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## Challenging Postjudgment Garnishment Actions Against Insurers

***Part Two of a Two-Part Article***

**By Donald O. Johnson, Seth F. Kirby and Kristin H. Landis**

*Part One of this article discussed garnishment statutes and the potentially significant exposure to insurers created by postjudgment garnishment actions. This final installment addresses response strategies and substantive defenses.*

### Response Strategies

In recognition of the significant risks that are generated by garnishment actions, insurers should develop a protocol of response strategies to ensure that their exposure to these risks is limited. At a minimum, the response protocol should include the steps discussed below, which are presented in a chronological fashion for ease of implementation.

***Consider Removing the Action to Federal Court***

As highlighted above, one of the chief disadvantages to an insurer presented by a garnishment action is being forced to litigate coverage issues, which are often complex, before relatively inexperienced state court judges. Indeed, many times state court garnishment actions are assigned to special collections courts rather than courts with general jurisdiction. To avoid the peril associated with presenting coverage defenses to a potentially inexperienced state court judge, an insurer should always consider removing a garnishment action to federal court.

Removing a garnishment action to federal court is not an easy task. In order for any case to be removed from state to federal court it must satisfy the requirements of federal diversity jurisdiction. This means that the amount in controversy must exceed $75,000, and all plaintiffs in the suit must be diverse from all defendants. Diversity only exists if all the plaintiffs are citizens of different states than all of the defendants. In an insurance context, determining whether diversity exists always requires an examination of whether the insurance company should

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## 'Late Notice' under Liability Policies

***California Law***

**By Kirk A. Pasich**

Liability insurance policies typically contain provisions requiring that an insured notify the insurance carrier "as soon as practicable" of a claim or loss that potentially might be covered by the policy. If there is any delay in providing notice, an insurance carrier may deny coverage, or at least reserve its right to deny coverage. However, there are many situations in which a delay in notice, even if not excusable, will not result in a loss of coverage.

California courts long have held that "[a]n insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby." *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305-06, 32 Cal. Rptr. 827 (1963). The *Campbell* court so held even though the insured had failed to cooperate with its carrier. It did so because the carrier had failed to show that it was prejudiced by the insured's failure to cooperate.

California courts have reached similar conclusions with respect to other policy conditions. For example, in *Shell Oil Co. v. Winterthur Swiss Insurance Co.,* 12 Cal. App. 4th 715, 15 Cal. Rptr.

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## *Garnishment Actions*

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be considered a citizen of the state in which the plaintiff resides.

The diversity analysis is further complicated in garnishment actions because of the nature of the action. Many courts view the action as one in which the insurer stands in the shoes of the insured. Based upon this view, some courts have refused to remove cases to federal court because the insured did not have diversity of citizenship from the judgment creditor, and that lack of diversity was imputed to the insurer. *Wheelwright Trucking*, 851 So. 2d 466.

Additional problems are presented by the fact that any "suit which is merely ancillary or supplemental to another action cannot be removed from state to federal court." *Scanlin*, 426 F. Supp. 2d at 249. Many states treat garnishment actions as mere continuations of the underlying suit, which seemingly would prohibit the removal of garnishment actions in such states. Federal courts are not, however, bound by the state court's treatment of the garnishment action. A garnishment action can be a distinct "civil action" subject to removal if it presents separate issues and separate defendants not involved in the state court tort action and all other statutory requirements for diversity are met. *Id.* at 250.

In the *Scanlin* case, the federal district court for the Middle District of Pennsylvania addressed the removal issue and adopted what it described as a "flexible analysis" for determining on a case–by-case basis whether a garnishment action in state court is a "distinct civil action" for purposes of 28 U.S.C. §1441(a) and, thus, can be removed to federal court. *Scanlin*, 426 F. Supp. 2d at 250 (citing for support *Graef v. Graef*, 633 F. Supp. 450, 452 (E.D. Pa. 1986) and *Randolph v. Employers Mut. Liab. Ins. Co. of Wis.*, 260 F.2d 461 (8th Cir. 1958)). The factors that the court considered were "whether the issue sought to be resolved in the garnishment proceeding is separate from the issues presented in the prior state court action … [and] whether the true defendant in the garnishment proceeding was also a defendant in the related state action." *Id.*

The court reasoned that if the same issues or same parties were involved in the tort action and in the garnishment action, then the facts would favor precluding removal to federal court because the garnishment proceeding would appear to be "merely ancillary to, or a continuation of, the prior state case." *Id.* On the other hand, if the issues and the defendants were distinct, the facts would favor removal. The court noted that a federal court is not obligated to accept the state's characterization of whether its garnishment proceedings are distinct civil actions. *Id.* Rather, it stated that a federal court should conduct an independent federal analysis of the issue. *Id.*

Applying these factors, the *Scanlin* court held that the garnishment action at issue could be removed to federal court because the issue presented in the garnishment proceeding was separate from the issue presented in the state court tort action and the defendants in the actions were different. *Id.* at 250-51. In the garnishment proceeding, the issue presented was whether the insurer acted in bad faith when it denied a defense to the insured, whereas, in the state court tort action, the issue presented was whether the insured and a university were liable for the claimant's injuries. The defendant in the garnishment proceeding was the insurer. The defendants in the state court tort action were the

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insured and the university. By showing that the garnishment action was a distinct civil action, the insurer was able to remove the action to federal court.

If an insurer can satisfy the unique requirements that are necessary to establish federal diversity jurisdiction in a garnishment action, then it should consider filing a notice of removal as soon as possible after receiving notice of the action.

***Respond in a Timely and Appropriate Manner***

In the event that removal is not an option, it is imperative that the insurer ascertain the procedural rules of the relevant jurisdiction regarding garnishments and respond to the garnishment action in a timely and appropriate manner. The procedural rules differ from jurisdiction to jurisdiction. However, garnishment statutes typically dictate that a garnishee must respond to a garnishment action in an expedited time frame (*e.g.,* 20 days) and in a particular manner (*e.g.,* using special forms or procedures). For example, Florida law requires that garnishment petitions be answered within 20 days of service. Fla. Stat. Ann. §77.04 (West 2008). In contrast, Georgia law requires an answer no sooner than 30 days following service and no later than 45 days following service. Ga. Code Ann. §18-4-62 (West 2008).

Failure to answer a garnishment petition in a timely manner can result in a default judgment against the insurer. For example, Georgia law provides that the failure to respond to a garnishment petition in a timely manner will result in a default judgment against the garnishee for "the amount *claimed to be due* on the judgment obtained against the defendant." Ga. Code Ann. §18-4-90 (West 2008) (emphasis added). *See also* Fla. Stat. Ann. §77.081 (West 2008) (Florida law providing for a default judgment for failure to respond to a garnishment action). Thus, failure to respond to a garnishment action in a timely manner could result in a waiver of policy defenses and judgment for the claimant in excess of limits.

In general, if the insurer does not believe any money is owed under the policy, the answer to the garnishment petition should set forth the factual basis for why no obligations are owed to the judgment debtor. *See e.g., Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.,* 200 S.E.2d 309 (Ga. App. 1973) (finding that a garnishee may respond to a garnishment petition by stating that no money is owed to the judgment debtor). A careful analysis of the relevant jurisdiction's garnishment procedures is necessary to ensure that the insurer takes advantage of any protections that are afforded to a garnishee. An example of such protections is provided by Georgia's procedures. Georgia law provides that a garnishee's answer is accepted as true unless traversed (*i.e.,* denied) by the plaintiff within 15 days after notice of the answer. Ga. Code Ann. §18-4-85 (West 2008). *See also West v. West,* 402 F. Supp. 1189 (N.D. Ga 1975). Thus, in Georgia, if an insurer properly responds to a garnishment action and denies liability by setting forth the factual and/or legal basis of its denial, the burden is shifted to the judgment creditor to contest the denial. If the judgment creditor fails to contest the denial with 15 days of the answer, the insurer is entitled to have the garnishment action dismissed. If, on the other hand, the judgment creditor objects to the denial, then the insurer has successfully framed the coverage issues for the court. Either way, the insurer is somewhat rewarded for drafting a comprehensive answer to the garnishment petition.

***Challenge the Judgment Creditor's Right to Bring The Garnishment Action***

A judgment creditor's right to bring a garnishment action is dependent upon its satisfaction of the relevant statutory requirements as interpreted by that state's judiciary. The possibility that a judgment creditor has failed to meet one or more of the necessary requirements to bring that action against the insurer exists in every garnishment action. Careful attention should, therefore, be given to whether the judgment creditor qualifies to bring the garnishment action under the relevant law.

In this regard, several issues should be examined at the outset of a garnishment action. First, as discussed fully above, is there an "indebtedness due" to the insured? Second, has the creditor complied with all relevant statutory requirements? Such requirements typically include, but are not necessarily limited to, proper service to the garnishee, notice to the original defendant, and the existence of a final judgment not subject to appeal. Third, if the action seeks damages for bad faith, are such actions allowed in the relevant jurisdiction?

If the judgment creditor does not satisfy the statutory requirements to bring a garnishment action against the insurer, the insurer should be able to challenge the action by filing a motion to dismiss. The viability of such an option is supported by the court's holding in *Stumpf v. Eidemiller*, 767 P.2d 77 (Or. Ct. App. 1989). There, the court held that Oregon's rules of civil procedure applied to a garnishment answer since the relevant garnishment statute did not specify a different procedure. *Id.* at 78. Pursuant to this ruling, the court allowed an insurance company garnishee to raise a question of law at the outset of the proceeding. *Id.* at 79.

***Limit the Scope of Discovery to Coverage Only***

Even in states that allow bad faith claims to proceed in a garnishment action, an insurer may be able to restrict discovery until a final determination is made regarding coverage. Given the ability of plaintiff's attorneys to create the perception of bad faith out of any misstep that may be present in an insurer's claim file, the importance of limiting discovery to the issue of coverage at the outset of coverage litigation cannot be overstated. If at all possible, insurers should attempt to restrict discovery in the initial stages of a

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garnishment action to information related to whether the claims asserted in the underlying action are covered by the policy. Restricting discovery to the policy in question limits discovery expense and may avoid an unnecessary witch hunt into how the claim was handled.

An excellent example of the ability to limit discovery to the issue of coverage is provided by Florida law. Florida law requires that the coverage action be resolved prior to the conduct of any discovery relating solely to the bad faith claim. "For both first party and third party bad faith claims against insurers, recent case law has clarified the point that coverage and liability issues must be determined before a bad faith cause can be prosecuted. Failure to follow this procedure would, in effect, reverse the established case law that discovery of an insured's claim file is not permissible until the insurer's obligation to provide coverage has been established." *Gen. Star Indem. Co. v. Anheuser-Busch Cos., Inc.,* 741 So. 2d 1259, 1261 (Fla. 5th DCA 1999) (internal citations omitted); *see also Old Republic Nat'l Title Ins. Co. v. Home Am. Credit, Inc.,* 844 So. 2d 818, 819 (Fla. 5th DCA 2003) ("a party is not entitled to discovery of an insurer's claim file or documents relating to the insurer's business policies or practices regarding the handling of claims in an action for insurance benefits combined with a bad faith action until the insurer's obligation to provide coverage has been established"); *Allstate Ins. Co. v. Shupack,* 335 So. 2d 620, 621 (Fla. 3d DCA 1976) ("[w]e hold that until the merits of respondent's claim to benefits have been determined, it is a departure from the essential requirements of law to require a petitioner to produce its entire file and all correspondence with its attorneys relative to the claim"). *But see JMIC Life Ins. Co. v. Henry,* 922 So. 2d 998, 1001 (Fla. 5th DCA 2005) (allowing beneficiary the discovery of the insurer's claims files, claims handling practices, and business policies before coverage was established because her complaint included four other causes of action that placed those matters within the scope of discovery).

The rationale behind these rules preventing discovery and/or dismissing or abating bad faith claims until coverage is resolved is found in *Hartford Ins. Co. v. Mainstream Constr. Group,* 864 So. 2d 1270, 1272-73 (Fla. 5th DCA 2004). There the court stated:

> If there is no insurance coverage, nor any loss or injury for which the insurer is contractually obligated to indemnify, the insurer cannot have acted in bad faith in refusing to settle the claim. Similarly, if there is no coverage, then the insured would suffer no damages resulting from its insurer's unfair settlement practices. In addition, the carrier would clearly be prejudiced by having to litigate either a bad faith claim or an unfair settlement practices claim in tandem with a coverage claim because the evidence used to prove either bad faith or unfair practices could well jaundice the jury's view of the coverage issue. Finally, as an insured is not entitled to discover an insurer's claim file or documents relating to the insurer's business policies or claims practices until coverage has been determined, it is inappropriate to run the bad faith and unfair settlement practices claims conjoined with coverage issues.

*Id.*; *see also One Beacon Ins. Co. v. Delta Fire Sprinklers, Inc.*, 898 So. 2d 113, 115 (Fla. 5th DCA 2005) (holding that trial court improperly allowed plaintiff to proceed with a bad faith claim before coverage was determined).

### SUBSTANTIVE DEFENSES

Naturally, not all garnishments will be defeated on procedural grounds. More likely than not, the insurer will be forced to defend its coverage position in the garnishment action and establish to the court, or in some cases to a jury, that no coverage is afforded to the defendant for the damages awarded to the judgment creditor. In such circumstances, the insurer is entitled to defend against the claim by asserting any defense that it may have under the policy or at law. Provided below is a brief overview of several different types of defenses that have been successfully asserted by insurers.

#### ***Proof of Judgment***

On a basic level, an insurer always should recognize that the right of a judgment creditor to recover against the garnishee depends upon the subsisting rights between the garnishee and the judgment debtor. *Peninsula Ins. Co. v. Houser*, 238 A.2d 95 (Md. 1968). In other words, for the judgment creditor to recover from the garnishee, the garnishee must owe a debt to the judgment debtor. *Id.* at 97-98. Moreover, the judgment creditor must prove that it is entitled to payment from the judgment debtor. *Id.* at 100. The claimant, therefore, must provide proof of entry of judgment in the underlying case as a condition precedent to recovering from the garnishee. *Id.* Failure to do so will result in a judgment for the garnishee. *Id.*

#### ***Coverage Defenses***

The following policy-based coverage defenses have been successfully asserted in garnishment actions. Their applicability should be considered in any garnishment action filed. More importantly, these cases establish that all policy defenses can be asserted in response to a garnishment action.

**Insuring Agreement Provides No Coverage.** It is obvious, but given its importance it bears stating, that a judgment creditor is not entitled to payment from an insurer if the insuring agreement does not provide coverage for the claims asserted or the damages awarded in the underlying suit. Such a finding was made by the court in *S. Cent. Kansas Health Ins. Group v. Harden & Co. Ins. Serv., Inc.,* 278 Kan. 347 (2004). There, after analyzing the terms and conditions of the allegedly relevant policy in the underling litigation, the court found that the insurer had no duty to defend

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against the allegation of the underlying suit and owed nothing to the insured or creditor in the absence of coverage. *Id.* at 354. Many other cases support this basic proposition. Without coverage, the insurer has no obligation to pay a judgment creditor.

**Coverage Exclusion Applies.** Insurers have successfully defended against garnishment actions by establishing that the underlying claims fall within one or more of the applicable policy's exclusions. Examples of successful exclusion defenses include the cases that follow.

In *Medd v. Fonder,* 543 N.W.2d 483 (N.D. 1996), the insurer successfully defended against a garnishment by establishing that the policy specifically excluded coverage for intentional acts and injuries to co-employees. In *Dyas v. Morris,* 235 N.W.2d 636 (Neb. 1975), the insurer avoided liability by establishing that the relevant automobile garage insurance policy excluded coverage for purchasers of automobiles. Similarly, in *Kepner v. W. Fire Ins. Co.,* 109 Ariz. 329 (1973), the insurer established that the defendants' home insurance policy contained an exclusion for any liability caused by business activities conducted within the home. The applicability of this exclusion prevented the insurer from having any liability to the judgment creditor in the garnishment action.

These cases serve as just a few examples of how an insurer can use an applicable exclusion to avoid liability in a garnishment action. In this regard, when forced to defend its coverage position in a garnishment action, the insurer should treat the action as if it were a breach of contract action brought by the insured seeking breach of contract damages. Any substantive defense that could be presented in the breach of contract action can also be presented in the garnishment action.

**Breach of a Material Policy Condition.** Continuing in the analysis of defenses that could be asserted in a garnishment action, there are occasions where the conduct of the insured waives his right to coverage under the policy. Such defenses are more difficult to assert than basic policy defenses because it requires the insurer to present facts to the court regarding the relationship between the underlying defendant and the insurer. The presentation of such a defense will also likely expand the scope of discovery to the relationship between the insurer and the insured and, at times, may open discovery to the relationship between the insured and his defense counsel. Given the potential problems that expansive discovery can create, careful consideration should be given to whether a defense based on the conduct of the insured should be raised. Nevertheless, if such a defense is applicable, it can be successfully asserted in a garnishment action.

The insured's failure to provide timely notice of a suit can be asserted as a valid defense in a garnishment action. For instance, in *Hardware Mut. Cas. Co. v. Scott,* 158 S.E.2d 275 (Ga. Ct. App. 1967), the court held that an insurer was not liable to a judgment creditor where the evidence showed that the insured had not complied with the terms of policy requiring that it immediately forward to the company every demand, notice, summons, or other process received.

The insured's failure to cooperate in the defense of a claim has also been recognized as a valid defense in a garnishment action. Specifically, in *DeRosa v. Aetna Ins. Co.,* 346 F.2d 245 (7th Cir. 1965), the relevant insurance policy required the insured to cooperate in the litigation of any suit. *Id.* at 246. There, the court found that the insured's lack of cooperation in the underlying suit breached the cooperation condition of the policy and precluded the judgment creditor from recovering from the insurer by way of garnishment. *Id.* at 247.

Misrepresentation or concealment of facts in the course of a policy application can also preclude recovery in a garnishment action. Such a defense was recently successfully asserted by an insurer in *Am. Special Risk Mgmt. Corp. v. Cahow,* Case No. 06-95942-A (Kan. Ct. App. argued Apr. 11, 2007). There, the insurer argued that the relevant D&O policy did not provide coverage because the judgment debtor allegedly knew about the claim at issue before it applied for the policy.

### *Consent Judgment Is the Product of Collusion, Fraud, Or Bad Faith*

As discussed in Part One of this article, *Coblentz* agreements can be enforced in a garnishment action. In order for such agreements to be enforceable against an insurer, the settlement or stipulated judgment must have been obtained without fraud or collusion. *Coblentz,* 416 F.2d at 1059. If the resulting judgment was obtained in good faith, and the insurer had proper notice of the action, then an insurer can be held liable for the judgment if coverage under the policy otherwise exists. *Id.* Specifically, the *Coblentz* court observed that "[i]t is a well-settled principle that where a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit against the person to whom he is liable over, and full opportunity is afforded him to defend the action, the judgment, *if obtained without fraud or collusion,* will be conclusive against him, whether he appeared or not." *Id.* at 1063 (emphasis added).

Whether a settlement has been tainted by collusion or fraud is, however, an affirmative defense that can, and if applicable should, be raised by an insurer in a garnishment action. *See Wheelwright Trucking,* 851 So.2d at 478-49 (Ala. 2002) (allowing, but ultimately rejecting, the insurer's argument that the underlying consent judgment was collusive). If the insurer is able to establish that the underlying settlement was obtained by collusion or fraud, then it will be relieved of any obligation it may have to pay damages to the judgment creditor.

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***Payment Obligation Limited to Reimbursement of the Insured***

An insurer that has issued an indemnity policy is liable only for reimbursing the insured or the insured's successor-in-interest for sums that the insured has paid to the injured party. The well-established difference between an indemnity policy and a liability policy is that, "[under an indemnity policy,] the insurance company does not become liable until the insured has suffered a loss, whereas [under a liability policy,] the obligation of the insurance company becomes fixed when the liability attaches to the insured." *Ronnau v. Caranvan Int'l Corp.,* 468 P.2d 118, 123 (Kan. 1970) (*"Ronnau"*). Under an indemnity policy, if the insured has not suffered a loss, the insurer will not be subject to a garnishment action by a judgment creditor because the insurer's obligation to pay will not have been triggered. *Id.* (stating that "[u]ntil the assured had met with a loss, there was no occasion [for the insurer] to pay indemnity; no reason to reimburse, until something had been paid by the assured").

An example of an insuring agreement that provides indemnity coverage (in a fidelity bond) follows:

> [The Company will indemnify the Insured against] any loss of money or other property, belonging to the Insured, or in which the Insured has a pecuniary interest, or for which the Insured is legally liable, or held by the Insured in any capacity whether the Insured is legally liable therefor or not, through any fraudulent or dishonest act or acts committed by any of the Employees … acting alone or in collusion with others … which the Insured shall sustain and discover as provided in Section …
>
> *Id.* at 120.

In contrast, an example of an insuring agreement that provides liability coverage is the following:

> [W]e will pay damages the insured becomes legally obligated to pay by reason of liability imposed by law or assumed under an insured contract for …
>
> Chubb Liability Insurance Form 17-02-3080 (Ed. 4-95).

In *Fireman's Fund Ins. Co. v. Puget Sound Escrow Closers, Inc.,* 979 P.2d 872, 875 (Wash. Ct. App. 1999) (*"Puget Sound"*), the court considered whether an escrow company "suffered a 'loss' under its fidelity bond that created a (potentially garnishable) debt due to Puget Sound Escrow." The fidelity bond at issue in *Puget Sound* did not define the term "loss." The Washington Supreme Court, however, had declared that a "loss" under a fidelity bond occurs when an employee of the insured escrow company embezzles funds by diverting them from an escrow account to a general operating account. *Id.* at 876 (citing *Estate of Jordan v. Hartford Acc. & Indem. Co.,* 844 P.2d 403 (Wash. 1993)).

The judgment creditors in *Puget Sound* had obtained a default judgment against an escrow company for damages resulting from an inadequately secured loan that the judgment creditors had made to a subsidiary of the escrow company. The escrow company's errors and omissions insurer filed a declaratory judgment action, seeking a ruling that it had no duty to defend or indemnify the escrow company in connection with the action that the judgment creditors had brought against the escrow company. The judgment creditor served a writ of garnishment on the escrow company's fidelity bond insurer. The escrow company later joined its fidelity bond insurer in the declaratory judgment action as a third-party defendant. The trial court, however, summarily dismissed the fidelity insurer from the suit.

The judgment creditors appealed the dismissal, arguing that it had a statutory right to garnish the proceeds from the escrow company's fidelity bond. The court of appeals affirmed the dismissal on the ground that the escrow company had not suffered a loss. The court observed that the judgment creditors did not allege that the escrow company's employees misappropriated funds from the escrow company; rather, they alleged that the employees had fraudulently obtained the loan money from the judgment creditors for the employees' benefit. The court concluded that although the escrow company might be legally liable for its employees' fraudulent acts under the default judgment, the escrow company had not suffered a loss for which it could be indemnified under the fidelity bond:

> To support a writ of garnishment, the garnishee must be indebted to the principal debtor. If the policy is a liability policy, then such indebtedness exists as soon as liability is established, and may be reached by garnishment as any other credit belonging to the judgment debtor. If, on the other hand, the policy be one of indemnity, the judgment debtor must first pay the judgment before he is entitled to maintain an action on the policy, and there is no indebtedness due him until he has paid the judgment; consequently garnishment cannot lie in favor of a judgment creditor, since his claim must be satisfied before there is anything due on the policy. *Id.* at 877.

Thus, insurers that have issued indemnity policies should consider whether the facts of the case allow them to raise the defense that their liability is limited to reimbursing the amount that the insured has paid in connection with a covered claim.

***Garnished Amount Limited to Insured's Legal Obligation to Pay***

Insurers that have issued liability policies can also raise the defense that liability to a judgment creditor in a garnishment action is limited to the amount that the insured is obligated to pay as damages. Because of the variance in the garnishment laws of the various states, this defense may not be available in some states.

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An insurer successfully used this defense in a case decided under Alabama law. *See St. Paul Fire & Marine Ins. Co. v. Nowlin*, 542 So. 2d 1190 (Ala. 1988). In that wrongful death case, the administrator of the estate of the deceased obtained a $500,000 judgment against a municipal hospital board. The hospital board had a liability policy with policy limits of, at least, $500,000. The insuring agreement of the board's liability policy stated that the insurer would pay the board "all sums which the insured shall become legally obligated to pay as damages" for covered bodily injuries. The hospital board, however, was covered by a state statute that limited its tort liability to $100,000 for the death of one person in an occurrence. Consequently, the insurer paid the judgment creditor $100,000.

Later the judgment creditor obtained a writ of garnishment against the insurer in an effort to collect the remaining $400,000 of the judgment plus interest. The trial court ordered the insurer to pay that amount. The Supreme Court of Alabama disagreed, reasoning that the board could not be indebted for more than it was statutorily obligated to pay. *Id.* at 1194. The court stated that Alabama law is clear that a judgment creditor's statutory right to satisfy a judgment against a judgment debtor's insurer is limited to the rights of the insured against its insurer. *Id.* The court concluded that "[b]ecause the Board is not 'legally obligated to pay' [the judgment creditor] more than $100,000 under [the state statute], [the insurer] is not obligated under its contract with the Board to pay the 400,000 as ordered by the trial court." *Id.*

***Policy Exhaustion***

Another garnishment action defense that insurers may invoke is exhaustion of the policy limits. If an insurer has paid out the total policy limits, the insurer is no longer indebted to the insured and there are no policy proceeds that a judgment creditor can garnish. This defense is illustrated in *Hattaway v. McMillian,* 859 F. Supp. 560 (N.D. Fla. 1994) (*"Hattaway"*).

In that case, a judgment creditor had obtained an $843,603 judgment against the county sheriff in his official capacity. The state's sovereign immunity waiver statute waived the sheriff's liability up to $100,000. Florida county sheriffs had set up a self-insurance pool to cover liability up to that amount. The terms of the self-insurance pool coverage provided that the $100,000 limit of liability would be reduced by loss adjustment expenses and defense costs.

In addition to the self-insurance pool that they maintained, the county sheriffs purchased $1 million in excess liability insurance. Florida courts have interpreted a state agency's purchase of excess coverage as a further waiver of sovereign immunity up to the statutory limit of liability and the limits of any excess policies, which in this case totaled $1,100,000.

The judgment creditor settled with the excess insurers for $700,000 and then sought to collect $100,000 from the county sheriff's self-insurance pool in a garnishment action. The court rejected the judgment creditor's effort to collect this sum on the ground that the self-insurance pool had paid out more than $100,000 in attorneys' fees and costs to defend the tort claim against the sheriff, and, therefore, the limits of the self-insurance pool had been exhausted:

> This means that the Sheriffs' Fund's contractual liability to the Sheriff with respect to Hattaway's claim has been exhausted. Since there is no debt due the Sheriff by the Sheriffs' Fund, Hattaway — who, as judgment creditor, stands in the shoes of the Sheriff — is not entitled to a writ of garnishment against the Sheriffs' Fund. Simply put, there is no debt to be garnished.

*Id.* at 564; *see also Booker T. Washington Burial Ins. Co. v. Roberts,* 153 So. 409 (Ala. 1934) (ruling that the insurer had no liability to garnishees if the insurer exhausted the funds paying expected bona fide claims).

***Release of Liability***

An insurer also may raise a release of liability defense to a garnishment action. In the *Hattaway* case, which is discussed in the preceding section, the judgment creditor had an $843,603 judgment against a judgment debtor who had $100,000 in primary insurance and $1 million in excess insurance. Before learning that the $100,000 in primary insurance had been exhausted by the payment of attorneys' fees and costs in the defense of the insured, the judgment creditor settled with the excess insurers for $700,000 and released the excess insurers from further liability. The release prevented the judgment creditor from recovering any additional proceeds from the excess insurers after the judgment creditor learned that the $100,000 in primary insurance had been exhausted.

In this regard, the court stated:

> If the excess carriers were released by [the judgment creditor], she can no longer look to them for payment of whatever portion of the judgment they might otherwise remain liable for in light of the [primary policy exhaustion] argument the [insured] and the [insured's self-insurer] now makes. *Hattaway,* 859 F. Supp. at 564.

***Premiums Not Subject to Garnishment***

If the judgment creditor attempts to garnish the premiums that the insured paid to the insurer, an insurer may be able to assert the defense that premiums are not subject to garnishment. A Georgia court of appeals ruled that "[a] paid premium is all earned when the policy issues and the risk attaches." *Pinkerton & Laws Co. v. Ins. Co. of N. Am.,* 172 S.E.2d 465, 466 (Ga. Ct. App. 1970). Accordingly, the court held that a premium paid in advance is not an asset that can be reached through the service of a summons of garnishment. *Id.*

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## Garnishment Actions

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***Non-Liquidated Damages***

As noted previously, some states do not permit bad faith claims to be brought in garnishment actions if the amount of the damages is not liquidated. Liquidated damages are damages established as a sum certain. Unliquidated damages are damages the amount of which is not presently known.

Under Illinois law, for example, "[t]o be subject to garnishment, the indebtedness sought to be garnished must be a liquidated sum due without contingency." *Chandler,* 731 N.E.2d at 1010. In *Chandler,* the court declared:

> Claims for a liquidated amount of damage such as [the judgment creditors'] claim for the amount up to [the insurer's] policy limits found to be due [the judgment creditors] in their original suit against [the insured] are properly the subject of a garnishment proceeding. Claims beyond the policy limits for an unknown amount of damages for [the insurer's] bad faith in failing to defend [the insured] in the original personal injury suit are not.

*Id.* (citing *Stevenson v. Samkow,* 491 N.E.2d 1318, 1320-21 (Ill. App. Ct. 1986) and *Powell v. Prudence Mut. Cas. Co.,* 232 N.E.2d 155, 158-59 (Ill. App. Ct. 1967)).

Not all states take this position. In *Moses v. Halstead,* 477 F. Supp. 2d 1119, 1122 (D. Kan. 2007), a federal district court applying Kansas law concluded that "Kansas courts have gone a step farther and have held that a judgment creditor may proceed by garnishment against a tortfeasor's insurer for the unpaid balance of the judgment which is in excess of the policy limits where the insurer refused to settle within policy limits. … [S]uch claim sounds in contract and is subject to garnishment even though unliquidated."

The obvious lessons here are that in cases governed by Illinois or similar law in other states, insurers should raise the unliquidated damages defense when judgment creditors bring bad faith claims in garnishment proceedings and that in Kansas and states with similar laws, insurers should be aware that judgment creditors appear to have expanded rights.

***Lack of Assignment to Judgment Creditor***

Another defense that insurers may make successfully to bad faith claims made in garnishment actions under some states' laws is the lack of an assignment to the judgment creditor of the judgment debtor's rights under the policy. *See, e.g., Metro. Prop. & Cas. Ins. Co., v. Crump,* 513 S.E.2d 33, 34 (Ga. Ct. App. 1999) (*"Crump"*); *Hoar v. Aetna Cas. & Sur. Co.,* 968 P.2d 1219, 1223-24 (Okla. 1998) (*"Hoar"*). The rationale for this defense is that without an assignment of the judgment debtor's rights against its insurer, the judgment creditor does not have a legal relationship with the judgment debtor's insurer that gives the judgment creditor standing to bring a bad faith claim against the insurer.

In *Crump,* the court "consider[ed] whether an individual who has recovered a judgment against a tortfeasor may garnish the tortfeasor's unasserted and unassigned claim against his own insurance company for failure to settle within policy limits." *Crump,* 513 S.E.2d at 33. The court held that the judgment creditor could not garnish the judgment debtor's unassigned claim against its insurer for bad faith failure to settle within the policy limits. The *Crump* court reasoned that although Georgia courts had held that an insurer's duty to use good faith in handling its insured's claim allowed an insured to make a claim against his insurer for negligence, fraud, or bad faith in failing to compromise a covered claim, it did not follow that a judgment creditor possessed the same right. *Id.* at 34. The court concluded that absent an assignment, a judgment creditor has no such right because "there is no fiduciary relationship or privity of contract existing between the insurer and a person injured by one of its policyholders." *Id.*; *see also Hoar*, 968 P.2d at 1224 (holding that "absent a statutory or contractual relationship an injured party may not maintain a bad faith action against a public liability insurer").

**CONCLUSION**

Although plaintiff's attorneys are increasingly using postjudgment garnishment actions against insurers in an effort to lessen their burden of proof when seeking to satisfy judgments obtained against insured tortfeasors, insurers have numerous defenses that they can assert against judgment creditors. Therefore, before agreeing to a judgment creditor's demands, insurers should examine thoroughly: 1) the facts and circumstances in the underlying case in which the claimant obtained a judgment against the insured; 2) the terms and conditions of the policy at issue to determine whether the policy required the insurer to defend or indemnify the insured; 3) the insured's actions with regard to whether it breached any material terms and conditions of its insurance contract; 4) the judgment that the claimant seeks to enforce; 5) any additional limitations on the insurer's obligation to pay the judgment; and 6) any procedural steps that the insurer can take to strengthen its position vis-à-vis the claimant, such as filing a pre-emptory declaratory judgment action seeking a "no coverage" ruling before the judgment creditor files a garnishment action against the insurer.

Given that garnishments are governed by statute, insurers also must thoroughly analyze the statutes at issue to determine whether the claimant has complied with all statutory perquisites to enforcing a judgment. This often will require obtaining specialized advice.

## *Late Notice*

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2d 815 (1993), the court of appeal recognized that "California law is settled that a defense based on an insured's failure to give timely notice requires the insurer to prove that it suffered substantial prejudice." *Id.* at 760. *See Clemmer v. Hartford Ins. Co.,* 22 Cal. 3d 865, 881-83, 151 Cal. Rptr. 285 (1978) (same). No matter what breach the insured allegedly has committed, prejudice will not be presumed. *See Campbell,* 60 Cal. 2d at 307 ("a judicially created presumption of prejudice, whether conclusive or rebuttable, is unwarranted"); *Moe v. Transamerica Title Ins. Co.,* 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547 (1971) (prejudice is not presumed from the fact of untimely notice). Instead, the insurance carrier has the burden of proving that a breach of a condition in the policy actually and substantially prejudiced it. *Campbell,* 60 Cal. 2d at 306; *Shell,* 12 Cal. App. 4th at 760. "The insurer must show actual prejudice, not the mere possibility of prejudice." *Id.* at 761. *See Billington v. Interins. Exch.*, 71 Cal. 2d 728, 737, 79 Cal. Rptr. 326 (1969) (same). As the California Supreme Court has explained, "prejudice is not shown simply by displaying end results; the probability that such results could or would have been avoided absent the claimed default or error must also be explored." *Clemmer,* 22 Cal. 3d at 883 n.12. *See also Insurance Co. of the State of Pa. v. Associated Internat'l Ins. Co.,* 922 F.2d 516, 523 (9th Cir. 1991) (The purpose of a condition in an insurance policy is "not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid.").

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### Rejected 'Prejudice' Arguments

California courts have rejected a number of arguments raised by carriers to establish prejudice. For example, in *Campbell,* the California Supreme Court ruled that testimony by an insurance carrier's claim manager that a report by the insured is required to guard against false claims, to verify that there has been an accident, and to determine liability was an insufficient showing of prejudice when the carrier had a sufficient opportunity to verify that there had been an accident, the insured was negligent, and the carrier would have been liable on its policy even if its insured had cooperated with it. 60 Cal. 2d at 306.

The court of appeal reached a similar conclusion in *Northwestern Title Security Co. v. Flack,* 6 Cal. App. 3d 134, 85 Cal. Rptr. 693 (1970). There, the carrier contended that a delay in notice cost it the opportunity to settle the claim against the insured for a small sum early in the proceedings. The court rejected this argument, noting that "prejudice does not arise merely because a delayed or late notice has denied the insurance company the ability to contemporaneously investigate the claim or interview witnesses," *Id.* at 142-43, or because the carrier has been denied "the opportunity to make an early settlement of the claim." It ruled that the carrier had to prove that:

> but for the delay in making a prompt investigation and in hiring [its] own attorney at the early stages, there was a substantial likelihood that [it] could have prevailed in a negligence action brought against [its] assured or that [it] could have settled the case for a small sum or a smaller sum than that for which [the] insured ultimately settled the claim. *Id.*

The *Shell* court rejected another argument made by carriers to establish prejudice. In *Shell*, the insured was seeking coverage for environmental cleanup costs. The carriers argued that the insured had delayed in notice and that the carriers had proven substantial actual prejudice by showing that the cleanup costs increased dramatically over a 10-year period. They also asserted that the passage of time made defending against the claims more difficult, and that the insured had denied them the right to investigate and had deprived them of the right to defend or settle the claims. By way of example, the carriers provided a list of 18 persons who they could not interview because they were now dead or unavailable. The carriers also noted that the cleanup costs had escalated drastically over the years before they were notified. The court of appeal rejected these arguments, finding that "the record does not support an inference that earlier notice would have changed anything." 12 Cal. App. 4th at 762. It stated:

> In order to demonstrate actual, substantial prejudice from lack of timely notice, an insurer must show it lost something that would have changed the handling of the underlying claim. If the insurer asserts that the underlying claim is not a covered occurrence or is excluded from basic coverage, then earlier notice would only result in earlier denial of coverage. To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability. 12 Cal. App. 4th at 763.

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The court also held that when "an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with." *Id.* at 762. In other words, the court specifically concluded that because the carriers had denied coverage on grounds in addition to breach of the notice condition, there could not have been any prejudice. Simply put, earlier notice would have resulted in nothing but an earlier denial.

Indeed, as another court of appeal has explained:

> [A]n insurer is not allowed to rely on an insured's failure to perform a condition of a policy when the insurer has denied coverage because the insurer has, by denying coverage, demonstrated performance of the condition would not have altered its response to the claim.
> *Select Ins. Co. v. Superior Court*, 226 Cal. App. 3d 631, 637, 276 Cal. Rptr. 598 (1990).

### Carriers Argue Inapplicability Of 'Notice-Prejudice' Rule

Notwithstanding the above principles, insurance carriers often argue that the notice-prejudice rule is not applicable to all types of liability policies. For example, carriers typically claim that the rule does not apply to "claims made" or "claims made and reported" policies. A "claims made" policy typically is a policy in which coverage depends not on when an underlying event took place, but rather on whether a claim was made within that policy period. Under such a policy, coverage is triggered when a claim is made during the policy period. A "claims made and reported" policy adds an additional requirement to trigger coverage — a requirement that the claim not only be made against the insured during the policy period, but also that the claim be reported to the carrier within the policy period or a specified time thereafter.

Many courts have held that the notice-prejudice rule does not apply to the "claims reported" provision of a "claims made and reported" policy. As one court explained, under a "claims made and reported" policy, the policy:

> unambiguously provides [the insured's] ability to report claims … would terminate at the end of the … period. The extension clause gave [the insured] [a specific period within which] to report claims …, a benefit for which [the carrier] received a specific "end date" of coverage in exchange.

*Industrial Indem. v. Superior Court*, 224 Cal. App. 3d 828, 831, 275 Cal. Rptr. 218 (1990). *See also Diluglio v. New England Ins. Co.*, 959 F.2d 355, 359 (1st Cir. 1992) ("Since the reporting period prescribed in a 'claims-made' insurance policy defines the scope of coverage …, [we] conclude that prejudice may be presumed where notice is not provided within the policy period … ").

However, the claims reporting requirement should be distinguished from the notice requirement also typically found in "claims made and reported" policies. Most "claims made and reported" policies have a separate condition that the insured provide "notice as soon as practicable" after a claim is made. In other words, as noted above, "claims made and reported" policies have two requirements applicable to notice — a condition that requires that notice be given as soon as practicable after a claim is made, and the reporting requirement, which requires that the claim be reported to the carrier before the policy or reporting period expires. It is this latter requirement that courts have strictly enforced. Indeed, the Ninth Circuit has emphasized the importance of distinguishing between a "claims made" notice condition and a "claims made and reported" reporting requirement:

> It is reasonable to conclude that a claims-made-and-reported policy differs from a general claims-made policy containing no requirement that the claim be reported within the policy period. We hold that this is a reasonable interpretation of California law. The reporting requirement serves two different purposes in the two policies. The notice provision on a general claims made policy, as in an occurrence policy, often requires notice "as soon as practicable." This serves to "facilitate the timely investigation of claims by bringing an event to the attention of the insurer and allows an inquiry 'before the scent of factual investigation grows cold.'" In contrast, in a claims-made-and-reported policy, notice is the event that actually triggers coverage. *Pension Trust Fund for Operating Engineers v. Federal Ins. Co.,* 307 F.3d 944, 956-57 (9th Cir. 2002).

Based on this distinction, the Ninth Circuit concluded that the notice-prejudice rule would apply to the notice provision of a "claims made" policy. *Id.*

The Ninth Circuit's holding is in accord with established California precedent. One of the leading California cases is *Northwestern Title Security Co. v. Flack,* 6 Cal. App. 3d 134 (1970). In *Northwestern*, the insured delayed approximately one year in notifying the carrier of a claim and more than four months in notifying the carrier of the filing of a lawsuit against it. The carrier contended that notice under its claims-made policy was barred because of the insured's delay in giving notice. The court of appeal rejected this argument, citing to the California Supreme Court's decision in *Campbell*:

> Campbell stands for these propositions: (1) that breach by an insured of a cooperation or notice clause may not be asserted by an insurer unless the insurer was substantially prejudiced thereby; (2) that prejudice is not presumed as a matter of law from such breach; [and] (3) that the burden of proving

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# CASE BRIEFS

By Frank J. DeAngelis

## Suit Limitation Period Enforceable Even If Absent From Insured's Policy

Insurers routinely include suit limitation provisions, limiting the time to file lawsuits over coverage determinations, in their insurance policies. The recent decision in *Matos v. Farmers Mut. Fire Ins. Co.,* 399 N.J.Super. 219, 943 A.2d 917 (App. Div. 2008), clarified that an insurer can rely on a suit limitation provision even if the clause is absent from the policy provided to the insured, as long as the insured was given sufficient notice of the limitation period after the loss.

In the *Matos* matter, the plaintiffs suffered water damage to the patio at their summer home in Toms River, NJ. After completing its investigation, the insurer declined to cover the bulk of the plaintiffs' claim as the loss resulted from normal wear and tear, a peril excluded by the policy, rather than a leaking pipe.

Plaintiffs reported the claim contemporaneous with the loss. The insurer issued its declination letter on May 6, 2005. In the declination letter, the insurer's adjuster advised that if the plaintiffs wanted to pursue litigation against the insurer, any suit would have to be filed within 12 months of the date of the declination letter.

After the declination letter was issued, plaintiffs' counsel asked that the adjuster provide him with an appeal request form, and on July 1, 2005 the insurer sent the appeal form. The letter enclosing the appeal form contained a disclaimer that stated "your request for appeal does not waive any of the terms, provisions or conditions under the policy, including but not limited to the time limit for filing suit in this matter."

On July 8, 2005, plaintiffs' counsel sent a letter to the adjuster advising that plaintiffs intended to file an appeal and that plaintiffs were in the process of obtaining their own engineering expert's report. Neither a completed appeal form nor an engineering expert's report was provided to the insurer. Not hearing from plaintiffs, the insurer closed its file on Oct. 1, 2005.

***[P]laintiffs knew or should have known that their policy contained a 12-month suit limitation period and that the limitation period began to run from the date of the declination letter.***

On Oct. 4, 2006, the plaintiffs filed suit against the insurer for the improper declination of its claim. The insurer moved to dismiss the complaint based on the 12-month suit limitation provision in the policy. Plaintiffs opposed the motion by noting that the endorsement containing the suit limitation provision was not included with the copy of the insurance policy issued to plaintiffs.

The trial court granted the insurer's motion and held that even though the suit limitation provision was not contained in plaintiffs' copy of the policy, plaintiffs were made aware of the suit limitation provision in post-loss correspondence from the insurer's adjuster.

Plaintiffs, relying on *Fredericks v. Farmers Reliance Ins. Co. of NJ,* 80 N.J.Super. 599, 194 A.2d 497 (App. Div. 1963) and *Nieder v. Royal Indem. Co.,* 62 N.J. 229, 300 A.2d 142 (1973), argued that because the insurer did not provide the endorsement containing the suit limitation provision to the plaintiffs prior to the loss, the suit limitation provision was unenforceable. In both *Fredericks and Nieder*, the court held that because the insurer withheld information regarding the suit limitation period from the insureds, the limitation period was unenforceable.

However, as the Appellate Division noted, both the *Fredericks* and *Nieder* courts held that the suit limitation period would have been enforceable "if the insured should have known of the limitation period provided in the policy." These decisions reinforce that, under New Jersey law, an insured may be notified of the suit limitation period by means other than the receipt of the endorsement in the policy containing the suit limitation provision.

In *Matos*, the Appellate Division held that based on the letters from the insurer's adjuster to plaintiffs and plaintiffs' counsel, plaintiffs knew or should have known that their policy contained a 12-month suit limitation period and that the limitation period began to run from the date of the declination letter.

The Appellate Division also rejected plaintiffs' argument that the suit limitation period was tolled by plaintiffs' counsel's July 8, 2005 letter advising their insurer that they were going to appeal the declination decision. The New Jersey Supreme Court held in *Peloso v. Hartford Fire Ins. Co.,* 56 N.J. 514, 267 A.2d 498 (1970), that a suit limitation period is tolled from the date the loss is reported until the declination letter is issued. In rejecting plaintiffs' argument, the Appellate Division noted that the July 1, 2005

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> prejudicial breach is on the insurer …

6 Cal. App. 3d at 141.

The court noted that the insurance carrier's burden of establishing substantial prejudice "is not carried by a showing of possibility of prejudice to the insurer. Rather, actual prejudice must be shown." *Id.* The court then stated:

> [The carrier] makes the policy argument that we should enunciate a strict rule of construction as regards the fulfillment of conditions precedent to indemnity found in claims-type policies. He argues that the cases which hold that an insurer may assert defenses based upon a breach by the insured of a policy condition only where the insurer was substantially prejudiced thereby, have been enunciated in "occurrence-type" policies where the obligation of the insurer is fixed in time by reference to the happening of an occurrence occasioning loss, such as an automobile accident … In considering this argument we observe that, notwithstanding the generic differences between the two types of policies, there is not indication in *Campbell* or the other cases … that a different rule can apply in "claims-type" policies. The cases make it clear that the subject rule applies to all cases in which the insurer asserts a defense based upon a breach by the insured of a cooperation or notice clause. *Id.* at 143-44.

**Claims Made Near the End Of the Reporting Period**

Furthermore, courts have not strictly enforced claims reporting requirements, at least with respect to claims made near the end of the reporting period. For example, in *Root v. American Equity Specialty Insurance Co.*, 130 Cal. App. 4th 926, 30 Cal. Rptr. 3d 631 (2005), the court addressed a malpractice policy that covered claims first made against the insured and reported in writing to the company while the policy is in force. The insured was named in a lawsuit just days before the policy expired and reported the suit after the policy expiration when he read that it had been filed. The court noted that the case involves "one of the worst nightmares faced by most every attorney, doctor, accountant or other professional covered by a malpractice insurance policy: the possibility of no malpractice coverage under a 'claims made and reported' policy where a claim is made very late in the policy period and the insured learns of the claim under highly ambiguous circumstances, so the claim is not reported until there is confirmation of that claim, which is shortly after the policy has expired." *Id.* at 929.

***[T]he case involves "one of the worst nightmares faced by most every attorney, doctor, accountant or other professional covered by a malpractice insurance policy …"***

The court then observed that "[t]he definition of 'claim' in the policy is ambiguously open-ended. The policy doesn't say that the mere filing of a suit is not a claim. It merely says that a claim is a demand for money … [T]here could be a situation in which an insured might have two 'claims' against him or her based on just one malpractice suit." *Id.* at 933. The court concluded that "the insured could be whipsawed … into having no coverage under policies on either side of a policy period expiration divide. Ambiguities in insurance contracts aren't supposed to work that way." *Id.* at 933-34.

**Conclusion**

The notice-prejudice rule should apply, as a minimum, to notice requirements in liability policies, even if they are claims made policies. As for the reporting requirements in claims made and reported policies, an insured should seek to comply with reporting requirements, but, depending upon the circumstances, still may be entitled to coverage even if there is a delay in reporting.

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letter from the insurer's adjuster enclosing the appeal form specifically advised plaintiffs that the insurer did not waive any terms and conditions under the policy "including but not limited to the time limit for filing suit in this matter." Further, plaintiffs never submitted the appeal form or an engineering report challenging the insurer's findings. Consequently, the suit limitation period was not tolled, and had expired by the time plaintiffs filed the within suit.

In a state that requires an insurer to prove appreciable prejudice to rely on a late notice or a failure to cooperate defense, New Jersey courts have consistently upheld and strictly enforced suit limitation provisions, without the requirement of a showing of prejudice to the insurer. The *Matos* decision reaffirms that as long as notice of the suit limitation provision is provided to the insured, the limitation period will be upheld, even if the endorsement containing the suit limitation provision is absent from the insurance policy provided to the insured.

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