Don’t Forget about Us: An Overview of Commonly-Invoked and Lesser-Known Insurance Policy Conditions

June 10, 2019

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Faculty Biographies

Michael T. McCormack, O'Sullivan McCormack Jensen & Bliss PC

Michael McCormack is a shareholder at O'Sullivan McCormack Jensen & Bliss PC in Wethersfield, where he represents clients in trials and arbitration proceedings involving complex insurance coverage litigation, securities and financial services litigation, and business litigation. He represents businesses and individual policyholders in claims for recovery of insurance benefits under various types of insurance policies, including general liability, property, director and officer liability, professional liability, life, disability and title insurance.

Michael has represented clients from various industries in numerous trials in the state and federal courts in Connecticut, appeals before the Connecticut Appellate and Supreme Courts, and in litigation and arbitration matters in courts throughout the country.

Michael is a former chair of the Insurance Law Section of the Connecticut Bar Association and he serves on the State of Connecticut Insurance and Risk Management Board following appointment by former Governor Dannel Malloy. Michael has been recognized as a Super Lawyer® in the area of insurance coverage since 2015 and he has also been named in the Best Lawyers in America® in the area of insurance litigation. He has also been recognized and distinguished as having an AV Rating by Martindale Hubbell.

GORDON&REES
SCULLY MANSUKHANI
ATTORNEYS AT LAW
95 GLASTONBURY BLVD
SUITE 206
GLASTONBURY, CT 06033
PHONE: (860) 494-7508
FAX: (860) 560-0185



Regen O'Malley

Of Counsel

Romalley@grsm.com

Attorney Biography

Regen O'Malley concentrates her practice on the defense of insurers against both contractual and extra-contractual claims, both in Connecticut and nationally. She also regularly counsels insurers regarding complex coverage issues and represents insurers in defending and prosecuting declaratory judgment actions in coverage disputes. Her experience includes commercial general liability, professional liability, directors and officers, errors and omissions, umbrella/excess, business property, liquor liability, homeowners, and automobile insurance policies.

Regen also has substantial civil litigation/insurance defense experience, including complex litigation. She regularly defends insureds in the context of employment liability, professional liability, insurance agent/broker liability, non-profit liability, and director and officer liability.

A "New England Super Lawyer" in 2017 and 2018 and a "Rising Star" from 2008 through 2013 in insurance coverage, Regen practices in both state and federal courts. She has successfully handled numerous appeals both in the Connecticut Appellate and Connecticut Supreme Court as well as in the United States Second Circuit Court of Appeals on matters ranging from civil rights and insurance-related actions to those involving legal and medical malpractice.

Admissions

Connecticut (2003)
United States District Court, District of Connecticut (2004)
United States Court of Appeals, Second Circuit (2005)

Memberships

Regen is a member of DRI, serving as Vice-Chair for the Bad Faith SLG of DRI's Insurance Law Committee. Regen is also a member of the Connecticut and Hartford County Bar Associations, currently serving on the CBA's Board of Governors, as a CBA Delegate for District 17 and on the HCBA's Bench-Bar Committee. She is Chair Emeritus of CBA's Insurance Law Section as well as an emeritus member of the Oliver Ellsworth Inn of Court.

Community Involvement

Regen is actively involved in her community. She has volunteered for many years with the New Britain YWCA, including as past President of the Board of Directors, past Chair of the Y's Women in Leadership Committee, and current Nominating Committee member. She also serves as a local alumni representative for Haverford College.

Timed Agenda
"Don't Forget about Us: An Overview of Commonly- Invoked and Lesser- Known Insurance Policy Conditions"

June 10, 2019 – CBA CLC

Regen O'Malley of Gordon Rees Scully Mansukhani, LLP
Michael McCormack of O'Sullivan McCormack Jensen & Bliss PC

I. GENERAL BACKGROUND (5 MINS –REGEN)

A. Anatomy of a Policy

B. Sample CGL Policy Conditions Section

C. Conditions Most Frequently at Issue

II. NOTICE OF "LOSS" OR "CLAIM" (15 MINS - REGEN)

A. Notice Requirements Generally

B. "Occurrence" Policy

C. "Claims Made" Policy

III. DUTY TO COOPERATE (20 MINS- REGEN & MIKE)

A. Duty Generally

B. Case Law Regarding Duty to Cooperate/ Breach

IV. COVERAGE CONDITIONS UNIQUE TO FIRST PARTY CLAIMS (5 MINS - MIKE)

A. Suit Limitation Clauses

B. Duty to Mitigate Damages

V. CONCEALMENT AND FRAUD (5 MINS - MIKE)

VI. CONSENT TO SETTLE AND VOLUNTARY PAYMENT PROVISIONS (10 MINS - MIKE)

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Policy Conditions Generally

General requirements of coverage imposed on the insured(s) and insurer, regarding such things as:

- loss reporting;
- provision of suit papers;
- cooperation with claim investigation;
- claim evaluation;
- settlement;
- insurance subrogation rights; and
- policy cancellation and nonrenewal.

Sample Conditions in Policies

Conditions Most Frequently at Issue:

(1) The duty to notify the insurer of a loss or claim

(2) The duty to cooperate with the insurer

(3) “Suit Limitation Clause” in First-Party Policies

(4) The duty to refrain from making voluntary payments

(5) The duty to mitigate damages

Commercial General Liability Conditions

DUTY TO NOTFY

You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the “occurrence” or offense took place;

(2) the names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the “occurrence” or offense.

DUTY TO NOTIFY

If a claim is made or a “suit” is brought against any insured, you must:

(1) Immediately record the specifics of the claim or “suit” and the date received; and

(2) Notify us as soon as practicable.

DUTY NOT TO MAKE VOLUNTARY PAYMENTS

No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Notice Requirements, Generally

Purpose

To give the insurer an opportunity to make a timely and adequate investigation and, in the context of a liability policy, to have an opportunity to make reasonable compromises and settlements. *See* ***Aetna Cas. & Sur. Co. v. Murphy***, 206 Conn. 409, 418-19 (1988).

To give insurer the right and duty to defend the insured.

Notice Requirements Re "Occurrence" Policy

NOTE: Late notice will *not* preclude the insurer's duty to defend or indemnify unless there is *material prejudice* to the insurer. *See* ***Murphy***, 206 Conn. at 418-19.

“Occurrence” Policy

Consequences of Late Notice

Occurrence policy triggered when an occurrence causes bodily injury or property damage during the policy period

Insurer may be relieved of its obligations due to late notice when there is:

- (1) an unexcused, unreasonable delay in notification by the insured, which
- (2) results in *material prejudice* to the insurer.

Arrowood Indem. Co. v. King, 304 Conn. 179, 198 (2012).

What is “Late” Notice?

Depends on the circumstances and a “reasonable person” standard is applied.

“As soon as practicable” means as soon as can reasonably be expected under the circumstances.

See ***State Farm Fire & Cas. Co. v. Yoel***, No. 03:13CV101, 2014 U.S. Dist. LEXIS 116743, at *12 (D. Conn. Aug. 21, 2014).

Burden of Proof of Late Notice/ Prejudice

"[T]he insurer bears the burden of proving, by a preponderance of evidence, that it has been prejudiced by the insured's failure to comply with a notice provision."

Arrowood Indem. Co. v. King, 304 Conn. 179, 201 (2012).

“Claims Made” Policy

"Claims Made" Policy

The claim, not the occurrence, triggers coverage.

- Provides coverage to the insured for claims made
  - during the policy period and
  - reported within that period or a specified period after the policy year, regardless of when the event giving rise to the claim occurred.
- The duty to provide timely notice is not technically a policy condition, but part of the coverage grant, so no proof of prejudice required for late notice to preclude coverage.

Sample "Claims Made" Policy Insuring Agreement

The "Claim" must arise out of "Professional Services" rendered on or after the "Retroactive Dates" and prior to the expiration of the "Policy Period"; and

The "Claim" must be first made against the "Insured" during the "Policy Period" and reported to the Company, in writing, during the "Policy Period" or, where applicable, the "Extended Reporting Period."

Burden of Proof

Burden of proving timely notice of claim is on the insured because it is not a condition but comes within the coverage grant.

Prejudice to insurer is not relevant if notice not provided during policy period.

“Awareness” Provisions

Insured must report potential claims or circumstances that the insured reasonably believes may give rise to a future claim.

If notice of a potential claim is made to the insurer and a claim then arises out of the reported incident or circumstances, then notice of the claim will be deemed to have been made during the policy period at the time the notice of the potential claim was first provided.

Duty To Cooperate

Duty To Cooperate, Generally

Sample Policy Language:

You or any other involved insured must:

(1) authorize us to obtain records and other information;

(2) cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(3) assist us, upon our request, in the enforcement of any rights against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

Duty To Cooperate, Examples

Breach of cooperation clause may include failure to cooperate with claim investigation or defense of claim or suit, *e.g.*: failure or refusal to:

- provide requested documents
- appear for EUO
- appear for IME
- appear for deposition or trial

Consequences of Failure to Cooperate

"In the absence of estoppel, waiver or excuse, the cooperation of the insured in accordance with the provisions of the policy is a condition, the breach of which puts an end to an insurer's obligation."

Chicago Title Ins. Co. v. Bristol Heights Assocs., LLC, 142 Conn. App. 390, 408 ***cert. denied***, 309 Conn. 909 (2013).

Consequences of Failure to Cooperate

However, "[t]he lack of cooperation . . . must be *substantial or material* . . . Lack of prejudice to the insurer from such failure is a test which usually determines that a failure is of that nature."

Chicago Title Ins., 142 Conn. App. at 408 (citation omitted; emphasis added).

Prejudice Required?

Is proof of prejudice due to breach of cooperation provision required?

Maybe, but it depends.

Burden of Proof of Prejudice

If an insured can prove lack of prejudice on behalf of the insurer, then the insurer cannot prevail on a lack of cooperation defense.

- ***Taricani v. Nationwide Mut. Ins. Co.***, 77 Conn. App. 139, 147 (2003) (concluding that, as matter of law, insureds' failure to appear for examination under oath was breach of material condition of policy and insurer was thus justified in denying their claim).
- *But see* ***Arrowood Indem. Co. v. King***, 304 Conn. 179, 201 (2012) (insurer bears the burden of proving, by a preponderance of evidence, that it has been prejudiced by the insured's failure to comply with a notice provision).

Consent to Settle and Voluntary Payment Provisions

"No insured will, except at the insured's own cost, voluntarily make any payment, assume any obligation, incur any expense, other than for first aid, without our consent."

Consent to Settle and Voluntary Payment Provisions

Purpose: To prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims."

"[F]ar from amounting to a mere technicality imposed upon an insured in an adhesion contract, [it is] a fundamental term defining the limits or extent of coverage."

MacDermid, Inc. v. Travelers Indem. Co., CV-12-6067744, 2017 Conn. Super. LEXIS 937, at *16 (Conn. Super. Ct. May 19, 2017).

Coverage Conditions Unique To First Party Claims

Suit Limitation Clauses

Usually 12- or 24-months limit to bring suit after loss inception

NOTE: MUCH shorter than breach of contract!

Suit Limitation Clauses

Uninsured/Underinsured Motorist Claims

Conn. Gen. Stat. § 38a-336(g)(1): Insurer cannot limit time to bring suit for UM/UIM to less than 3 years from the date of accident

But, the period may be tolled if notice of intent to bring claim provided to insurer within 3-year period.

Suit Limitation Clauses

Property Policy Contractual Limitations

Conn. Gen. Stat. § 38a-307 governs the provisions of the standard form fire insurance policy issued in Connecticut.

Suit Limitation Clause: “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 [24] months next after inception of the loss.”

Duty to Mitigate Damages

Take care in walking the tightrope!

There is some tension caused by the requirements that an insured must “take all reasonable steps necessary to prevent further damage” after a loss and also mitigate damages.

Concealment and Fraud

Most policies include a provision stating that the entire policy will be void if the insured:

- intentionally conceals or misrepresents any material fact;
- engages in fraudulent conduct; or
- makes any false statements related to insurance.

Concealment and Fraud

Burden of Proof

- Insurer must prove special defense by showing that the insured "willfully concealed or misrepresented a material fact with the intention of deceiving the insurer." ***Rego v. Conn. Ins. Placement Facility***, 219 Conn. 339, 346 (1991).
- Insurer does *not* have to prove that it actually relied on the misrepresentation or concealment or that it actually suffered injury. ***Id.*** at 346-47.

Questions? Comments?

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Outline Re Presentation: "Don't Forget about Us: An Overview of Commonly- Invoked and Lesser- Known Insurance Policy Conditions"

June 10, 2019 – CBA CLC

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Michael McCormack of O'Sullivan McCormack Jensen & Bliss PC

I. GENERAL BACKGROUND

A. Anatomy of a Policy

1. Policy is generally made up of: Declarations, Schedule of Forms, Terms, Exclusions, Conditions (and Endorsements). Conditions are generally procedural in contrast to substantive, but are no less an integral part of a policy

2. Terms = Claim must satisfy the terms of coverage; must fall within the policy's coverage grant and *not* within an exclusion. Terms define the scope of available coverage.

3. Conditions = general requirements of coverage that are imposed on the insured(s) and insurer, regarding such things as:
- loss reporting;
- provision of suit papers;
- cooperation with claim investigation;
- claim evaluation;
- settlement;
- insurance subrogation rights; and
- policy cancellation and nonrenewal.

B. Sample CGL Policy Conditions Section

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy
Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this coverage part.

2. Duties In The Event of Occurrence, Offense, Claim Or Suit
a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
(1) How, when and where the "occurrence" or offense took place;
(2) the names and addresses of any injured persons and witnesses; and
(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
b. If a claim is made or a "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and
(2) Notify us as soon as practicable.
You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:
(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
(2) Authorize us to obtain records and other information;
(3) Cooperate with us in the investigation, settlement of the claim or defense against the "suit";
(4) Assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A Person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

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C. Conditions Most Frequently at Issue

(1) the duty to notify the insurer of a loss or claim; and
(2) the duty to cooperate with the insurer.

Also, "Suit Limitation Clause" in First-Party Policies

II. NOTICE OF "LOSS" OR "CLAIM"

A. Notice Requirements Generally

1. What are they? Duty to timely notify insurer of "loss" (the accident or incident) or "claim"

2. Common Policy Definitions

> "Claim" is "written notice of any act or omission of the insured, or of any incident, alleged to have caused injury or damage that the insured is legally obligated to pay, whether or not constituting a legal complaint."
>
> "Claim" in a director and officer claims-made policy is often defined as a written demand for monetary damages or nonmonetary relief, a civil proceeding commenced by a complaint or similar pleading, and a formal administrative or regulatory investigation commenced by filing notice of charges or similar documents.
>
> "Occurrence" is an "accident, including continuous or repeated exposure to the same general harmful conditions."

3. Purpose: The purpose of the policy's notice provision is to give the insurer an opportunity to make a timely and adequate investigation and, in the context of a liability policy, to have an opportunity to make reasonable compromises and settlements. See Aetna Cas. & Sur. Co. v. Murphy, 206 Conn. 409, 418-19 (1988), overruled in part on other grounds, Arrowood Indem. Co. v. King, 304 Conn. 179 (2012).

Liability policy coverage grant typically provides a primary insurer with the right and duty to defend. Late notice deprives insurer of that right. However, late notice will not preclude the insurer's duty to defend or indemnify unless there is ***material prejudice*** to the insurer as a result of the delay in notice. See Murphy, 206 Conn. at 418-19 (** NOTE: Does not apply to claims made policies)

Know the difference between claims made and occurrence-based policy language. Whether prejudice is required for insurer to disclaim over late notice depends on whether policy is: "Occurrence"-based or "Claims-made" (*See infra*)

B. "Occurrence" Policy

1. An "Occurrence" policy provides coverage for acts or omissions that cause bodily injury or property damage during the policy period.

2. Consequences of Breach: Under Connecticut law, an insurer may be relieved of its obligations pursuant to a "notice" provision where there is: (1) an unexcused, unreasonable delay in notification by the insured that (2) results in *material prejudice* to the insurer. Arrowood Indem. Co. v. King, 304 Conn. 179, 198 (2012).

3. What is "Late" Notice?

- Depends on the circumstances;
- "Reasonable person" standard applied

"The Connecticut Supreme Court has 'long recognized, in the context of notice provisions, 'as soon as practicable' means 'as soon as can reasonably be expected under the circumstances[.] The duty to give notice does not arise unless and until facts develop which would suggest to a person of ordinary and reasonable prudence that liability may have been incurred, and is complied with if notice is given within a reasonable time after the situation so assumes an aspect suggestive of a possible claim for damages.'" State Farm Fire & Cas. Co. v. Yoel, No. 03:13CV101 (AWT), 2014 U.S. Dist. LEXIS 116743, *12 (D. Conn. Aug. 21, 2014) ("The notice provision in this case provides that when an accident or occurrence occurs, the insured shall 'give written notice to [the insurer] or [its] agent as soon as practicable.'"), quoting Arrowood, 304 Conn. at 199; Plasticrete Corp. v. Am. Policyholders Ins. Co., 184 Conn. 231, 241, 439 A.2d 968 (1981)). Thus, "the notice requirement turns not on an insured's subjective assessment of how likely a claim is to be brought, but rather on whether a reasonable person would recognize that liability may have been incurred and the situation so assumes an aspect suggestive of a possible claim for damages." Id. at *13 (citing Arrowood, 304 Conn. at 200).

4. Burden of Proof of Late Notice/ Prejudice

Under Arrowood Indem. Co. v. King, 304 Conn. 179, 198 (2012), "the insurer bears the burden of proving, by a preponderance of evidence, that it has been prejudiced by the insured's failure to comply with a notice provision." Id. at 201, overruling, *sua sponte*, Aetna Cas. & Sur. Co. v. Murphy, 206 Conn. 409, 418-19 (1988) (holding that burden was on insured to rebut presumption of prejudice to insurer due to late notice).

5. Rationale

Under Murphy, which stated the prior rule, the Court reasoned that the burden was appropriately on the shoulders of the insured as "[i]t is the insured who is seeking to be excused from the consequences of a contract provision with which he has concededly failed to comply. . . . The determination of what is fair, as a factual matter, must . . . depend upon a proper showing by the [party] who seeks this extraordinary relief." 206 Conn. at 419-20.

Under Arrowood, the Supreme Court of Connecticut reversed itself sua sponte, holding:

> As we recognized in Murphy, the task of proving a negative is an inherently difficult one, and it may be further complicated by the opposing party's interest in concealment. . . . Imposing this difficult task on the insured—the party least well equipped to know, let alone demonstrate, the effect of delayed disclosure on the investigatory and legal defense capabilities of the insurer—reduces the likelihood that the fact finder will possess sufficient information to determine whether prejudice has resulted

> from delayed disclosure. . . . To better achieve that balance, we now join the overwhelming majority of our sister states in adopting a rule that facilitates informed determinations of prejudice by incentivizing insurers to bring evidence of prejudice, should it exist, to the court's attention.

304 Conn. at 203 (internal citations omitted).

6. Relevant Case Law

Pre-suit social interaction between the underlying plaintiff and insured defendants did not excuse the lateness of notice provided to the insurer more than one year after the subject ATV accident; the severity of the accident and resulting injuries, which was "unmistakably apparent," "would have led a reasonable person to believe that 'liability may have been incurred' and thus gave rise to a duty to give notice." Arrowood Indem. Co. v. King, 304 Conn. 179, 185, 199, 39 A.3d 712, 716 (2012).

"Although 'the duty to give notice does not attach in the case of a trivial accident where there is no reasonable ground for believing at the time that it involves any injury insured against' this court has long recognized that '[i]njury, however slight, received from an accident within the coverage of a liability policy may, and experience indicates, probably will, result in a claim for damages . . . .'" Arrowood Indem. Co., 304 Conn. at 199-200, citing Baker v. Metropolitan Casualty Ins. Co., 118 Conn. 147, 150, 152-154, 171 A. 7 (1934) (reasonableness of delayed disclosure is question of fact when child struck by car displayed no injuries and child's mother informed driver that child was not injured).

There were genuine issues of material fact as to whether the insured's delay of more than a year in notifying the insurer of a fight in which he injured the plaintiff was excused and reasonable and whether the delay resulted in material prejudice to the insurer where there was a dispute about whether the insured defendant, who claimed self-defense, was aware of the severity of the injuries he caused, and insured had given notice of the suit within approximately 14 days of service upon him. State Farm Fire & Cas. Co. v. Yoel, No. 03:13CV101 (AWT), 2014 U.S. Dist. LEXIS 116743, at *1 (D. Conn. Aug. 21, 2014).

In Prizio v. Lincoln National Life Insurance Co., No. 3:11CV736(JBA), 2014 U.S. Dist. LEXIS 43886, 2014 WL 1315648 (D. Conn. Mar. 31, 2014), the court held that the insurer was materially prejudiced in its ability to investigate the insured's claim for depression-related total disability where the insured filed her claim three years after she said the disability began and the insurer was unable to interview the insured's co-workers from the period predating her disability. See 2014 U.S. Dist. LEXIS 43886, 2014 WL 1315648, at *1.

The court denied summary judgment to an insurer on its claim of late notice of a first party property loss in Garre v. Peerless Ins. Co., No. CV126013760, 2013 Conn. Super. LEXIS 1763, 2013 WL 4504933 (Conn. Super. Ct. Aug. 7, 2013), where the court held the insurer failed to submit evidence in support of its assertion that the property which was the subject of the insured's claim had not been protected from further damage since the date of the incident giving rise to the claim. See 2013 Conn. Super. LEXIS 1763, 2013 WL 4504933, at *5-6.

In Merrimack Mutual Fire Insurance Company v. Selby, the Connecticut Superior Court held that there was a genuine issue of material fact as to when the insured first knew of an occurrence, and therefore whether the insured gave notice as soon as practicable, where an individual fell on the insured's property when the insured was not home, and when the insured asked her realtor, who had been with that individual when she fell, whether the individual was okay, the realtor replied "I think so." No. CV074008234S, 2009 Conn. Super. LEXIS 3202, 2009 WL 5184329, *6 (Dec. 8, 2009).

There was no coverage where an insured who failed to provide notice of a lawsuit until after a default judgment had been entered against the insured. Wagner v. General Acc. Ins. Co., 1997 Conn. Super. LEXIS 184, 1997 WL 41216 (Jan. 27, 1997). "It is difficult to conceive of any greater prejudice to an insurer 'than a demand for payment of a default judgment of which a defendant is totally ignorant, and which, through the failure of the assured to comply with the terms of the contract and forward the process and pleadings to the insurer, it has been deprived of its right to defend the action.'" Id. (listing extra-jurisdictional case law holding "that where the evidence establishes that no notification of suit was received by the insurer until after a final default judgment, the insurer has satisfied its burden of showing prejudice so as to relieve it of the contractual obligation to pay the judgment.")

C. "Claims Made" Policy

1. The claim, not the occurrence, triggers coverage. A claims-made policy provides coverage to the insured for claims made during the policy period and reported within that period or a specified period after the policy year regardless of when the event giving rise to the claim occurred. The duty to provide timely notice is not technically a policy condition, but part of the coverage grant. No proof of prejudice required if notice is late.

2. Sample Claims-Made Policy Insuring Agreements:

- The Company will pay on behalf of the "Insured" for "Professional Loss" which the "Insured" becomes legally obligated to pay because of a "Claim" resulting from an act, error or omission in "Professional Services", provided that:

a. the "Claim" arises out of "Professional Services" rendered on or after the "Retroactive Dates" and prior to the expiration of the "Policy Period"; and

b. the "Claim" is first made against the "Insured" during the "Policy Period" and reported to the Company, in writing, during the "Policy Period" or, where applicable, the "Extended Reporting Period."

- This policy shall pay the "Loss" of each and every "Insured" arising from a "Claim" first made against such "Insured" during the "Policy Period" or the "Discovery Period" (if applicable) and reported to the "Insurer" pursuant to the terms of this policy for any "Wrongful Act". The "Insurer" shall, in accordance with and subject to Clause 4 of this "Coverage Section" advance "Defense Costs" of such "Claim" prior to its final disposition.

"Claim" = (1) a written demand for monetary relief or non-monetary relief (including any request to toll or waive any statute of limitations); or

(2) a civil, administrative, regulatory or arbitration proceeding for monetary relief or non-monetary relief which is commenced by: (i) service of a complaint or similar pleading; or (ii) receipt or filing of a notice of charges.

"Wrongful Act" is usually specifically defined in the claims made policy coverage part.

3. Burden of proof on the insured to prove timely notice of claim because it is not a condition but comes within the coverage grant

4. "Claims Made" Versus "Claims Made and Reported" Coverage

Some claims-made policies dictate that a claim is not considered made until an insured provides notice of the claim to the insurer. Consequently, an insured's failure to provide notice within the policy period may result in a loss of coverage. Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes (15th ed., vol. 1) at 122-26.

Other policies require that claims be both first "*made and reported*" during the applicable policy period and that the claim be reported to the insurer during the policy period.

5. "Awareness" Provisions

Insured must report potential claims or circumstances that the insured reasonably believes may give rise to a future claim.

If notice of a potential claim is made to the insurer and a claim then arises out of the reported incident or circumstances, then notice of the claim will be deemed to have been made during the policy period at the time the notice of the potential claim was first provided.

6. "Savings" Clauses/Extended Reporting Period

Claims made during a certain limited time period after the policy period ends are deemed to have been made during the policy period, as long as the insured gives the insurer timely notice of the underlying facts and circumstances of the claim.

7. Retroactive Date

Claims-made policies often cover acts and omissions arising either before or during the policy period. With regard to prior acts, the policy may provide either full retroactive coverage or only coverage for claims arising out of acts and omissions after the "retroactive date" as specified in the policy. *Id.*

III. DUTY TO COOPERATE

A. Duty Generally

1. Sample Policy Language:

-You or any other involved insured must:

(1) authorize us to obtain records and other information;
(2) cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
(3) assist us, upon our request, in the enforcement of any rights against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply

2. Examples**:**

Breach of cooperation clause may include failures to cooperate with claim investigation or defense of claim or suit, e.g.: failure or refusal to:

- provide requested documents
- appear for EUO
- appear for IME (UM/UIM)
- appear for deposition or trial

3. Consequences of breach: "Absent estoppel, waiver or excuse, the cooperation of the insured in accordance with the provisions of the policy is a condition, the breach of which puts an end to an insurer's obligation." Chicago Title Ins. Co. v. Bristol Heights Assocs., LLC, 142 Conn. App. 390, 408, 70 A.3d 74, cert. denied, 309 Conn. 909, 68 A.3d 662 (2013); Arton v. Liberty Mut. Ins. Co., 163 Conn. 127, 133 (1972).

However, "[t]he lack of cooperation . . . must be *substantial or material*. The condition of cooperation with an insurer is not broken by a failure of the insured in an immaterial or unsubstantial matter. Lack of prejudice to the insurer from such failure is a test which usually determines that a failure is of that nature." Chicago Title Ins., 142 Conn. App. at 408 (citation omitted; emphasis added).

4. Purpose:

"The purpose of the cooperation provision is to protect the interests of the insurer . . . If insurers could not contract for fair treatment and helpful cooperation from the insured, they would, at the very least, be severely handicapped in determining how and whether to contest the claim, and might, in addition, be particularly susceptible to possible collusion between the participants in the accident." Arton v. Liberty Mut. Ins. Co.,163 Conn. at 134) (citation omitted; internal quotation marks omitted).

The purpose of an examination under oath provision is to protect the insurer's interests; it gives the insurer an opportunity to obtain the information needed to verify the basis for the

insured's claim and decide whether and upon what ground to contest the claim and to protect itself from unsound or fraudulent claims. Preka v. Vt. Mut. Ins. Co., No. CV156024492S, 2017 Conn. Super. LEXIS 5086, at *17-18 (Super. Ct. Dec. 8, 2017).

5. Prejudice Required?

Is proof of prejudice due to breach of cooperation provision required? **Maybe, but it depends.**

Connecticut courts have distinguished between circumstances where an insured *delays* in compliance with a policy condition and fails or refuses to comply altogether. Contrast Murphy and Taricani, where insureds merely delayed fulfilling a policy condition, with Palkimas v. State Farm Fire & Cas. Company, 150 Conn. App. 655, 91 A.3d 532, cert. denied, 314 Conn. 904, 99 A.3d 1169 (2014).

In Palkimas, the insurer denied coverage where the insured never submitted the proof of loss required. Id. at 656-57. Although the insured brought suit alleging a breach of the policy due to the denial of coverage, the trial court granted the insurer's motion for summary judgment on the ground that the insured had failed to satisfy a condition precedent of the policy, concluding that the insurer was not required to establish prejudice in light of the insured's complete failure to submit the proof of loss. Id. at 658. On appeal, the insured argued that the court had erred by failing to require proof of prejudice and that a genuine dispute of material fact existed on that issue. Id. at 658-59.

Held: Affirmed. An insurer is not required to prove prejudice where the insured completely fails to file a proof of loss. The court rejected the insured's argument that proof of prejudice was required, as in cases involving *delayed* filing of notice of claim or proof of loss. Such cases should not be extended to excuse the failure to submit a proof of loss altogether. Palkimas, 150 Conn. App. at 659-60.

See also Preka v. Vt. Mut. Ins. Co., No. CV156024492S, 2017 Conn. Super. LEXIS 5086, at *25 (Dec. 8, 2017) (Cole-Chu, J.) (holding that defendant was not required to establish prejudice in order to prevail on its motion for summary judgment" pursuant to Palkimas v. State Farm, and granting summary judgment to the insurer on insureds' breach of contract claim as they had "materially breached their policy by refusing to appear for examination under oath, and . . . failed to present a valid excuse for their noncompliance.")

But see Jarrett v. Government Employees Ins. Co., 2014 WL 3397944 (June 4, 2014(Sommer, J.)(denying insurer's motion to dismiss uninsured motorist claim for lack of subject matter jurisdiction arising from insured's alleged failure to comply with terms of insurance policy governing notice and cooperation because factual issues existed as to whether insurer can meet burden of establishing material prejudice from insured's delay in notice or lack of cooperation)

6. Burden of Proof of Prejudice

If an insured can prove lack of prejudice on behalf of the insurer, the insurer cannot prevail on a lack of cooperation defense. Taricani v. Nationwide Mut. Ins. Co., 77 Conn. App. 139, 147, 822 A.2d 341 (2003) (concluding that, as matter of law, insureds' failure to appear for examination under oath was breach of material condition of policy and insurer was thus justified in denying their claim). But see Arrowood Indem. Co. v. King, 304 Conn. 179, 201 (2012) (insurer bears the burden of proving, by a preponderance of evidence, that it has been prejudiced by the insured's failure to comply with a notice provision) and Jarrett v. Government Employees Ins. Co., 2014 WL 3397944 (Conn. Super. Ct. June 4, 2014) (Sommer, J.) (under Arrowood, insurer has burden of establishing material prejudice from insured's delay in notice or lack of cooperation)

"In this state, where an insurer raises the issue of the violation of the cooperation clause of the policy by a special defense, the burden is on the plaintiff [insured] to prove cooperation by the insured." Double G.G. Leasing, LLC v. Underwriters at Lloyd's, 116 Conn. App. 417, 432-33, 978 A.2d 83, 92-93 (2009) (citations omitted). See also O'Leary v. Lumbermen's Mut. Cas. Co., 178 Conn. 32, 38 (1979) (holding that where an insurer raises a defense of lack of cooperation, the burden is on the insured to prove that he or she has cooperated); Manthey v. Am. Auto. Ins. Co, 127 Conn. 516, 519 (1941).

B. Case Law Regarding Duty to Cooperate/ Breach

In Chicago Title Ins. Co. v. Bristol Heights Associates, LLC, 142 Conn. App. 409, the insured defendant's refusal to submit to examination under oath and produce various records and documentation, which reasonably pertained to the loss or damage, was found to breach the policy. The Appellate Court concluded that this was "far from the fair, frank, and substantially full disclosure of information generally required by a cooperation clause" as in the subject policy. Id. at 410.

In Ruggerio v. Harleysville Preferred Insurance Co., 278 F. Supp. 3d 536 (D. Conn. 2017), the Court found that the plaintiff insured breached her homeowner's insurance policy by failing to appear for the continuation of her EUO, by failing to produce material portions of the records and documents requested by insurer, and by making material misrepresentations concerning whether she resided at the property.

The Court held this even though the plaintiff's refusal to cooperate was due to an existing warrant for her arrest on charges of attempted larceny, insurance fraud and making a false statement. While the Court held that the insured "had the right to assert her Fifth Amendment privilege with respect to specific questions . . . she did not have a right to simply refuse to appear for continuation of the examination by asserting her Fifth Amendment privilege." Doing so deprived the insurer of the benefit of the adverse inferences that could have properly been drawn based on her asserting the privilege with respect to specific questions. Id. at 551-52 (citation omitted). See also Taricani v. Nationwide Mut. Ins. Co., 77 Conn. App. 139 (2003).

In Farino v. Geico Indem. Co., No. NNHCV156056571S, 2019 Conn. Super. LEXIS 224 (Jan. 30, 2019) the plaintiff claimed uninsured motorist coverage for injuries allegedly sustained when he struck a guard rail attempting to avoid debris falling from another vehicle. The court

(Young, J.) granted summary judgment to the insurer based on insured's breach of general auto policy conditions, where absent claims of "estoppel, waiver or other [valid] excuse," the plaintiff admittedly failed to appear for five separately scheduled EUOs.

In contrast, the Court in North River Insurance Co. v. O & G Industries, No. 3:13-cv-00589 (JAM), 2017 U.S. Dist. LEXIS 199559 (D. Conn. Dec. 5, 2017), the Court (Meyer, J.) denied summary judgment to the insurer on its claim that it was excused from providing coverage for injury and damage caused by a power plant explosion where the insured had breached the policy's cooperation provision. The insurer argued that the insured had breached the insurance contract's cooperation clause by: (1) failing to provide adequate documentation and information relating to claims made against Keystone by various claimants;(2) by colluding with the power plant's general contractor O&G Industries, Co. (O&G) to exhaust Keystone's underlying insurance coverage; (3) by failing to provide information regarding settlements made by Keystone's underlying insurers; and by entering into settlements with O&G in which Keystone stipulated to its liability.

The Court in North River held that, even assuming a breach had occurred, evidence of "a lack of prejudice to the insurance company indicate[d] that a failure to cooperate was neither material nor substantial." Id. at *5-6 (citing Double G.G. Leasing, 116 Conn. App. at 433). Specifically, the Court held that issues of fact existed where there was evidence that the insurer had access to substantial information indicating the insured's liability for the explosion, and it had not shown prejudice stemming from the insured's stipulation to liability where it failed to demonstrate that the insured would not otherwise have been found liable for similar or even greater damages. The Court concluded that due to "a genuine issue of fact about whether the underlying insurers made independent decisions that resulted in the exhaustion of their policies," the insurer had not shown as a matter of law that the insured's "alleged collusive conduct caused it any harm." Id. at *7-8.

IV. COVERAGE CONDITIONS UNIQUE TO FIRST PARTY CLAIMS

A. Suit Limitation Clauses

Usually 12- or 24-months limit to bring suit after loss inception (MUCH shorter than breach of contract!)

"[A] contractual condition in an insurance policy requiring an action to be brought with a particular time period is a part of the contract ... [and] is valid and binding upon the parties." (Internal quotation marks omitted.) Chichester v. New Hampshire Fire Ins. Co. 74 Conn. 510, 513 (1902). See also Voris v. Mutual Co., 297 Conn. 589, 600, 999 A.2d 741 (2010) ("[c]ontracting parties are free to adopt an unambiguous contract provision limiting the time in which an insurance claim must be filed"). A contract provision requiring suit to be brought within a certain period of time does not operate as a statute of limitations. It is a condition that "is a part of the contract so that it controls the rights of the parties under the contract and, hence, such rights must be governed by the rules of law applicable to contracts." Monteiro v. Am. Home Assurance Co., 177 Conn. 281, 283, 416 A.2d 1189 (1979).

1. Uninsured/Underinsured Motorist Claims

Conn. Gen. Stat. § 38a-336(g)(1): "No insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made on the uninsured or underinsured motorist provisions of an automobile liability insurance policy to a period of less than three years from the date of accident . . .."

"[I]n the case of an underinsured motorist claim the insured may toll any applicable limitation period (A) by notifying such insurer prior to the expiration of the applicable limitation period, in writing, of any claim which the insured may have for underinsured motorist benefits and (B) by commencing suit or demanding arbitration under the terms of the policy not more than one hundred eighty days from the date of exhaustion of the limits of liability under all automobile bodily injury liability bonds or automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals." Id.

Conn. Gen. Stat. § 38a-336(g)(2): In the case of an uninsured motorist claim, if the tortfeasor's motor vehicle is uninsured because the tortfeasor's automobile liability insurance becomes insolvent or denies coverage, uninsured motorist carrier may not limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made under the uninsured motorist provisions of automobile liability insurance policy to a period of less than one year from the date of receipt by the insured of written notice of such insolvency of, or denial of coverage by, tortfeasor's automobile liability insurance company.

If contractual limitations period for uninsured motorist claims is less than three years and violates Conn. Gen. Stat. §38a-336(g), then the suit-limitations period is governed by six-year statute of limitations for contract claims. Tracy v. Allstate Ins. Co., 76 Conn. App. 329 (2003), aff'd, 268 Conn. 281, 842 A.2d 1123 (2004). Notice of intent to bring underinsured motorist claim in order to toll time period under statute must be specific notice of underinsured motorist claim to insurer within the three-year time period. See Dorchinsky v. Windsor Ins. Co., 90 Conn. App. 557, 561 (2005) (insured's telephone call to agent immediately after accident notifying agent of accident and forwarding copy of repair estimate and police report shortly after accident with note concerning intent "to make an insurance claim for all the damages sustained to my car and to me as caused by the accident" not sufficient notice of underinsured motorist claim), Insurer moving for summary judgment on statutory contractual limitations period has burden of showing nonexistence of material fact with respect to three-year limitations period and no tolling under statute. Romprey v. Safeco Ins. Co. of Am., 310 Conn. 304, 323 (2013).

2. Property Policy Contractual Limitations Period Under Standard Form Fire Insurance Policies

Conn. Gen. Stat. §38a-307 governs the provisions of the standard form fire insurance policy issued in Connecticut.

Suit Limitation Clause: "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 twenty-four months next after inception of the loss."

Section 38a-307 only applies to standard fire insurance policy and not all risk homeowner policy or other policies that provide for coverage of property losses other than fire. As a result, such policies may contain different suit limitation provisions. See Conn. Gen. Stat. § 308; Holmes v. Safeco Ins. Co. of Am., 171 Conn. App. 597, 607(2017) (affirming summary judgment in favor of insurer for insured's failure to comply with requirement that suit be filed within 18 months of loss because loss was not a fire loss and inclusion of coverage for fire loss does not transform all risk policy into fire insurance policy governed by Conn. Gen. Stat. § 38a-307).

Proof of prejudice to insurer not required

B. Duty to Mitigate Damages

There is some tension caused by the requirements that an insured must "take all reasonable steps necessary to prevent further damage" after a loss and also mitigate damages. Take care in walking the tightrope!

E.g., tarp a leaking roof to prevent further interior water/weather damage or temporary repairs to a roof following storm damage to prevent water intrusion in the period of time before permanent repairs can be made. Most such policies impose that obligation by means of a variation on the ancient "sue-and-labor" clause, which is a separate grant of coverage under the policy that requires such loss-mitigating steps and also provides that the costs of those steps will be covered under the policy.

V. CONCEALMENT AND FRAUD

1. Sample Language: Most policies include a provision stating that the entire policy will be void if the insured intentionally conceals or misrepresents any material fact, engages in fraudulent conduct or makes any false statements related to insurance.

2. Burden of Proof: Where an insurer raises this provision as a special defense to an insured's lawsuit seeking payment of a claim policy, the insurer must prove that the insured willfully concealed or misrepresented a material fact with the intention of deceiving the insurer. Rego v. Conn. Ins. Placement Facility, 219 Conn. 339, 346 (1991). The insurer does *not* have to prove that it actually relied on the misrepresentation or concealment or that it actually suffered injury. Id. at 346-47.

3. Standard of Proof: The standard of proof is preponderance of the evidence, the standard normally applied to contractual claims, and not the higher standard of clear and convincing evidence typically applied to common law fraud claims. Id. at 347. A false statement is material if it will affect that attitude or actions of the insurer or if it would discourage, mislead or deflect the

insurer's investigation. Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179, 184 (2d Cir. 1984).

4. Consequences of Breach: The breach of this policy condition often results in the denial of first party claims, typically for property loss. It also generally only voids the policy as to that particular claim. Further, at least with respect to automobile insurance policy where there is a pending third party claim it is unlikely that the insurer will be able to rely on this provision to void the policy. See Munroe v. Great Am. Ins. Co., 234 Conn. 182 (1995).

VI. CONSENT TO SETTLE AND VOLUNTARY PAYMENT PROVISIONS

1. Most insurance policies contain a provision that prohibit the insured from settling a case, incurring a liability or an expense without the insurer's consent. Such a provision may state something similar to "no insured will, except at the insured's own cost, voluntarily make any payment, assume any obligation, incur any expense, other than for first aid, without our consent."

2. Purpose: The purpose of a "no voluntary payments" clause "is to prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims . . . The "no voluntary payments" clause, "far from amounting to a mere technicality imposed upon an insured in an adhesion contract, [is] a fundamental term defining the limits or extent of coverage." MacDermid, Inc. v. Travelers Indem. Co., 2017 WL 2622646, at *6 (Conn. Super. Ct. May 19, 2017) (internal citations omitted) (insured breached no voluntary payment provision by incurring costs and entering into stewardship permit governing its environmental clean-up obligations before providing insurer with notice of loss).

3. Relevant Case Law: This provision may apply in situations involving attorney's fees and expenses incurred by an insured and settlement strategies when an insurer defends under a reservation of rights, denies coverage, or breaches a duty to defend under the insurance policy. In such situations, the insurer may need to establish it was prejudiced as a result of any agreement entered into by the insured to protect its rights. See, e.g., North River Ins. Co. v. O&G Indus., Inc., 2017 WL 6028334, *3 (D. Conn. 2017) (denying insurer's motion for summary judgment concerning insured's alleged breach of voluntary payment provision by entering into multiple settlement agreements and agreement to arbitrate rather than litigate because insurer did not establish lack of factual dispute concerning prejudice to insurer). See also Risdon Corp. v. Hartford Accident & Indem. Co., 1994 WL 228642 (Conn. Super. Ct., April 21, 2014) (insured not foreclosed as a matter of law from recovering defense fees and settlement payment in environmental matter incurred before notice to insurer absent evidence of prejudice to insurer). If an insurer denies coverage under a policy, the insured is released from covenant against settlement and may settle the claim and still seek recovery from the insurer for wrongful denial of coverage. Alderman v. Hanover Ins. Group, 169 Conn. 603, 612 (1975). See also Capstone Bldg. Corp. v. Am. Motorists Ins. Co., 308 Conn. 760, 807-08 (2013).