3117 FAILURE TO GIVE NOTICE TO INSURER

Question ____ inquires whether the insured, ____, failed to give (immediate written notice) (written notice as soon as practicable) to the insurer, of the collision in question.

The terms of the contract of insurance require the insured, ____, to give (immediate notice, etc.).

("Immediate" in this connection means as soon as reasonably necessary under the circumstances to do the thing required.)

("As soon as practicable" in this connection means notice to be given with reasonable dispatch and within a reasonable time in view of all the facts and circumstances of the case.)

The burden of proof with respect to your answer to this question is upon the insurer, ____, who contends that you should answer this question "yes."

COMMENT

This instruction and comment were approved by the Committee in their present form in 1971. The comment was updated in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. § 632.26 (1979); Wis. Stat. § 631.81(1) (1975). See also Gerrard Realty Corp. v. American States Inc. Co., 89 Wis.2d 130, 146, 277 N.W.2d 863 (1979); Ehlers v. Colonial Penn. Inc. Co., 81 Wis.2d 64, 259 N.W.2d 718 (1977).

Ignorance of policy provisions or a belief coverage is questionable is not an excuse for the failure to give notice. Gerrard Realty Corp. v. American States Inc. Co., supra at 145; State Bank of Viroqua v. Capitol Indem., 61 Wis.2d 699, 214 N.W.2d 42 (1974).

"As soon as practicable," "immediately," "forthwith," "promptly" were collectively defined in RTE Corp. v. Maryland Cas. Co., 74 Wis.2d 614, 627, 247 N.W.2d 171 (1976) in the following manner:

> The words "immediately," "forthwith," "promptly," "as soon as practicable" all require notice in "a reasonable time." See: 5A Appleman, Insurance Law and Practice, §§ 3501-03; Annot., 18 A.L.R.2d 443, 448 (1951).

The court, in RTE Corp., supra at 628-629 also compiled a comprehensive listing of Wisconsin cases wherein various periods of delay were found not to be "as soon as practicable":

> Sanderfoot v. Sherry Motors, Inc., 33 Wis.2d 301, 147 N.W.2d 255 (1967) (Auto liability policy; delay of seven and one-half months not "as soon as practicable" as a matter of law; excuse based on apparently trivial nature of accident rejected on the facts.); . . . Buss v. Clements, 18 Wis.2d 407, 118 N.W.2d 928 (1963) (Auto liability policy; where insured knew of accident and injury at the time, not "as soon as practicable" to give notice three years later, as a matter of law.); Britz v. American Ins. Co., 2 Wis.2d 192, 86 N.W.2d 18 (1957) (Insurance against theft of truck; unexplained delay of three months not "as soon as practicable" as a matter of law.); Calhoun v. Western Cas. & Sur. Co., 260 Wis. 34, 49 N.W.2d 911 (1951) (Auto liability policy; delay in notice of one year, apparently unexplained, held not "as soon as practicable" as a matter of law.); Parrish v. Phillips, 229 Wis. 439, 282 N.W. 551 (1938) (Auto liability policy; notice required "as soon as practicable" after twenty days from accident; unexplained delay for additional thirteen days was non-compliance as a matter of law.) . . . .

Before a court may find noncompliance with notice provisions as a matter of law, it must be able to say:

(1) that there is no material issue of fact as to when notice was given, and when under the policy the duty to give it arose; and

(2) that no jury could reasonably find the delay to have constituted only such time as was "reasonably necessary" under the circumstances. Gerrard Realty Corp. v. American States Ins. Co., supra at 144n; RTE Corp. v. Maryland Cas. Co., supra at 628-629.

See also Ehlers v. Colonial Penn. Ins. Co., 81 Wis.2d 64, 259 N.W.2d 718 (1977); Kolbeck v. Rural Mut. Ins. Co., 70 Wis.2d 655, 235 N.W.2d 466 (1975); Allen v. Ross, 38 Wis.2d 209, 156 N.W.2d 435 (1968); Sanderfoot v. Sherry Motors, Inc., 33 Wis.2d 301, 147 N.W.2d 255 (1966); Peterson v. Warren, 31 Wis.2d 547, 562, 143 N.W.2d 560 (1965); American Ins. Co. v. Rural Mut. Cas. Ins. Co, 11 Wis.2d 405, 105 N.W.2d 798 (1960); Illinois Cent. R.R. Co. v. Blaha, 3 Wis.2d 638, 644, 89 N.W.2d 197 (1957); Calhoun v. Western Cas. & Sur. Co., 260 Wis. 34, 49 N.W.2d 911 (1951); Parrish v. Phillips, 229 Wis. 439, 282 N.W. 551 (1938); Underwood Veneer Co. v. London Guar. & Accident Co., 100 Wis. 378, 381, 75 N.W. 996 (1898); Foster v. Fidelity & Cas. Co. of New York, 99 Wis. 447, 451-452, 75 N.W. 69 (1898).