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**EQUITABLE TOLLING IN FIDELITY BONDS: WHY COURTS
SHOULD NOT REFUSE TO START THE CLOCK IN THE NAME
OF FAIRNESS**

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Equitable Tolling in Fidelity Bonds: Why Courts Should Not Refuse to Start the Clock in the Name of Fairness

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INTRODUCTION

For nearly 36 years, twelve Olympic silver medals have sat unclaimed in a vault in Lusanne, Switzerland. And those silver medals will remain in that vault indefinitely. The reason: the refusal of a referee to start (or, as some might say, the willingness of a referee to repeatedly reset) the game clock.

The 1972 men's Olympic gold medal basketball game featured a match-up between the United States and the Soviet Union.² Heading into the gold medal game, the United States was undefeated in Olympic play (63-0) and the winners of seven consecutive gold medals. Despite being the gold medal favorites, the United States found itself trailing the Soviet Union by as many as 10 points with 10 minutes remaining in the game. The United States was able to cut the Soviet lead to one point with 38 seconds remaining, and then, with the Soviet Union trying to run the clock out, Doug Collins intercepted a cross-court pass and was fouled driving to the basket with three seconds to play.

Collins calmly sank the first free throw. After Collins made the second free throw, the Soviets immediately in-bounded the basketball, only to have the referee blow the whistle and stop the clock with one second remaining. After a brief conference, the officials decided the Soviets had called a timeout in between Collins' free throws—even though no official had recognized the timeout—and ordered three seconds back on the game clock. The Soviets in-bounded the ball for a second time, this time the length of the court pass missing its mark as the horn sounded.

¹ I would like to thank Cynthia Mellon-Balmer (Liberty Mutual Surety) for her invaluable contribution to this article and for presenting this topic at the Nineteenth Annual Northeast Surety & Fidelity Claims Conference.

² For an interesting history of the infamous 1972 match-up between the U.S. and Soviet Union's men's basketball teams, see generally *Politics and the Olympics: The World of 1972*, SportsHistory.us, <available at <http://www.sportshistory.us/politics.html>> (last visited Aug. 18, 2008); Frank Saraceno, *Classic 1972 USA vs. USSR Basketball Game*, <available at http://espn.go.com/classic/s/Classic_1972_usa_ussr_gold_medal_hoop.html> (last visited Aug. 18, 2008); 1972 Munich Olympics: USA vs. USSR Basketball Game, available at <<http://www.pahoops.org/1972olympics.htm>> (last visited Aug. 18, 2008).

Game over? Not quite. The horn apparently did not mark the end of the game. Instead, the officials sounded the horn because—according to the officials—the game clock apparently had not been properly reset to three seconds. The officials—for a second time—ordered the game clock reset to three seconds. On the Soviets’ third attempt, they in-bounded the ball the length of the court to Alexander Belov, who scored at the buzzer, giving the Soviets an apparent 51-50 victory.

The United States immediately protested the outcome of the game. In a 3-2 decision (divided along ideological lines between Communist and non-Communist countries), the United States’ protest was denied, and the gold medals were awarded to the Soviet Union. After the game, Mike Bantom (forward for the United States) said of the referees continually resetting the game clock:

We couldn’t believe that [the referees] were giving [the Russians] all those chances. It was like they were going to let them do it until they got it right.³

The U.S. players voted unanimously to refuse their silver medals.

Bantom may as well have been referring to the willingness of some courts to give insureds repeated chances to bring untimely claims under fidelity bonds. Virtually all fidelity bonds (as well as various types of insurance policies) include provisions limiting (often to 24 months) the time period within which an insured can file suit against its fidelity insurer under the bond. The limitations period for filing suit generally begins to run upon the discovery of the loss, although the fidelity bond’s contractual limitations provision creates a safe harbor (often 60 or 90 days from the date of filing a proof of loss with the insurer) during which an insured cannot bring a legal action against the fidelity insurer.

Under the plain language of the standard fidelity bond, then, an insured loses its right to sue its fidelity insurer upon expiration of the limitations period, *irrespective of the safe harbor period*. However, a minority of courts have, based on a perceived incongruity between the contractual limitations period and the safe harbor period, “equitably tolled”—in other words, refused to enforce in the name of fairness—the limitations period during the time the insurer investigates the claim.

Equitably tolling the contractual limitations period is completely inconsistent with the plain language of standard fidelity bonds. Worse, tolling the limitations period defeats the very purpose of the provision (i.e., to create some certainty regarding an insurer’s potential liability and to cut off liability for stale claims). And no court has been able to articulate a compelling reason for disregarding the plain language of the standard fidelity bond’s contractual limitations period. Accordingly, absent a statute to the contrary, courts should enforce contractual limitations periods as written.

³ Tom Hennessy, U.S. 1972 Olympic Team Still Won’t Concede, Long Beach Press-Telegram (August 2, 2008), <available at http://www.prestelegram.com/columnists/ci_10081695> (last visited August 19, 2008).

THE RULES OF THE GAME

The Standard Form 24 Bankers Blanket Bond was first introduced by the Surety Association of America (“SAA”) in 1941.⁴ The 1941 Standard Form 24 Bankers Blanket Bond provided coverage for, among other things, (i) fidelity losses; (ii) on-premises losses; (iii) transit losses; (iv) forgery or alteration losses; and (v) losses resulting from forged or counterfeit securities. Not surprisingly, the initial Bankers Blanket Bond has seen a number of changes during the past sixty-five years.⁵

In particular, the SAA promulgated the Standard Form 24 Financial Institution Bond (the “Bond”) in 1986. The Bond, which provides essentially the same coverage as the 1941 Bankers Blanket Bond, imposes several critical temporal restrictions on an insured’s ability to assert a claim against its fidelity insurer.

For instance, the Bond requires that the insured notify its fidelity insurer of a loss “[a]t the earliest practicable moment, not to exceed 30 days, after discovery of the loss.”⁶ The insured also is required to furnish a proof of loss to its fidelity insurer within six months after discovery of the loss.⁷ Under the terms of the Bond, an insured cannot sue its fidelity insurer for a period of sixty days after it furnishes a proof of loss to the fidelity insurer.⁸

Notwithstanding the 60-day nonsuit (or safe harbor) provision, the insured is required to bring any action under the Bond within twenty-four months of *discovering a loss*.⁹ Specifically, section 5 of the Bond provides that any:

[l]egal proceedings for the recovery of any loss hereunder shall not be brought prior to the expiration of 60 days after the original proof of loss is filed with the [insured] or after the expiration of 24 months from the discovery of such loss.¹⁰

Discovery of a loss under a fidelity policy generally occurs when the insured learns of facts or obtains knowledge which would justify a careful and prudent person in charging another with dishonesty or fraud.¹¹

⁴ For a discussion of the history of the Standard Form 24 Financial Institution Bond, see Edward G. Gallagher, *A Brief History of the Financial Institution Bond*, in *Financial Institution Bonds* 1, 14-38 (Duncan L. Clore ed. 1998) [hereinafter Gallagher, *Brief History*].

⁵ See Gallagher, *Brief History*, *supra* note 4, at 14; see also Robin V. Weldy, *History of the Bankers Blanket Bond and the Financial Institution Bond Standard Form 24 with Comments on the Drafting Process*, in *Second Supplement: Annotated Bankers Blanket Bond*, Ch. 1, at 3 (Harvey C. Koch ed., 1988); Robin V. Weldy, *The Evolution of the Financial Institution Bond: A New Perspective*, at 1 (unpublished paper submitted at the International Association of Defense Counsel mid-winter program in New York, NY on January 26, 1991).

⁶ Bond, § 5.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* Other standard form fidelity policies contain similar restrictions. For instance, the standard Commercial Crime Policy provides that an insured cannot bring any legal action against the insurer: (i) until 90 days after the insured has filed a proof of loss with the insurer; and (ii) more the two years from the date the insured discovers the loss.

¹¹ See e.g., *FDIC v. Aetna Cas. & Surety Co.*, 426 F.2d 729, 739 (5th Cir. 1970); *Alfalfa Elec. Coop., Inc. v. Travelers Indem. Co.*, 376 F. Supp. 901, 906 (W.D. Okl. 1973).

IS THIS 1972 ALL OVER AGAIN?

Buzzer Sounds.....Game Over?

Generally, absent a controlling statute to the contrary, contractual limitation provisions—such as the contractual limitation provision set forth in section 5 of the Bond—are enforceable.¹² Of course, as the 1972 men’s Olympic basketball team well knows, it’s not the length of the game that matters, but when the referee (or, in the case of liability and fidelity insurers, the court) starts the clock. Fortunately for liability insurers, the majority of courts historically have enforced contractual limitations provisions exactly as written, generally holding—unless the insurance policy provides otherwise—that the contractual limitation period begins to run upon discovery of the loss and is not tolled pending events taking place during the limitations period.¹³ Any claim not brought within the contractual limitation period is deemed time barred.¹⁴

“The Insured Called Timeout”

A minority of courts, however, have taken a page out of the 1972 men’s Olympic basketball referees’ playbook and used the doctrine of equitable tolling to enlarge the contractual limitations period to allow insureds to bring claims that would otherwise be time barred.¹⁵ For instance, in *Peloso v. Hartford Fire Insurance Company*, Hartford Fire Insurance Company issued Peloso a fire insurance policy containing the standard, statutory limitation requiring the insured to file suit within twelve months after incurring a loss.¹⁶ The fire insurance policy in that case covered a multi-family dwelling owned by Peloso.

On September 12 and 13, 1965, Peloso’s premises were damaged by a fire. Two days later, Peloso notified Hartford of the fire loss. Hartford advised Peloso it intended to investigate Peloso’s claim and that it would advise Peloso whether Peloso’s claim was covered under the insured policy.¹⁷ Hartford’s investigation was protracted; Hartford did not provide Peloso written notice that Hartford was denying liability until June 15, 1966—nine months after Peloso initially notified Hartford of Peloso’s loss.

¹² For a discussion of legal authorities upholding the validity of contractual limitations periods, see David G. Gillis, Jason W. Glasgow, & Joel P. Williams, *Contractual Limitations Waiting Periods: Time (and Time) Again*, For the Defense 12 (March 2008), available at <http://www.niles-law.com/CM/Articles/Contractual-Limitations.pdf> (last visited Aug. 19, 2008)

¹³ See e.g., *Suntrust Mtg., Inc. v. Georgia Farm Bureau Mut. Ins. Co.*, 416 S.E.2d 322 (Ga. 1992) (refusing to toll limitations provision during the 60-day nonsuit period); *Ashland Fin. Co. v. Hartford Acc. & Indemn. Co.*, 474 S.W.2d 364, 366 (Ky. 1971) (enforcing contractual limitations period even though policy provided that insured could not bring suit for at least three months following insured’s loss); *Closser v. Penn. Mut. Fire Ins. Co.*, 457 A.2d 1081, 1085-86 (Del. 1983) (refusing to toll a limitations provision where insured was not prevented from complying with provision); *Kelley v. Travelers Ins. Co.*, 458 N.E.2d 406, 407 (Ohio 1983) (rejecting doctrine of equitable tolling of limitations period); *Brunner v. United Fire & Cas. Co.* 338 N.W.2d 151, 152 (Iowa 198) (rejecting doctrine of equitable tolling).

¹⁴ A number of state statutes toll an insurance policy’s limitations period. See COUCH ON INSURANCE, *Pursuant to Statute*, § 237:45 (3d ed. 2008). This paper addresses courts’ willingness to equitably toll contractual limitations periods *in the absence of a controlling statute to the contrary*.

¹⁵ See e.g., *Peloso v. Hartford Fire Ins. Co.*, 267 A.2d 498, 501 (N.J. 1970); *Prudential-LMI Comm. Ins. Co. v. Superior Court*, 798 P.2d 1230, 1232 (Cal. 1990); *In re Certified Questions: Ford Motor Co. v. Lumbermens Mut. Cas. Co.*, 319 N.W.2d 320, 323-25 (Mich. 1982).

¹⁶ 267 A.2d 498, 499 (N.J. 1970).

¹⁷ *Id.* at 500.

Peloso filed suit against Hartford on March 10, 1967. Hartford moved for summary judgment arguing that Peloso failed to timely file its claim, and the trial court granted Hartford's motion. On appeal, the *Peloso* Court initially noted that two divergent views had developed regarding when the limitations period begins to run under the standard insurance policy. According to the *Peloso* Court, the majority of courts held that the limitations period began to run from the date of the casualty.¹⁸ The minority of courts, on the other hand, held that the limitations period began to run from the time the cause of action accrued.¹⁹ The courts following the minority view reasoned that courts were required to read together the provision in the standard policy requiring suit to be filed within twelve months with the provision granting insurers immunity within 60 days after the insured filed its proof of loss.

The *Peloso* Court adopted the minority view. The *Peloso* Court concluded there was an incongruity between the twelve-month limitation period and the 60-day nonsuit period, which (at least according to the *Peloso* Court) greatly reduced the insured's time period for filing suit.²⁰ Accordingly, the *Peloso* Court reasoned that:

the fair resolution of the statutory incongruity is to allow the period of limitation to run from the date of the casualty *but to toll it from the time an insured gives notice until liability is formally declined*. In this manner, the literal language of the limitation provision is given effect; the insured is not penalized for the time consumed by the company while it pursues its contractual and statutory rights to have a proof of loss, call the insured in for examination, and consider what amount to pay; and the central idea of the limitation provision is preserved since an insured will have only 12 months to institute suit.²¹

“Please Put 3 Seconds Back on the Game Clock.”

Unfortunately for fidelity insurers, only a handful of courts have addressed the doctrine of equitable tolling in the fidelity context, and some of those courts are all too willing to adopt the *Peloso* Court's rationale and enlarge the time period for insureds to file claims against its fidelity insurer.²² The Court in *Federal Savings & Loan Insurance Co. v. Aetna Casualty & Surety Co.* provides the most comprehensive discussion of the different approaches to interpreting contractual limitations periods in the fidelity context.²³ The Court's opinion in that case, however can best be described as “clear as mud.”

In that case, Aetna Casualty & Surety Company issued a savings and loan blanket bond to Knox Federal Savings & Loan (which later failed and was taken over by FSLIC).²⁴ The bond provided that any legal proceedings to recover a loss under the bond shall not be brought

¹⁸ *Id.*

¹⁹ *Id.* at 501.

²⁰ *Id.*

²¹ *Id.* (emphasis added).

²² See e.g., *Nat'l Newark & Essex Bank v. Am. Ins. Co.*, 385 A.2d 1216 (N.J. 1978); *Fed. Sav. & Loan Ins. Corp. v. Aetna Cas. & Surety Co.*, 701 F. Supp. 1357 (E.D. Tenn. 1988).

²³ 701 F. Supp. at 1359-63.

²⁴ *Id.* at 1358.

before the expiration of 60 days from the date the insured files a proof of loss with Aetna, but in no case shall any claim be filed after expiration of twenty-four months from the discovery of the insured's loss.²⁵

On December 12, 1983, Knox submitted to Aetna a notice of loss indicated that Knox had sustained losses under the bond. On April 13, 1984 and July 25, 1984, Knox filed a total of three proofs of loss with Aetna.²⁶ Shortly thereafter, Aetna acknowledged receipt of Knox's proofs of loss and requested additional information to investigate Knox's claims.²⁷

On March 25, 1986, Aetna had entered a formal "time freeze" agreement with FSLIC (which, by that point, had taken over for the failed Knox). The "time freeze" agreement provided that any claim filed by FSLIC by September 30, 1986 would be treated as if it had been filed March 25, 1986. The parties subsequently extended the "time freeze" agreement until February 28, 1988. Aetna ultimately denied Knox's claims, and FSLIC filed its lawsuit on February 24, 1988.

Aetna moved for final summary judgment on various legal theories, at the core of which was Aetna's claim that FSLIC's lawsuit was untimely under the bond's contractual limitation period.²⁸ In ruling on Aetna's motion for summary judgment, the Court noted a two-step analysis was required: the first step required the Court to interpret the bond's limitations provision (i.e., when the limitations period began and ended), while the second step required the Court to determine whether FSLIC's claims were timely under whatever interpretation the Court adopted.

The Court initially set forth four different approaches to interpreting the bond's limitations provisions. The first approach (advocated by Aetna) required the Court to read the limitations provision literally. Under that approach, FSLIC lost its right to sue Aetna upon expiration of two years from the date Knox first discovered its losses, regardless of what happened during that two-year period. The second approach (advocated by FSLIC) was known as the "accrual method." The accrual method holds that the contractual limitations period begins to run—not at the discovery of the loss—but on the date the nonsuit (or safe harbor) period elapses.²⁹ In that case, the limitations period would have begun 60 days after Knox submitted its notice of loss. The third approach (also advanced by FSLIC) involved a waiver analysis. Under the third approach, the insurer is barred from asserting the limitations period where the insurer (i) lulls the insured into inaction by promises of, or negotiations for, payment under a claim; or (ii) fails to deny liability until after a contractual limitations period has expired.³⁰ The fourth approach involves equitable tolling the limitations period between the time the insured submits its notice of loss until the insurer denies liability.

The Court had little, if any, difficulty articulating the four approaches. Deciding which of the four was appropriate was a different story. The Court rejected the first (literal) approach because, according to the Court, that approach: (i) "seems to be a dated approach, and is not consistent with more contemporary analysis of contractual limitations periods in insurance

²⁵ *Id.*

²⁶ *Id.* at 1358-59.

²⁷ *Id.* at 1359.

²⁸ *Id.* at 1359-60.

²⁹ *Id.* at 1360-61.

³⁰ *Id.* at 1361.

policies”; and (ii) the literal reading of the limitations period is not logically sound because it results in the limitations period running even though the insured cannot bring suit during that period.³¹ The Court reasoned that the second approach (the accrual method) “stretches the contractual language more than should be the case,” even though it is the approach most supported by Tennessee law.³² The third approach (waiver analysis), according to the Court, “would be quite acceptable” in some cases, although generally not as satisfactory as the fourth approach (equitable tolling).³³

In the end, however, the Court ultimately concludes that a fifth approach—a hybrid between the literal approach and equitable tolling analysis—is the “most analytically sound.”³⁴ According to the Court, its hybrid approach is most compatible with the language (even more so than the literal approach?), yet does not deal harshly with either party as could be true if equitable tolling were not permitted.³⁵

How does the Court’s hybrid approach work in practice? We will never know because the Court does not apply the very approach it concludes is the most analytically sound. Nor does it choose between the remaining three approaches (the accrual, waiver, or equitable tolling analysis). Instead, the Court punts on the issue and *actually applies all three approaches*, concluding that FSLIC’s claims are timely under each of the three analyses.³⁶

Fortunately for fidelity insurers, the Court’s analysis in rejecting the literal approach in *Federal Savings & Loan Insurance Co. v. Aetna Casualty & Surety Co.* was not particularly—if at all—persuasive and other Courts interpreting limitations periods in fidelity bonds have provided sound analysis in adopting the literal approach.³⁷ For instance, in *FDIC v. Hartford Accident Insurance Co.*, the Eighth Circuit Court of Appeals reviewed the district court’s order tolling the contractual limitations period contained in a standard savings and loan blanket bond during the fidelity insurer’s investigation.³⁸ In that case, Hartford Accident & Indemnity Company issued a standard savings and loan blanket bond to the First Federal Bank, which later went defunct.³⁹ The bond provided coverage for, among other things, losses arising out of dishonest acts. The bond also provided that any action on the bond must be brought no later than 24 months after discovery of any loss under the bond. Under the terms of the bond, however, Hartford was immune from suit for sixty days following submission of the insured’s proof of loss.

In 1987, First Federal, along with John Gaustad, established a mortgage banking company. In late 1988, First Federal discovered that Gustaud had engaged in fraudulent activities involving fictitious loans funded by First Federal. First Federal filed a proof of loss with Hartford on December 20, 1988, and Hartford denied First Federal’s claim on March 7, 1990. On November 15, 1990, eight months after Hartford denied First Federal’s claim and nearly twenty-five months after First Federal discovered the loss, First Federal sued Hartford to recover under its bond.

³¹ *Id.* at 1362.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1362-63.

³⁷ See e.g., *Fed. Dep. Ins. Co. v. Hartford Accident & Indem. Co.*, 97 F.3d 1148 (8th Cir. 1996)

³⁸ *Id.* at 1149-50.

³⁹ *Id.* at 1149.

FDIC argued the lawsuit was timely filed because, according to the FDIC: (i) the limitations period did not begin to run until March 7, 1990 (the date Hartford denied First Federal's claim); or (ii) the limitation period did not begin to run until after the expiration of sixty days following the submission of the proof of loss. In either case, FDIC's lawsuit would be timely.

The district court concluded that the limitations period began to run upon First Federal's discovery of the loss, but that the limitations period was tolled during the fifteen months Hartford investigated the claim. According to the district court, literally enforcing the twenty-four month limitation period would produce unjust results and would be contrary to the insured's rights under the bond.⁴⁰ The district court noted that when factoring in the fifteen month period during which the insurer investigated First Federal's claim and the sixty-day safe harbor period, the insured's time for bringing suit was "severely reduced." Accordingly, the district court equitably tolled the limitations period.

The Eighth Circuit reversed the district court's ruling. In doing so, the Eighth Circuit specifically rejected the district court's use of the doctrine of "equitable tolling." According to the Eighth Circuit, the language of the bond was plain and unambiguous: Hartford's bond specifically required First Federal to file an action under the bond no later than twenty-four months from the discovery of a loss under the bond.

The Eighth Circuit noted that no showing was made that the bond's limitations period was inherently unfair to the insured or that compliance with the bond's time requirements actually delayed the insured from filing suit within the limitations period.⁴¹ In fact, the FDIC never claimed that First Federal could not have filed suit during the 24-month limitation period. Because South Dakota law already protected an insured who had been misled or otherwise induced into missing a filing deadline, the Eighth Circuit:

decline[d] to rewrite the bond's limitations provisions to read other than its clear and unambiguous terms provide, namely that suit may not be brought "after the expiration of 24 months from discovery of such loss."⁴²

WHY COURTS SHOULD START THE CLOCK AS REQUIRED BY THE RULES (THE BOND'S LIMITATIONS PROVISION)

Tolling the contractual limitations period is completely inconsistent with the intent of the insured and fidelity insurer. Courts generally recognize that the actual language used in a contract is the best evidence of the parties' intent.⁴³ And when the terms of a voluntary contract—which evidence the intent of the parties—are clear and unambiguous, the contracting parties are bound by those terms, and courts are—as the Court in *FDIC v. Hartford Accident &*

⁴⁰ *Id.* at 1150.

⁴¹ *Id.* at 1151.

⁴² *Id.*

⁴³ See e.g., *Rose v. M/V Gulf Stream Falcon*, 186 F.3d 1345, 1350 (11th Cir. 1999); *Tingley Sys., Inc. v. Healthlink, Inc.*, 509 F. Supp. 2d 1209, 1214 (M.D. Fla. 2007); *Haliburton Energy Servs., Inc. v. NL Indus.*, 553 F. Supp. 2d 733, 757 (S.D. Tex. 2008); *BP Prods. N. Am., Inc. v. Twin Cities Stores, Inc.*, 534 F. Supp. 959, 962 (D. Minn. 2007).

Indemnity Co. recognized—powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties.⁴⁴

The plain language of the Bond—an arms-length, negotiated standard form contract between sophisticated business entities—does not provide for tolling the limitations period.⁴⁵ The Bond does not contain a single provision evidencing the intent of either the insured or fidelity insurer to suspend the contractual limitations period during the fidelity insurer’s investigation of the insured’s claim—or, for that matter, during any other time.⁴⁶ To the contrary, the Bond simply provides that “[l]egal proceedings for the recovery of any loss [under the Bond] shall not be brought after the expiration of 24 months from the discovery of such loss.”⁴⁷ By equitably tolling the limitations period, courts are, in effect, rewriting the terms of the Bond and giving the insured a better deal than it freely bargained for.

Worse, tolling the limitations period defeats the very purpose of the provision—i.e., to create some certainty regarding a fidelity insurer’s potential liability and to cut off liability for stale claims. An insured’s liability for a potentially untimely claim now varies depending on which jurisdiction’s law governs and whether that particular jurisdiction recognizes equitable tolling.

And, unfortunately, that is only the starting point of the analysis. Equitable tolling gives rise to numerous issues not present under the literal approach. For instance, fidelity insurers will face uncertainty—and litigation—regarding whether an insured’s notice or proof of loss is sufficient for purposes of tolling the limitations period. As one commentator has observed, the “tolling of a period of limitations from notice of a loss until denial of the claim depends on *the sufficiency of the notice*.”⁴⁸ Now, fidelity insurers will have to grapple with the very same issue courts have struggled with in projecting their liability for potentially untimely claims.⁴⁹

Fidelity insurers will likewise face uncertainty—and, again, litigation—regarding whether its denial of an insured’s claim is sufficiently unequivocal to restart the limitations period. On the one hand, one California appellate court has held that an insurer’s declination letter (in which the insurer clearly denied a property damage claim after investigation) was sufficiently unequivocal to resume the limitations period even though the insurer offered to review any additional information submitted by the insured.⁵⁰ On the other hand, the Nevada Supreme Court has held that an insurance adjuster’s letter advising the insured that the insured’s

⁴⁴ 97 F.3d at 1151; see also *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1290-91 (11th Cir. 2001).

⁴⁵ Numerous courts have observed that there is not unequal bargaining power between an insured and its fidelity insurer because the terms of the Bond was drafted by the joint efforts of the Surety Association of America and the American Bankers Association. See e.g., *FDIC v. Ins. Co. of N. Am.*, 105 F.3d 778, 786 (1st Cir. 1997) (“[T]he fidelity bond is an arms-length, negotiated contract between sophisticated business entities, the standard form for which was drafted by the joint efforts of the Surety Association of America and the American Bankers Association.”) (citation omitted); *FDIC v. St. Paul Cos.*, Civ. No. 03-cv-00115-MEH-BNB, 2008 WL 3845418, at *10 (D. Colo. Aug. 15, 2008).

⁴⁶ See Bond.

⁴⁷ See Bond, § 5.

⁴⁸ COUCH, *supra* note 14, at § 237:48 (emphasis added).

⁴⁹ See *id.* (discussing *Johnson v. State Farm Mut. Auto. Ins. Co.*, 455 N.W.2d 420 (Mich. 1990)); *Vashistha v. Allstate Ins. Co.*, 989 F. Supp. 1029 (C.D. Cal. 1997); *Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777 (N.M. 1991).

⁵⁰ See *Singh v. Allstate Ins. Co.*, 73 Cal. Rptr. 2d 546 (Ca. Ct. App. 1998); see also COUCH, *supra* note 14, at § 237:42.

personal property loss was declined was not sufficient to restart the limitations period where the insurer continued to negotiate with the insured after sending the denial letter.⁵¹

And no compelling reason exists for tolling the limitations period. The concern advanced by most courts—like the Court in *Peloso*—is the perceived incongruity between the nonsuit or safe harbor provision and the contractual limitation period. Any perceived incongruity, however is just that: perceived. The Bond’s contractual limitation provision does not grant the insured—as some courts assume—an unfettered right to sue its fidelity insurer during the twenty-four month beginning from the discovery of the loss. Instead, the Bond imposes a deadline by which the insured must file suit. Consequently, the nonsuit or safe harbor provision cannot limit a non-existent right (i.e., the unfettered right of an insured to sue its fidelity insurer), and that non-existent right should not be the basis for equitably tolling a contractual limitations period.

One leading commentator has offered another rationale for equitable tolling:

[equitable tolling] avoids the possibility that the insurer may drag out negotiations while the period passes, leading either to insureds losing their rights in a questionable manner or to costly evidentiary battles over whether the insureds’ actions should be deemed to be a waiver of the defense, or to estop the insurer from raising it.⁵²

This rationale is flawed for one obvious reason: nothing prevents an insured from suing its fidelity insurer under the Bond if the insurer is dragging out negotiations. Once the nonsuit or safe harbor period has lapsed, the insured can sue its fidelity at any time within two years from discovery of the loss.

If, after the expiration of the nonsuit or safe harbor provision, the insured believes the fidelity insurer is dragging its feet and the contractual limitations period is set to expire, the insured’s remedy is simple: it can sue its fidelity insurer. Moreover, the concern that some insurers may drag their feet is further ameliorated by state statutes granting insured’s prevailing party attorneys’ fee in action against a fidelity insurer.

Accordingly, equitable tolling is not necessary to protect an insured’s interests. In fact, in some instances, equitable tolling may be detrimental to insureds. In particular, insureds benefit from the certainty resulting from literal application of the Bond’s limitations provision. For instance, an insured may be lulled into believing the contractual limitations period was tolled by the insured’s notice of loss only to later learn its notice was insufficient to toll the limitations period. The uncertainty on the part of fidelity insurers may, in some cases, make fidelity insurers reluctant to continue negotiating with insureds if doing so continues to toll the limitations period.

⁵¹ See *Walker v. Am. Bankers Ins. Group*, 836 P.2d 59 (Nev. 1992).

⁵² COUCH *supra* note 14, at § 237:39.

CONCLUSION

Some say sports is a metaphor for life, and if the 1972 men's Olympic gold medal basketball game taught us anything, it is that referees do not always enforce the rules of the game as written, and appellate panels cannot always be counted on to remedy a referee's failure to properly interpret or apply the rules.

Like the 1972 men's Olympic team, fidelity insurers cannot rely on trial courts to properly enforce the Bond's contractual limitations period. Nor can—or should—fidelity insurers rely on appellate courts to remedy a trial court's failure to properly enforce the Bond's limitations period. Fidelity insurers need look no further than the decisions in *Smith v. Allstate*, *Federal Savings & Loan v. Aetna Casualty & Surety Co.*, *Colonial Penn Insurance Co. v. Dean Witter Reynolds, Inc.*, and *National Newark & Essex Bank v. American Insurance Co.*, among other cases, for evidence of courts' willingness to refuse to start the contractual limitations period—thereby allowing insureds to bring untimely claims against fidelity insurers.

If fidelity insurers want to avoid the fate of the 1972 men's Olympic team, fidelity insurers should be careful to avoid giving courts any reason to equitably toll the contractual limitations period. If the fidelity insurer determines the insured's claim is not covered under the Bond, the fidelity insurer should as soon as practically possible notify the insured that its claim has been denied, taking care to ensure that its claim denial is unequivocal. And fidelity insurers should only negotiate with its insured after denying the insured's claim if the fidelity insurer makes clear that the fidelity insurer is not waiving the Bond's contractual limitations period.

Otherwise, fidelity insurers may end up like Mike Bantom (and other members of the 1972 U.S. men's Olympic basketball team) wondering why courts are giving insureds so many chances to bring untimely claims under the Bond. And the consequence to the fidelity insurer may be more costly than twelve silver medals abandoned in a vault in Lusanne, Switzerland.

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