

3118 FAILURE TO GIVE NOTICE TO INSURER: MATERIALITY

Question ____ inquires whether the failure of the insured to give timely notice to the insurer was immaterial so as not to prejudice the insurer.

By your answer to this question, you are to determine whether the failure of the insured to (give timely written notice) (give written notice as soon as practicable) was harmless and noninjurious, so that the insurer was not prevented from making a thorough investigation and from presenting every available defense.

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

COMMENT

This instruction and comment were approved by the Committee in 1971. The comment was updated in 1980 and 2001.

Wis. Stat. § 631.81(1) (1975); Wis. Stat. § 632.26 (1979).

See Comment, Wis JI-Civil 3117.

See also Sanderfoot v. Sherry Motors, Inc., 33 Wis.2d 301, 309, 147 N.W.2d 255 (1966); Peterson v. Warren, 31 Wis.2d 547, 564, 143 N.W.2d 560 (1965); Kohls v. Glassman, 29 Wis.2d 324, 139 N.W.2d 37 (1965); Buss v. Clements, 18 Wis.2d 407, 118 N.W.2d 928 (1962).

In Mt. Pleasant v. Hartford Accident & Indemnity, 2001 WI App 38, ¶ 13 n.3, 241 Wis.2d 327, 625 N.W.2d 317, the court found prejudice to the insurer where the insured gave notice 30 months late. The court said because of the late notice, the insurer: (1) could not seek an immediate determination of coverage; (2) could not participate in prelawsuit mediation; (3) could not select defense counsel and control the defense; and (4) was prevented from selecting the same counsel representing an unrelated defendant, which would have kept the attorney's fees much lower.