DePaul Law Review

Volume 28
Issue 3 *Spring 1979*

Article 4

Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities

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SHIELDING THE PLAINTIFF'S ACHILLES' HEEL: TORT CLAIM NOTICES TO GOVERNMENTAL ENTITIES

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The requirement of notice prior to suit against governmental entities has barred the courtroom door to many injured plaintiffs. In this Article, Mr. Corboy traces the development of statutory pre-suit notice requirements and analyzes their purpose and scope. The author notes and encourages the recent trend of legislative amendments and liberal judicial interpretations which have ameliorated the harsh and final effect of the notice provisions, but at the same time, have fulfilled their legislative purpose.

STATE NOTICE PROVISIONS

There lies in wait for every injured plaintiff seeking redress from a governmental entity in Illinois the snare of notice. Often unexpected, this legal trap presents a great danger to the unwary attorney, for failure to comply with statutory notice requirements is generally fatal to a claim.[1] A client with a compensable claim which has been barred can then obtain compensation only by retaliating against his attorney in a malpractice action. The outcome of this litigation is predictable. Notice provisions are statutory and thus set out clearly (though not always logically). Therefore, it is difficult, if not impossible, for an attorney to seek refuge behind the shield of professional judgment after failing to notify a defendant.[2] Even where representation has been declined, an attorney must be wary of advising claimants of periods of limitation without also advising of notice requirements. The purpose of this Article is to examine the means by which an injured plaintiff and his

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† Whenever the male pronoun is used in this Article, it is intended to apply to the female gender also.

1. If the required notice of injury is not provided, civil actions against local governmental entities must be dismissed with prejudice. ILL. REV. STAT. ch. 85, § 8-103 (1977). Other specific statutory provisions are: ILL. REV. STAT. ch. 111-2/3, § 341 (1977), which mandates the same result for failure to notify in suits against the Chicago Transit Authority; and ILL. REV. STAT. ch. 37, § 439.22-2 (1977), which requires notice prior to suit against the state.

In actions under the Federal Tort Claims Act, 28 U.S.C. § 2675 (1976), filing of an administrative claim is a jurisdictional prerequisite, and failure to timely comply results in dismissal of the claim with prejudice. Blain v. United States, 552 F.2d 289, 291 (1977) (*per curiam*).

2. Attorneys are presumed to have full knowledge of the statutes of the states in which they practice. *See, e.g., In re* Woods, 158 Tenn. 383, 13 S.W.2d 800 (1929); Citizens' Loan Fund & Savings Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890).

attorney can satisfy the notice requirements in actions against the State of Illinois, local governmental entities, and the federal government.

There are notice requirements for claims against municipalities,[3] the State of Illinois,[4] the Chicago Transit Authority,[5] sanitary districts,[6] and county highway superintendents.[7] Each of these entities is covered by a separate statutory notice provision, requiring the claimant's attorney to tailor notice to the specific provisions of the applicable statute. Prior to suing one of these entities, an injured plaintiff must serve it with proper notice. To be proper, the notice must be a signed,[8] written[9] statement containing designated information[10] relating to the claim presented. The information requirements of the Illinois Local Governmental and Governmental Employees Tort Immunity Act[11] are generally representative of most notice statutes. That Illinois statute requires that an injured plaintiff give his name and address, the time, place and nature of the accident, and the names and addresses of the attending physician and hospital.[12] Although the informa-

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3. ILL. REV. STAT. ch. 85, § 8-102 (1977).

4. ILL. REV. STAT. ch. 37, § 439.22-1 (1977), requires notice to the state in actions for personal injuries. In addition, ILL. REV. STAT. ch. 37, § 439.8(d) (1977), gives exclusive jurisdiction over such actions against the state to the Illinois Court of Claims. The Illinois Court of Claims is created in ILL. REV. STAT. ch. 37, § 439.1 (1977). Certain actions considered to be against the state recently have been redefined in Watson v. St. Anne's Hosp., 68 Ill. App. 3d 1048, 386 N.E.2d 885 (1st Dist. 1979) (an action filed against state-employed physicians is not an action against the state and the state is not the real party in interest; therefore the action may be brought in circuit court).

5. ILL. REV. STAT. ch. 111-2/3, § 341 (1977).

6. ILL. REV. STAT. ch. 42, § 252 (1977).

7. ILL. REV. STAT. ch. 121, § 383 (1977).

8. The Local Government and Governmental Employees Tort Immunity Act and the Metropolitan Transit Authority Act require that the notice be signed by the injured party, or by his agent or attorney. ILL. REV. STAT. ch. 85, § 8-102 (1977); ILL. REV. STAT. ch. 111-2/3, § 341 (1977). The signature requirement is strictly construed. Minnis v. Friend, 360 Ill. 328, 196 N.E. 191 (1935); Hayes v. Chicago Transit Auth., 340 Ill. App. 375, 92 N.E.2d 174 (1st Dist. 1950). The Court of Claims Act omits the signature requirement. ILL. REV. STAT. ch. 37, § 439.22-1 (1977).

9. ILL. REV. STAT. ch. 85, § 8-102 (1977); ILL. REV. STAT. ch. 111-2/3, § 341 (1977). The Court of Claims does not require the notice to be in writing, but Rule 5(b) of the Practice Rules of the Court of Claims requires that claimant attach to his complaint copies of the notices served by him pursuant to chapter 37, § 439.22-1 (1977). Consequently, compliance with this rule necessitates that the plaintiff's notice be in writing.

10. *See* note 12 and accompanying text *infra*.

11. ILL. REV. STAT. ch. 85, § 1-101 *et. seq.* (1977). The Act defines "local public entity" as a county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, or any other local governmental body. The definition does not include the state or any office, officer, department, division, board, commission, university, or similar state agency. ILL. REV. STAT. ch. 85, § 1-206 (1977).

See Note, *Torts—Sovereign Immunity—The Government's Liability for Tortious Conduct Arising From Proprietary Functions*, 20 DEPAUL L. REV. 302 (1970) [hereinafter cited as *The Government's Liability*]; Comment, *Local Government and Governmental Employees Tort Immunity Act—An Overreaction to Harvey*, 4 J. MAR. L.J. 111 (1970).

12. ILL. REV. STAT. ch. 85, § 8-102 (1977).

tion required by other Illinois notice statutes is similar,[13] the period of limitations governing the timeliness of notice varies among the statutes from six months[14] to one year,[15] with no apparent reason for the variation.

Historical Analysis

Absent a historical analysis, the limitations established by the notice statutes would appear to represent only an unwarranted attempt by governmental entities to avoid responsibilities imposed by the common law on the remainder of society. Actually, the notice statutes emerged as one response to the assault on the doctrine of sovereign immunity.[16] By virtue of that doctrine, state governmental units had possessed absolute immunity from liability for the acts or omissions of employees acting within the scope of their employment.

One case which dealt head-on with the common law doctrine of sovereign immunity was *Molitor v. Kaneland*.[17] There, the Illinois Supreme Court rhetorically questioned why a quasi-municipal corporation, such as a school district, might be excused from liability while an individual or private corporation was forced to appear in court and defend itself.[18] Although the facts of *Molitor* dealt only with limiting school district tort immunity, its obvious consequence was to destroy the general viability of the doctrine of governmental tort immunity. In response[19] to *Molitor*, the Illinois Legislature

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13. A significant difference in the requirements arises in suits against the employee in his individual capacity. If the tortfeasor was an agent of a local governmental entity and the act or omission occurred while the employee was acting within the scope of his employment, statutory notice must be tendered to preserve the claim against the employee. Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (2d Dist. 1970); Smith v. Glowacki, 122 Ill. App. 2d 336, 258 N.E.2d 591 (4th Dist. 1970). The term "employee" includes an officer, member of the board, commission, or committee, whether or not compensated, but the definition does not include an independent contractor. ILL. REV. STAT. ch. 85, § 8-102 (1977). If the action is brought against an agent of the State of Illinois in his individual capacity, there is no requirement of notice to the principal-state governmental entity. The problem facing the plaintiff in an action against a state agent is whether the claim is in fact a suit against the state, subject to the exclusive jurisdiction of the Illinois Court of Claims, and consequently requires notice. *See* Golden v. Holaday, 59 Ill. App. 3d 866, 376 N.E.2d 92 (3d Dist. 1978); Madden v. Kuehn, 56 Ill. App. 3d 997, 372 N.E.2d 1131 (2d Dist. 1978).

14. ILL. REV. STAT. ch. 37, § 439.22-1 (1977); ILL. REV. STAT. ch. 111-2/3, § 341 (1977). Notably, the statute of limitations for the latter section is one year.

15. ILL. REV. STAT. ch. 85, § 8-102 (1977).

16. The origin of this doctrine in the common law was the theory, allied with the divine right of kings, that the king could do no wrong. It was felt to be a contradiction of his sovereignty to allow suit to be brought against him in his own courts. Crisp v. Thomas, 63 L.T.R. (n.s.) 756 (1890). *See* W. PROSSER, THE LAW OF TORTS 970 (4th ed. 1971); E. Kronka, *The King is Dead, Long Live the King: State Sovereign Immunity in Illinois*, 59 ILL. B.J. 660 (1971); *The Government's Liability*, note 11 *supra*.

17. 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960).

18. *Id.* at 20, 163 N.E.2d at 93.

19. *Id.* at 29, 163 N.E.2d at 98.

quickly granted tort immunity to several governmental entities.[20] On initial examination then, it might appear that the notice statutes were efforts by municipal entities to reclaim the protection that was provided previously by the sovereign immunity doctrine. This is not wholly correct. Indeed, notice provisions have a valid historical basis. Municipal entities, because they were subject to an extraordinary number of lawsuits, believed that they needed to be allowed to investigate and settle claims promptly in order to avoid the expenses of litigation where settlement could be achieved[21] and to establish a budget for taxation purposes.[22] Early notice presumably allowed a municipality the time to investigate a claim and ascertain the facts while evidence and memories were still fresh.[23] Under these circumstances the municipality could, if it so desired, settle those claims which appeared valid before expending time and money on their defense. If a major impact on the municipality's budget seemed likely, it could be taken into account in planning future budgets. These purposes were achieved by means of municipal notice statutes as early as 1905.[24]

Moreover, because municipal entities were thought to have an inherently greater exposure to suits than private individuals, the logic that supported early notice, thus allowing prompt investigation, also buttressed the argument that municipalities needed special protection from surprise at trial. The requirement of notice allowed a municipal unit a partial mode of discovery, a method of trial preparation not generally available to litigants in Illinois until 1933.[25] Prior to that time, discovery as known today did not exist. A defendant municipal entity would have only that information available from

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20. This opinion was announced on May 21, 1959. In response to it, the legislature, by an overwhelming vote, adopted five bills granting tort immunity to: park districts, ILL. REV. STAT. ch. 105, §§ 12.1-1, 491 (1959); counties, ILL. REV. STAT. ch. 34, § 301.1 (1959); forest preserve districts, ILL. REV. STAT. ch. 57-1/2, § 3a (1959); and the Chicago Park District, ILL. REV. STAT. ch. 105, § 333.2a (1959). It also passed a bill granting limited tort immunity to school districts and nonprofit private schools. ILL. REV. STAT. ch. 122, §§ 821-31 (1959); Molitor v. Kaneland, 18 Ill. 2d 11, 42, 163 N.E.2d 89, 104 (1959).

21. Saragusa v. City of Chicago, 63 Ill. 2d 288, 293, 348 N.E.2d 176, 179 (1976) (defective notice cured by prompt filing of suit; substantial compliance may be sufficient); King v. Johnson, 47 Ill. 2d 247, 250-51, 265 N.E.2d 874, 875-76 (1970) (constitutionality of notice provisions upheld, as they impose tort liability on all governmental entities on a fair and orderly basis).

22. King v. Johnson, 47 Ill. 2d 247, 251, 265 N.E.2d 874, 876 (1976).

23. One purpose served by notice statutes is to allow the governmental entity to make a timely investigation into the facts surrounding an injury which may subsequently result in litigation. By forcing injured parties to give notice of injury within six months, the governmental body is enabled to locate witnesses and interview them while the facts are still fresh. Furthermore, in a shorter period it is likely that conditions have not materially changed. Hinz v. Chicago Transit Auth., 133 Ill. App. 2d 642, 645, 273 N.E.2d 427, 429 (1971). *Accord*, Swenson v. City of Aurora, 196 Ill. App. 83, 93 (1915); Seaton v. State, 25 Ill. Ct. Cl. 291 (1966).

24. The first statutory notice provisions were enacted in Illinois in 1905. 1905-06 Ill. Laws 111, §§ 1-2.

25. The current discovery provision is found at ILL. REV. STAT. ch. 110, § 58, and ILL. REV. STAT. ch. 110A, §§ 201-19 (1977).

the complaint and through its own discovery,[26] making settlement of litigation difficult and trial often a gamble.

Notice as a Condition Precedent

Originally the service of a notice conforming with statutory requirements was a condition precedent to bringing an action against a municipal entity.[27] Although there clearly existed a common law right of action for damages against municipal units, courts nevertheless strictly construed the notice statutes to establish that provision of notice was necessary to create the cause of action. Even where suit was filed against a municipality well before the period within which notice was required, it was necessary to plead that the requisite statutory notice had been given in order to avoid dismissal of the action. In *Erford v. City of Peoria*,[28] suit was filed one month after the date of injury, but no notice had been given. The Illinois Supreme Court stated: "Statutes of this character are mandatory, and the giving of the notice is a condition precedent to the right to bring such suit, and the giving of the notice must be averred and proved by the plaintiff to avoid a dismissal of his suit."[29] Consequently, not only was it necessary to give notice before the right to sue existed, but it was also necessary to plead and prove that notice had been given.[30]

The first derogation of the concept of notice as a condition precedent to suit came indirectly in *Haymes v. Catholic Bishop of Chicago*.[31] The principal issue before the Illinois Supreme Court in *Haymes* was whether the notice requirements of the School Tort Liability Act were binding on minors.[32] The Chicago Archbishop, as defendant, argued that the Act

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26. Prior to the enactment of the first notice statutes in the Civil Practice Act of 1933, presuit notice was arguably necessary for the governmental entity to preserve its fiscal integrity. Modern liberal pretrial discovery did not exist. The only available discovery was the bill of particulars, and it was seldom obtained in actions for common law negligence. Saragusa v. City of Chicago, 63 Ill. 2d 288, 295-96, 348 N.E.2d 176, 181 (1976). *See* Whittington v. National Lead Co., 236 Ill. App. 104, 107-08 (1925).

27. Erford v. City of Peoria, 229 Ill. 546, 82 N.E. 374 (1907), *overruled on other grounds*, Lorton v. Brown County Community Unit School Dist. No. 1, 35 Ill. 2d 362, 366, 220 N.E.2d 161, 163 (1966).

28. 229 Ill. 546, 82 N.E. 374 (1907).

29. *Id.* at 553, 82 N.E. at 376.

30. It is elementary that a declaration must allege all the circumstances necessary for the support of the action, and that if any act is to be done by the plaintiff before the accruing of the defendant's liability, the performance of that act must be averred. A declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. In other states having a statute similar to ours the courts have frequently decided that the giving of notice is an essential part of the cause of action, and that without an averment of the fact of notice a complaint does not state facts sufficient to state a cause of action.

Walters v. City of Ottawa, 240 Ill. 259, 264, 88 N.E. 651, 653 (1909).

31. 33 Ill. 2d 425, 211 N.E.2d 690 (1965).

32. *Id.* at 428, 211 N.E.2d at 692. The defendant argued that the liability imposed on schools parallels dramshop and wrongful death actions, both of which require timely filing of

created a new cause of action subject to the condition precedent prescribed in the Act. The court noted, however, that the Act did *not* create a new cause of action, but only imposed certain limitations on the right to recover.[33] In so holding, this case established the principle that the notice statutes were clearly in derogation of the common law, thus obligating the courts to strictly construe the notice requirements against public entities.[34]

A liberal construction of the notice requirements was forthcoming in *Housewright v. City of LaHarpe*.[35] There the Illinois Supreme Court held that the defense of failure to furnish notice in accordance with the notice statute was subject to waiver.[36] Specifically, failure to provide notice pursuant to the dictates of the statute could not be asserted as a defense by a municipal unit which was insured against the alleged negligence.[37] As a result, the giving of notice could not now be construed as a condition precedent, for as such it could not have been waived.

Shortly thereafter, the Illinois Supreme Court held that the notice required in suits against local public entities[38] was a provision of limitation, as previously described in *Haymes*,[39] and not a condition precedent.[40] Therefore, the filing of suit by the public entity could, and in fact did, act as a waiver of the notice requirement for purposes of defendant's counterclaim against the public entity.[41] This interpretation has been followed and ex-

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suit as a condition of liability. *Id. See* Lowrey v. Malkowski, 20 Ill. 2d 280, 170 N.E.2d 147 (1960), *cert. denied*, 365 U.S. 879 (1961); Wilson v. Tromly, 404 Ill. 307, 89 N.E.2d 22 (1949).

33. Haymes v. Catholic Bishop of Chicago, 33 Ill. 2d 425, 428, 211 N.E.2d 690, 692 (1965).

34. *Id.* "In consideration of this statute we are also guided by the fact that the Local Government and Governmental Employees Tort Immunity Act is in derogation of the common-law action against local public entities and must, therefore, be strictly construed against the local public entity." Reynolds v. City of Tuscola, 48 Ill. 2d 339, 342, 270 N.E.2d 415, 417 (1971). *Accord*, Williams v. Medical Center Comm'n, 60 Ill. 2d 389, 328 N.E.2d 1 (1975) (improperly filing tort action in circuit court rather than court of claims satisfied the statutory requirement of notice of filing).

35. 51 Ill. 2d 357, 282 N.E.2d 437 (1972).

36. *Id.* at 365, 282 N.E.2d at 442. The notice statute was set forth in ILL. REV. STAT. ch. 85, § 8-102 (1969). The waiver provision was contained in ILL. REV. STAT. ch. 85, § 9-103(b) (1969).

37. Housewright v. City of LaHarpe, 51 Ill. 2d 357, 365, 282 N.E.2d 437, 442 (1972).

38. ILL. REV. STAT. ch. 85, § 8-102 (1977).

39. *See* note 33 and accompanying text *supra*.

40. Helle v. Brush, 53 Ill. 2d 405, 410, 292 N.E.2d 372, 375 (1973).

41. *Id.*

> In Housewright v. City of LaHarpe (1972), 51 Ill. 2d 357, we held that the local public entity had the power to waive the notice requirement of Section 8-102. *Also see* Fanio v. John W. Breslin Co. (1972), 51 Ill. 2d 366, 369-70. If such notice were mandatory and a condition precedent to the right to bring suit, then it could not be waived. *Consequently, we hold the notice provision of Section 8-102 not to be a condition precedent to the right to bring suit*, but rather to be a limitation provision which can be waived by the local public entity, and, under the circumstances of this case, *we regard the filing of suit by the plaintiff public entity as a waiver of this notice requirement.* (Emphasis added).

panded upon by the First District Appellate Court.[42] No similar liberalization, however, has taken place with respect to actions brought in the Court of Claims, where the giving of notice still remains a condition precedent.[43]

Governmental Unit Informational Notice Requirements

Despite the apparent tendency to encourage litigation of claims against governmental units on their merits, the courts generally have required strict compliance with the specific informational requirements of the notice statutes by the claimant. Thus, there exists an apparently contradictory situation wherein notice itself may be waived by the public entity, but the informational requirements called for by the applicable statute must be supplied in exact conformity to the statutory requisites.[44]

For example, if a claim against a local public entity is contemplated, the notice of injury must provide the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and approximate hour of the accident, the place or location where the accident occurred, the general nature of the accident, the name and address of the attending physician and the name and address of the treating hospital or hospitals.[45] The term "injury" enjoys a broad meaning with regard to local public entities; it embraces death, injury to a person, and damage to or loss of property.[46] An action in the Court of Claims against the State of Illinois for injury to the person requires the same elements of information with the exception of the name of the hospital.[47] Notice to the Chicago Transit Authority for personal injuries requires the name of the person to whom the cause of action has accrued, the name and address of the person injured, the date and approximate hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician.[48] However, suits against sanitary districts for damage to property merely require notice containing the name and address of the property owner, the location of the property and the extent of the damage.[49] Finally, notice to

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42. In sum, we judge that the service of notice is not a condition precedent to the filing of the complaint; that the notice requirement may be waived or the public body under some circumstances may be estopped to assert it; and whether the public body may be estopped is a question of fact to be determined from all the facts and circumstances.

Dunbar v. Reiser, 26 Ill. App. 3d 708, 712, 325 N.E.2d 440, 444 (1st Dist. 1975), *aff'd*, 64 Ill. 2d 230, 356 N.E.2d 89 (1976).

43. Munch v. State, 25 Ill. Ct. Cl. 313 (1966); Seaton v. State, 25 Ill. Ct. Cl. 291 (1966).

44. Thomas v. Chicago Transit Auth., 29 Ill. App. 3d 952, 331 N.E.2d 216 (1st Dist. 1975) (listing the wrong physician held insufficient).

45. *See* note 12 and accompanying text *supra*.

46. ILL. REV. STAT. ch. 85, § 1-204 (1977).

47. ILL. REV. STAT. ch. 37, § 439.22-1 (1977).

48. ILL. REV. STAT. ch. 111-2/3, § 341 (1977).

49. ILL. REV. STAT. ch. 42, § 252 (1977).

the County Superintendent of Highways requires the name of the claimant, the location of the accident, the nature of the injury and the name and address of the attending physician.[50]

Notice must be exact. It would be incorrect to assume that substantial compliance would save an otherwise defective notice. A notice which completely omits one or more of the required items is insufficient.[51] In *Thomas v. Chicago Transit Authority*,[52] the timely filed notice incorrectly identified the attending physician. More than one year later, after the matter was in suit, plaintiff sought to amend the notice by inserting the correct name of the treating physician. The court denied leave to amend and dismissed the complaint, holding that the first notice was so insufficient that any subsequent amendment of the notice would be tardy.[53] Likewise, complete omission of secondary information is fatal to a plaintiff's claim. For example, in *Zavala v. City of Chicago*,[54] the notice failed to contain the names of the two hospitals at which the injured party was treated. Plaintiff argued that the omission was a *de minimis* error, as she received only minimal outpatient care at each hospital, and further, that substantial compliance with the statute as a whole cured the specific defect. The court rejected both arguments, holding that substantial compliance was inadequate.[55] A further reason supporting this rationale was that the City was not given that information which the legislature clearly felt was necessary in order for the municipality to estimate the extent of its liability.[56]

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50. ILL. REV. STAT. ch. 121, § 383 (1977).

51. Bollinger v. Schneider, 64 Ill. App. 3d 758, 381 N.E.2d 849 (3d Dist. 1978); Thomas v. Chicago Transit Auth., 29 Ill. App. 3d 952, 954, 331 N.E.2d 216, 218 (1st Dist. 1975). Notices have been found insufficient because of various omissions. *See generally* Zavala v. City of Chicago, 66 Ill. 2d 573, 363 N.E.2d 848 (1977) (failure to list names and addresses of two treating hospitals); Minnis v. Friend, 360 Ill. 328, 196 N.E. 191 (1935) (unsigned notice); Nikolic v. City of Chicago, 18 Ill. App. 3d 426, 305 N.E.2d 325 (1st Dist. 1973) (nature of accident omitted); Ramos v. Armstrong, 8 Ill. App. 3d 503, 289 N.E.2d 709 (3d Dist. 1972) (failure to include plaintiff's address); Hayes v. Chicago Transit Auth., 340 Ill. App. 375, 92 N.E.2d 174 (1st Dist. 1950) (signature omitted); Swenson v. City of Aurora, 196 Ill. App. 83 (2d Dist. 1915) (residence of injured party omitted); Zycinski v. City of Chicago, 163 Ill. App. 413 (1st Dist. 1911) (hour of injury omitted). *Accord,* Lyons v. Chicago Transit Auth., 349 Ill. App. 437, 111 N.E.2d 177 (1st Dist. 1953); Seaton v. State, 25 Ct. Cl. 291 (1966). However, where suit is filed within six months of the injury, the defect in the notice has not barred the claim. *See* Dunbar v. Reiser, 64 Ill. 2d 230, 356 N.E.2d 89 (1976); Saragusa v. City of Chicago, 63 Ill. 2d 288, 348 N.E.2d 176 (1976).

52. 29 Ill. App. 3d 952, 331 N.E.2d 216 (1st Dist. 1975). The statute at issue was the Metropolitan Transit Act, ILL. REV. STAT. ch. 111-2/3, § 341 (1971). This statute is an example of the Illinois Legislature's reaction to Molitor v. Kaneland, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). *See* note 20 *supra.*

53. Thomas v. Chicago Transit Auth., 29 Ill. App. 3d 952, 955, 331 N.E.2d 216, 218 (1st Dist. 1975). The court stated that the notice provision did not contain an amendatory provision. In addition, the court noted, any amendatory procedure would nullify the purpose of the statute, *i.e., to permit early investigation and prompt settlement. Id.*

54. 66 Ill. 2d 573, 363 N.E.2d 848 (1977).

55. *Id.* at 578, 363 N.E.2d at 850.

56. *Id.*

Omission of the correct time[57] or date[58] of the accident also is invariably fatal. In *Williams v. City of Gibson*,[59] the notice and complaint alleged that an accident occurred on April 25, 1965. It later became evident, however, that the injury occurred on the previous day. The court refused to hold that substantial compliance was sufficient, reasoning that a more liberal standard could be set only by the legislature.[60]

It is difficult to reconcile these cases with that line of decisions which has held notice to be sufficient even though individual items of information were not entirely correct.[61] For example, in *Klein v. City of Chicago*,[62] notice was deemed adequate although it inaccurately stated that an accident occurred fifty feet from a street rather than the correct three to five feet.[63] There, notice was upheld because plaintiff's good faith effort to comply was deemed sufficient to allow reasonably diligent municipal investigators the opportunity to examine the scene of the accident.[64] Apparently, tort victims can expect to benefit from a greater degree of latitude with regard to the sufficiency of the description of location, as investigators are expected to exercise reasonable diligence in locating the scene and ascertaining the conditions existing at the time of the accident.[65] Even where an incorrect address is stated, investigators have been required to ascertain a proper address where it was only three numbers away and across the street from the location given.[66]

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57. Condon v. City of Chicago, 249 Ill. 596, 94 N.E. 976 (1911); Zycinski v. City of Chicago, 163 Ill. App. 413 (1st Dist. 1911). *See also* Swenson v. City of Aurora, 196 Ill. App. 83 (2d Dist. 1915) (notice which misstated time of injury by three hours disallowed).

58. Ouimette v. City of Chicago, 242 Ill. 501, 90 N.E. 300 (1909) (notice invalidated because of one month error); Rapacz v. Township High School Dist. No. 207, 2 Ill. App. 3d 1095, 1099, 278 N.E.2d 540, 543 (1st Dist. 1971) (typographical error of one year invalidated notice); Williams v. City of Gibson, 129 Ill. App. 2d 431, 433, 263 N.E.2d 138, 139 (4th Dist. 1970) (notice one day in error insufficient); Frowner v. Chicago Transit Auth., 25 Ill. App. 2d 312, 167 N.E.2d 26 (1st Dist. 1960) (complaint three days in error invalidated).

59. 129 Ill. App. 2d 431, 263 N.E.2d 138 (4th Dist. 1970).

60. *Id.* at 433-34, 263 N.E.2d at 139.

61. If, considering the whole notice together, it gives sufficient information to city authorities to enable them by the exercise of reasonable intelligence and diligence to locate the place of the injury and to ascertain the conditions alleged to have existed which caused it, it is sufficient according to the weight of the authorities to serve the purpose for which it was required by the statute to be given.

McComb v. City of Chicago, 263 Ill. 510, 512, 105 N.E. 294, 294 (1914).

62. 10 Ill. App. 3d 670, 294 N.E.2d 755 (1st Dist. 1973).

63. *Id.* at 674, 294 N.E.2d at 757.

64. *Id.* at 674-75, 294 N.E.2d at 757-58.

65. The *Klein* court stated:

We do not believe that the erroneous measurement statistic, under the facts of the present case, should bar a meritorious claim. . . . It would not have required great diligence by the City investigators to have examined the sidewalk on either side of the specified measurements. . . . [W]e believe that the City urges too rigid a function and too rigid a test on notices.

Id. at 674, 294 N.E.2d at 757-58.

66. Redmond v. City of Chicago, 10 Ill. App. 3d 567, 294 N.E.2d 761 (1st Dist. 1973).

The trend toward liberal construction of the sufficiency of the elements actually listed in a statutorily required notice[67] has paralleled some courts' strict construction of the same elements.[68] If there is complete omission, the notice fails as a matter of law.[69] Absent complete omission, however, the test to be applied is whether there was a reasonable attempt to include the required information.[70] If such an attempt was made, then the claimant is entitled to have the sufficiency of the attempt examined to determine whether it substantially fulfilled the requirements of the statute without misleading or prejudicing the local public entity.[71] In one case, a notice furnishing the name of only one of two treating hospitals was found to be sufficient to constitute substantial compliance.[72] This liberal trend had been furthered by the state legislature when it amended the Tort Immunity Act in 1973 by inserting the words "*in substance* the following information" into the listing of required information.[73]

Method of Service

Certain procedures must be followed to effect adequate service of notice. Service on local public entities must be made by personal service or by registered or certified mail, return receipt requested, on the secretary or clerk of the entity.[74] Furthermore, the notice must be signed by the claimant, his agent, or his attorney.[75] A claimant against the Chicago Transit Authority must file a signed written notice with the office of the Secretary of the Board and the office of the General Counsel for the Authority.[76] Notice

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67. Bickel v. City of Chicago, 25 Ill. App. 3d 684, 688, 323 N.E.2d 832, 835 (1st Dist. 1975). The *Bickel* court set forth a historical overview of this liberalizing trend.

68. *Id.* at 692, 323 N.E.2d at 837-38. *See* note 51 *supra*.

69. *Id.* The *Bickel* court stressed that strict construction of the statute still requires that the written notice contain reference to each of the essential items of notice. Bickel v. City of Chicago, 25 Ill. App. 3d 684, 691, 323 N.E.2d 832, 838 (1st Dist. 1975).

70. "Accordingly, here the test to be applied is whether there is some attempt to designate the [specific element, in the instant case, treating hospital] and if so, the sufficiency of the designation set forth in the notice." Bickel v. City of Chicago, 25 Ill. App. 3d 684, 691, 323 N.E.2d 832, 837 (1975).

71. Thus, the *Bickel* court held:

> The notice contained the name and address of the first hospital at which plaintiff had been treated, and only omitted the one other hospital where further treatment was received. The information was sufficiently complete to constitute substantial compliance with the treating hospital requirement of the statute. . . . Therefore, the trial court did not err in holding the notice sufficient.

Id. at 692, 323 N.E.2d at 838.

72. *Id.* This holding is contrary to the holding in Zavala v. City of Chicago, 66 Ill. 2d 573, 363 N.E.2d 848 (1977), where the omission of *both* treating hospitals was fatal to the notice.

73. ILL. REV. STAT. ch. 85, § 8-102 (1977).

74. *Id.*

75. *See* note 8 *supra*; Gambling v. Cornish, 426 F. Supp. 1153 (N.D. Ill. 1977) (allowing an alias); Saragusa v. City of Chicago, 63 Ill. 2d 288, 348 N.E.2d 176 (1976) (allowing an unsigned copy, when the original was signed).

76. ILL. REV. STAT. ch. 111-2/3, § 341 (1977).

also must be filed in the office of the Attorney General and with the Clerk of the Court of Claims before a claimant can commence an action against the State in that court.[77] In fact, the rules of the Court of Claims require that a separate copy of such notice be attached to the complaint with a showing of how and when such notice was served.[78] Yet the method of filing is apparently left to the discretion of the claimant.

Judicial construction of these procedural requisites reflects the view that the substantive purpose of the notice statutes—to inform the public entity quickly—is achieved even though some requirements have been overlooked. For example, the absence of a signature on the copy of a notice left with the City of Chicago did not invalidate the notice where the original notice was signed for and marked "received" by the clerk.[79] Similarly, although the Tort Immunity Act prior to 1973 required personal service,[80] the Illinois Supreme Court in *Reynolds v. City of Tuscola*[81] held that service by registered mail, return receipt requested, complied with the statutory requirements.[82] The court justified this liberal construction on the basis that the entity in fact received the notice it needed to begin its investigation. The court stated:

> A liberal interpretation of the statute is necessary because of its position in relation to the common law and because a more restrictive interpretation could lead to absurd, inconvenient or unjust consequences. Under these circumstances we adopt a construction which it is reasonable to presume was contemplated by the legislature.[83]

Chief Justice Underwood's dissent in *Reynolds* emphasizes the court's willingness to liberally construe the statute so as to protect the claimant.[84] If, however, the rationale of *Reynolds* were to be applied to all cases involving challenges to notice, it would appear that the underlying criterion to be used in evaluating a challenged notice would be solely the question of whether the local entity did in fact have actual notice of the statutory elements. While the author is certainly not opposed to the creative and vigorous application of this principle, the practitioner should be aware of its inherent limitations.[85]

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77. *See* note 47 and accompanying text *supra*.

78. ILL. CT. CL. R. 5(B)(1) (1977).

79. Saragusa v. City of Chicago, 63 Ill. 2d 288, 348 N.E.2d 176 (1976); Klapkowski v. City of Chicago, 23 Ill. App. 2d 222, 161 N.E.2d 865 (1st Dist. 1959).

80. ILL. REV. STAT. ch. 85, § 8-102 (1971).

81. 48 Ill. 2d 339, 270 N.E.2d 415 (1971).

82. *Id.* at 343, 270 N.E.2d at 417.

83. *Id.*

84. *Id.* at 343-45, 270 N.E.2d at 417-19.

85. Thomas v. Chicago Transit Auth., 29 Ill. App. 3d 952, 331 N.E.2d 216 (1st Dist. 1975) (listing wrong physician is tantamount to a complete omission of an essential element and thus fatal to plaintiff's cause of action); Rapacz v. Township High School Dist. No. 207, 2 Ill. App. 3d 1095, 278 N.E.2d 540 (1st Dist. 1971) (erroneous date of one month did not satisfy statutory notice requirement, despite plaintiff's claim that the error was typographical); Williams v. City

Waiver, Estoppel, and Avoidance

Judicial construction of the notice statutes and legislative amendments thereto have presented the injured claimant and his attorney with several means by which the statutes' restrictive impact can be avoided. Originally a public entity could not waive any of its defenses under the Tort Immunity Act because the notice requirement was construed as a condition precedent which precluded a finding of waiver.[86] Once it became clear, however, that the filing of a statutory notice was a procedural limitation upon the bringing of an action rather than a condition precedent thereto,[87] the courts began to examine the behavior of the public entity, as well as that of the claimant, in determining both sufficiency and necessity of statutory notice.

The initial provision for waiver of statutory notice rights by local public entities, at least to the extent of insurance policy limits, was provided by the state legislature in the Tort Immunity Act.[88] The legislature denied to insurers of public entities the defenses otherwise provided for those entities in the Act, including the defense of lack of notice.[89] The first case arising

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of Gibson, 129 Ill. App. 2d 431, 263 N.E.2d 138 (4th Dist. 1970) (discrepancy of one day in date of injury did not satisfy statutory notice requirement of date of incident); Frowner v. Chicago Transit Auth., 25 Ill. App. 2d 312, 167 N.E.2d 26 (1st Dist. 1960) (wrong date is fatal to notice and thus to plaintiff's cause of action).

86. Walters v. City of Ottawa, 240 Ill. 259, 263, 88 N.E. 651, 653 (1909); Erford v. City of Peoria, 229 Ill. 546, 553, 82 N.E. 374, 376 (1907).

87. Helle v. Brush, 53 Ill. 2d 405, 410, 292 N.E.2d 372, 375 (1973). *Helle* involved a suit brought by a local public entity (highway commission) against a motorist for property damage to a commission road grader. The issue in the case was whether a timely counterclaim could be filed by the defendant under the Local Government and Governmental Employees Tort Immunity Act, ILL. REV. STAT. ch. 85, § 8-102 (1967), when the original suit and counterclaim derived from the same occurrence. Defendant's counterclaim was filed after the expiration of the statutory period of six months for filing notice of injury. In *Helle*, the court held that the defendant's counterclaim was not barred by the notice provision of the Tort Immunity Act. The statute of limitations did not prevent a party from filing a counterclaim if he was sued by the party against whom the claim was barred. ILL. REV. STAT. ch. 83, § 18 (1967). The court analyzed the purposes of the Act's notice provision. It found that the purpose of avoiding expensive litigation was mooted by the public entity's initiation of the suit. Suit by the entity also indicated that the facts were not stale. Reynolds v. City of Tuscola, 48 Ill. 2d 339, 342, 270 N.E.2d 415, 417 (1971); King v. Johnson, 47 Ill. 2d 247, 250-51, 265 N.E.2d 874, 876 (1970); Thomas v. Chicago Transit Auth., 29 Ill. App. 3d 952, 955-56, 331 N.E.2d 216, 218 (1st Dist. 1975). In *Helle*, the court stated that this purpose must be weighed against the rights of the person who is sued to have his full day in court. Helle v. Brush, 53 Ill. 2d 405, 408-09, 292 N.E.2d 372, 374 (1973). The court construed the time limitation of § 8-102 as applicable only to cases where the initial action was commenced by a person against a local public entity. In an action initiated by the public entity, the notice provisions of § 8-102 are not a prerequisite to the filing of a counterclaim which arises from the same occurrence.

See also Hull v. City of Griggsville, 29 Ill. App. 3d 253, 255, 330 N.E.2d 293, 295 (4th Dist. 1975); Dunbar v. Reiser, 26 Ill. App. 3d 708, 710, 325 N.E.2d 440, 442 (1st Dist. 1975); Wood Acceptance Co. v. King, 18 Ill. App. 3d 149, 151, 309 N.E.2d 403, 405 (1st Dist. 1974).

88. ILL. REV. STAT. ch. 85, § 9-103(c) (1977).

89. Section 9-103(c) of the Tort Immunity Act provides:

> Every policy for insurance coverage issued to a local public entity shall provide or be endorsed to provide that the company issuing such policy waives any right to

under this section was *Housewright v. City of LaHarpe*,[90] in which a claimant did not give notice pursuant to section 8-102,[91] but did allege in his complaint that the city had contracted for insurance coverage against the liability sought to be imposed by his action.[92] The court there held that, since the notice provision was purely statutory,[93] and since in cases of this type defendants were not allowed to assert the lack of notice defense,[94] the defense was thereby waived.[95]

As a result, the purchase of liability insurance by a local public entity waives the requirement of notice prior to filing suit.[96] There are, however, three significant limitations upon this provision. First, the waiver resulting from the purchase of liability insurance applies exclusively to the defenses and immunities provided in the Local Governmental and Governmental

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> refuse payment or to deny liability thereto within the limits of said policy by reason of the non-liability of the insured public entity for the wrongful or negligent acts of itself or its employees and its immunity from suit by reason of the defenses and immunities provided in this Act.

ILL. REV. STAT. ch. 85, § 9-103(c) (1977). For a discussion of the constitutionality of § 9-103 and proposed alternatives, *see* Comment, *The Constitutionality of Section 9-103 of the Local Government and Governmental Employees Tort Immunity Act*, 50 CHI.-KENT L. REV. 137 (1973).

90. 51 Ill. 2d 357, 282 N.E.2d 437 (1972). For a discussion of *Housewright*, *see* Leck, *Notice Requirements of Chap. 85, Sec. 8-102—What Must Be Done Before Suit Is Filed Against a Local Public Entity*, 64 ILL. B.J. 468, 474 (1976); West, *Immunity from the Tort Immunity Act*, 62 ILL. B.J. 496 (1974).

91. Housewright v. City of LaHarpe, 51 Ill. 2d 357, 359, 282 N.E.2d 437, 439 (1972).

92. *Id.* at 361, 282 N.E.2d at 440.

93. ILL. REV. STAT. ch. 85, § 8-102 (1971). The court in *Housewright* found this statutory derivation significant:

> For the reason that the defense or immunity which results from failure to comply with section 8-102 exists solely because of that section of the Governmental Employees Tort Immunity Act and because it is not excepted from the "immunity from suit by reason of the defense and immunities provided in this Act" provided in section 9-103(b), [9-103(c) (1977)], we hold that the failure to give notice in accordance with section 8-102 is subject to the waiver provision of section 9-103(b).

51 Ill. 2d at 365, 282 N.E.2d at 442.

The court applied the doctrine of Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960), in holding that, absent a statute, there would not be a requirement of notice as provided in section 8-102. It also followed the rationale of Ouimette v. City of Chicago, 242 Ill. 501, 90 N.E. 300 (1909), where it was held that "the question of notice is entirely within legislative control." *Id.* at 507, 90 N.E. at 302. Consequently, also within legislative control is the question of whether immunity from liability created by § 8-103 for failure to comply with the notice provisions of § 8-102 can be waived by reason of § 9-103(b).

For a discussion of *Molitor* and the prior history of tort immunity in Illinois, *see* Comment, *Governmental Immunity in Illinois: The Molitor Decision and the Legislative Reaction*, 54 NW. U.L. REV. 588 (1959).

94. ILL. REV. STAT. ch. 85, § 9-103(c) (1977). *See* note 89 and accompanying text *supra*.

95. Housewright v. City of LaHarpe, 51 Ill. 2d 357, 365, 282 N.E.2d 437, 442 (1972).

96. *Id.* at 357, 282 N.E.2d at 437; Fanio v. John W. Breslin Co., 51 Ill. 2d 366, 282 N.E.2d 443 (1972); Borkoski v. Tumilty, 52 Ill. App. 3d 839, 368 N.E.2d 136 (3d Dist. 1977); Crowe v. Doyle, 6 Ill. App. 3d 1098, 287 N.E.2d 99 (3d Dist. 1972).

Employees Tort Immunity Act[97] and will not waive the notice requirements in actions against the State of Illinois or the Chicago Transit Authority.[98] Second, the purchase of liability insurance will waive the defense of defective notice only up to the limits of liability contained within the policy.[99] Finally, the purchase of liability insurance by the employee, as opposed to the entity, will not operate as a waiver by the entity of the defenses provided in section 8-103.[100]

The holding in *Housewright*[101] enabled the Illinois Supreme Court in *Helle v. Brush*[102] to reason that the waiver in *Housewright* could not have occurred if statutory notice was a condition precedent to suit.[103] In *Helle*, a

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See West, *Immunity from the Tort Immunity Act*, 62 ILL. B.J. 496 (1974). West argues that "any" in section 9-103(b) is to be construed as "all" immunities are waived.

97. The procurement of insurance does not preclude a public entity from raising a defense that existed prior to the Tort Immunity Act. *See* Lansing v. County of McLean, 69 Ill. 2d 562, 372 N.E.2d 822 (1978) (§ 3-105 of the Local Government and Governmental Employees Tort Immunity Act, ILL. REV. STAT. ch. 85, § 3-105 (1975), codifies the preexisting judicially created rule of nonliability of local governmental entities for certain damages caused by weather conditions, and this is not waived by the purchase of insurance); Tanari v. School Directors of Dist. No. 502, 69 Ill. 2d 630, 373 N.E.2d 5 (1977) (an educator's statutory immunity, ILL. REV. STAT. ch. 85, § 24-24 (1971), from a student's suit for ordinary negligence is not waived by the public entity's purchase of insurance); Mora v. State, 68 Ill. 2d 223, 369 N.E.2d 868 (1977) (the Tort Immunity Act, ILL. REV. STAT. ch. 85, §§ 2-201, 3-104 (1975), and case law provides that a state employee's immunity from personal liability for the performance of his discretionary duties is not defeated by the purchase of insurance); Kobylanski v. Chicago Bd. of Educ., 63 Ill. 2d 165, 347 N.E.2d 705 (1976) (§ 9-103 provisions for waiver do not apply to preexisting immunities conferred on educators by the School Code, ILL. REV. STAT. ch. 122, §§ 24-24, 34-84(a) (1967)).

98. Specifically excluded from the definition of a local public entity is "the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State." ILL. REV. STAT. ch. 85, § 1-206 (1977).

Section 2-101 of chapter 85 provides with respect to the Chicago Transit Authority: "Nothing in this Act affects the liability, if any, of a local public entity or public employee, based on: . . . (b) operation as a common carrier; and this Act does not apply to any entity organized under or subject to the Metropolitan 'Transit Authority Act' . . . ." *See* Fujimura v. Chicago Transit Auth., 67 Ill. 2d 506, 368 N.E.2d 105 (1977) (court upheld as constitutional a six month notice-of-claim period and one year statute of limitations for personal injury claims against the Chicago Transit Authority, although a one year notice-of-claim period and a two year statute of limitations were applicable to local governmental units generally under the Tort Immunity Act, ILL. REV. STAT. ch. 85, § 8-101, 102 (1973)).

99. Section 9-103(c) only precludes the insurer from raising the defenses and immunities of the Act: "Every policy for insurance coverage issued to a local public entity shall provide or be endorsed to provide that the company issuing such policy waives any right to refuse payment or to deny liability thereto within the limits of said policy." Beyond the limits of the policy the entity is free to assert the defenses and immunities of the Act.

100. Section 9-103(c) expressly applies only to those policies issued to the "local public entity." *See* Eason v. Garfield Park Community Hosp., 55 Ill. App. 3d 483, 487, 370 N.E.2d 1099, 1102 (1st Dist. 1977).

101. *See* note 36 and accompanying text *supra*.

102. 53 Ill. 2d 405, 292 N.E.2d 372 (1973).

103. *Id.* at 410, 292 N.E.2d at 375. Obviously the court could also have reasoned that no waiver existed, but rather that the state legislature had simply created a statutory exception to

private individual who was sued by a highway commissioner filed a counterclaim without first filing notice pursuant to section 8-103. The court found that filing notice was not a prerequisite to an individual's counterclaim arising from the same occurrence. In so holding, the court reasoned that the public entity had waived the limitation provided by the notice requirement when it filed suit as plaintiff. Specifically, the court stated:

> We construe the limitation of section 8-102 to apply only to those cases where the initial action is in fact commenced by any person against a local public entity, and we hold that in an action commenced by the local entity against the defendant, the serving of the notice required by this section is not a requisite to the filing of a counterclaim arising from the same occurrence.
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> . . . .
>
> Consequently, we hold the notice provision of section 8-102 not to be a condition precedent to the right to bring suit, but rather to be a limitation provision which can be waived by the local public entity, and, under the circumstances of this case, we regard the filing of suit by the plaintiff public entity as a waiver of this notice requirement.[104]

This holding is significant in two respects. First, it suggests that a claimant who would otherwise be denied his day in court due to failure to comply with notice requirements may preserve his cause of action if his attorney can fashion an argument that suggests waiver or estoppel by the public entity. The courts may be receptive to such arguments where the public entity was aware of the incident which led to the claim and would not be prejudiced by an absence of a formal notice. Second, the effect of this decision is to sever the notice requirement from the plaintiff's cause of action, establishing it instead as an affirmative defense to be construed in relation to the general limitations statute.[105] It would be premature to suggest that a plaintiff need no longer plead and prove proper tender of notice, but it is now clear that this requirement is subject to the counter-defenses of waiver[106] and estoppel.[107]

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the notice requirement, as would be within its power, leaving the notice requirement as a condition precedent applicable in all instances except those where insurance was purchased. The court could have achieved the same result in a limited opinion. The liberal construction served notice that well-reasoned attacks on the notice provisions may bear fruit.

104. *Id.* at 409-10, 292 N.E.2d at 375.

105. As the court in *Helle* explained: "Sections 8-101, 8-102, and 8-103 of the Tort Immunity Act and Section 17 of the Limitations Act are in *pari materia* and should be construed together in determining the intent of the legislature relative to the issue under consideration." *Id.* at 408, 292 N.E.2d at 374. *See also* Eason v. Garfield Park Community Hosp., 55 Ill. App. 3d 483, 492, 370 N.E.2d 1099, 1105-1106 (1st Dist. 1977) (Simon, J., dissenting) (dissent argues hospital had full knowledge of facts and access to information concerning treatment; therefore, notice requirement should be held waived because its informational purpose had already been accomplished).

106. Hull v. City of Griggsville, 29 Ill. App. 3d 253, 330 N.E.2d 293 (4th Dist. 1975) (city waived issue of defective notice by failure to move for dismissal after filing of amended complaint or in post-trial motions).

107. Dunbar v. Reiser, 26 Ill. App. 3d 708, 712, 325 N.E.2d 440, 443 (1st Dist. 1975), *aff'd*,

Even more significant than the development of the waiver and estoppel doctrines is the development of the rule that the filing of a complaint within the notice period satisfies the requirements of section 8-102.[108] This rule of construction represents a complete departure from those cases which held that actual notice was not a defense where the statutory notice was insufficient.[109] It was first adopted in cases in which the statutory notice was defective. The Illinois Supreme Court has reasoned that filing suit cures the defect in the notice because the defendant entity is then able to instigate a complete investigation through use of discovery and, as a result, be in a better position than if it had only statutorily sufficient notice.[110] The court, however, removed any doubt as to whether the new rule was related to the "substantial compliance" doctrine when it firmly established the proposition that filing suit satisfied statutory notice requirements even where no notice was filed.[111]

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64 Ill.2d 230, 356 N.E.2d 89 (1976); Hinz v. Chicago Transit Auth., 133 Ill. App. 2d 642, 326 N.E.2d 775 (1st Dist. 1971). The appellate court in *Dunbar* explained:

> [W]e believe the procedural conduct of the defendant in this case raises a fact question of estoppel that cannot be determined on a motion to dismiss. The City had to know of any defect in the pleadings before its original motion to dismiss and before its subsequent answers; but it was not until ten (10) days after the expiration of the statutory period [to provide notice] that it served notice on the plaintiff of its motion [to dismiss for failure to provide notice].

26 Ill. App. 3d at 712, 325 N.E.2d at 443. *See also* Repasky v. Chicago Transit Auth., 9 Ill. App. 3d 897, 293 N.E.2d 440 (1st Dist. 1973), *aff'd*, 60 Ill. 2d 185, 189, 326 N.E.2d 771, 777 (1975). In *Repasky*, the injured plaintiff did not serve notice because a C.T.A. employee had allegedly assured her over the telephone that her case was being "taken care of." The Supreme Court held it was not persuaded that the conduct of an employee could operate generally to eliminate the requirement of notice. *Id.* at 189, 326 N.E.2d at 777 (1975).

108. Dunbar v. Reiser, 64 Ill. 2d 230, 236, 356 N.E.2d 89, 91-92 (1976).

109. Significantly, the Supreme Court in Housewright v. City of LaHarpe, 51 Ill. 2d 357, 361, 282 N.E.2d 437, 440 (1972), had only four years earlier stressed: "Section 8-102 is unambiguous and clearly expresses the legislative intent that a local public entity be given certain information in writing, within the time period provided, and we hold that the allegation of actual notice does not satisfy the statutory requirement of written notice." *Accord*, Repasky v. Chicago Transit Auth., 60 Ill. 2d 185, 188, 326 N.E.2d 771, 773 (1975); Hayes v. Chicago Transit Auth., 340 Ill. App. 375, 92 N.E.2d 174 (1st Dist. 1950); Thomas v. State, 24 Ill. Ct. Cl. 137 (1961).

110. Saragusa v. City of Chicago, 63 Ill. 2d 288, 348 N.E.2d 176 (1976). There, the court held:

> Under our discovery procedures, a defendant may commence an inquiry into the relevant facts by serving interrogatories as soon as the defendant's appearance or answer is filed, as was done here. The information bearing upon the defendant's liability which may be obtained in this manner will be more complete than what would be obtained under the generalized specifications called for in statutory notice.

Id. at 293-94, 348 N.E.2d at 180.

111. Dunbar v. Reiser, 64 Ill. 2d 230, 237, 356 N.E.2d 89, 92 (1976). The court tersely noted: "[W]e hold that the filing of a complaint within the six months period satisfied the notice requirement of § 8-102 of the Tort Immunity Act . . . ." *Accord*, Williams v. Medical Center Comm'n, 60 Ill. 2d 389, 396, 328 N.E.2d 1, 5 (1975).

Arguably, this new rule of construction provides a precedent which can be applied to hold that actual notice will operate as a waiver of statutory notice requirements. Certainly this rule contradicts the reasoning of those prior cases in which the courts have strictly interpreted the legislative requirement that certain information be furnished to the entity by statutory notice.[112] If the opportunity to conduct discovery satisfies statutory notice requirements, it is illogical to contend that actual notice cannot serve the same purpose. Both the statutory notice and the complaint serve to alert the public entity that a claim has been commenced.[113] It would be absurd to suggest that a city would wait until receiving statutory notice of a claim before conducting an investigation, rather than proceeding with an investigation immediately upon actual notice of the incident. Despite holdings to the contrary,[114] it seems reasonable to predict that actual notice[115] will eventually be held to satisfy the notice statutes.

Exceptions

Several exceptions to the notice requirements arise due to either the legal status of the person injured or the type of injury suffered. Although not expressly excluded from the requirement of providing notice, infants and incompetents are under no obligation to give notice prior to commencement of a suit.[116] Also, the Local Government and Governmental Employees Tort Immunity Act requires notice for all actions sounding in tort whether they are for death, personal injury, or damage to property.[117] However, a plaintiff is not required to give notice to the Chicago Transit Authority for wrongful death or damage to property, as the notice provisions of this statute apply exclusively to actions involving injuries to the person.[118] Further-

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112. *See* note 85 and accompanying text *supra*.

113. In Dunbar v. Reiser, 64 Ill. 2d 230, 235, 356 N.E.2d 89, 91 (1976), the court observed: "The notice statute, since its original enactment, has been designed to give the local public entity notice, not that an injury was suffered, but that a person 'is about to commence [a] civil action for damages on account of such injury.' "

114. *See* note 85 and accompanying text *supra*.

115. Actual notice connotes notice which is sufficient to allow the entity to conduct an investigation and obtain the information sought to be elicited by the statutory notice requirements.

116. *See generally* Haymes v. Catholic Bishop of Chicago, 33 Ill. 2d 425, 211 N.E.2d 690 (1965); McDonald v. City of Spring Valley, 285 Ill. 52, 120 N.E. 476 (1918). *But see* Fanio v. John W. Breslin Co., 51 Ill. 2d 366, 282 N.E.2d 443 (1972) (holding administrator in a wrongful death action to the notice requirement where the next of kin were minors); Addison v. Health and Hosp. Governing Comm'n, 56 Ill. App. 3d 533, 371 N.E.2d 1060 (1st Dist. 1977) (same).

117. ILL. REV. STAT. ch. 85, § 1-204 (1977). The statute defines injury as:

> death, injury to a person, or damage to or loss of property. It includes any other injury that a person may suffer to his person, reputation, character, or estate which does not result from circumstances in which a privilege is otherwise conferred by law and which is of such a nature that it would be actionable if inflicted by a private person.

118. *See generally* ILL. REV. STAT. ch. 111-2/3, § 341 (1977). *Accord*, Prouty v. City of Chicago, 250 Ill. 222, 95 N.E. 147 (1911) (an action for wrongful death is not an action for

more, a plaintiff is not required to give notice in an action against the State of Illinois for injury to property,[119] but in an action for wrongful death it is specifically required that the executor give notice within six months of the date of death.[120]

Miscellaneous Statutory Notice Requirements

There are numerous other statutory notice provisions in Illinois. Most of the remaining statutes, however, do not have quite so harsh a final effect on the rights of injured parties because of either legislative enactment or judicial interpretation.[121] For example, the Crime Victims Compensation Act[122] requires that notice be given the State by victims. That Act, however, requires only that notice of intent to file a claim be filed in the Office of the Attorney General within six months of the date of injury.[123]

Another example of liberal notice requirements can be found in the Workmen's Compensation Act.[124] As a prerequisite to recovery, it requires that the injured employee give notice to his employer orally or in writing. The notice should advise the employer of the approximate date of the accident, as well as its location, and it must be given as soon as practicable, but not later than forty-five days after the accident.[125] A defect or inaccuracy in such notice is not a bar to the claim unless the employer proves that he is, or will be, unduly prejudiced by the defect.[126] Employers have seldom

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personal injury); Shumpert v. Chicago Transit Auth., 30 Ill. App. 2d 232, 173 N.E.2d 835 (1st Dist. 1961) (injury to the person under this section does not include occupational diseases).

119. Munch v. Illinois, 25 Ct. Cl. 313 (1966) (claim for personal injury denied because the claimant failed to file within the required six months; claim for property damage permitted).

120. *See generally* ILL. REV. STAT. ch. 37, § 439.22-1 (1977), which states that in a wrongful death action, the executor, administrator, or personal representative for the estate must file the name of the person to whom the action has accrued; the name and last residence of the decedent; the date, place, and time of the accident causing the death; a description of the accident and the names and addresses of the attending physicians and treating hospitals. The filing must be done within six months from the date of death or the date the person filing is qualified as executor or administrator of the estate (whichever is later) with the Attorney General and with the Clerk of the Court of Claims.

121. *See* notes 34 and 41 *supra*.

122. ILL. REV. STAT. ch. 70, § 71-84 (1977).

123. *Id.* § 73(g). An extension of time is granted if "good cause" is shown. *Id.*

124. ILL. REV. STAT. ch. 48, §§ 138.1-138.28 (1977).

125. *Id.* § 138.6(c). The court has held that the legislature intended to require an employee to give to his employer all known facts about the injury within the time provided and, if not known, within a reasonable time after discovery. Republic Steel Corp. v. Industrial Comm'n, 26 Ill. 2d 32, 185 N.E.2d 877 (1962). Under the prior Act it was found that there existed a conclusive presumption that the employer was prejudiced by a failure to give notice to him within the required time. Ristow v. Industrial Comm'n, 39 Ill. 2d 410, 235 N.E.2d 617 (1968).

126. ILL. REV. STAT. ch. 48, § 138.6(c)(2) (1977). In Republic Steel Corp. v. Industrial Comm'n, 26 Ill. 2d 32, 185 N.E.2d 877 (1962), the court held that a liberal interpretation of the requirement of notice to the employer should be allowed to the extent that it is consistent with the employer's protection against unjust concealment of the claim. *See also* Thrall Car Mfg. Co. v. Industrial Comm'n, 64 Ill. 2d 459, 356 N.E.2d 516 (1976) (notice to a plant nurse of an

successfully interposed lack of notice as a defense,[127] probably because this notice requirement is satisfied if there has been actual notice.[128] This notice requirement was held to be jurisdictional in its original form,[129] but the Act

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injury, though incomplete, was adequate, as there was no evidence that the employer was unduly prejudiced by any defect in notice); Sohio Pipe Line Co. v. Industrial Comm'n, 63 Ill. 2d 147, 345 N.E.2d 468 (1976) (where an employer was informed of claimant's disability from a heart attack, a subsequent statement from the employee that the heart attack was not work-related did not estop the employee's later statement that the heart attack arose out of his employment); U.S. Steel Corp. v. Industrial Comm'n, 32 Ill. 2d 68, 203 N.E.2d 569 (1964) (though the notice given to the employer was not complete, it was not fraudulent nor was there any indication of prejudice to the employer and therefore was adequate); Quaker Oats Co. v. Industrial Comm'n, 414 Ill. 326, 111 N.E.2d 351 (1953) (where an employee told his foreman on several occasions that cans had fallen on his foot, notice was considered sufficient, as it was found to be the only notice that could be given at the time); Armour & Co. v. Industrial Comm'n, 367 Ill. 471, 11 N.E.2d 949 (1937) (after notifying his company of an ammonia leak the employee was found lying on the floor, overcome by the fumes, and he died shortly thereafter; although no formal notice was given, the court found sufficient evidence that the employer had notice of the accident within the required time).

127. In Andronaco v. Industrial Comm'n, 50 Ill. 2d 251, 278 N.E.2d 802 (1972), the employee died of a heart attack after suffering chest pains at work. The next day his widow informed the employer that her husband had come home sick and died. The court held that "the telephone call to the employer following Andronaco's death was the only notice given to the City. However, we approved an identical form of notice in Chicago Rawhide Mfg. Co. v. Industrial Comm'n, 291 Ill. 616, 621, 126 N.E. 616, 618." *Id.* at 256-57, 278 N.E.2d at 805. *See* Thrall Car Mfg. Co. v. Industrial Comm'n, 64 Ill. 2d 459, 356 N.E.2d 516 (1976) (adequate notice when employee reported to the plant nurse complaining of knee trouble and requesting to see the doctor); American Distilling Co. v. Industrial Comm'n, 40 Ill. 2d 350, 239 N.E.2d 848 (1968) (notice found sufficient when employee reported the pain and injury to the company nurse); Armour & Co. v. Industrial Comm'n, 367 Ill. 471, 11 N.E.2d 949 (1937) (formal notice is not necessary if the employer has constructive or actual notice); Consumer Co. v. Industrial Comm'n, 364 Ill. 145, 4 N.E.2d 34 (1936) (a widow's suggestion that her husband may have fallen into the river was held to be sufficient notice after the body was recovered from the river); Ralph H. Simpson Co. v. Industrial Comm'n, 337 Ill. 454, 169 N.E. 225 (1929) (actual notice is sufficient). *But see* Fenix & Scisson Constr. Co. v. Industrial Comm'n, 27 Ill. 2d 354, 189 N.E.2d 268 (1963) (notice insufficient where nothing said about the accident).

128. Actual notice exists even if only notice of trauma is given when that trauma is only later found to have caused an injury. In Quaker Oats Co. v. Industrial Comm'n, 414 Ill. 326, 111 N.E.2d 351 (1953), the employee complained to his foreman several times about cans dropping on his foot, and the complaint was acknowledged. The employee, at the time, was not aware that he suffered from a disease. Later, in a search for the cause of the disability, it was ascertained that the injury arose out of his employment. The court held that the notice prior to this discovery was sufficient. The court stated:

> [The] complaints to the foreman about the falling cans may have been defective and inaccurate as a notice, but the facts were as apparent to the employer as to the employee; there was no attempt at a concealment of claim nor was the employer in any way prejudiced by the defect or inaccuracy, for it was well-acquainted with all the facts and circumstances of the accident. Chicago Rawhide Mfg. Co. v. Industrial Comm'n, 291 Ill. 616, 126 N.E. 616 (1920); Valier Coal Co. v. Industrial Comm'n, 320 Ill. 69, 150 N.E. 651 (1926); Savin v. Industrial Comm'n, 342 Ill. 41, 173 N.E. 802 (1930).

Id. at 337, 111 N.E.2d 351, 356.

129. Giving notice within forty-five days was jurisdictional and a prerequisite to the maintenance of a proceeding under the Workmen's Compensation Act. *See, e.g.*, Ristow v. Industrial

has since been greatly altered and liberalized by amendment. The practitioner, however, should be aware that the suggestive "should"[130] of the 1975 amendment has been changed to a mandatory "shall"[131] with regard to the need to give notice. It is unclear now whether absence of notice, as opposed to defective notice, will be characterized as a "defect or inaccuracy"[132] and thus excusable absent a showing of prejudice to the employer.

The notice requirements of the Occupational Disease Act[133] are similar to those of the Workmen's Compensation Act. A claimant under this statute must give oral or written notice to the employer as soon as practicable after the date of disablement.[134] Defect or inaccuracy in the notice is not a bar to the claim unless the employer proves that he has been, or will be, unduly prejudiced thereby.[135] More importantly, this statute makes clear that failure to give notice bars a claim only if the rights of the employer are substantially prejudiced.[136]

The Workmen's Compensation and the Occupational Disease Acts also require that notice be given to the employer whenever the employee brings a common law or statutory action arising out of an incident covered by either act.[137] The employer must be notified by personal service or registered

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Comm'n, 39 Ill. 2d 410, 235 N.E.2d 617 (1968); Railway Ex. Agency v. Industrial Comm'n, 415 Ill. 294, 297, 114 N.E.2d 353, 355 (1953); Ridge Coal Co. v. Industrial Comm'n, 298 Ill. 532, 534, 131 N.E. 637, 637-38 (1921).

130. ILL. REV. STAT. ch. 48, § 138.6(c) (1975).

131. ILL. REV. STAT. ch. 48, § 138.6(c) (1977).

132. *Id.*

133. ILL. REV. STAT. ch. 48, §§ 172.31-172.62 (1977).

134. *Id.* § 172.41(c). This section requires that notice be given to the employer of the disablement arising from an occuptional disease. Notice must be given as required by the Workmen's Compensation Act as soon as practicable after the date of disablement. Unlike the Workmen's Compensation Act, however, there is no time limitaton set. Again, in the case of mental incompetency, the time limitations do not begin to run until a conservator or guardian has been appointed.

The similarities between the two acts extend even further. First, liberality in the matter of notice to the employer of injury will again be permitted to the extent it is consistent with the employer's protection against unjust concealment of claim. Crane Co. v. Industrial Comm'n, 32 Ill. 2d 348, 351, 205 N.E.2d 425, 427 (1965). Second, unless the employer would be unduly prejudiced, defects or inaccuracies will be tolerated. In *Crane*, it was held that no prejudice resulted to the employer where the employee failed to file a claim until three weeks after his release from the hospital and after his first diagnosis of silicosis. *Id.* at 352, 205 N.E.2d at 427-28. *See also* Raymond v. Industrial Comm'n, 354 Ill. 586, 188 N.E. 861 (1933) (a disabled employee was not required to notify his employer that the disablement was due to lead poisoning when he did not know this until after the statutory time for notice had run; further, oral notices to the employer within a week after the employee quit work because of the disablement were sufficient).

135. Crane Co. v. Industrial Comm'n, 32 Ill. 2d 348, 205 N.E. 425 (1965).

136. ILL. REV. STAT. ch. 48, § 172.41(c) (1977).

137. ILL. REV. STAT. ch. 48, §§ 138.5(b), 172.40(b) (1977). No common law actions may be instituted against an employer or his agent by an employee who is covered by the Workmen's Compensation Act. In return for the employer's liability for compensation of employees, regardless of fault, under the Act the employer is granted immunity from common law actions. *See*

mail of the fact of suit and the name of the court in which it is being brought. No statutory penalty attaches for failure to notify the employer, but in practice it may result in a disruption of settlement negotiations.

Notice to the employer enables it to intervene in a civil suit, or in the absence of suit and notice, to file a civil claim for indemnification against a third party.[138] In *Public Litho Service Inc. v. City of Chicago*,[139] a curious result occurred with respect to such an indemnification claim. There, an employer sought indemnification from the City of Chicago, but failed to notify the City pursuant to section 8-102 until more than six months after the accident.[140] The notice was filed, however, within six months of the Industrial Commission's approval of the employee's settlement contract. The First District Appellate Court found that the employer was subrogated only to the rights of the employee and that the notice period had commenced on the date of the accident.[141] The rationale of this holding is especially weak. One might readily foresee a situation in which the notice to the employer is not sufficient to put it on notice that a public entity is involved and the industrial claim is not brought until the municipal notice period has elapsed.[142] Consequently, the employer might not be aware of its right of indemnity until the right had become worthless.

The final significant notice requirement contained in the Industrial Acts mandates that an illegally employed minor or his legal representatives file notice with the Industrial Commission if he wishes to reject compensation benefits in order to pursue a common law remedy.[143] This notice must be

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Laffon v. Bell & Zoller Coal Co., 27 Ill. App. 3d 472, 327 N.E.2d 147 (5th Dist. 1975). It must be noted that the employer-defendant has the burden of persuading the trier of fact that the employee was injured while performing his work-related duties. Lopez v. Galeener, 34 Ill. App. 3d 815, 819, 341 N.E.2d 59, 63 (5th Dist. 1975); Meador v. City of Salem, 51 Ill. 2d 572, 578-79, 284 N.E.2d 266, 270 (1972). An employee, however, may bring a common law action against a third party who is responsible for the employee's injury. In such cases, the employer must be notified of the suit. ILL. REV. STAT. ch. 48, § 138.5(b) (1977). This gives the employer a chance to intervene and join the employee's action. Villapiano v. Better Brands of Ill., Inc., 26 Ill. App. 3d 512, 517, 325 N.E. 722, 726 (1st Dist. 1975). *See also* Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U.L. REV. 351 (1970).

The similarities between the Workmen's Compensation Act and the Occupational Disease Act are apparent. No statutory or common law action may be brought against an employer by an employee covered by the Occupational Disease Act to recover compensation for injury to his health. The employee may bring an action against a person other than the employer for damages when disablement is caused by that person. Again, the employer must be notified and may join the action to insure that all orders of the court are made for his protection.

138. *See* note 149 *infra*.

139. 8 Ill. App. 3d 315, 290 N.E.2d 677 (1st Dist. 1972).

140. *Id.* at 316, 290 N.E.2d at 678.

141. *Id.* at 317-18, 290 N.E.2d at 679.

142. A compensation claim can be brought against an employer for a period of three years from the date of injury or two years from the last date of payment of compensation. ILL. REV. STAT. ch. 48, § 138.6(c)(2) (1977).

143. ILL. REV. STAT. ch. 48, § 138.5(a) (1977). *See* Yerk v. Rockford Coca Cola Bottling Co., 12 Ill. App. 3d 299, 300-01, 298 N.E.2d 319, 321 (2d Dist. 1973) (if a minor rejects his rights under the Workmen's Compensation Act his common law remedies are preserved).

filed within six months of the date of injury or death, or within six months of the appointment of a legal representative, whichever occurs later.[144] Although the statute does not require any specific form or content, filing should be done personally at the Industrial Commission and the petitioner or his lawyer should obtain a filing receipt in order to avoid the problem encountered in *Alton v. Byerly Aviation, Inc.*,[145] where the representative's claim was dismissed by the trial court because the notice was lost in the mail.[146]

Federal employees must also provide notice of injury,[147] but that notice may be varied by regulation propounded by the Secretary of Labor.[148] These notice requirements are not construed as the power of the agency to exercise regulatory power to destroy the precedential value of decisions thereunder. Consequently, lawyers must be aware of the statute, the regulations, and the policy existing at the time the claim is presented in order to protect their client's claim.

Another Illinois statutory notice provision that may be overlooked is that which requires the personal representative of a deceased policeman or fireman to notify the municipality of any action taken to recover compensation from a third party for the other's death.[149] Notice must be effectuated by

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144. ILL. REV. STAT. ch. 48, § 138.5(a) (1977). Under the 1967 version of this statute, the six-month period in which the minor had to give notice of his desire to reject the Workmen's Compensation Act began to run from the date on which the employee was injured, not from the date on which a guardian was appointed. Estep v. Janler Plastic Mold Corp., 11 Ill. App. 3d 551, 553, 297 N.E.2d 341, 343 (1st Dist. 1973), *aff'd*, 57 Ill. 2d 395, 312 N.E.2d 618 (1974), *cert. denied*, 419 U.S. 1109 (1975).

145. 44 Ill. App. 3d 571, 358 N.E.2d 396 (3d Dist. 1976), *rev'd*, 68 Ill. 2d 19, 368 N.E.2d 922 (1977).

146. 44 Ill. App. 3d 571, 572-73, 358 N.E.2d 396, 397 (3d Dist. 1976), *rev'd*, 68 Ill. 2d 19, 368 N.E.2d 922 (1977). In *Alton*, the plaintiff represented an illegally employed minor who died as a result of a work-related accident. The plaintiff, wishing to bring a common law tort action, mailed the required rejection of workmen's compensation rights to the Industrial Commission. The rejection notice was never received by the Commission, nor was it returned to the plaintiff. The appellate court held that notice was not timely because the Commission never received it. The Illinois Supreme Court reversed this decision, holding that notice is filed timely if plaintiff can prove, with competent evidence, that the letter containing notice was deposited, properly addressed, in the United States mail on or before the date due. *Id.*

147. 5 U.S.C. § 8119 (1977).

148. *See, e.g.*, 20 C.F.R. § 10.102 (1978).

149. ILL. REV. STAT. ch. 108-1/2, § 22-308 (1977). Where the death of a policeman or fireman was not caused by the negligence of the city or village but by the action of a third party, legal proceedings may be taken against the third party notwithstanding any award made by the city or village (for the death). If the personal representative of the deceased brings an action against the third party and judgment is obtained or settlement is made, the amount received by the personal representative shall be deducted from the city's award. The city has or may claim lien upon any judgment or fund by which the representative may be compensated by a third party for any money paid out of an award prior to judgment or settlement. When the personal representative brings an action against a third party, he must notify the city of such action by personal service or registered mail and must file proof of such notice. This permits the city to join the action to insure that orders of the court are made for its protection. *Id.*

personal service or registered mail and must include the name of the court in which the suit is brought.[150] Again, no specific penalty is provided for failure to comply, but failure may result in later complications because no settlement, release, or satisfaction of judgment is valid without the written consent of the municipality.[151]

Attorneys representing police officers should also be aware that a police officer who is made a party defendant to a suit arising out of injury to person or property while the officer is engaged in the performance of his duties must notify his municipality in order to obtain indemnity from that entity.[152] The written notice must identify the suit and must be served within ten days of the date of service of process.[153] This notice is a condition precedent to obtaining indemnity from the municipality.

A recent Illinois Supreme Court case, *Cooney v. Society of Mount Carmel*,[154] held that the notice requirement of the Local Governmental and Governmental Tort Immunity Act is not applicable to private schools, but rather, only applies to public schools. Therefore, failure to give pre-suit notice of injury to a private school will not bar suit.

Commercial Notice

Another instance in which a statutory notice requirement is important occurs when an injured plaintiff seeks to extend the period of limitation pursuant to the Uniform Commercial Code.[155] Although the Code uses the

150. *Id.*

151. No settlement, release, or satisfaction is valid without written consent of the city except where the city or village has been fully indemnified or protected by order of the court. *Id.*

152. ILL. REV. STAT. ch. 24, § 1-4-6 (1977). First, it must be noted that this section applies only to municipalities having a population of fewer than 500,000. The section provides that a municipality will indemnify its police officers for judgments (not to exceed $100,000 including the cost of the suit) received against them as a result of an injury to a person or property caused by the officer (without contributory negligence on the part of the person or owner of the property) while engaged in the performance of his duties. Note that this does not apply where there has been willful misconduct on the part of the police officer. When a party defendant to such an action, the officer must, within ten days of service of process, notify the municipality by whom he is or was employed of the action and the fact that he is a party defendant. The duty of the municipality to indemnify any officer for judgment received against him is conditioned on receiving such notice. *See* Comment, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois*, 61 NW. U.L. REV. 265 (1966).

153. The written notice shall include the name of the policeman, that he has been served with process and made a party defendant to an action wherein it is claimed a person suffered injury to his person or property caused by the policeman, title and number of the case, the court wherein it is pending, and date on which the policeman was served with process. ILL. REV. STAT. ch. 24, § 1-4-6 (1977).

154. 75 Ill. 2d 430, 389 N.E.2d 549 (1979).

155. ILL. REV. STAT. ch. 26, § 2-607 (1977). Section 2-607 pertains to notice that must be given by a buyer to a seller who has breached the sales contract. A buyer who has accepted the seller's tender must notify the seller of any breach within a reasonable time after discovery of the breach or within a reasonable time after buyer should have discovered the breach. If notice is not forthcoming, the buyer will be barred from any remedy. Furthermore, when the buyer is sued for a breach of warranty or some other obligation for which the seller is answerable, buyer

term "barred" when formulating time limits, there is almost always a question of fact as to when the breach should have been discovered, and thus, when notice should have been served, making at least summary disposition unlikely.[156] Neither particular words nor set form are required[157] in notifying the seller. However, a reasonable notice is necessary in personal injury cases, as well as in matters arising out of commercial transactions.[158] If no notice has been given, a claimant may still preserve his right to sue if he can show that the seller had actual notice of the incident which gave rise to the dispute. This interpretation is buttressed by the fact that no particularity is needed in the statutory notice, because its only purpose is to put the seller on notice that the transaction is not closed to the satisfaction of all parties.[159] The reasoning of *Dunbar* v. *Reiser*[160] suggests that the seller is estopped from utilizing a notice defense where he has actual notice of the claim.[161]

Perhaps the least known notice statute is the one which deals with the sale of unregistered securities. A purchaser who wishes to void a sale must serve notice on the seller within six months after learning that the sale is voidable.[162] Notice must be given to each person from whom recovery is

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may give seller notice of the litigation. If this notice states that seller may join the action and he does not, he will be bound in any action against him by the buyer. *See* Wagneister v. A.H. Robins Co., 64 Ill. App. 3d 964, 382 N.E.2d 23 (1st Dist. 1978).

156. Branden v. Gerbie, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1st Dist. 1978) (notice is an essential element of a cause of action based on breach of an implied warranty; delay of fifteen months was, as a matter of law, a reasonable time within which the plaintiff should have discovered the breach); Wilke Metal Products, Inc. v. David Architectural Metals, 92 Ill. App. 2d 265, 236 N.E.2d 303 (1st Dist. 1968) (notice of defect in windows given by the corporation that ordered them was not timely when given six months after corporation should have known of breach).

157. Murray v. Kleen Leen, Inc., 41 Ill. App. 3d 436, 354 N.E.2d 415 (5th Dist. 1976) (notification to seller of a defect need not be in any particular form but notification is a question of fact looking to all circumstances; held sufficient when given within a "few days" after the discovery of the defect).

158. Berry v. G. D. Searle & Co., 56 Ill. 2d 548, 555, 309 N.E.2d 550, 554-55 (1974); Branden v. Gerbie, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1st Dist. 1978).

159. The comments to ILL. REV. STAT. ch. 26, § 207 (1977), state:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (§ 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

160. 64 Ill. 2d 230, 356 N.E.2d 89 (1976).

161. *See* note 108 and accompanying text *supra*.

162. ILL. REV. STAT. ch. 121-1/2, § 137.13(B) (1977). This section also provides that notice must be given to each person from whom recovery will be sought. The notice must be by

sought and must be delivered by registered letter or satisfied by personal service.[163] Courts have construed this notice limitation as an equitable feature built into the statute to protect sellers against prejudice arising from stale claims.[164] This interpretation, based upon the legislature's intent in enacting the statute, would seem to support a claim that constructive or actual notice to the seller would satisfy the notice requirements. No precedent, however, can be found which directly supports this position.

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registered mail, addressed to the person at his last known address, with the proper postage affixed, or by personal service. This rule is not a statute of limitations but an equitable feature designed to protect against stale claims and to prevent buyers who have sufficient knowledge of this remedy from waiting to elect rescission. *See* Martin v. Orvis Bros. & Co., 25 Ill. App. 3d 238, 323 N.E.2d 73 (1st Dist. 1974); Gowdy v. Richter, 20 Ill. App. 3d 514, 314 N.E.2d 549 (1st Dist. 1974) (where defendant admitted that the purchaser gave notice within twelve days after learning that the purchase was voidable, defendant was precluded from contesting the sale).

A purchaser may void a sale of a security if it was made in violation of the Securities Law of 1953:

> Every sale of a security made in violation of the provisions of this Act shall be voidable at the election of the purchaser exercised as provided in subsection B of this Section; and upon tender to the seller or into court of the securities sold or, where the securities were not received, of any contract made in respect of such sale, the issuer, controlling person, underwriter, dealer or other person by or on behalf of whom said sale was made, and each underwriter, dealer or salesman who shall have participated or aided in any way in making such sale, and in case such issuer, controlling person, underwriter or dealer is a corporation or unincorporated association or organization, each of its officers and directors (or persons performing similar functions) who shall have participated or aided in making such sale, shall be jointly and severally liable to such purchaser for (1) the full amount paid, together with interest from the date of payment for the securities sold at the rate of the interest or dividend stipulated in the securities sold (or if no rate is stipulated, then at the legal rate of interest) less any income or other amounts received by such purchaser on such securities and (2) the reasonable fees of such purchaser's attorney incurred in any action brought for recovery of the amounts recoverable hereunder.
>
> Notice of any election provided for in subsection (A) of this section shall be given by the purchaser, within 6 months after the purchaser shall have knowledge that the sale of the securities to him is voidable, to each person from whom recovery will be sought, by registered letter addressed to the person to be notified at his last known address with proper postage affixed, or by personal service.

ILL. REV. STAT. ch. 121-1/2, §§ 137,13(A)-(B) (1977).

163. ILL. REV. STAT. ch. 121-1/2, § 137.13(B) (1978). A purchaser has six months after he learns that the sale is voidable within which to give notice to the person from whom recovery will be sought. *See* Gowdy v. Richter, 20 Ill. App. 3d 514, 314 N.E.2d 549 (1974). *See also* note 139 *infra*.

164. Gowdy v. Richter, 20 Ill. App. 3d 514, 523, 314 N.E.2d 549, 556 (1974) (court denied that plaintiff had constructive notice due to a bankruptcy petition filed two months after the stock purchase and held that notice given twelve days after plaintiff learned that the sale was voidable was timely). *See also* Martin v. Orvis Brothers & Co., 25 Ill. App. 3d 238, 323 N.E.2d 73 (1974) (plaintiff was held to have had sufficient knowledge to be put on inquiry of the non-registered nature of securities purchased by him even before a consultation with his attorney which confirmed the knowledge).

Returning to tort law, it is unclear whether a public entity employee who is injured on the job must serve notice pursuant to section 8-102 in addition to the notice to the employer required by the Industrial Acts.[165] Such a construction would appear counter to the very purpose of the Workmen's Compensation[166] and Occupational Diseases Acts,[167] but the harsh and unimaginative construction utilized in some instances might make such an implausible construction possible. *Hecko v. City of Chicago*[168] is illustrative of this question. There, the court held that actions brought against public entities pursuant to section 1-4-7 of the Illinois Municipal Code[169] were not subject to the provisions of the Tort Immunity Act by virtue of section 2-101[170] of the latter Act.[171] The Court of Claims Act's notice requirement governs only actions commenced in that court[172] and, therefore, state employees are not affected. Similarly, the notice requirements of the Metropolitan Transit Authority Act[173] apply only to actions to be commenced in a court of law.[174]

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165. The Illinois Legislature has specified when notice must be given as it relates to the individual employee and employer. Under the Workmen's Compensation Act, ILL. REV. STAT. ch. 48, § 138.6(c) (1977), the general rule is that notice of an accident must be given by the employee as soon as practicable but no later than forty-five days after the accident. This rule is modified for dependents of a deceased employee and in cases of injury caused by radiation. Similarly, the Occupational Diseases Act, ILL. REV. STAT. ch. 48, § 172.41(c) (1977), indicates that notice of employee's disablement arising from an occupational disease shall be given as soon as practicable. The commission reserves the right to bar further proceedings if a failure to give such notice has prejudiced the rights of the employer. In both acts, notice requirements for radiological harm are subject to a more liberal time schedule which is substantially coextensive with the applicable statute of limitations.

166. ILL. REV. STAT. ch. 48, § 138.6(c) (1977).

167. ILL. REV. STAT. ch. 48, § 172.41(c) (1977).

168. 25 Ill. App. 3d 572, 323 N.E.2d 595 (1975) (plaintiffs brought actions against defendants for their failure to serve notice of the demolition of plaintiff's jointly owned property and for failure to serve notice of the proceedings leading to the demolition decree; judgment dismissing plaintiff's suit was reversed and remanded to trial for determination of the issue).

169. ILL. REV. STAT. ch. 24, § 1-4-7 (1977).

170. Local Governmental and Governmental Employees Tort Immunity Act, ILL. REV. STAT. ch. 85, § 2-101 (1977).

171. Hecko v. City of Chicago, 25 Ill. App. 3d 572, 578, 323 N.E.2d 595, 599 (1975). The statute provides:

> Nothing in this Act affects the right to obtain relief other than damages against a local public entity or public employee, based on:
>
> . . . .
>
> c) The "Workmen's Compensation Act", approved July 9, 1951, as heretofore or hereinafter amended;
>
> d) The "Workmen's Occupational Diseases Act", approved July 9, 1951, as heretofore or hereinafter amended. . .

ILL. REV. STAT. ch. 85, § 2-101 (1977). The issue was raised but not resolved in an earlier case, City of Chicago v. Vickers, 8 Ill. App. 3d 902, 291 N.E.2d 315 (1972). There the court indicated that governmental immunity is "clearly" eliminated under § 1-4-7 of the Illinois Municipal Code and that the legislature intended the Tort Immunity Act, where applicable, to prevail.

172. ILL. REV. STAT. ch. 37, § 439.22-1 (1977).

173. ILL. REV. STAT. ch. 111-2/3, § 341 (1977).

174. *Id.*

Civil rights actions are also excluded from statutory notice requirements[175] because civil rights claims are not deemed to sound in tort.[176] Lawyers whose clients have delayed in seeking counsel, or who have themselves been dilatory, should be aware of this saving exception. It applies when the defendants are government employees acting under color of state law.[177] In many instances tort claims might be pursued as civil rights claims, thus avoiding the need to give notice.

It is interesting to speculate what result might have occurred historically had Illinois courts initially tested for substantial compliance with the overall purpose of the notice statutes rather than testing whether the requirements of each individual subsection had been met. It is difficult, semantically and logically, to argue that an erroneous date-of-occurrence entry in the notice substantially complies with specific statutory requirements because it is near to the actual date of occurrence. It is easier to justify a defective notice, which has substantially complied with most of the statutory requirements, by arguing that the general purpose of the statute has been satisfied. If the notice statutes are not construed to be jurisdictional,[178] then the more liberal interpretation would seem easily justifiable, especially since the notice requirements are in derogation of the common law and thus are to be strictly construed against the public entity.[179]

FEDERAL TORT CLAIMS ACT COMPARED WITH ILLINOIS NOTICE PROVISIONS

The Federal Tort Claims Act,[180] although different in form, provides the federal government with an informational vehicle similar in purpose to that provided by Illinois' statutory notice requirements. Prior to filing a claim

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175. Luker v. Nelson, 341 F. Supp. 111 (N.D. Ill. 1972) (the notice requirements of the Tort Immunity Act not applicable to a civil rights action when the plaintiff claimed that a false arrest deprived him of his constitutionally guaranteed rights because the Act governs only common law tort actions).

176. *Id.* at 118-19.

177. The Civil Rights Act only protects individuals from state action. 42 U.S.C. § 1983 (1976).

178. Lyons v. Chicago Transit Auth., 349 Ill. App. 437, 443, 111 N.E.2d 177, 180 (1953) (statutory requirements of notice are not jurisdictional, and therefore defendant may waive, without penalty, a requirement which is for his own protection and convenience).

179. Reynolds v. City of Tuscola, 48 Ill. 2d 339, 270 N.E.2d 415 (1971). In *Reynolds*, the plaintiff filed suit against the defendant and served notice via registered mail, return receipt requested. The trial court dismissed with prejudice because the mailed notice did not meet the statutory requirement that notice be personally served. *Id.* at 340, 270 N.E.2d at 416. The Illinois Supreme Court reversed and remanded stating that the statute was in derogation of the common law and therefore was to be strictly construed against the public entities. Further, the court held that substantial compliance in this case achieved the purpose of furnishing timely notice. *Id.* at 342, 270 N.E.2d at 417.

180. The basic provisions of the Federal Tort Claims Procedure Act appear in 28 U.S.C. §§ 1346(b), 2671-80 (1976).

under the Federal Act, but within two years of the date of the incident,[181] the injured party must present the claim to the appropriate federal agency for review. This allows the federal government the opportunity to obtain full knowledge of the circumstances surrounding the claim prior to actual litigation. As a result, the government can investigate the claim fully and make a settlement offer if it deems such advisable. One is also reminded that an injured claimant must exhaust all administrative remedies as a condition precedent to bringing an action under the Federal Tort Claims Act.[182] Failure to do so results in dismissal.[183]

Computation of the Periods of Limitation

The requirements of notice to the government and exhaustion of administrative remedies as a condition precedent to filing suit[184] create not one, but three, periods of limitation, all of them controlled by the filing and disposition of the administrative claim. First, there is the two-year period,[185]

181. 28 U.S.C. § 2401(b) (1976) provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues . . . . "

182. The requirement that an injured plaintiff must exhaust administrative remedies as a condition precedent to filing suit is established in 28 U.S.C. § 2675(2) (1976), which provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

This provision must be construed with 28 U.S.C. § 2401(b) (1976), which provides a further limitation:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

183. An action instituted prior to the exhaustion of the two year period will be dismissed as being premature if it is not first presented to and subsequently denied by the appropriate federal agency. Cummins v. Ciccone, 317 F. Supp. 342 (W.D. Mo. 1970) (a prisoner on writ of habeas corpus who complained about the conditions of his confinement had a premature claim under 28 U.S.C. § 2675(a) (1976) since he failed to comply with its administrative requirements). Further, a claim must be filed within the two-year period and it must comply with the administrative requirements of 28 U.S.C. § 2675 (1976), or it will be dismissed. *See* Blain v. United States, 552 F.2d 289 (9th Cir. 1977) (plaintiffs had not filed with the appropriate federal agency, and since they were not a party to a class action previously filed, their claim was barred for failure to file within the two year period prescribed by statute and for noncompliance with the appropriate administrative requirements of 28 U.S.C. § 2675 (1976)).

184. *See* notes 180-81 *supra*.

185. The time limit is measured from the date of accrual of the claim. 28 U.S.C. § 2401(b) (1976).

within which the claim must be presented to the appropriate federal agency.[186] Second, there is the six-month period of time during which the agency may consider the claim and an action against the United States may not be brought in the absence of a denial of the claim.[187] Third, there is the six-month period of time,[188] commencing with the denial of the claim by the agency,[189] during which the action against the United States must be brought.[190] Following the expiration of six months from the date of filing the claim, an injured party whose claim has not been finally disposed may, at his option, institute suit as if the claim had been denied.[191]

These time constraints are important because, unlike the statutory notice requirements of the Illinois statutes, the period within which a cause of action can be filed against the United States is governed by the processing of the administrative claim. The filing and disposition of the administrative claim serve to inform the government of the claim and determine the limitation period beyond which an action cannot be brought. The total period of time between accrual and filing of the cause of action may be lengthened or shortened by the timing of the presentation of the administrative claim. To illustrate: assume that the injured plaintiff's cause of action accrued on January 1, 1979. This date marks the commencement of the only fixed time period, *i.e.*, the two-year period within which the administrative claim must be filed.[192] The claim must be presented on or before January 1, 1981. If

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186. 28 C.F.R. § 14.2(a) (1978). A claim is deemed presented to a federal agency when a standard form or written notification of an incident plus a claim for damages is *received*. *See* Steele v. United States, 390 F. Supp. 1109 (S.D. Cal. 1975), where a mere deposit of the proper administrative claim forms in a mailbag was held not to be equivalent to receipt by a federal agency, much less "presentment" within the meaning of the statutes. *Id.* at 1111. These requirements have been strictly interpreted, and timely notice is one essential criteria for compliance with the statute. In Prince v. United States, 185 F. Supp. 269 (E.D. Wis. 1960), the court applied the majority view of the common-law rule of timing which provides that the period will be computed by excluding the day of the event and including the last day of the prescribed time period. *Id.* at 271.

187. Caton v. United States, 495 F.2d 635 (9th Cir. 1974) (claimant may not commence a court action until the federal agency denies the claim within the six-month period, or the six-month period expires without determination of the claim, whereby the failure to act is treated as a final denial of the claim).

188. 28 U.S.C. § 2401(b) (1976) provides that "[a] tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

189. 28 U.S.C. § 2675(a) (1976) requires that the denial of the claim be in writing and sent by registered mail.

190. Carr v. Veterans Administration, 522 F.2d 1355 (5th Cir. 1975) (the six month period during which an action must be begun is to be strictly construed when a waiver of sovereign immunity is involved).

191. Mack v. United States Postal Service, 414 F. Supp. 504 (E.D. Mich. 1976). (A plaintiff has the power to determine the date on which the unanswered claim shall be deemed denied for purposes of filing suit).

192. 28 U.S.C. § 2675(a) (1976).

the claim is presented on January 1, 1981, and denied by the Federal Agency on July 1, 1981, the complaint must be filed by January 1, 1982, resulting in a three-year period between accrual of the claim and filing of the complaint. On the other hand, a claim presented January 2, 1979, and denied January 3, 1979, would allow the claimant until July 3, 1979, to file a complaint, a period of approximately six months from accrual of the claim. If the federal agency fails to make final disposition of a claim, the injured plaintiff may institute suit at any time after the expiration of the six-month period allowed for agency consideration of the claim. Such failure extends indefinitely the period of time during which an injured plaintiff is allowed to file a cause of action. Practitioners should bear in mind the procedural and strategically important relationship between the date or presentation of the claim, the date of final disposition by the administrative agency and the resulting time period within which the cause of action must be instituted.

Presentation of the Claim

If Illinois statutory notice provisions are a snare, then federal administrative claim requirements present a pitfall for the practitioner. Attorneys accustomed to relying on statutes for notice requirements might easily overlook the requirements of the Code of Federal Regulations.[193] Presentation of a claim to a federal agency must be made by a claimant or his representative and should be made on a Standard Form, accompanied by a claim for money damages in a sum certain.[194] Although the regulations do not require that only Form 95 be used,[195] any other writing must contain all of the information otherwise solicited by that form.[196] Standard Form 95 requires the claimant to identify himself, describe the occurrence, disclose all known facts and circumstances surrounding the injury, set forth statements concern-

193. One regulation which governs the presentation of a claim to a federal agency provides that:

> For purposes of the provisions of Section 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. If a claim is presented to the wrong federal agency, that agency shall transfer it forthwith to the appropriate agency.

28 C.F.R. § 14.2(a) (1978). Note also that "[e]ach agency is authorized to issue regulations and establish procedures consistent with the regulations in this part." 28 C.F.R. § 14.11 (1978).

194. *Id.*

195. The regulations allow "some other written notification of an incident." 28 C.F.R. § 14.2(a) (1978).

196. In Robinson v. United States Navy, 342 F. Supp. 381 (E.D. Pa. 1972), recovery was denied to plaintiff because he failed to complete the Standard Form 95 sent him by the defendant. Further, he did not provide supporting documentation to substantiate his claim. The court held that the omitted information was necessary to evaluate the claim and that a claim will be barred when damages are not set out. *Id.* at 383.

ing the nature and extent of the injury, report the names and addresses of the witnesses, and state the amount of the claim.[197] It is also required that a claim for personal injury or death be supported by the report of the attending physician.[198] This section also provides that each agency issue regulations and establish its own procedures.[199] Therefore, a claim has been duly presented when the agency receives an executed Standard Form 95 containing a demand for specific money damages, and when the claim is in compliance with any additional requirements promulgated by the individual agency.[200] Clearly, the filing of an administrative claim involves much more than a simple notice of claim.[201]

The avowed purpose of these regulations is to allow the administrative agency to evaluate the claim, including the specific sum stated therein, and settle the matter without the need for litigation.[202] Ostensibly, the Justice Department is spared the burden of trying cases which might otherwise be settled by negotiation with the agency involved.[203]

Plaintiffs who fail to comply with the information requirements of the federal notice regulations face consequences similar to those experienced by injured plaintiffs who have not complied with the Illinois notice statutes. Failure to sign the form,[204] date the claim,[205] state a sum certain,[206] provide

197. *Reprinted in* 15 Lawyers Co-Operative Federal Procedural Forms § 63.21 at 331, 15 FED. PROC. FORMS 331 (1978).

198. *Id.*

199. *See* note 193 *supra*.

200. The regulations promulgated by each agency must be complied with. Kornbluth v. Savannah, 398 F. Supp. 1266 (E.D.N.Y. 1975), illustrates that failure to provide reports of attending physicians and medical bills, in addition to the necessary forms and applications, can be fatal to recovery on a claim for damages. Postal Service regulations specifically required additional evidence and information. *Id.* at 1267. The court indicated that an agency may require additional information to achieve financial economy and relieve the judicial burden imposed by excessive Federal Tort Claims Act suits. *Id.* at 1268.

201. *See* Three-M Enterprises, Inc. v. United States, 548 F.2d 293 (10th Cir. 1977) (a "Notice to Pay Rent or Quit Premises" served upon the Postal Manager of the post office in plaintiff's building did not constitute an administrative claim against the United States as contemplated by 28 U.S.C. § 2675(a) (1976)).

202. In Bialowas v. United States, 443 F.2d 1047 (3rd Cir. 1971), the court stressed that:

> The initial purpose of the regulations requiring a statement of the specified sum claimed is to enable a determination by the head of a federal agency as to whether the claim falls within the jurisdictional limits of his exclusive authority to process, settle, or to properly adjudicate the claim. Above those limits the settlement must have the prior written approval of the Attorney General or his designee.

Id. at 1050.

203. *See* Mudlo v. United States, 423 F. Supp. 1373, 1376 (W.D. Pa. 1976), where the court noted:

> The requirement of Title 28 U.S.C., § 2675(a), that a claim under the Federal Tort Claims Act must first be submitted to the proper administrative agency is aimed at sparing the courts the burden of trying cases when an administrative agency can provide a settlement procedure without litigation.

204. Bialowas v. United States, 443 F.2d 1047, 1049 (3rd Cir. 1971).

205. *Id.*

206. *Id.* The plaintiff in *Bialowas* was given a standard injury form on which he entered a dollar sign and the words "neck, chest, and right arm" on the line where the personal injury

documentation of the loss,[207] provide evidence of agency or representative capacity,[208] or supply information regarding insurance coverage,[209] has rendered claims fatally defective. As a result of any of these defects, causes of action have subsequently been dismissed. Courts have limited their analysis of the information requirements to situations in which some necessary element of information or documentation has been totally omitted.[210] Therefore, no general principal of substantial compliance has evolved, although it has been made clear that the complete omission of a single element will preclude utilization of the substantial compliance rationale.[211] Thus, lawyers should attempt to comply with the information requirements of the regulations in every detail.

The requirement that the injured person demand a sum certain in money damages is significant, not only because it is a jurisdictional prerequisite,[212] but also because it affects the ultimate recovery of the claimant in a subsequent lawsuit. Although an *ad damnum* can generally be amended to con-

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claim was to be stated. The court held this to be insufficient. *Id. Accord,* Driggers v. United States, 309 F. Supp. 1377 (D.S.C. 1970) (written communications between the parties were insufficient since they failed to make a claim for money damages).

207. Kornbluth v. Savannah, 398 F. Supp. 1266 (E.D.N.Y. 1975); Robinson v. United States Navy, 342 F. Supp. 381 (E.D. Pa. 1972). In *Robinson*, a definite amount of property damage was claimed, but no supporting documents were provided.

208. Gunstream v. United States, 307 F. Supp. 366, 368 (C.D. Cal. 1969) (claim filed by plaintiff's parents with Post Office Department declared defective for failure to show parents' representative capacity). *But see* Young v. United States, 372 F. Supp. 736, 741 (S.D. Ga. 1974), where the court indicated that in certain limited situations, failure to include evidence of representative capacity will *not* be fatal to a claim. These situations are where:

> 1) An administrative claim for death of a parent is filed for children by a purported 'guardian' or agent and is defective in failing to name the minors, to identify their relationship to the decedent or to provide proof of the legal capacity and authority of the person presenting such claim; 2) A proper claim is individually presented by the surviving spouse of a decedent and such claimant neglects to name and include as claimants children who possess a joint right of action for the death of their parent.

Id. Accord, Locke v. United States, 351 F. Supp. 185 (D. Hawaii, 1972) (court noted a judicial unwillingness to stand on technicalities once a claim has been filed, particularly where the rights of children are involved and inequities result).

209. Bialowas v. United States, 443 F.2d 1047 (3rd Cir. 1971). It is not clear what emphasis the court placed on the plaintiff's failure to submit the insurance information requested on the Standard Form 95, but the failure was expressly noted.

210. With the sum certain requirement, courts have allowed some leeway. For example, in Fallon v. United States, 405 F. Supp. 1320, 1322 (D. Mont. 1976), it was held that "[w]here a claim filed with a federal agency contains definite figures rendered uncertain by the use of qualifying words, there seems to be no valid reason why the agencies and the courts cannot treat the additional words as surplusage, leaving the certain amounts stated as the claim." Thus, the claim "approximately $15,000" was allowed as a statement of a sum certain.

211. As expressed in Gunstream v. United States, 307 F. Supp. 366, 369 (C.D. Cal. 1969), "[t]he conditions put upon the exercise of the privilege [of allowing the Federal Tort Claims Act to impinge on the doctrine of sovereign immunity] created call for literal interpretation of the procedure for filing an administrative claim and the time limitations applicable thereto."

212. *See* note 202 *supra*.

form to the damages awarded at trial,[213] the sum stated in the administrative claim establishes an outer limit upon the amount of recovery in any subsequent lawsuit.[214] The amount claimed administratively can be amended if it can be shown that on the date of presentment the newly found evidence could not have been discovered by reasonable means or if intervening facts which relate to the amount of the claim can be proved.[215] Both of these are burdens to demonstrate.[216] Federal regulations specifically state who may properly present an administrative claim:

> § 14.3 Administrative claim; who may file.
> (a) A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent or legal representative.
> (b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative.
> (c) A claim based on death may be presented by the executor or administrator of the decedent's estate, or by any other person legally entitled to assert such a claim in accordance with applicable State law.
> (d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially com-

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213. Rule 15(b) of the Federal Rules of Civil Procedure states:

> [T]he court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

See generally Dickinson v. Burnham, 197 F.2d 973 (2d Cir. 1952); Audi Vision, Inc. v. RCA Mfg. Co., 136 F.2d 621 (2d Cir. 1943). *See also* Couto v. Union Fruit Co., 203 F.2d 456 (2d Cir. 1953) (amount of the verdict can exceed the ad damnum).

214. 28 U.S.C. § 2675(b) (1976) provides:

> Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

215. *Id.*

216. Thus, in Joyce v. United States, 329 F. Supp. 1242 (W.D. Pa. 1971), recovery was allowed in excess of amount claimed on the basis of newly discovered evidence because plaintiff had suffered subtle and complex injuries which required extensive physical, psychological, and psychiatric examination.

Similarly, in Molinor v. United States, 515 F.2d 246 (5th Cir. 1975), proof of three knee operations and ensuing treatment allowed a recovery $18,500 above the original $1,500 claim.

In Kielwein v. United States, 540 F.2d 676 (4th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976), plaintiff filed a $25,000 administrative claim against the Department of the Navy, suing for personal injuries suffered because of a Navy doctor's alleged negligence during a routine operation. At trial, the plaintiff argued that she had not known the true extent of her injuries at the time of the claim. The district court agreed and awarded $123,000 on the basis of her severe, permanent disability. The court of appeals reversed, holding that, prior to the claim, plaintiff had consulted neurosurgeons and had obtained diagnoses which clearly indicated that the injury was permanent; therefore, there were no intervening facts or newly discovered evidence on which to base the increased award.

> pensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly.
> (3) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.[217]

Unlike the Illinois notice requirements, infants and incompetents are not excluded from the requirement of filing an administrative claim. The Federal Tort Claims Act confers the right of action against the United States and the limitations provisions contained therein establish the duration of this right.[218]

CONCLUSION

The stringent requirements of the Federal Tort Claims Act have not been tempered by judicial interpretation, and a liberal construction in the future seems unlikely. Moreover, there has been no movement by Congress to ease the requirements. In contrast, however, the Illinois notice provisions have been construed so that their purpose is met and, at the same time, justice is done.

It is to be hoped that Illinois courts will continue to expand the concept that constructive or actual notice may satisfy statutory notice rather than limit the liberal approach to the instances cited. In the future, courts will find it increasingly difficult to justify a narrow approach where the recently liberalized discovery rule[219] is involved. The inequities created by strict construction of statutory notice requirements are manifested by recent malpractice cases which raise the specter of an injured plaintiff who might not know of his cause of action until after the statutory notice period has expired. The courts have employed various methods to avoid the harsh effects of Illinois statutory notice provisions.[220] They have relied on the particular

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217. 28 C.F.R. § 14.3 (1978).

218. Mann v. United States, 399 F.2d 672 (9th Cir. 1968); Brown v. United States, 353 F.2d 578 (9th Cir. 1965); Pittman v. United States, 341 F.2d 739 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965). *See* 28 U.S.C. § 2401 (1976).

219. *See* Nolan v. Johns-Manville Asbestos & Magnesia Materials Co., ___ Ill. App. 3d ___, 392 N.E.2d 1352 (1st Dist. 1979).

220. Had the statute been intended to include within the notice requirement any injury for which a governmental body might be liable, the legislature would have used a broader term or phrase, such as "injury," rather than the more exact word "accident," which limits the types of injuries covered. *See* Eason v. Garfield Community Hosp., 55 Ill. App. 3d 483, 370 N.E.2d 1099 (1st Dist. 1977) (Simon, J., dissenting):

> The rationale behind the notice requirement of the Tort Immunity Act is that it facilitates prompt investigation and allows prompt settlement of meritorious claims. [King v. Johnson, 47 Ill. 2d 247, 265 N.E.2d 874 (1970)] In this case, the hospital would have had no real need to make an immediate investigation of the treatment

facts of individual cases to avoid injustice and have employed other exceptions, such as waiver and estoppel, to the notice statutes. These developments should lead to the adoption of an all-encompassing actual-or-constructive notice rule, ultimately promising injured plaintiffs escape from the snare of notice.

> of which plaintiff complains, since presumably the hospital's own records already would have included all pertinent information. The hospital had full knowledge of the facts, and full control of, and access to, all the relevant information, since it was the hospital which provided the treatment.
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> . . .
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> The final, and perhaps critical, point bolstering this statutory interpretation and result is simply that it is unrealistic to expect a patient to give the doctors treating him, and the hospital caring for him, notice that he intends to sue them while he still is under their care and supervision.
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> . . .
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> Even if the statutory interpretation I suggest (excluding injuries resulting from malpractice from the notice requirements of the Tort Immunity Act) is not followed, and the plaintiff here was required to provide the notice called for by Sections 8-102 and 8-103, the question arises: When was he required to give the notice?
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> . . .
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> The next question becomes, then, that of discerning whether the plaintiff filed suit, and thereby gave notice, within six months of the date his injury was received or his cause of action accrued.
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> . . .
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> Because plaintiff may not have reasonably learned of his injury until immediately prior to the time he filed his actual complaint, he may have filed suit, and so served notice, within the requisite six-month period from the time his cause of action accrued.

Id. at 489-92, 370 N.E.2d at 1103-06.