuse the notice requirement, even where the insurer "conceded it was not prejudiced by the delayed notice").

V. IF THIS COURT CHOOSES TO REVERSE THE DECISION BELOW, ITS HOLDING SHOULD BE STRICTLY LIMITED OR BASED UPON AN ISSUE OTHER THAN PROOF OF PREJUDICE

As outlined above, both Illinois law and public policy support affirmance of the decision below, without requiring proof of prejudice by the insurer. However, if this court chooses to reverse, its holding should be strictly limited to one or more of the following scenarios.

A. If this Court wishes to reverse the appellate decision, it should do so on the basis of reasonable notice.

As noted above, Illinois courts may consider prejudice when reviewing whether notice was reasonable. If this court wishes to reverse the court below, it should reverse on the basis that the notice was reasonable in light of the specific facts. With such a ruling, the decision may be reversed without any consideration of prejudice and without upending the long-standing legal standard that prejudice need not be shown by the insurer. Instead, the decision will be based on an issue wholly apart from prejudice.

B. If prejudice is required, it should be limited to this unique factual situation.

Appellant Livorsi notes that the instant case poses a set of facts which is unique to any other reported decision in the United States. (Livorsi brief, pg. 7) ("we have been unable to find any case in any court in the United States that has involved the factual scenario presented here"). If this court determines that the notice requirement will not be fully honored without proof of prejudice, it should limit its holding to situations (1) where the insurer stipulated that it suffered no prejudice and/or (2) where the insurer has a conflict of interest and therefore was limited in its involvement during the litigation.

C. If the Court changes Illinois law to require proof of prejudice, the changes should only apply to claims brought by injured parties who were not responsible for failing to provide notice.

Even though the hypothetical injured party and related public policy concerns have been discussed by Appellants, it is undisputed that, in this case, there was no injured party. The court below did not impose any damages upon either of the insureds. Instead, the insureds only seek to obtain recovery of their litigation and defense costs. Therefore, we have a pure scenario where the only harmed parties are those who clearly breached the notice provisions contained in the insurance policies. The insureds' current struggle was caused solely by their own conduct. Now, those same parties seek to be excused of the consequences of that conduct and still obtain coverage under the policies.

If this court wishes to impose a prejudice requirement, it should do so only at the request of an injured third party who has been denied recovery as a result of the loss of coverage. If the insured is solvent and is able to make the injured party whole without insurance coverage, then prejudice should not be required. On the other hand, if the only injured party is the insured, then prejudice should not be required in order to deny coverage for lack of notice. In other words, late notice without prejudice will excuse insurance coverage unless the injured third party is ultimately left without a recovery.

D. If the Court changes Illinois law to require proof of prejudice, any type of actual prejudice should be a coverage based defense.

If this Court chooses to impose a prejudice requirement, the Court should acknowledge the difficulty of establishing proof and the inherent prejudice that occurs to every insurer in every case involving late notice. This acknowledgement should include allowing a denial of coverage upon any showing of actual prejudice. An insurer should not be required to prove substantial prejudice or material prejudice, but simply any type of actual prejudice.

E. If the Court adopts the modern rule it should be applied only to occurrence based claims and not claims-made policies.

Many commercial insurance policies are "claims made" policies, which are agreements "to indemnify against all claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred." Central Illinois Light Co. v. Home Ins. Co., 213 Ill.2d 141, 173, 290 Ill.Dec. 155, 173, 821 N.E.2d 206, 224, (2004) (citing to Black's Law Dictionary 821 (8th ed. 2004)). In a claims-made policy, it is of utmost importance that the insured give prompt notice of any claims, for the policy's risk analysis is based upon the assumption that claims will be promptly reported and investigated by the current insurance company. Any delay in reporting the claim may result in a different insurance company being responsible for the claim. If this court chooses to require proof of prejudice, it should not be imposed on claims-made policies.

F. If prejudice is required, the burden of proof for such prejudice should be placed on the insured.

If a showing of prejudice is required, the burden of proof should be placed on the insured. First, the insured is in a better position to argue prejudice since the insured was involved since the beginning of the process. The insured is better able to demonstrate that vital witnesses are still available and crucial information has not been lost. Champion Spark Plug v. Fidelity & Casualty Co. of New York, 687 N.E.2d 785, 792 (Ohio App. 1996) (insurer is "not in a position to discern what information may now be unavailable that they could have discovered with timely notice."). As the Ohio court stated:

> [I]nsurers …were not in a position to discern what information may now be unavailable that they could have discovered with timely notice, or what witnesses may now be unavailable; this is the reason Ohio law recognizes a presumption of prejudice…[I]nsured…is in the best position to show that information has not been lost, or that witnesses are still available.

Champion Spark Plug, 687 N.E.2d at 792. The insurer should not be given a burden to prove a hypothetical involving a time period in which it had no involvement.

Furthermore, it is unfair to place the burden on the insurer. As discussed above, proof of prejudice is difficult and sometimes impossible. The insurer, who has complied with all the terms of the policy, should not be placed in such a difficult position, since it is the insured's breach that required the need for such proof. The insured is attempting to be relieved of the consequences of its breach and therefore should bear the burden of seeking that relief. Aetna Casualty and Surety Co. v. Murphy, 538 A.2d 219, 223-224 (Conn. 1998) ("It is the insured who is seeking to be excused from the consequences of a contract provision with which he has concededly failed to comply."); Alcazar v. Hayes, 982 S.W.2d 845, 856 (Tenn. 2000) ("issue is akin to unjust enrichment law; in both instances, an undeserving party seeks forgiveness for his or her own breach").

Many other states that have chosen to require proof of prejudice have placed the burden on the insured. Friedland v. Travelers Indemnity Co., 105 P.3d 639, 648 (Colo. 2005) (court will presume that the insurer was prejudiced by the delayed notice, but the insured has an opportunity to rebut that presumption); Alcazar v. Hayes, 982 S.W.2d 845, 856 (Tenn. 2000) ("the rebuttable presumption rule is the soundest approach"); Fireman's Fund Ins. Co. v. ACC Chemical, 538 N.W.2d 259, 266 (Iowa 1995); Gray v. State Farm Mutual Ins. Co., 734 So.2d 1102, 1103 (Fla.App. 1999) ("If the insurer shows that the insured did not comply with the statute, then the insured may show that the failure to obtain the consent to settle did not prejudice the insurer"); Askren Hub States Pest Control Services, Inc. v. Zurich Ins. Co., 721 N.E.2d 270, 278 (Ind.App. 1999) ("Prejudice to the insurance company's ability to prepare an adequate defense can therefore be presumed by an unreasonable delay in notifying"); Phoenix Contractors, Inc. v. Affiliated Capital Corp., 681 N.W.2d 310, 313 (Wis.App. 2004) (pursuant to Wisconsin statute, insured bears the burden of proof when the insured failed to give notice within one year after the time required under the insurance policy); Aetna Casualty and Surety Co. v. Murphy, 538 A.2d 219,

223-224 (Conn. 1998) (court compared the position of the insured to that of a defaulting purchaser of real estate, noting that the insured was seeking "extraordinary relief" which required that the "burden of establishing lack of prejudice must be borne by the insured"). If Illinois chooses to impose a notice/prejudice rule, Illinois should join these states in placing the burden of proof on the insured who breached its duties of notice pursuant to the insurance policy.

CONCLUSION

WHEREFORE, for the reasons stated above, the *amici* Illinois Insurance Association, Property Casualty Insurers Association of America, and the National Association of Mutual Insurance Companies, respectfully request that this Court uphold the long-standing Illinois law and decline to impose a rule that would require insurers to prove prejudice before denying coverage to a policyholder who failed to comply with the notice provision of the insurance contract. Preservation of the no prejudice rule is fair, consistent with Illinois public policy, not unduly burdensome for the insured's of this state, and beneficial to the citizens of Illinois.

Respectfully submitted,

ILLINOIS INSURANCE ASSOCIATION,
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA, and
NATIONAL ASSOCIATION OF MUTUAL
INSURANCE COMPANIES

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