

Conditions to Coverage: What You Don't Know Can Hurt You

(REVISED)

J James Cooper
Gardere Wynne Sewell LLP
1000 Louisiana Street, Suite 3400
Houston, Texas 77002
713.276.5884
jcooper@gardere.com

South Texas College of Law
14th Annual Texas Insurance Law Symposium
January 21-22, 2010

Q



J James Cooper

Gardere Wynne Sewell LLP
1000 Louisiana Street, Suite 3400 | Houston, TX 77002

jcooper@gardere.com

713.276.5884 direct

713.276-6884 fax

Jim Cooper is a Partner at Gardere Wynne Sewell where he co-chairs the firm's Policyholder Insurance Coverage Practice Group.

- Mr. Cooper was Lead Counsel for Lennar Corporation, a major U.S. builder, in a widely cited insurance coverage case in which the court held that defective construction constitutes an “occurrence” under Texas law (*Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651 (Tex. App.–Houston [14th Dist.] 2006, writ denied)).
- He is a frequent speaker at insurance coverage seminars, including at Mealey's Annual Advanced Insurance Conference and Construction Litigation Conference (both held in Philadelphia), National Constitution Center (three national audio conferences), the Annual Insurance Law Institute (Austin, TX), and Texas State Bar Webcast (*Lamar Homes: The New Supreme Court Decision*).
- Mr. Cooper has 25 years of experience, handling a wide range of insurance coverage matters. He was selected by his peers in 2006-2009 as a “Texas Super Lawyer” in the area of insurance coverage (less than 5 percent of the attorneys in Texas are chosen as Super Lawyers), and recognized for the sixth consecutive year as one of the nation's top insurance coverage lawyers by Chambers USA. He was also nominated to appear in the Insurance & Reinsurance chapter of Who's Who Legal: Texas.
- He is a current co-chair of the Emerging Insurance Coverage Issues Subcommittee of the American Bar Association, a former co-chair of the Products Liability Insurance Coverage Subcommittee of the ABA, and a Council Member of the Insurance Law Section of the State Bar of Texas. He is also a Contributing Editor for the Texas Annotated Insurance Code.
- Mr. Cooper co-authored a chapter on handling complex insurance coverage matters in *Inside the Minds: Legal Strategies for the Insurance Industry*, published by Aspatore Books. He has authored insurance coverage articles for the *Journal of Texas Insurance Law* and *University of Houston International Law Journal*, including “Maximizing Insurance Coverage for Pre-Suit Settlements of Construction Defect Claims.”
- Mr. Cooper received his B.A. from Wabash College and his J.D. (cum laude) from Tulane University Law School.

TABLE OF CONTENTS

	<u>Page</u>
I. The “Notice” Condition	1
a. Typical Policy Language	1
b. Rules of Construction	2
c. What Does “as soon as practicable” Mean?	2
d. Oral Notice May Not Be Sufficient	3
e. Notice to the Broker	3
f. Effect of Untimely Notice	5
g. Proving Prejudice	5
i. Generally a Fact Question	5
ii. Insurer Has Burden of Proof	5
iii. Defining Prejudice	5
iv. Evidence Required	6
v. Prejudice as a Matter of Law	7
h. Waiver of Late Notice Defense	8
i. Claims-Made Policies—A New Day for Policyholders	9
j. Additional Insured Issues	10
II. The “Settlement Without Consent” Condition	11
a. Typical Policy Language	11
b. Prejudice is Required	12
c. Prejudice as a Matter of Law	13
d. Waiver	15
e. Can Insurer Settle Over Insured’s Objection?	16

III.	Duty to Cooperate	17
a.	Typical Policy Language	17
b.	Prejudice is Required	17
c.	Breach of the Cooperation Clause Does Not Give Rise to a Claim for Damages by the Insurer	17
d.	Insurers May Not Use the Cooperation Clause to Develop Coverage Defenses or Compel Production of Privileged Communications	18

Conditions to Coverage: What You Don't Know Can Hurt You

This paper will address “Conditions” that are typically found in commercial general liability policies, and how Texas law—for the most part—assists policyholders in avoiding forfeiture under these provisions.

I. The “Notice” Condition

a. Typical Policy Language

All commercial general liability policies require timely notice of an “occurrence” or accident. The insurer also requires additional notice if the “occurrence” results in litigation—typically referred to as “suit”—against an insured. The latest ISO general liability coverage form (“Occurrence” version) provides the following “Duties in the Event of Occurrence, Offense, Claim or Suit”—found under the “Conditions” section of the policy:

You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim.

...

If a claim is made or “suit” is brought against any insured, you must ... [notify us as soon as practicable].

ISO Commercial General Liability Form, CG 00 01 12 07 (ISO Properties, Inc., 2006).

With respect to coverage for bodily injury and property damage, the State Board of Insurance has issued the following amendatory endorsement applicable to all general liability policies:

As respects bodily injury liability coverage and property damage liability coverage, unless the company is prejudiced by the insured’s failure to comply with the requirement, any provision of this policy requiring the insured to give notice of action, occurrence or loss, or requiring the insured to forward demands, notices, summons or other legal process, shall not bar liability under the policy.

State Bd. of Ins., Revision of Texas Standard Provision for General Liability Policies-Amendatory Endorsement-Notice, Order No. 23080 (March 13, 1973) (“Board Order”). *See generally Coastal Refining & Marketing, Inc. v. U.S. Fidelity and Guar. Co.*, 218 S.W.3d 279, 285 (Tex. App.—Houston [14th Dist.] 2007, review denied) (discussing Board Order).