

# Property Insurance Suit Limitations Provisions: Pitfalls for the Unwary

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**In the current economic climate, insurers seem to be adjusting claims more slowly and taking a much harder and longer look at every claim and every element of every claim. They seem to be more aggressive in asserting that exclusions and limitations apply to reduce or even preclude coverage.**

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Policyholders must respond aggressively, and one way to combat insurer delay is to submit claims and supporting documentation as early as possible. In addition, when insurance companies raise coverage issues, as opposed to issues relating solely to the amount of loss, policyholders should seriously consider retaining counsel experienced in property insurance at a much earlier date so that coverage issues can be addressed more quickly and insurance company delay reduced.

One important consequence of a longer adjustment process is the need to pay close attention to the policy's suit limitations provision. In most jurisdictions, property insurers are allowed to insert into the policy contractual provisions significantly limiting the time within which policyholders may file suit on a claim. While each jurisdiction is different, many states permit a contractual suit limitations provision which requires a policyholder to file suit in as little as 1 year from the date of loss or lose coverage entirely. Policies have provisions ranging from 1 to 3 years, compared to statutes of limitations of 4, 6, or even 10 years within which one may file suit for breach of other types of contracts.

In light of the potentially very short time frames presented by suit limitations provisions, policyholders must pay closer attention to the progress of claims and understand how courts enforce suit limitation provisions. This article will discuss recent cases which highlight some of these issues and, at the end, discuss some practical solutions to the problems they present.

## **Suit Limitations Caselaw**

Some states actually hold that the suit limitations period begins to run on the date of loss even when the insured does not discover the damage until after it expires. *SeeBorgen v.*

*Economy Preferred Ins.*, 500 N.W.2d 419 (Wis. App. 1993) (12-month suit limitations begins to run at "inception" of damage, even when insureds did not discover hail damage to home until 14 months after hailstorm had caused damage).

The rationale for this type of holding is that it protects the insurer from stale claims and creates a strong incentive for the insured, as the party with the most control over its own properties, to monitor them closely. In many states, absent policy language specifically tolling the limitations period, or caselaw which tolls the suit limitations period while the insurance company investigates, the mere fact that the insurance company is continuing its investigation, without more, is not enough to toll the suit limitations period.

*Davidson v. Brethren Mut. Ins. Co.*, 2007 U.S. Dist. LEXIS 48525 (July 5, 2007) (applying Pennsylvania law), strictly enforced a suit limitations period. There, the insured home burned down on February 5, 2004. The claim was denied on December 10, 2004, based on the insured's alleged misrepresentation in a statement and failure to disclose a prior fire loss on her application for the policy. On February 1, 2005, the insured's counsel requested a copy of the policy, which was delivered on February 21, 2005, after the limitations period expired. The insured finally filed suit on July 20, 2005.

The court enforced the policy's 1-year suit limitations period, rejecting the insured's argument that the defense was waived because it was not mentioned in the denial letter. The court held that, under Pennsylvania law, an insurer is not obligated to remind an insured of a suit limitations period. The court refused to find waiver or estoppel because the insured's counsel was not given a copy of the policy until after the suit limitations period expired. The court held that there was no evidence of waiver and no evidence of misleading conduct which would justify an estoppel against the insurer.

In some states, the suit limitations period is tolled between the time notice is given and the time the claim is denied. This leads to questions about when denial of the claim actually takes place.

In *Tiel Oil Co. v. Employers Mut. Cas. Co.*, 2009 Mich. App. LEXIS 82 (Jan. 15, 2009), that was precisely the issue. Tiel Oil had suffered a February 6, 2004, loss and a March 17, 2004, loss at two gas stations. It timely notified Employers Mutual and, on August 1, 2004, the insurer wrote to Tiel Oil notifying it that it had "determined that the damage was caused by the soil freezing and causing earth movement which cracked the pipe" and that "this type of claim is not covered by your insurance policy." The letter invited Tiel Oil to submit additional

information and reserved the right to reassess its position based on any such submission. Tiel Oil submitted additional information and, on October 8, 2004, Employers Mutual responded by stating that "our position of denial remains the same."

However, the second letter also invited submission of additional information. On December 21, 2005, Tiel Oil's counsel accepted that invitation and submitted additional information. On December 23, 2005, Employers Mutual asked for even more information. That was provided in March 2006 and, 4 days later, Employers Mutual responded stating that "our denial of this claim still stands." This last letter contained no language inviting further submission of information.

The policy contained a 2-year suit limitation provision and a clause tolling that period from the time of notice to Employers Mutual to the date Employers Mutual "formally" denied the claim. Plaintiff filed suit on October 10, 2006, because October 8 was a Sunday and October 9 was Columbus Day.

The trial court granted summary judgment to Employers Mutual stating that the October 8, 2004, letter was a formal denial and, since Columbus Day was not a court holiday, suit was filed after the 2-year limitations period expired. The Michigan Court of Appeals reversed, holding that the determination of which of the letters from Employers Mutual constituted the "formal denial" was an issue of fact because the first three letters, while arguably denying coverage, all indicated that additional information would be accepted and considered in reassessing the availability of coverage. The Michigan Court of Appeals said that this was sufficient to raise an issue of fact which precluded summary judgment on suit limitations.

## **Practical Solutions**

The most important practical lesson to learn from these cases is that policyholders and their counsel must determine the applicable suit limitations period set forth in the policy and determine whether, under applicable state law, that period is tolled while the insurance company is investigating and before it denies coverage. In a state where the suit limitations period is not tolled, the insurer should be contacted 60 or 90 days before the suit limitations period expires and asked to extend the suit limitations period for a reasonable amount of time. Most insurers will extend the suit limitations period, particularly where it has not made a determination of coverage. If the insurer extends the suit limitations period, the claim should be re-diaried and the process repeated if the claim has not been resolved. If the insurer does not agree to toll the suit limitations period, the policyholder knows that it must file suit.

Even if this procedure is not followed, the mere fact that an insurer relies on a suit limitations provision to deny coverage does not mean that all is lost. There is law in most states which will preclude the insurer from enforcing a suit limitations provision based on theories of either waiver or estoppel where the insurance company has indicated in some way that it is not going to rely on the suit limitations period, i.e., by paying a portion of the loss after the suit limitations period has expired, or, as in *Tiel* above, where its letters are unclear. However, overcoming suit limitations based on waiver or estoppel is usually a difficult burden. It is much better to address the issue before the suit limitations period expires.