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**Insurance - Suit Limitation Clause - An Insurer's
Bad faith Accusation of Criminal Conduct, or an
Accusation Which is the Result of a Negligent
Investigation, Can Toll the Suit Limitation Clause**

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INSURANCE—SUIT LIMITATION CLAUSE—AN INSURER'S BAD FAITH ACCUSATION OF CRIMINAL CONDUCT BY THE INSURED, OR AN ACCUSATION WHICH IS THE RESULT OF A NEGLIGENT INVESTIGATION, CAN TOLL THE SUIT LIMITATION CLAUSE.

Leone v. Aetna Casualty & Surety Co. (1979).

Plaintiff, Joseph Leone, Jr., was the assignee of a two-month binder¹ of fire insurance issued by the defendant, Aetna Casualty & Surety Co. (Aetna).² The binder contained a standard provision,³ mandated by Pennsylvania law, requiring plaintiff to initiate suit on the policy within twelve months after a loss.⁴ On May 15, 1976, while the binder was in effect, the insured property was damaged by fire.⁵ Having been duly notified,⁶ Aetna investigated the loss and denied coverage under the terms of the policy,⁷ notifying Leone that it suspected him of arson.⁸ Leone denied responsibility for the fire,⁹ but failed to bring suit on the policy for more than a year following the incident.¹⁰ The United States District Court for the Eastern District of Pennsylvania granted Aetna's motion to dismiss¹¹

1. A binder is "a temporary contract, pending the issuance of a policy." R. MEHR & E. CAMMACK, *PRINCIPLES OF INSURANCE* 153 (6th ed. 1967). A binder is necessary because, since there is often a substantial interval between the application for and the issuance of an insurance policy, the applicant may suffer an unprotected loss before the actual policy becomes effective. R. KEETON, *INSURANCE LAW* § 2.3 (a), at 36 (1971). In most cases, the courts "assume that the binder conforms to standardized policy provisions." R. MEHR & E. CAMMACK, *supra* at 154.

2. 448 F. Supp. 698, 699 (E.D. Pa. 1978), *rev'd sub nom.* Leone v. Aetna Cas. & Sur. Co., 599 F.2d 566, 567 (3d Cir. 1979). The binder provided coverage for damages resulting from fire, vandalism, and/or malicious mischief. 448 F. Supp. at 699.

3. See 599 F.2d at 567.

4. See PA. STAT. ANN. tit. 40, § 636(2) (Purdon 1971). The statute requires, *inter alia*, that the following provision be included in insurance policies: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss." *Id.*

5. 599 F.2d at 567. The loss occurred 15 days after coverage was obtained. *Id.*

6. *Id.* Under Pennsylvania law, the insured must give immediate written notice to the insurer of any loss. PA. STAT. ANN. tit. 40, § 636(2) (Purdon 1971). For a discussion of the notice requirement, see Brakeman v. Potomac Ins. Co., 472 Pa. 66, 371 A.2d 193 (1977). See also notes 30-33 and accompanying text *infra*.

7. 599 F.2d at 567.

8. *Id.* at 567-68. On or about October 12, 1976, Aetna informed the plaintiff that it would continue its investigation of the claim because it had reason to believe that Leone was responsible for the loss. *Id.* at 568. Aetna formally denied plaintiff's claim on November 30, 1976, five months prior to the expiration of the suit limitation period. See *id.* at 567.

9. *Id.* at 568.

10. *Id.* at 567.

11. 448 F. Supp. at 702. The suit was removed to the federal court as a diversity action and Aetna moved to dismiss under rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, claiming that the action was barred by the suit limitation clause. *Id.* at 698-99. See FED. R. CIV. P. 12(b)(6).

Plaintiff argued that, because the policy provided coverage against vandalism and malicious mischief, the statutory requirements for standard fire policies, including the suit limitation clause, did not apply. 448 F. Supp. at 699. Leone further contended that Aetna's failure to formally notify him of its objections to his claim until November 30, 1976, constituted an im-

because of Leone's failure to comply with the policy's suit limitation clause.¹² On appeal, the United States Court of Appeals for the Third Circuit¹³ reversed and remanded, *holding* that an insurance company's bad faith allegation of criminal conduct on the part of the insured, or an allegation of such conduct resulting from a negligent investigation, can toll a suit limitation clause.¹⁴ *Leone v. Aetna Casualty & Surety Co.*, 599 F.2d 566 (3d Cir. 1979).

Suit limitation clauses enable an insurer to rely on the non-assertion of a claim after a reasonable time has passed,¹⁵ make the insurer aware of the extent of asserted losses,¹⁶ and assure a speedy resolution of the claim.¹⁷ These contractually imposed limitation periods were initially rejected by some courts as against public policy in that they usurped the legislative function of determining statutes of limitations.¹⁸ Other courts, however, have, after considering the length of the time period provided and determining that the insurer gained no undue advantage, upheld suit limitation provisions which appeared to be reasonable.¹⁹ Many states, including Pennsyl-

plied waiver of the suit limitation provision estopping Aetna from asserting that provision as a defense. *Id.* at 701.

Rejecting Leone's first argument, the district court concluded that all policies containing fire insurance coverage are governed by Pennsylvania's statutory requirements for fire policies set out in PA. STAT. ANN. tit. 40, § 636(2) (Purdon 1971). 448 F. Supp. at 700. The court then rejected Leone's allegation of implied waiver, finding that the insurer's conduct was not the cause of Leone's failure to comply with the suit limitation requirement. *Id.* at 702. For a discussion of the doctrine of waiver of suit limitation provisions under Pennsylvania law, see note 26 *infra*.

12. 448 F. Supp. at 702. The district court found "no basis for the tolling of [the] limitations clause" and granted defendant's motion to dismiss "as it [was] admitted that th[e] action was not filed within twelve (12) months of the date on which the fire occurred." *Id.* at 701.

13. The case was heard by Judges Gibbons and Hunter, and by Judge Meanor of the United States District Court for the District of New Jersey, sitting by designation. Judge Meanor wrote the majority opinion. Judge Hunter wrote a dissenting opinion.

14. 599 F.2d at 569. The court did not reach the merits of plaintiff's claim, holding only that Leone should be allowed the opportunity to demonstrate that Aetna's allegations of criminal conduct were made either in bad faith or as the result of a negligently conducted investigation. *Id.*

15. R. MEHR & E. CAMMACK, *supra* note 1, at 264. Insurers rely upon a suit limitation clause so as to efficiently manage their reserves for losses which are reported but not yet settled. *Id.* One court has concluded that the purposes of a suit limitation clause in a policy are to allow insurers to cut off claims at a certain time and to reduce uncertainty as to the insurer's liability. *Brandywine One Hundred Corp. v. Hartford Fire Ins. Co.*, 405 F. Supp. 147, 151 (D. Del. 1975), *aff'd mem.*, 588 F.2d 819 (3d Cir. 1978).

16. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1870).

17. *Id.* The Supreme Court has acknowledged that it "is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the loss should be speedily adjusted and paid." *Id.*

18. See, e.g., *Thielbar Realities, Inc. v. National Union Fire Co.*, 91 Mont. 525, 9 P.2d 469 (1932) (in effect, "the parties assumed to legislate to shorten the statutory period of limitation prescribed"); *Young v. Order of United Commercial Travelers of Am.*, 142 Neb. 566, 7 N.W.2d 81 (1942) (although suit limitation clause was contrary to state public policy, limitation upheld under "full faith and credit" clause); *Miller v. State Ins. Co.*, 54 Neb. 121, 74 N.W. 416 (1898) (contractual suit limitation period differing from statutory period of limitations is void).

19. See, e.g., *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386 (1870) (parties to contract are free to shorten period in which claims may be brought); *Fageol Truck & Coach Co. v. Pacific Indem. Co.*, 18 Cal. 2d 731, 117 P.2d 669 (1941) (courts cannot disregard covenant

vania,²⁰ have statutorily adopted a standard fire insurance policy containing a suit limitation clause.²¹

Because of the adhesion nature of insurance contracts,²² courts tend to protect the insured.²³ For example, courts have avoided giving a literal construction to certain procedural policy clauses where their breach would

shortening period for bringing suit unless clause is shown to be unreasonable or the result of imposition or undue advantage); *Beeson v. Schloss*, 183 Cal. 618, 192 P. 292 (1920) (contractual provision allowing insured six months in which to institute suit is not unreasonable as a matter of law where insured cannot show undue advantage); *Tebbetts v. Fidelity & Cas. Co.*, 155 Cal. 137, 99 P. 501 (1909) (suit limitation clause valid if time limit is not unreasonable).

20. See PA. STAT. ANN. tit. 40, § 636(2) (Purdon 1971). Pennsylvania law requires that fire insurance policies contain the standard provisions listed in the statute, with a few limited exceptions as set forth in § 636(3). *Id.* See *id.* § 636(3). The issuance of a policy without these statutory provisions may result in the revocation of the insurer's license and/or imposition of a fine. *Id.* § 637.

21. ABA SUBCOMM. ON STANDARD FIRE POLICY AND SUBCOMM. ON EXTENDED COVERAGE ENDORSEMENT OF THE COMM. ON FIRE INSURANCE LAW, CURRENT ANNOTATIONS OF THE 1943 STANDARD FIRE INSURANCE POLICY AND EXTENDED COVERAGE ENDORSEMENT §§ 1, 22B (1970). The need for a standardized fire policy arose due to the variations resulting from the practice of having many different people draft policies and from the growing complexity of insurance contracts. D. BICKELHAUPT, GENERAL INSURANCE 469-70 (9th ed. 1974). Many states have adopted the 1943 New York Standard Fire Insurance Policy, either by legislative enactment or administration regulation. R. KEETON, *supra* note 1, at 70. See, e.g., 20 ARIZ. REV. STAT. ANN. § 1503(A) (1956); 76 IDAHO CODE § 41-2401 (1977); 17 N.J. STAT. ANN. § 36-5.20 (West 1977); PA. STAT. ANN. tit. 40, § 636 (Purdon 1971).

Fire policies are, by their nature, susceptible to standardization and, although variations in maintenance patterns may affect the risk of fire, standardized fire policies provide for easily adjustable rates and standardized endorsements. R. KEETON, *supra*, at 70.

A standardized fire policy benefits the insured in two respects: 1) by minimizing discrepancies in a policy; and 2) by obviating the necessity to compare, sentence-by-sentence, the coverage offered by different insurance companies. D. BICKELHAUPT, *supra*, at 471.

22. See R. KEETON, *supra* note 1, at 350. The prospective insured's input is, for example, often limited to requesting endorsements on the form policy. *Id.*

Although the interests of policyholders and the general public are, in theory, represented in the standard policies mandated by the legislature,

[o]nly the insurers have an effectively organized lobby . . . ; policyholder interests and the public interest in a sound insurance system are independently represented to a very little extent except insofar as individual legislators and administrators take the initiative in such representation. Thus, standardization by cooperation among insurers is effective in advancing the interests of policyholders and the public only insofar as these latter interests are consistent with those of the insurers.

Id. at 73.

23. See, e.g., *State Farm Mut. Auto Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974) (because an insurance contract is not a truly consensual agreement, it must be interpreted to accord with the reasonable expectations of the purchaser); *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 237 A.2d 870 (1968) (insurer has burden of persuasion to prove insured's breach of notice provision and resulting prejudice); *Brakeman v. Potomac Ins. Co.*, 427 Pa. 66, 371 A.2d 193 (1977) (strict contractual approach is inappropriate where the result of such approach would be a forfeiture of insured's policy rights); *Pickering v. American Employers Ins. Co.*, 109 R.I. 143, 282 A.2d 584 (1971) (clause making uninsured motorist coverage unavailable when insured makes settlement with the party liable for insured's injury without insurer's written consent carries implied promise that such consent will not be unreasonably or arbitrarily withheld).

As noted by one commentator, "[t]here has been a very marked trend toward liberality in the construction of policies for the benefit of the insured, and a broad general policy of protection of the insured as against the insurance companies. . . ." Note, *The Effect of Conditions Precedent in Insurance Policies*, 44 DICK. L. REV. 77, 82 (1940). The contract law doctrine that

technically bar an insured's claim.²⁴ Applying theories of prejudice,²⁵ waiver,²⁶ and estoppel,²⁷ the Pennsylvania Supreme Court has, in such cases, considered whether the breach adversely affects the insurer's ability to

"ambiguities in contract drafting are resolved against the party responsible for its drafting" has been invoked by the courts in regulating these adhesionary contracts. R. KEETON, *supra* note 1, at 351. For a further discussion of judicial attempts to protect the insured, see notes 24-33 and accompanying text *infra*.

24. See, e.g., *Lindus v. Northern Ins. Co.*, 103 Ariz. 160, 438 P.2d 311 (1968); *State Farm Mut. Auto Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974); *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 237 A.2d 870 (1968); *Lusch v. Aetna Cas. & Sur. Co.*, 272 Or. 593, 538 P.2d 902 (1975); *Brakeman v. Potomac Ins. Co.*, 427 Pa. 66, 371 A.2d 193 (1977); *Pickering v. American Employers Ins. Co.*, 109 R.I. 143, 282 A.2d 584 (1971).

Professor Keeton has concluded that, to protect insureds, many courts will uphold "the objectively reasonable expectations of applicants and intended beneficiaries." R. KEETON, *supra* note 1, at 351. Cf. *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wash. 2d 372, 535 P.2d 816 (1975) (insurer must demonstrate prejudice before insured's breach of cooperation clause will relieve insurer of its obligations under the policy). See also *Prudential Ins. Co. v. Lamme*, 83 Nev. 146, 425 P.2d 346 (1967) (a conditional receipt issued by the insurer creates a temporary life insurance contract); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965) (applicant's reasonable expectation of coverage will not be frustrated by a literal reading of a life insurance binding receipt). Regarding the construction of policies containing ambiguities, see note 23 and accompanying text *supra*.

25. See *Brakeman v. Potomac Ins. Co.*, 427 Pa. 66, 371 A.2d 193 (1977); note 24 *supra*. For a discussion of *Brakeman*, see notes 30-33 and accompanying text *infra*.

26. See *Fritz v. British Am. Assur. Co.*, 208 Pa. 268, 57 A. 573 (1904). Waiver is "the voluntary relinquishment of a known right." R. KEETON, *supra* note 1, at 343. In *Fritz*, the insurer had required an appraisal of damages through arbitration proceedings which concluded, unresolved, subsequent to the 12-month limitation period. 208 Pa. at 271, 57 A. at 574. In allowing the insured to proceed with his claim, the court stated:

The company, having required an appraisal . . . must be regarded as having waived its right to enforce the limitation clause until the appraisers have made an award or the appraisal has been abandoned, unless the award has been delayed or the appraisal has been abandoned by reason of the conduct of the insured.

Id. at 275, 57 A. at 576.

Although a waiver cannot be revoked simply by conduct, an insurer can reinstate the effectiveness of a previously waived limitations provision as of a later date by giving notice to the insured. See *O'Connor v. Allemania Fire Ins. Co.*, 128 Pa. Super. Ct. 336, 194 A. 217 (1937). In *O'Connor*, the insured and insurer were unable to resolve their differences after 13 months of negotiations and the insurer then asserted that it would pay nothing. *Id.* at 343, 194 A. at 220. The court refused to allow the insured to bring suit more than one year after the insurer's final refusal to pay anything, stating:

[W]here the acts or conduct of the insurance company . . . [have] been such as to estop it from strictly enforcing the limitation clause . . . the clause begins to run again when the company definitely announces its refusal to pay . . . and the insured . . . must bring his or her action within a reasonable time thereafter, not exceeding twelve months.

Id. at 347, 194 A. at 221. For additional cases involving waiver, see G. COUCH, COUCH ON INSURANCE, 2d § 75:183 (R. Anderson ed. 1968).

27. See *Sudnick v. Home Friendly Ins. Co.*, 149 Pa. Super. Ct. 145, 27 A.2d 468 (1942). Under the principle of estoppel, if the insurer gives the insured a reasonable basis for believing either that the suit limitation clause will not be strictly enforced or that the period will be extended, the insurer will be estopped from asserting the insured's noncompliance as a defense. See *id.* at 151-52, 27 A.2d at 471. There must, however, be detrimental reliance by the insured. R. KEETON, *supra* note 1, at 343.

At least one Pennsylvania court has noted that waiver and estoppel principles have been invoked interchangeably in Pennsylvania. See *O'Connor v. Allemania Fire Ins. Co.*, 128 Pa. Super. Ct. 336, 194 A. 217 (1937). For a discussion of waiver, see note 26 *supra*.

defend²⁸ and whether the insurer's conduct induced the insured's failure to comply.²⁹ In *Brakeman v. Potomac Insurance Co.*,³⁰ for example, the supreme court considered the effect of the insured's breach in light of the purpose of the contractual provision and required the insurer to demonstrate that, because the insured had failed to give prompt notice as required under the policy, it was unable to investigate adequately the claim or was otherwise prejudiced.³¹ Despite the fact that the insurer's liability was contractually conditioned upon prompt notice,³² the court was unwilling to work the forfeiture that would have resulted from a strict contractual approach.³³

Although specifically approving an insurer's use of suit limitation clauses as a defense to an insured's suit on a policy,³⁴ Pennsylvania courts have applied the principles of waiver and estoppel to mitigate the effects of strict

28. See *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 19 (1977). For a discussion of *Brakeman*, see notes 30-33 and accompanying text *infra*.

29. See, e.g., *General State Auth. v. Planet Ins. Co.*, 464 Pa. 162, 346 A.2d 265 (1975); *Lardas v. Underwriters Ins. Co.*, 426 Pa. 47, 231 A.2d 740 (1967). For a discussion of these cases, see notes 36-41 and accompanying text *infra*.

30. 472 Pa. 66, 371 A.2d 193 (1977). In *Brakeman*, the plaintiff, a victim of an automobile accident in which the insured was involved, sought to recover under the insured's insurance policy. *Id.* at 68, 371 A.2d at 194. The defendant insurance company refused to defend the suit or to accept liability on the judgment which plaintiff had obtained because the insured had failed to give prompt notice of the claim. *Id.*

31. *Id.* at 77, 371 A.2d at 198. Holding that the insurer must prove prejudice, the court emphasized that the purpose of a notice provision is to protect the insurer by enabling adequate investigation. *Id.* at 75, 371 A.2d at 197. As the court stated:

The function of the notice requirement is simply to prevent the insurer from being prejudiced, not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice. . . . Therefore, unless the insurer is actually prejudiced by the insured's failure to give notice immediately, the insurer cannot defeat its liability under the policy because of the non-prejudicial failure of its insured to give immediate notice of an accident or claim as stipulated by a policy provision.

Id., quoting *Miller v. Marcantel*, 221 So. 2d 557, 599 (La. Ct. App. 1969).

32. 472 Pa. at 71, 371 A.2d at 195. The court noted that, in prior decisions, it had strictly enforced the notice clause: "[W]e have said that the duty to give the notice as stipulated is a condition precedent, and its breach releases the insurance company from the obligations imposed by the policy, regardless of whether the company suffered prejudice thereby." *Id.* at 70, 371 A.2d at 195, citing *Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406 (1959); *Jeannette Glass Co. v. Indemnity Ins. Co.*, 370 Pa. 409, 88 A.2d 407 (1952); *Unverzagt v. Prestera*, 339 Pa. 141, 13 A.2d 46 (1940); *Ross v. Mayflower Drug Stores, Inc.*, 338 Pa. 211, 12 A.2d 569 (1940).

33. 472 Pa. at 73-74, 371 A.2d at 196-97. The court distinguished the insurance contract from other contracts in that the terms of the policy are imposed by one party and the insured's rights would be forfeited if all contractual provisions had to be strictly observed. *Id.* at 77, 371 A.2d at 198. Furthermore, the court was reluctant to allow the insurer to deny coverage for which it had accepted premium payments. *Id.* at 75, 371 A.2d at 198.

34. See, e.g., *General State Auth. v. Planet Ins. Co.*, 464 Pa. 162, 346 A.2d 265 (1975) (failure to comply with 12-month suit limitation clause was not excused by insured's ignorance of loss); *Lardas v. Underwriters Ins. Co.*, 426 Pa. 47, 231 A.2d 740 (1967) (insured failed to comply with suit limitation clause when suit was brought within eight months after learning of loss but later than twelve months after loss occurred); *Selden v. Metropolitan Life Ins. Co.*, 354 Pa. 500, 47 A.2d 687 (1946) (two-year suit limitation clause in accident insurance policy held valid); *Terpeluk v. Insurance Co. of N. Am.*, 189 Pa. Super. Ct. 259, 150 A.2d 558 (1959) (contractual suit limitation period valid in fire insurance policy with extended coverage); *Ercle v. Metropolitan Life Ins. Co.*, 155 Pa. Super. Ct. 549, 39 A.2d 293 (1944) (two-year suit limitation period commencing from date proof of loss is filed held valid in life insurance policy); *Ferguson v. Manufacturers' Cas. Ins. Co.*, 129 Pa. Super. Ct. 276, 195 A. 661 (1937) (90-day suit limitation

enforcement of such provisions.³⁵ The use of waiver and estoppel, however, has been limited to those instances in which the insurer is responsible for the delay.³⁶ In *Lardas v. Underwriters Insurance Co.*,³⁷ the Pennsylvania Supreme Court concluded that the insurer had not induced the insured to refrain from bringing suit by denying liability prior to the expiration of the suit limitation period.³⁸ Similarly, in enforcing the suit limitation provision in *General State Authority v. Planet Insurance Co.*,³⁹ the court held that the insured's ignorance of the loss did not excuse its failure to bring suit within the limitations period⁴⁰ and indicated that a suit limitation clause is to be

provision in automobile insurance policy sustained). *But cf.* *Thompson v. Equitable Life Assur. Soc'y of United States*, 447 Pa. 271, 290 A.2d 422 (1972) (suit limitation clause does not bar beneficiary's suit on life insurance policy where beneficiary did not know the policy existed). For a discussion of cases in which suit limitation provisions were upheld, *see* notes 37-41 and accompanying text *infra*.

35. *See, e.g.*, *Fritz v. British Am. Assur. Co.*, 208 Pa. 268, 57 A. 573 (1904). For a discussion of *Fritz*, *see* note 26 *supra*. The Pennsylvania Supreme Court has found that, where necessary, "injustice is avoided and adequate relief assured by resort to traditional principles of waiver and estoppel." *General State Auth. v. Planet Ins. Co.*, 464 Pa. 162, 168, 346 A.2d 265, 268 (1975). For a further discussion of *General State*, *see* notes 39-41 and accompanying text *infra*. For a discussion of waiver and estoppel as applied by the Pennsylvania courts, *see* notes 26 & 27 *supra*.

36. *See, e.g.*, *General State Auth. v. Planet Ins. Co.*, 464 Pa. 162, 346 A.2d 265 (1975); *Lardas v. Underwriters Ins. Co.*, 426 Pa. 47, 231 A.2d 740 (1967); *Terpeluk v. Insurance Co. of N. Am.*, 189 Pa. Super. Ct. 259, 150 A.2d 558 (1959). *See also* *Selden v. Metropolitan Life Ins. Co.*, 354 Pa. 500, 47 A.2d 687 (1946) (beneficiary's ignorance of the existence of policy does not excuse failure to comply with suit limitation clause). *But see* *Thompson v. Equitable Life Assur. Soc'y of United States*, 447 Pa. 271, 290 A.2d 422 (1972) (beneficiary's unawareness of policy's existence excused failure to bring suit within period of limitations). For a further discussion of the Pennsylvania courts' use of waiver and estoppel, *see* notes 26 & 27 *supra*.

37. 426 Pa. 47, 231 A.2d 740 (1967).

38. *Id.* at 52, 231 A.2d at 742. Negotiations for settlement of the insured's claim were terminated, without resolution, five and one-half months before the suit limitation period expired. *Id.* at 49, 231 A.2d at 741. However, the insured did not file suit until after the period had expired. *Id.* at 49-50, 231 A.2d at 741. Plaintiff *Lardas* attempted to excuse the breach by arguing that 1) the period for bringing suit commences when the insured learns of the loss, and 2) that the insurer had waived the requirement. *Id.* at 51, 231 A.2d at 741. The court rejected *Lardas*' first contention, noting that an adequate period of time remained in which to bring suit under the policy after he had learned of the loss. *Id.* The court also rejected *Lardas*' second argument, determining that the insurer had not misled the plaintiff as to the possibility of a settlement during negotiations nor attempted to persuade *Lardas* to forebear bringing suit. *Id.* at 52, 231 A.2d at 742. Further, the court noted that the plaintiff had signed a non-waiver agreement prior to the negotiations. *Id.*

Non-waiver provisions do not, however, necessarily preclude a finding that the insurer has, in fact, waived its rights under the policy. One court has held that, because the insurer required all claims to be submitted to arbitration, it had, despite a non-waiver provision, waived its right to rely on the suit limitation clause. *Fritz v. British Am. Assur. Co.*, 208 Pa. 268, 274-75, 57 A. 573, 575-76 (1904). For a further discussion of *Fritz*, *see* note 26 *supra*.

39. 464 Pa. 162, 346 A.2d 265 (1975).

40. *Id.* at 168, 346 A.2d at 268. Almost three years after the loss, the insured brought suit to recover for property damage sustained during a fire. *Id.* at 164, 346 A.2d at 267. On appeal, plaintiff attempted to excuse its noncompliance with the suit limitation provision by alleging that it had become aware of the loss only seven months prior to bringing suit, and that, being a government agency, its delay was excusable. *Id.* at 166-67, 346 A.2d at 267-68. In rejecting the plaintiff's argument, the court distinguished its holding in *Thompson v. Equitable Life Assur. Soc'y of United States*, 447 Pa. 271, 290 A.2d 422 (1972), in which a life insurance beneficiary

strictly applied except when the insurer is responsible for the delay.⁴¹

The Superior Court of Pennsylvania has nevertheless found that, if an insurer breaches its duty of good faith owed to policy holders, an insured may be released from the contractual obligations imposed by the policy despite the insurer's lack of responsibility for the delay.⁴² In *Diamon v. Penn Mutual Fire Insurance Co.*,⁴³ the insurer had been instrumental in having criminal charges brought against the insured for filing a false proof of loss with respect to a fire damage claim.⁴⁴ The court excused the insured's failure to bring suit until after the statute of limitations for the criminal offense charge had expired, concluding that the insurer's activities in securing criminal charges had suspended the suit limitation period.⁴⁵ In an alternative

was allowed to proceed with her suit after the expiration of the statute of limitations, by noting that *Thompson* concerned 1) a statutorily imposed bar to legal action rather than an agreed upon contract term, and 2) an innocent third-party beneficiary who had been unaware of the policy rather than a party to the contract itself. 464 Pa. at 167 n.7, 346 A.2d at 268 n.7. *But see Selden v. Metropolitan Life Ins. Co.*, 354 Pa. 500, 503, 47 A.2d 687, 688 (1946) (court concluded that beneficiary's ignorance of policy's existence does not excuse failure to comply with suit limitation provision).

41. 464 Pa. at 168, 346 A.2d at 268. For a discussion of the application of the doctrines of waiver and estoppel when the insurer is responsible for the delay, see notes 26 & 27 *supra*; note 36 and accompanying text *supra*.

42. *Diamon v. Penn Mut. Fire Ins. Co.*, 247 Pa. Super. Ct. 534, 372 A.2d 1218 (1977). It should be noted that, since *Diamon* is a superior court decision, it is arguably not an expression of Pennsylvania law binding upon a federal diversity court. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); note 68 *infra*. For a discussion of the *Leone* court's reliance upon *Diamon*, see notes 57-67 & 72-89 and accompanying text *infra*.

43. 247 Pa. Super. Ct. 534, 372 A.2d 1218 (1977).

44. *Id.* at 539, 372 A.2d at 1220. The insurer denied the plaintiff's claim, suspecting that he had previously removed some of the articles allegedly damaged by the fire, and then had plaintiff arrested for filing a false proof of loss. *Id.* at 541-42, 372 A.2d at 1219-20. Plaintiff was subsequently found guilty on the falsification charge. *Id.* *Diamon* then hired a bulldozer to excavate the site of the loss, conducted a personal investigation, and found some of the disputed items on the surface of the ground and the rest buried under the debris. *Id.* at 549, 372 A.2d at 1225-26. The district attorney subsequently entered a *nolle prosequi*. *Id.* at 538, 372 A.2d at 1220.

45. *Id.* at 541-42, 372 A.2d at 1222. *Diamon* contended that he waited until the five-year statute of limitations applicable to the crime had expired before bringing suit because he feared that the insurer would retaliate by having him reprosecuted. *Id.* at 538-39, 372 A.2d at 1220.

In holding for the plaintiff, the *Diamon* court relied upon an earlier superior court decision, enforcing a suit limitation provision, in which the court emphasized that the insurer had only informed the insured that it had not decided whether to pay the claim or to have him arrested for arson. *Id.* at 542-43, 372 A.2d at 1222. See *Abolin v. Farmers Am. Mut. Fire Ins. Co.*, 100 Pa. Super. Ct. 433 (1930). The *Abolin* court found "nothing in this statement that was by way of inducement to withhold bringing suit, or that evidenced any intention on the part of the company to waive the provision of the contract." 100 Pa. Super. Ct. at 436. In *Diamon*, however, the court concluded that, because the insured had been arrested, there was sufficient inducement to withhold suit. 247 Pa. Super. Ct. at 542-43, 372 A.2d at 1222. For a discussion of the *Leone* court's interpretation of this aspect of *Diamon*, see note 59 and accompanying text *infra*.

The *Diamon* court concluded that a remand for a trial on the merits was proper, noting that the insured had suffered a devastating material loss as well as the agony of an unfounded criminal prosecution while the insurer, which had initiated the prosecution, had failed to make any payments on the claim even after the charges were dismissed. 247 Pa. Super. Ct. at 546, 372 A.2d at 1224. Relying on the *Brakeman* decision, the *Diamon* court further noted that, although the insurer was seeking to be relieved from its contractual liabilities, it had not demonstrated any prejudice resulting from the insured's late filing of a complaint. *Id.* at 547-48, 372 A.2d at

holding, the *Diamon* court refused to find that an insured's breach of his contractual duty to bring suit within one year barred a suit on the policy where the insurer was suspected of having acted in bad faith⁴⁶ and of having failed to exercise proper care in investigating the claim.⁴⁷

In support of its good faith standard, the *Diamon* court adopted the reasoning of the California Supreme Court⁴⁸ in *Gruenberg v. Aetna Life Insurance Co.*⁴⁹ in which the California court held that the insured's breach

1224-25, citing *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 73, 371 A.2d 193, 197 (1977). For a critical analysis of the *Brakeman* prejudice requirement for enforcement of suit limitation clauses, see notes 90-91 and accompanying text *infra*.

46. 247 Pa. Super. Ct. at 555, 372 A.2d at 1229. Reasoning that an insurer impliedly agrees to do nothing to interfere with an insured's rights under the policy, the court declared that good faith is an implied-in-fact condition of the contract and requires strict compliance. *Id.* at 550-52, 372 A.2d at 1225-27. According to the court, the insured's failure to comply with the suit limitation clause does not relieve the insurer of this duty to act in good faith, since "the insurer's duty is unconditional and independent of the performance of [the insured's] contractual obligations." *Id.* at 553, 372 A.2d at 1228, quoting *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 578, 510 P.2d 1032, 1040, 108 Cal. Rptr. 480, 488 (1973). For a discussion of *Gruenberg*, see notes 48-53 and accompanying text *infra*.

47. 247 Pa. Super. Ct. at 555, 372 A.2d at 1229. The *Diamon* court concluded that the insurer's duty to act in good faith included an implied promise to exercise reasonable care in investigating claims. *Id.* at 550-51, 372 A.2d at 1226-28. A California court of appeals similarly considered the quality of an insurer's investigation to be a factor in determining bad faith, suggesting that those factors include:

the strength of the injured claimant's case on the issues of liability and damages; attempts by the insurer to induce the insured to contribute to a settlement; failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; the insurer's rejection of advice of its own attorney or agent; failure of the insurer to inform the insured of a compromise offer; the amount of financial risk to which each party is exposed in the event of a refusal to settle; the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and any other factors tending to establish or negate bad faith on the part of the insurer.

Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 689, 319 P.2d 69, 75 (1957) (emphasis added).

Emphasizing that some of the disputed items alleged to have been removed by the insured were found on the surface of the ground, the *Diamon* court found that the quality of the investigation was subject to question and allowed the insured an opportunity to establish that the insurer had not exercised proper care. 247 Pa. Super. Ct. at 555, 372 A.2d at 1229. For a brief summary of the accusations levelled at the insured, see *id.* at 549, 372 A.2d at 1226; note 44 *supra*. Just as in the case of the good faith requirement, thus it would appear that the insurer loses its right to assert the insured's breach of contract when that breach is caused by the insurer's failure to properly investigate the claim. See 247 Pa. Super. Ct. at 555, 372 A.2d at 1229.

48. 247 Pa. Super. Ct. at 553-54, 372 A.2d at 1228.

49. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). In *Gruenberg*, the insurer had caused criminal charges of arson and defrauding an insurer to be brought against the insured. *Id.* at 570, 510 P.2d at 1034, 108 Cal. Rptr. at 482. While the charges were pending, the insurer demanded that the insured submit to an examination under oath concerning the loss. *Id.* On the advice of counsel, the insured refused to do so and the insurer denied liability for the claim on the ground that the insured had failed to cooperate with the investigation as required by the cooperation and notice clause in the policy. *Id.* at 570-71, 510 P.2d at 1035, 108 Cal. Rptr. at 483. After the criminal charges were dismissed, the insured notified the insurer of his willingness to submit to the examination, but the insurer continued to deny coverage. *Id.*

of the "cooperation and notice" clause⁵⁰ was no defense to his action against the insurer for a tortious breach of the good faith obligation.⁵¹ The *Diamon* court applied the California court's conclusion that an insurer's duty of good faith is independent of the insured's contractual obligations⁵² and decided that a breach of contractual duties would not preclude an action on the contract for breach of the obligation of good faith.⁵³

The *Leone* court began its analysis by emphasizing that, because the case had come before it on a motion to dismiss, its decision was based solely on the pleadings.⁵⁴ Consequently, the issue, as framed by the Third Circuit, was whether the plaintiff's complaint contained any allegations which, if proved, would provide a legal basis for the suit to proceed⁵⁵ despite the expiration of the contractual suit limitation period.⁵⁶

Although acknowledging that a strict reading of the Pennsylvania Supreme Court's decision in *Lardas* would require dismissal of the plaintiff's complaint,⁵⁷ the Third Circuit found *Diamon*, the more recent superior

50. A cooperation and notice clause requires an insured to submit to examination under oath, exhibit remains of property covered by the insurance contract, and produce records to the insurer as many times as may reasonably be required. *See id.* at 570-71, n.2, 510 P.2d at 1034-35 n.2, 108 Cal. Rptr. 482-83 n.2. Gruenberg's policy contained a provision that precluded suits to recover a claim unless all requirements of the policy, including the cooperation and notice clause, had been satisfied. *Id.*

51. *Id.* at 578, 510 P.2d at 1040, 108 Cal. Rptr. at 488. The *Gruenberg* court held that an implied duty of good faith exists in every insurance policy. *Id.* at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486. Further, the court concluded that the insurer's duty to act in good faith cannot be excused by the failure of the insured to perform its contractual duties. *Id.* at 578, 510 P.2d at 1040, 108 Cal. Rptr. at 488. For a discussion of the *Diamon* court's application of the *Gruenberg* rationale, *see* note 46 and accompanying text *supra*; notes 52-53 and accompanying text *infra*.

52. 247 Pa. Super. Ct. at 553-54, 372 A.2d at 1228. The *Diamon* court recognized that if this duty were not independent of the insured's contractual obligations, then "the insured could circumvent its duty to act in good faith by asserting a violation by the insured of a contractual obligation that would not have occurred but for the insurer's own action in denying the claim." *Id.* at 554, 372 A.2d at 1228.

53. *Id.* at 555, 372 A.2d at 1229. In reaching this conclusion, the *Diamon* court extended the *Gruenberg* court's holding—which had allowed a *tort* action for breach of the covenant of good faith—to negate the insurer's defense to an action on the *contract* itself. *Id.* For a discussion of *Diamon*, *see* notes 42-47, 57-67 & 72-89 and accompanying text *supra*.

54. 599 F.2d at 567. *See* note 11 and accompanying text *supra*.

55. 599 F.2d at 567. In analyzing this question, the court focused on that portion of plaintiff's complaint which alleged that

[o]n or about October 12, 1976, Defendant, by its duly authorized agent, did advise Plaintiff and Plaintiff's agent that Defendant was continuing to investigate the cause of said loss, because Defendant had reason to believe that the loss incurred was caused by the wilful [*sic*] act of Plaintiff, which allegation Plaintiff then and there denied, but which Defendant continued thereafter to allege, despite continued denial by Plaintiff.

Id. at 568.

The court noted that on a motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 567, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

56. 599 F.2d at 567.

57. *Id.* at 568. The district court had relied on *Lardas* in granting Aetna's motion to dismiss. 448 F. Supp. at 701-02, citing *Lardas v. Underwriters Ins. Co.*, 426 Pa. at 52, 231 A.2d at 742.

court case, to be a more accurate expression of Pennsylvania law.⁵⁸ At the outset, the court first found the primary holding in *Diamon* to be inapplicable, concluding that a mere accusation of criminal conduct on the part of the insured was insufficient to toll the suit limitation provision.⁵⁹ Applying the alternate holding of *Diamon*, however, as well as an admittedly liberal reading of the plaintiff's complaint,⁶⁰ the *Leone* court concluded that the complaint posited allegations of the defendant's bad faith which, if proved, could provide a basis for recovery.⁶¹ Consequently, the court reversed and remanded to allow the plaintiff an opportunity to place in issue Aetna's good faith in asserting criminal conduct and in performing the investigation which had engendered the criminal accusation.⁶²

The *Lardas* court held that, unless the insurer was responsible for the insured's delay, a suit limitation clause is an absolute bar to a suit on an insurance policy. 426 Pa. at 53, 231 A.2d at 742. For a discussion of *Lardas*, see notes 37-38 and accompanying text *supra*.

58. 599 F.2d at 568. For a discussion of *Diamon*, see notes 42-53 and accompanying text *supra*. For a discussion of the duties of a federal diversity court in applying state law and the weight to be accorded decisions of a state intermediate appellate court, see note 42 *supra*; note 68 and accompanying text *infra*.

59. 599 F.2d at 568. For a discussion of the facts of *Leone*, see notes 1-10 and accompanying text *supra*. For a discussion of the factual situation in *Diamon* found to be distinguishable by the *Leone* court, see notes 43-45 and accompanying text *supra*. In light of the superior court's decision in *Abolin v. Farmers Am. Mut. Fire Ins. Co.*, 100 Pa. Super. Ct. 433 (1930), that the mere accusation of criminal conduct is insufficient to induce failure to comply with the suit limitation provision, and considering the *Diamon* court's holding that an actual arrest is adequate inducement to withhold suing on the policy, the *Leone* court declared: "[W]e believe that it is the law of Pennsylvania that a mere accusation of criminal conduct by an insurer against its insured, made in good faith, and with no steps taken by the insurer toward criminal prosecution, does not effect a tolling or suspension of the suit limitation clause." 599 F.2d at 569. Thus, the court found no grounds for applying the doctrine of estoppel. *Id.* For a discussion of *Abolin*, see note 45 *supra*.

60. 599 F.2d at 567, 569. The Third Circuit analyzed plaintiff's complaint with a "required broad sweep" and a "required liberal reading." *Id.* For a discussion of the dissent's criticism of the majority's approach on this point, see note 67 and accompanying text *infra*.

61. 599 F.2d at 569. The court read the alternate holding in *Diamon* as postulating that an "insurer's bad faith accusation of criminal conduct on the part of an insured, or such an allegation engendered by a negligently conducted investigation would toll the suit limitation clause." *Id.* It should be noted, however, that the *Diamon* court held only that, if an insured could establish a breach by the insurer of the implied promise to exercise reasonable care in investigating a claim, an action on the policy would not be barred by the expiration of the suit limitation clause. 247 Pa. Super. Ct. at 555, 372 A.2d at 1229. For a discussion of this aspect of *Diamon*, see notes 46-47 & 52-53 and accompanying text *supra*. For a discussion of the dissent's contrary interpretation of *Diamon*, see note 67 *infra*.

The *Leone* court left open the issue of whether, if the limitation period had been tolled, an event had occurred which might have caused the suit limitation period to begin to run again. 599 F.2d at 569. For a discussion of the means by which an insurer may revoke its waiver of a limitation clause, see note 26 *supra*.

In a footnote, the *Leone* court discussed, without deciding, whether *Diamon*, like *Brakeman*, required the insurer to establish actual prejudice in order to escape its contractual obligations through the insured's breach of the suit limitation clause. 599 F.2d at 569 n.4. The *Leone* court distinguished *Brakeman* on its facts, noting that *Brakeman* concerned a notice of loss provision whereas *Leone* involved the suit limitation provision. *Id.* The *Leone* court read *Diamon* as applying the *Brakeman* decision to a determination of when a suit limitation clause, once tolled, begins to run again. *Id.* It would seem, however, that the *Diamon* court would require an insurer to demonstrate prejudice due to the insured's untimely complaint. See 247 Pa. Super. Ct. at 547-48, 372 A.2d at 1224-25; note 45 *supra*.

62. 599 F.2d at 569-70.

In his dissenting opinion, Judge Hunter contended that the *Diamon* "good faith" test does not represent, and is, in fact, inconsistent with, Pennsylvania law.⁶³ Judge Hunter maintained that *Lardas* and *General State*, the most recent Pennsylvania Supreme Court cases concerning suit limitation clauses,⁶⁴ had narrowly limited suspension of a suit limitation provision to situations in which "the insurer is responsible for the insured's failure to comply in time."⁶⁵ Judge Hunter also noted that, unlike situations in which the insurer induces the insured to withhold bringing suit, an insured whose claim is denied will be motivated to bring suit immediately.⁶⁶ Further, Judge Hunter argued that, even if the *Diamon* holding is an accurate statement of Pennsylvania law, the plaintiff's complaint could not reasonably be read to suggest an issue of Aetna's bad faith.⁶⁷

In a diversity action, a federal court is "to consider all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide."⁶⁸ It is submitted, however, that in

63. *Id.* at 570-72 (Hunter, J., dissenting).

64. *See id.* at 570 (Hunter, J., dissenting). Judge Hunter noted, in an obvious reference to *Diamon*, that a federal diversity court is not obligated to adopt the most recent decision of a lower state court as state law but, rather, must determine "how the [state] Supreme Court would decide the question. . . ." *Id.*, quoting *National Sur. Corp. v. Midland Bank*, 551 F.2d 21, 28 (3d Cir. 1977). For a further discussion of this issue, *see* note 68 *infra*.

65. 599 F.2d at 571 (Hunter, J., dissenting). The dissent noted that, as in *Lardas* where the supreme court enforced the suit limitation period, the plaintiff in *Leone* had had approximately five months in which to bring suit after his claim was formally denied. *Id.* at 572 n.5 (Hunter, J., dissenting). For a discussion of *Lardas* and *General State*, *see* notes 38-41 and accompanying text *supra*.

66. 599 F.2d at 572 (Hunter, J., dissenting). Judge Hunter stated:

The equitable underpinning which makes the *Lardas/General State Authority* estoppel rule a necessary exception to the twelve month suit limitation clause is glaringly absent with regard to the *Diamon* "good faith" test. If the insurer, whether or not acting in good faith, denies an insured's claim and there is sufficient time left for the insured to comply with the one year limit, the insured, far from being induced not to sue, will be motivated to file suit promptly.

Id. (footnote omitted).

67. *Id.* at 572-73 (Hunter, J., dissenting). Judge Hunter contended that plaintiff's complaint neither directly alleged, nor allowed an inference of, Aetna's bad faith in making the criminal accusation or in conducting its investigation. *Id.* at 572 (Hunter, J., dissenting). For the pertinent portion of the insured's complaint, *see* note 55 *supra*.

The dissent further asserted that, in order to put into issue the insurer's good faith under the *Diamon* holding, the investigation must be shown to have been recklessly, not simply negligently, performed. 599 F.2d at 572 (Hunter, J., dissenting). For a critical comparison of the views of the majority and the dissent on this issue, *see* notes 88-89 and accompanying text *infra*.

Judge Hunter also addressed the issue of whether the *Brakeman* decision requires the insurer to establish prejudice before relying on the suit limitation clause but concluded that the purpose of a notice provision is so distinct that the supreme court would not extend *Brakeman* to a suit limitation conflict. 599 F.2d at 572 n.7 (Hunter, J., dissenting), citing *Brandywine One Hundred Corp. v. Hartford Fire Ins. Co.*, 405 F. Supp. 147 (D. Del. 1975), *aff'd mem.*, 588 F.2d 819 (3d Cir. 1978). For further discussion of the possible extension of *Brakeman*, *see* notes 90-91 and accompanying text *infra*.

68. C. WRIGHT, *LAW OF FEDERAL COURTS* (3d ed. 1976). The United States Supreme Court has held that a federal court, sitting in a diversity action, is to apply the law as declared by the state's legislature or its highest court. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). After *Erie*, the outcome of a diversity suit in a federal court should be the same as if the action had

giving only passing deference to the most recent Pennsylvania Supreme Court cases, the Third Circuit has failed to apply this guideline and has departed from current Pennsylvania law.⁶⁹ The Pennsylvania Supreme Court has clearly expressed its reluctance to obviate the suit limitation requirement absent grounds for an estoppel.⁷⁰ The *Leone* court, however, allowed the plaintiff to proceed after the expiration of the suit limitation clause but found no grounds for imposing an estoppel.⁷¹ Furthermore, it is suggested that *Diamon*—the superior court case on which the Third Circuit relied⁷²—is, in fact, inconsistent with the supreme court cases that allow such an action only if the insurer was responsible for the insured's failure to sue within the specified time period.⁷³ Even assuming that the plaintiff's complaint did in fact allege bad faith conduct by the insurer,⁷⁴ neither the *Diamon* nor the *Leone* court found that the insurer's breach of good faith induced the insured to withhold a timely suit.⁷⁵ Although *Diamon* held that

proceeded in the state court. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). The Supreme Court further tightened its *Erie* rule when, in *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940), it held that an *intermediate* state court's decisions may not be disregarded in the absence of "other persuasive data that the highest court of the state would decide otherwise." *Id.* at 237. Most recently, however, the Supreme Court has held that federal courts are, at times, free to disregard the decision of intermediate state appellate courts when the state high court has made no determination of the issue; instead, they are to apply "what *they* find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (emphasis added).

69. See notes 70-89 and accompanying text *infra*; *General State Auth. v. Planet Ins. Co.*, 464 Pa. 162, 346 A.2d 265 (1975); *Lardas v. Underwriters Ins. Co.*, 426 Pa. 47, 231 A.2d 740 (1967). For a discussion of these recent decisions in which the Pennsylvania Supreme Court has affirmed its unwillingness to allow an insured's action on a policy begun after the expiration of the suit limitation period, see notes 36-41 and accompanying text *supra*.

70. *General State Auth. v. Planet Ins. Co.*, 464 Pa. at 168, 346 A.2d at 268. See notes 39-41 and accompanying text *supra*.

71. 599 F.2d at 569. See note 59 and accompanying text *supra*.

72. See 599 F.2d at 568-70, citing *Diamon v. Penn Mut. Fire Ins. Co.*, 247 Pa. Super. Ct. 534, 372 A.2d 1218 (1977). For a discussion of *Diamon*, see notes 42-53 and accompanying text *supra*.

73. Compare notes 34-41 and accompanying text *supra* with notes 42-53 and accompanying text *supra*.

74. See note 55 *supra*. For further discussion of whether plaintiff's complaint contained allegations of bad faith, see notes 85-87 and accompanying text *infra*.

75. See notes 1-14, 42-47 & 57-62 and accompanying text *supra*. In determining whether the insurer has waived the right to assert the suit limitation clause or whether the circumstances necessitate an estoppel, the Pennsylvania courts have focused on the insurer's conduct as it relates to the insured's failure to bring a timely action. See, e.g., *General State Auth. v. Planet Ins. Co.*, 464 Pa. at 168, 346 A.2d at 268; *Lardas v. Underwriters Ins. Co.*, 426 Pa. at 52, 231 A.2d at 742; *Fritz v. British Am. Assur. Co.*, 208 Pa. 268, 274-76, 57 A. 573, 575-76 (1904); *Sudnick v. Home Friendly Ins. Co.*, 149 Pa. Super. Ct. 145, 151-52, 27 A.2d 468, 471 (1942). See also notes 23-33 & 37-38 and accompanying text *supra*.

In view of the Pennsylvania courts' repeated consideration of whether the insurer had expressly or impliedly indicated that the suit limitation provision would not be asserted to avoid liability under the policy, it is submitted that any breach of good faith by the insurer, no matter how egregious, which does not indicate that the insurer is going to forbear reliance upon the suit limitation provision, is insufficient to toll the running of that provision. See notes 34-41 and accompanying text *supra*. It should be noted that the dissent in *Leone* pointed out that when a claim is denied, whether in good or bad faith, an insured "will be motivated to file suit promptly." 599 F.2d at 572 (Hunter, J., dissenting).

the insurer's duty to act in good faith is "independent" of the insured's contractual obligations,⁷⁶ the fact remains that the supreme court has suspended the suit limitation provision *only* when the insurer's conduct affected the insured's timeliness in bringing suit.⁷⁷

Although the Third Circuit dismissed *Lardas* as not controlling,⁷⁸ it is submitted that *Leone* is factually more similar to *Lardas* than to *Diamon*.⁷⁹ In both *Leone* and *Lardas*, at least five months remained in which to bring suit after the insurer formally denied coverage.⁸⁰ Furthermore, the plaintiff in *Leone* alleged only that the insurer had made criminal accusations,⁸¹ whereas, in *Diamon*, the insurer had actually procured the insured's arrest.⁸² Lastly, unlike *Diamon*, in which the court noted the egregiousness of the situation,⁸³ *Leone*'s complaint did not suggest that the insurer's investigation had been negligently performed.⁸⁴

It is suggested that, even if *Diamon* represents the proper rule of law to be applied by the federal court,⁸⁵ the Third Circuit's admittedly liberal reading of *Leone*'s complaint conflicts with the Pennsylvania Supreme Court's efforts to narrowly limit those occasions when an insured's failure to file a timely suit will be excused.⁸⁶ Although the plaintiff made no assertion that

76. 247 Pa. Super. Ct. at 555, 372 A.2d at 1229. See notes 46-47 and accompanying text *supra*. The *Diamon* court failed, however, to distinguish the fact that that case was contractual in nature whereas *Gruenberg*, upon which the *Diamon* court relied, was an action in tort. See 247 Pa. at 553-54, 372 A.2d at 1228; notes 48-53 and accompanying text *supra*. It is suggested that, for purposes of an action on the contract, as occurred in both *Diamon* and *Leone*, the insured should be required to demonstrate that the insurer's breach of good faith affected the insured's ability to comply with the suit limitation clause. This resolution is at least suggested by *Diamon* in that the court there expressed concern that "the insurer could circumvent its duty to act in good faith by asserting a violation by the insured of a contractual obligation that would not have occurred but for the insurer's own action in denying the claim." 247 Pa. Super. Ct. at 554, 372 A.2d at 1228.

77. See notes 35-41 and accompanying text *supra*; note 75 *supra*. Arguably, the *Diamon* court's primary holding—i.e., that the insurer's active role in bringing criminal charges against the insured tolled the limitation clause—is not inconsistent with the state supreme court's requirement that the insurer have been responsible for the delay. See notes 43-45 and accompanying text *supra*. Had no such action been taken, the insured would presumably not have been forced to "wait out" the criminal statute of limitations period for fear of retaliation. See note 45 *supra*. In any event, the *Leone* court found this aspect of *Diamon* to be inapplicable, concluding that mere accusation of criminal activity, as occurred in *Leone*, is insufficient to toll the suit limitation provision. See note 59 and accompanying text *supra*.

78. See notes 57-58 and accompanying text *supra*.

79. For the facts of *Leone*, *Lardas* and *Diamon*, see notes 1-10, 37-38 & 43-45 and accompanying text *supra*.

80. See notes 8 & 38 *supra*.

81. See note 55 *supra*.

82. See note 44 and accompanying text *supra*.

83. See notes 45-47 and accompanying text *supra*.

84. See note 55 *supra*.

85. See notes 68-77 and accompanying text *supra*.

86. See, e.g., *General State Auth. v. Planet Ins. Co.*, 464 Pa. at 167-68, 346 A.2d at 268; *Lardas v. Underwriters Ins. Co.*, 426 Pa. at 52, 231 A.2d at 742; notes 34-36, 39-41 & 70 and accompanying text *supra*. Because the suit limitation clause is mandated by statute, it can be inferred that the legislative preference is to encourage the timeliness of suits. See note 4 *supra*.

the insurer had acted in bad faith, the *Leone* court appeared to make a special effort to find grounds to save plaintiff's suit.⁸⁷ On the other hand, assuming *Diamon* applies, it would appear that the *Leone* majority correctly understood that negligence in carrying out an investigation is sufficient indicia of bad faith to toll the limitation clause,⁸⁸ and that the dissent's argument that the plaintiff was required to show recklessness on the part of the insurer in order to prove bad faith would invoke a standard considerably stricter than that dictated by Pennsylvania law.⁸⁹

In order to avoid the analytical problems engendered by its reliance on *Diamon*, it is submitted that the Third Circuit might, instead, have extended the *Brakeman* court's prejudice requirement to suit limitation provisions to achieve the same result of remanding for a fuller development of the facts.⁹⁰ Although leading to an expansion of circumstances in which an untimely suit will be allowed, it would appear that barring an untimely suit only when the delay prejudices the insurer is more consistent with the law as stated by the Pennsylvania Supreme Court than is the *Leone* court's reading of *Diamon*.⁹¹

87. 599 F.2d at 569. In light of the Third Circuit's failure to explain how, considering the substance of the complaint, it concluded that plaintiff's complaint contained allegations of bad faith, it would appear that an issue of the insurer's good faith may be raised in an action on the policy whenever the insurer has denied a claim on the ground that it suspects the insured of complicity in the loss.

88. See 599 F.2d at 569; note 61 *supra*. The *Diamon* court concluded that the insured's action would not be barred by the expiration of the contractual suit limitation period if, on remand, the insured were to establish that the insurer "did not exercise reasonable care in investigating their claim." 247 Pa. Super. Ct. at 555, 372 A.2d at 1229 (emphasis added). See also note 47 and accompanying text *supra*. Furthermore, despite the fact that recklessness could probably have been found in light of the egregiousness of the situation, the *Diamon* court did not insist that "reckless" conduct be shown. 247 Pa. Super. Ct. at 555, 372 A.2d at 1229.

89. See 599 F.2d at 572 (Hunter, J., dissenting); note 67 *supra*.

90. See notes 30-33 and accompanying text *supra*. Precedent for requiring the insurer to demonstrate prejudice when defending against liability on grounds of the insured's breach of either the notice clause or the suit limitation provision may be found in *Diamon*. See 247 Pa. Super. Ct. at 547-48, 372 A.2d at 1224-25; note 45 *supra*. The *Leone* court, however, asserted that *Diamon* did not hold that the insurer must establish prejudice, but only that prejudice is a factor to be considered in determining if a suspended suit limitation period has begun to run again. Compare note 45 *supra* with note 61 *supra*. Nevertheless, the Third Circuit concluded that the issue of whether prejudice must be demonstrated was not properly before it. 599 F.2d at 569 n.4.

91. The similarities between *Leone* and *Brakeman* would appear to support this argument. The Pennsylvania Supreme Court in *Brakeman* was concerned that a forfeiture of the insured's policy rights would result if strict compliance with all policy provisions were required of the insured. See notes 32-33 and accompanying text *supra*. Similarly, in *Leone*, dismissal because of the expiration of the suit limitation clause would work a forfeiture of the insured's rights. See notes 11-12 & 55-56 and accompanying text *supra*. Further, the *Brakeman* court asserted that, since the purpose of a notice requirement is to prevent prejudice to the insurer, requiring the insurer to establish prejudice in order to rely upon the limitation clause would not be unjust. See notes 30-33 and accompanying text *supra*. Because suit limitation provisions similarly inure to the insurer's benefit, requiring the insurer to demonstrate prejudice due to an untimely action appears to be consistent with the *Brakeman* court's holding. For a discussion of the purposes and legality of suit limitation clauses, see notes 15-21 and accompanying text *supra*. For a discussion of the reluctance of the Pennsylvania Supreme Court to work a forfeiture due

The court's holding in *Leone* creates a decided disadvantage for insurers defending a policy action in the Third Circuit where Pennsylvania law is to be applied. Since it is arguable that the Pennsylvania Supreme Court would apply more stringent requirements in similar situations,⁹² insureds who can meet the jurisdictional requirements will be induced to bring their untimely claims in federal court.⁹³ Further, the court's practice of reading the complaint so liberally as to suggest the insured's defense to a timeliness challenge⁹⁴ may cause the insurer's good faith to be called into issue whenever the plaintiff's complaint alleges that the insurer denied the claim because it suspected the insured of culpable activity; consequently, defense of claims which were denied because the insured was suspected of being responsible for the loss will become much more difficult.⁹⁵ Finally, while the *Diamon* court appeared to limit its holding to those breaches of good faith by the insurer which are responsible for the insured's breach of a contractual duty,⁹⁶ because of that court's determination that the duty of good faith is

to the insured's failure to comply with his contractual obligations, *see* notes 32-33 and accompanying text *supra*.

At least one court has concluded that the prejudice requirement should *not* be extended to the suit limitation context. *See* *Brandywine One Hundred Corp. v. Hartford Fire Ins. Co.*, 405 F. Supp. 147 (D. Del. 1975), *aff'd mem.*, 588 F.2d 819 (3d Cir. 1978). In *Brandywine*, the district court noted that the purpose of a notice requirement in an insurance policy is "the avoidance of prejudice to an insurer in handling a claim due to lapse of time." 405 F. Supp. at 151. In contrast, "the purpose of a policy limitation on suit is not to avoid prejudice to an insurer in opening the handling process [but] so that the files may be closed at a definite date, uncertainty as to the amount of an insurer's liability avoided, and stale claims cutoff. *Id.* Thus, the *Brandywine* court concluded that "prejudice from delay in filing suit is not a 'paramount' concern." *Id.* The dissent in *Leone* approved of the reasoning of the *Brandywine* court. *See* 599 F.2d at 573 n.7 (Hunter, J., dissenting).

92. *See* notes 69-77 and accompanying text *supra*. The Pennsylvania Supreme Court has stated that an insured's failure to comply with suit limitation clause will be excused only in narrowly limited situations. *See* notes 35-41 and accompanying text *supra*. It is submitted that the *Diamon* rationale, allowing an insured's allegation that an insurer breached its duty of good faith to suspend the suit limitation clause, will not be accepted by the Pennsylvania Supreme Court in light of its recent restrictive holdings. *See id.*

93. Such a result would, it is submitted, be in clear contravention of the Supreme Court's prohibition against "forum shopping" as announced in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *See* note 68 *supra*.

94. *See* notes 60-61 & 86-87 and accompanying text *supra*.

95. This result would clearly defeat the purposes behind suit limitation provisions. *See* notes 15-17 and accompanying text *supra*. It is suggested that the main thrust of such a provision—protection of the insurer's interest in bringing all submitted claims to a final resolution through either settlement or abandonment—will be undermined if, in reliance upon *Leone*, a dilatory policyholder can bring an untimely action by raising allegations of the insurer's bad faith, especially where the policyholder does not contend that such bad faith was in any way responsible for his failure to comply with the suit limitation clause.

Furthermore, despite its sweeping language, it is submitted that the *Diamon* court did not hold that *any* breach of the duty of good faith would excuse an insured's failure to comply with a policy obligation; rather, the court appeared to limit its inquiry to whether the breach of good faith was, in fact, responsible for the insured's lack of timeliness. 247 Pa. Super. Ct. at 554, 372 A.2d at 1226. *See* note 47 *supra*; notes 52-53 and accompanying text *supra*.

96. *See* notes 47 & 95 *supra*; notes 52-53 and accompanying text *supra*.

“independent” and “unconditional,”⁹⁷ an insurer who in any way breaches the duty to act in good faith may find that it can no longer claim the protection of the contract provisions.⁹⁸ As a result, insurers will be prompted to make extensive investigations of even minor claims to protect themselves from such charges of bad faith.⁹⁹

In conclusion, by imposing the requirement that the insurer must not have breached its duty of good faith in order to rely on the suit limitation provision,¹⁰⁰ the Third Circuit has carved out a new exception under which an insured can proceed with an untimely suit.¹⁰¹ Moreover, the Third Circuit has liberally extended the requirement of good faith to excuse a policyholder’s noncompliance with a standard contract provision¹⁰² without requiring a showing that the insurer’s acts affect the insured’s ability to comply with the obligations he has undertaken.

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97. 247 Pa. Super. Ct. at 553, 372 A.2d at 1228. See note 46 *supra*.

98. It is unclear whether the Third Circuit would extend the *Diamon* holding so broadly, but the *Leone* court’s failure to discuss the effect of the insurer’s breach of good faith on the insured’s ability to bring suit suggests that it did not consider the connection relevant. For a discussion of the Third Circuit’s holding, see notes 54-62 and accompanying text *supra*.

99. Because the Pennsylvania Supreme Court has never held a breach of good faith by the insurer to be a sufficient reason to toll the suit limitation clause, it is unclear exactly what facts the insurer will be required to demonstrate in order to show that reasonable care was exercised in conducting the investigation. See notes 76-77 and accompanying text *supra*. Until sufficient guidelines are set forth as to what constitutes a “good faith” investigation, it is suggested that insurers will be likely to err on the side of caution, conducting more extensive, and more expensive, investigations.

100. See text accompanying note 14 *supra*.

101. For a discussion of devices previously employed by Pennsylvania courts to allow an insured to proceed with his untimely suit, see notes 24-29 and accompanying text *supra*.

102. See notes 3-4 and accompanying text *supra*.