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COLORADO SUPREME COURT
Colorado State Judicial Building
2 East 14th Avenue
Denver, Colorado 80203

Appeal from the District Court for the City and County of Denver
The Honorable Joseph E. Meyer III, Case No. 03CV3383
On Petition for *Certiorari* Pursuant to C.A.R. 50

Petitioners:

BOARD OF DIRECTORS, METRO WASTEWATER
RECLAMATION DISTRICT

Intervenor/Respondent:

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURG, PA. (a member company of American
International Group, Inc.), a Delaware Corporation

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Case Number: 03 SC 846

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE ISSUES 1

INTRODUCTION 1

ARGUMENT 3

I. THE OVERWHELMING MAJORITY OF STATES APPLY THE NOTICE-PREJUDICE RULE TO LATE NOTICE. 3

II. THE RATIONALE SUPPORTING ADOPTION OF THE NOTICE-PREJUDICE RULE IN UIM CASES EXTENDS TO LIABILITY POLICIES GENERALLY. 4

III. AUTOMATIC FORFEITURE IS INCOMPATIBLE WITH ESTABLISHED PRINCIPLES OF COLORADO INSURANCE AND CONTRACT LAW...... 6

IV. THE RATIONALE FOR THE NOTICE-PREJUDICE RULE APPLIES WITH EQUAL FORCE TO CLAIMS-MADE POLICIES...... 8

V. THE INSURERS' OBJECTIONS TO THE NOTICE-PREJUDICE RULE ARE UNJUSTIFIED AND SHOULD BE REJECTED...... 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

<i>Aetna Cas. & Sur. Co. v. Murphy</i> , 538 A.2d 219 (Conn. 1988)	5
<i>Alcazar v. Hayes</i> , 982 S.W.2d 845 (Tenn. 1998)	3, 5
<i>Ballow v. PHICO Ins. Co.</i> , 875 P.2d 1354 (Colo. 1993) (en banc)	4, 6, 10
<i>Brakeman v. Potomac Ins. Co.</i> , 371 A.2d 193 (Pa. 1977)	3, 4
<i>Brandon v. Nationwide Mutual Insurance Co.</i> , 97 N.Y.2d 491 (N.Y. 2002)	3
<i>Cast Steel Products, Inc. v. Admiral Ins. Co.</i> , 348 F.3d 1298 (11th Cir. 2003)	9
<i>Clementi v. Nationwide Mutual Fire Ins. Co.</i> , 16 P.3d 223 (Colo. 2001)	passim
<i>Commercial Underwriters Ins. Co. v. Aires Envtl. Servs.</i> , 259 F.3d 792 (7th Cir. 2001)	3
<i>Farmers Auto. Inter-Insurance Exch. v. Komugres</i> , 202 P.2d 959 (Colo. 1949)	7
<i>Farmers Group, Inc. v. Trimble</i> , 691 P.2d 1138 (Colo. 1984)	5, 6, 15
<i>Hansen v. Barmore</i> , 779 P.2d 1360 (Colo. Ct. App. 1989)	7
<i>Hartford Fire Ins. v. California</i> , 509 U.S. 764 (1993)	14
<i>Huizar v. Allstate Ins. Co.</i> , 952 P.2d 342 (Colo. 1998)	5, 6
<i>Interbank Invs., L.L.C. v. Vail Valley Consol. Water Dist.</i> , 12 P.3d 1224 (Colo. Ct. App. 2000), cert. denied, 2003 WL 22284310 (Colo. Oct. 6, 2003)	11
<i>Marez v. Dairyland Ins., Co.</i> , 638 P.2d 286 (Colo. 1981)	6, 7, 8
<i>Rohauer v. Little</i> , 736 P.2d 403 (Colo. 1987)	7
<i>St. Charles Hospital and Rehab. Center v. Royal Globe Ins. Co.</i> , R/D: 03-22-04	3
<i>St. Paul Fire & Marine Ins. Co. v. Hunt</i> , 811 P.2d 432 (Colo. Ct. App. 1991)	12
<i>State Farm Mut. Automobiles Ins. Co. v. Cassinelli</i> , 216 P.2d 606 (Nev. 1950)	3
<i>Thompson v. Maryland Casualty Co.</i> , 84 P.3d 496 (Colo. 2004)	5, 6, 15, 16
<i>Weaver Bros., Inc. v. Chappell</i> , 684 P.2d 123 (Ala. 1984)	4

Yerton v. Bowden, 762 P.2d 786 (Colo. Ct. App. 1988)..... 7

Statutes

Colo. Rev. Stat. § 10-1-101..... 4, 6

Other Authorities

15-111 HOLMES' APPLEMAN ON INSURANCE 2d (2001 ed.) 14

16-117 HOLMES' APPLEMAN ON INSURANCE 2d (2001 ed.)..... 13

18 COLORADO LAWYER 1121, *The Claims Made Policy—A Trap for the Unwary Lawyer*, (June 1989)..... 8

7 COUCH ON INSURANCE § 101:18 (2004)..... 5

Background of States' Antitrust Lawsuit Against Insurers, Liability Week, Oct. 11, 1994 (available on Westlaw at "10/11/94 LIABWEEK")..... 13

Carolyn M. Frame, *"Claims-Made" Liability Insurance: Closing the Gaps with Retroactive Coverage*, 60 TEMP. L.Q. 165 (Spring 1987) 14

Shand, *"Claims Made" vs. "Occurrence"*, 28 INT'L INS. MONITOR 269 (1974)..... 14

INTEREST OF AMICUS CURIAE

United Policyholders was founded in 1991 as a non-profit tax-exempt organization dedicated to educating the public on insurance issues and consumer rights. The organization is funded by donations and grants from individuals, businesses, and foundations. United Policyholders serves as a resource for insurance claimants and actively monitors legal and marketplace developments affecting the interests of all policyholders.

STATEMENT OF THE ISSUES

1. Should the modern rule requiring a showing of prejudice apply in all liability policy cases before forfeiture is conclusively deemed to have occurred based on late notice?
2. Is a rule that imposes forfeiture of coverage on insureds without regard to the facts or equities of a particular case inconsistent with Colorado law and policy?

INTRODUCTION

Colorado courts have long been aware of the inherent inequities in agreements between insurers and insureds. Colorado law has consistently recognized the importance of protecting the rights of policyholders in the face of these inequities. In recent years such protection has included the adoption by this Court, for UIM policies, of the notice-prejudice rule, which prevents insurers from denying premium-paid coverage based solely on late notice unless the insurer can show it was harmed by the delay. Before this Court now is whether the notice-prejudice rule should be confined to UIM policies or apply generally to all liability policies. Well-established principles of Colorado law and policy support the recognition of the notice-prejudice rule beyond the UIM context.

The insurance industry has filed briefs in this case implying, in essence, that an insurance policy is a freely-negotiated contract between a consumer, including individuals or corporations, and an individual insurance company and that this Court, therefore, should honor that contract without further question. Contrary to the insurers' assertions, that is not how the industry works.

Regardless of their size or sophistication, policyholders have no meaningful opportunity to negotiate the notice terms of insurance policies. Insurance companies and related organizations – such as the Insurance Services Organization – generally draft uniform policy clauses for all types of liability insurance and then present them in a take-it-or-leave-it fashion to policyholders such as the Metro Wastewater Reclamation District. These are contracts of adhesion in the truest sense of the term, as they cannot be varied with respect to notice, regardless of the policyholder. Well-settled principles of Colorado law establish that such contracts of adhesion should not be used to achieve a forfeiture of the very coverage purchased by insureds for protection.

The insurers here attempt to persuade this Court that a notice-prejudice rule in occurrence and claims-made policies will prevent them from realizing their own contractual rights under the policies. With the exception of realizing the benefits of forfeiture, the examples offered by insurers – such as inability to settle cases, learn operative facts and select efficient and effective counsel – are addressed by a prejudice rule. If an insured fails to notify its insurer soon enough to permit the insurer to exercise such rights, then a court can affirm the denial of coverage. But, courts should not permit an insurer to use strict application of a notice clause to avoid coverage where, as here, there is no right that cannot be addressed by a prejudice rule. Under such a strict rule, notice that is one day late has the same effect as notice that is one year late – or five years late. A strict forfeiture rule is contrary to the reasonable expectations of the average purchaser of insurance, particularly where the policyholder may have repeatedly renewed policies with the same insurer over many years, paying premiums annually over the entire period. This Court should reject this type of anti-consumer forfeiture, requiring instead that insurers establish prejudice from any late notice before depriving insureds of coverage.

ARGUMENT

I. THE OVERWHELMING MAJORITY OF STATES APPLY THE NOTICE-PREJUDICE RULE TO LATE NOTICE.

Most jurisdictions recognize that it is inequitable to allow an insurer to void its coverage obligation based solely on late notice if the insurer has not been prejudiced by the delay. *See Clementi v. Nationwide Mutual Fire Ins. Co.*, 16 P.3d 223, 228 (Colo. 2001) ("Few courts today strictly adhere to the traditional approach which allowed for no consideration of insurer prejudice in determining whether benefits should be denied due to noncompliance with an insurance policy's notice requirements.") (citing *Alcazar v. Hayes*, 982 S.W.2d 845, 853 (Tenn. 1998)).¹

The so-called traditional rule, which required strict compliance with contractual conditions irrespective of resulting harshness, is now the disfavored approach.² *Id.* Courts adopting a prejudice standard recognize that the traditional rule is oppressive to insureds and unnecessary to protect the legitimate interests of insurers. In *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 198 (Pa. 1977), which this Court cited in *Clementi*, the court noted that refusing

¹ The number of jurisdictions rejecting the traditional approach appears to be growing. For example, in *Brandon v. Nationwide Mutual Insurance Co.*, 97 N.Y.2d 491, 496 n.3 (N.Y. 2002), which involved late notice of suit, the New York Court of Appeals described the traditional approach disapprovingly as one that allows insurers to "avoid their obligations to premium paying clients," and noted that it was the law in an ever smaller number of states. Since then, at least one New York court has held that an insurer must show prejudice in order to deny coverage on the basis of late notice. *See St. Charles Hospital and Rehab. Center v. Royal Globe Ins. Co.*, R/D: 03-22-04 (characterizing *Brandon* as "the clearest signal yet of this Court's acknowledgment that the time has come for New York to recognize what the majority of other states have recognized, namely that the egregious imbalance between insurer and insured needs to be corrected").

² Even in jurisdictions where insurers are not required to show prejudice, courts do not automatically void coverage, but instead consider the facts of each case to determine whether the policyholder acted reasonably or had a justifiable excuse. *See, e.g., State Farm Mut. Automobiles Ins. Co. v. Cassinelli*, 216 P.2d 606, 616 (Nev. 1950) (absence of prejudice immaterial, but court would consider the facts presented to determine whether an insured's delay was reasonable or excused); *Commercial Underwriters Ins. Co. v. Aires Envtl. Servs.*, 259 F.3d 792 (7th Cir. 2001) (justifiable excuse).

compensation to an insured, where timely notice would not have put the insurer in a better position, was "unduly severe and inequitable." Likewise, in *Weaver Bros., Inc. v. Chappell*, 684 P.2d 123, 125 (Ala. 1984), the court stated, "the notice requirement is designed to protect the insurer from prejudice; in the absence of prejudice, regardless of the reasons for the delayed notice, there is no justification for excusing the insurer from its obligations."

The Colorado Supreme Court recently adopted the notice-prejudice rule³ in the UIM context on similar grounds, noting that to allow "an insurance company, which has collected full premiums for coverage, to refuse compensation to an accident victim or an insured on the ground of late notice, where it is not shown timely notice would have put the company in a more favorable position, is unduly severe and inequitable." *Clementi*, 16 P.3d at 230 (quoting with approval *Brakeman*, 371 A.2d at 198).

II. THE RATIONALE SUPPORTING ADOPTION OF THE NOTICE-PREJUDICE RULE IN UIM CASES EXTENDS TO LIABILITY POLICIES GENERALLY.

This Court has repeatedly recognized that the fair treatment and protection of policyholders is important, particularly in the context of standard form insurance policies. This principle is not restricted to UIM policies. *See, e.g., Ballow v. PHICO Ins. Co.*, 875 P.2d 1354 (Colo. 1993) (en banc) (noting same in the context of claims-made policy). Colorado statutory law also requires the protection of policyholders and provides that. *See Colo. Rev. Stat. § 10-1-101* (the public welfare "requires that all persons having to do with insurance services to the public be at all times actuated by good faith in everything pertaining thereto, abstain from deceptive or misleading practices, and keep, observe, and practice the principles of law and equity in all matters pertaining to such business").

³ The notice-prejudice rule refers to the obligation of an insurer to show that it has been prejudiced by the insured's delay in providing notice of a claim before the insurer is allowed to deny coverage on this ground.

In *Clementi*, this Court adopted the notice-prejudice rule despite the fact that the insureds' late notice did not substantially comply with the notice provisions of the policy and that their delay was unreasonable. 16 P.3d at 227. This Court's approval of the rule was based on three policy grounds: "(1) the adhesive nature of insurance contracts, (2) the public policy objective of compensating tort victims, and (3) the inequity of the insurer receiving a windfall due to a technicality." *Id.* at 229 (citing *Alcazar*, 982 S.W.2d at 850; *Aetna Cas. & Sur. Co. v. Murphy*, 538 A.2d 219, 222 (Conn. 1988)).

These considerations are not limited to UIM policies, and extend to liability policies generally. UIM policies are not the only insurance policies that are contracts of adhesion. Modern cases recognize that insurers dictate the terms of insurance policies and that insureds are typically powerless to negotiate modifications. *See, e.g., Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 501-02 (Colo. 2004), (citing *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 344 (Colo. 1998)). In *Thompson*, this Court noted, in the context of a general liability policy, that "unlike a negotiated contract, an insurance policy is often imposed on a 'take-it-or-leave-it' basis." *Thompson*, 84 P.3d at 501. Earlier, in *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo. 1984), this Court identified the imbalance of bargaining power between insurers and insureds as one way insurance policies differ from ordinary contracts. The widespread use of standard insurance forms – rather than manuscripted forms containing specifically negotiated terms – in all types of insurance policies shows that the imbalance of bargaining power persists regardless of the sophistication of the insured.

The public policy of compensating tort victims, likewise, is not limited to UIM policies, and is served by liability insurance generally. *See* 7 COUCH ON INSURANCE § 101:18 (2004) ("Public policy concerns for the compensation of third-party victims may also be found in the context of general liability insurance coverage.").

Finally, it is no less offensive for the insurer to receive a windfall as a result of a technicality in the context of an occurrence or claims-made policy than in the context of a UIM

policy. As this Court stated in *Thompson*, in the context of a general liability policy, courts have a "heightened responsibility" to review policy terms to ensure compliance with "public policy and principles of fairness." 84 P.3d at 501-502 (citing *Huizar*, 952 P.2d at 344).

This Court has emphasized that insurance policies are not like other contracts and that a special relationship exists between insurer and insured. *See, e.g., Farmers*, 691 P.2d at 1142. In *Farmers*, this Court explained that "[t]he motivation of the insured when entering into an insurance contract differs from that of parties entering into an ordinary commercial contract. By obtaining insurance, an insured seeks to obtain some measure of financial security and protection against calamity, rather than to secure commercial advantage." *Id.* Likewise in *Ballow*, this Court emphasized that insurers' duty to act in good faith extends beyond the scope of insurance claims setting to "'everything pertaining' to provision of the insurance services to the public." 875 P.2d at 1363 (citing Colo. Rev. Stat. § 10-1-101). In light of the special relationship between the insurer and the insured and the heightened duties owed by the insurer, it is unfair to deny an insured the protection the policy was purchased to secure if the insurer has suffered no prejudice from the delay.

III. AUTOMATIC FORFEITURE IS INCOMPATIBLE WITH ESTABLISHED PRINCIPLES OF COLORADO INSURANCE AND CONTRACT LAW.

Colorado courts have long recognized the unequal bargaining power of the parties to an insurance contract and the heightened responsibility of courts to ensure the protection of insureds. For example, established Colorado law excuses late notice based on extenuating circumstances or justifiable excuse. *Marez v. Dairyland Ins. Co.*, 638 P.2d 286, 289 (Colo. 1981). This alone seriously undermines the insurers' position that draconian enforcement of time limits is critical to setting rates and predicting risk.

Automatic forfeiture for late notice is also inconsistent with Colorado's treatment of other breaches of insurance policy conditions. For example, an insurer generally is required to show prejudice before it can avoid its coverage obligation based on breach of a non-cooperation

clause. In *Hansen v. Barmore*, 779 P.2d 1360, 1364 (Colo. Ct. App. 1989), the court noted that breach of a non-cooperation clause constitutes breach "only if material and substantial disadvantage to the insurer is proved." See also *Farmers Auto. Inter-Insurance Exch. v. Konugres*, 202 P.2d 959 (Colo. 1949) (breach of a cooperation clause generally requires more than a formal or inconsequential failure by the insured).

A forfeiture rule that operates irrespective of prejudice is effectively a penalty, and also violates Colorado law on this basis. See, e.g., *Rohauer v. Little*, 736 P.2d 403, 410 & n.3 (Colo. 1987) ("Under the doctrine of substantial performance, a party may recover on a contract when that party has performed all the major aspects of the contract but has deviated in insignificant particulars that do not detract from the benefit which the other party would derive from a literal performance. Whether performance is 'substantial' is generally a question of fact that depends on the particular circumstances of the case.") (internal citations omitted); *Yerton v. Bowden*, 762 P.2d 786 (Colo. Ct. App. 1988) (damages stipulated by the parties invalid as a penalty if they are unreasonably disproportionate to the expected loss).

Not even *Marez*, on which the insurers rely, stands for the principle of automatic forfeiture in late-notice cases. As this Court indicated in *Clementi*, *Marez* is a no-notice case and therefore provides no guidance in the case of late notice. 16 P.3d at 228. More importantly, this Court's analysis in *Marez* was fact-specific and clearly signaled that different facts could warrant a different result:

We emphasize that *in the present case* Valdez and Montoya, without justifiable excuse or extenuating circumstances, *totally failed* to give notice of any kind whatsoever to Dairyland, and that it was only by chance that Dairyland learned of the accident and lawsuit two and one-half years after the accident.

.....

In accordance with the rule of law consistently followed over the years by our courts, *under the circumstances of the present case* the failure of Valdez and Montoya to comply with the notice of accident and suit

conditions, as a matter of law, constituted a material breach of the contract of insurance, relieving Dairyland of its duty to defend the insureds. . . .

638 P.2d at 289 (emphasis added).

In our view, the *facts of this case* do not justify a departure from the present rule and the pronouncement of a new rule based on the concept of prejudice.

....

In view of the salutary purposes of the provisions for notice of accident and claim, they should not be *lightly* ignored or set aside without *substantial justification*, which we find lacking *in the present case*.

Id. at 291 (emphasis added).

Marez stands for the limited proposition that – in an appropriate case – the issue of whether forfeiture should result from failure of notice may be decided as a matter of law. The case emphatically does not stand for the principle that late notice must operate to deprive the insured of the protection to which it otherwise would be entitled irrespective of the facts or equities involved.

IV. THE RATIONALE FOR THE NOTICE-PREJUDICE RULE APPLIES WITH EQUAL FORCE TO CLAIMS-MADE POLICIES.

The need for the notice-prejudice rule in claims-made policies is especially compelling because the operation of notice provisions in such policies can be treacherous to insureds. For example, if an insured maintains successive claims-made policies without gaps in coverage, the mechanical operation of the notice requirement can have unexpected results. In such a case, coverage can be denied based solely on a trivial delay in notice that in no way compromises the insurer's interests, leaving the insured wholly unprotected despite faithful payment of premiums over the course of all policies. This result, at best, would be counterintuitive to the insured, who would expect coverage under one or another of its successive policies.

It is not surprising that claims-made policies are widely acknowledged to be traps for the unwary. *See, e.g.*, 18 COLORADO LAWYER 1121, *The Claims Made Policy—A Trap for the*

Unwary Lawyer, (June 1989); *Cast Steel Products, Inc. v. Admiral Ins. Co.*, 348 F.3d 1298 (11th Cir. 2003) (applying Florida law) (illustrating the unexpected and inequitable way in which coverage can be lost in a claims-made policy). For this reason alone, this Court should be especially solicitous of the reasonable expectations of insureds and disapprove of rules that impose forfeiture – the most draconian of penalties – on insureds in circumstances where the insurer has not been damaged.

It is useful for this Court to consider a hypothetical result based on one of the policies at issue. The policy offered to Metro provides that an insured must give the insurer notice "as soon as practicable" *and either* "any time during the Policy Year" *or* "within thirty days after the end of the Policy Year. . . ." Under Colorado law, an insurance policy's requirement of notice "as soon as practicable" requires notice within a reasonable length of time under the circumstances. *Clementi*, 16 P.3d at 226. Now, assume that Metro secured coverage under the exemplar policy and renewed the policy for two successive years ("Year 1" and "Year 2"). In that situation, during 22 of the 24 months of coverage, Metro would have to provide its insurer with notice of a claim as soon as practicable, and within a reasonable length of time under the circumstances. However, in each of the last months of coverage under Year 1 and Year 2, Metro would have a different notice obligation and would have to report a claim within 30 days. These are the types of purportedly fair and efficient results that the insurance industry trumpets in demanding a bright-line enforcement of notice provisions. The results, however, are absurd. If Metro were to receive a claim in the last month of its Year 1 policy but take 60 days to report the claim, the insurer could deny coverage for the claim under Year 1 because of a violation of the policy's notice provision, and deny coverage for the claim under Year 2 because it was a claim made during Year 1. As a result, Metro might pay for 24 months of consecutive coverage for claims, incur a claim during those 24 months, notify its insurer in a reasonable length of time under the circumstances (with any delay resulting in no prejudice to the insurer), but still be left without coverage because of a series of hyper-technicalities. If this Court adopts the notice-prejudice

rule, however, both insureds and the insurance industry are protected. Metro would get the benefit of its policies, and the insurer would still be able to avoid coverage based on violations of the notice provisions if it could establish that the late notice resulted in prejudice to its investigation, defense, or settlement of the claim, or otherwise. Application of the notice-prejudice rule to claims-made policies would avoid the unfair result of treating notice by Metro that is one day late exactly the same as notice that is one year or five years late.

Application of the rule to claims-made policies would not transform them into occurrence policies – as insurers frequently contend – nor would it provide the insured with coverage it did not purchase.

Occurrence policies provide coverage for harm that occurs during the policy period. In occurrence policies, coverage for such harm extends indefinitely into the future. By contrast, claims-made policies provide far more limited coverage. Such policies cover only claims brought against the insured during a defined time frame, typically the policy period. *See Ballou*, 875 P.2d at 1357.

The notice-prejudice rule in the claims-made context would not require the insurer to assume any additional risk than that for which it accepted premiums: coverage would still not exist for a claim brought against the insured after the policy period expires. The effect of the rule is modest: to prevent the insurer from avoiding its obligation to pay based solely on late notice if the insurer has not been prejudiced by the delay.⁴

⁴ The parties in this case cite a number of cases in which courts declined to extend the notice-prejudice rule to claims-made policies. These cases take as their premise the insurers' contentions that the timing of notice is material in claims-made policies, that the timing of notice defines the scope of coverage, or that a strict forfeiture standard is necessary to establish premiums and reserves. Although many cases have declined to apply the notice-prejudice rule to claims-made policies, the courts in these cases accepted the insurers' contentions without critically examining their premises. As discussed in this section, these premises are at the very least problematic and therefore are insufficient to justify rejection of the notice-prejudice rule.

Because application of the notice-prejudice rule does not provide the insured with coverage for claims brought against the insured outside the policy period, there is also no reason to believe that it would affect substantially the assumptions on which pricing and reserves are calculated. The insurers' suggestion to the contrary asks this Court to believe that pricing and reserves depend to some significant degree on forfeitures due to technical mistakes by insureds. If this were truly the state of affairs, an even stronger case would exist for the adoption of the notice-prejudice rule in light of insurers' good faith obligations and Colorado's public policy of protecting insureds. To the extent the insurance industry actually calculates pricing and reserves taking into account the probability that insureds will miss notice deadlines and suffer coverage forfeitures based on a technicality, the insurance industry surely can use its actuarial skill to create pricing and reserve models that accommodate the practical implications of the notice-prejudice rule.

The insurers also attempt to avoid application of the notice-prejudice rule to claims-made policies by arguing that the timing of notice in such policies is "material" and therefore must be strictly enforced. The insurance industry understandably wants to characterize the timing of notice as "material" in order to defend a forfeiture standard. As a matter of public policy and common sense, an insurer should not be allowed to circumvent the equitable concerns underlying the notice-prejudice rule by the mere expedient of characterizing a policy term as material.

Furthermore, as a matter of contract law, materiality is a question of *fact*, not a conclusion one party can unilaterally declare in order to force forfeiture on the other. *See, e.g., Interbank Invs., L.L.C. v. Vail Valley Consol. Water Dist.*, 12 P.3d 1224 (Colo. Ct. App. 2000), *cert. denied*, 2003 WL 22284310 (Colo. Oct. 6, 2003). The Restatement of Contracts, to which this Court has looked for guidance, agrees, and provides that the test for determining whether a circumstance is material is fact-specific and includes, among other considerations, the likelihood that the party failing to perform will suffer forfeiture. Restatement (Second) of Contracts § 241

(1981); see *Clementi*, 16 P.3d at 230 (citing as persuasive cases reasoning that disproportionate forfeiture is pertinent to determining whether a condition should be excused).⁵

The insurers also urge this Court to assume prejudice as a matter of law from any delay in notice, no matter how trivial. Yet every day the insurance industry proves its capacity to respond to claims well after they have been brought against insureds. It is a peculiarity of claims-made policies that the time available to notify the insurer of a claim depends on how much of the policy has elapsed:⁶ an insured has over one year to notify the insurer of a claim brought against the insured on the first day of the policy, whereas the same insured has only the time permitted in the policy's notification requirement, typically 30 days, to notify the insurer of a claim brought against the insured on the last day of the policy. Insurers, even in claims-made policies, clearly have the capacity to respond to claims reported long after the underlying events have taken place. A forfeiture rule that operates automatically to deprive an insured of all coverage based on a one-day delay beyond the notice period is therefore excessive to protect insurers from actual prejudice.

⁵ In *St. Paul Fire & Marine Ins. Co. v. Hunt*, 811 P.2d 432 (Colo. Ct. App. 1991), the Court of Appeals accepted the insurer's contention that the timing of notice is material in claims-made policies. The court's conclusion was premised on its view that insurance contracts reflect a bargain whose terms are freely negotiated, *id.* at 434, a notion that has been rejected repeatedly by this Court. The *Hunt* court also accepted the insurer's argument that a forfeiture standard allows insurers to provide claims-made insurance at a "substantially" lower cost than occurrence policies and that the notice-prejudice rule would constitute an "expansion of coverage." *Id.* at 435. These assumptions are unwarranted, as explained above and depend in reality on a single variable – the possibility of forfeiture alone. This is inconsistent with the principles recognized in Colorado and elsewhere whereby insurance contracts are to be accorded special significance based on the quasi-fiduciary obligation owed by an insured to its insurer. The insurance industry would turn this principle on its head and treat claims-made insurance policies in a far stricter fashion than ordinary commercial contracts.

⁶ An illustration of how this can operate in practice is provided at the beginning of this section in the discussion of one of the policies proposed to Metro.

The approach advocated by the insurers demands the identical result – the complete loss of all insurance benefits – for notice that is late by one day, for notice that is late by five years, and for notice that never occurs at all. There is nothing fair about this result, particularly where the insurer has not been harmed by the delay.

Rather than adopting a bright-line rule for claims-made policies that would treat all future late notice cases the same, regardless of the underlying factual circumstances and equities at issue, this Court should recognize that prejudice is among the factors that should be considered in cases involving both occurrence-based and claims-made policies. This is the only outcome that is consistent with well-established principles of Colorado general contract and insurance coverage law.

If this Court draws a distinction between occurrence and claims-made policies and – at the insurance industry's urging – refuses to apply the notice-prejudice rule to claims-made policies, this Court will in all likelihood hasten the complete demise of occurrence policies in Colorado. The insurance industry already has shifted substantially from occurrence policies to claims-made policies to limit its coverage responsibilities.⁷ Historically, liability insurance

⁷ The shift from occurrence policies to claims-made policies stemmed from the Insurance Service Office's ("ISO") 1984-86 revisions to its standard-form commercial general liability policy. ISO's model policy forms are extremely influential and, in practice, are the basis for forms submitted to state regulators. See 16-117 HOLMES' APPLEMAN ON INSURANCE 2d § 117.1[3] (2001 ed.) ("In recent times, the [ISO] prepares the vast majority of the uniform, standard-form liability insurance policies. The ISO forms provide an industry standard, a benchmark for comparison by the more than 1,500 insurers in the property/liability-casualty insurance market."). See also *id.* at § 117.1[2] (providing a description of the rise of the standard-form policy and the arguments for nationwide standardization). Between 1984 and 1986, ISO revised its model commercial general liability ("CGL") form so that policies would cover claims made during the period of coverage rather than an occurrence during that term, as had previously been the case. This change from "occurrence" to "claims-made" policies meant that at the end of a policy's term, insurers would know the total amount of claims they faced rather than risking a "long tail" of potential liability. *Background of States' Antitrust Lawsuit Against Insurers*, Liability Week, Oct. 11, 1994 (available on Westlaw at "10/11/94 LIABWEEK"). The ISO's changes to model insurance forms led nineteen (19) states and a group of private plaintiffs to sue

policies were written as "occurrence" policies – covering events that took place during the policy period irrespective of when a claim was ultimately brought. Today, claims-made policies almost completely predominate. See *California*, 509 U.S. at 771; Carolyn M. Frame, "Claims-Made" Liability Insurance: Closing the Gaps with Retroactive Coverage, 60 TEMP. L.Q. 165, 165 (Spring 1987) (citing Shand, "Claims Made" vs. "Occurrence", 28 INT'L INS. MONITOR 269, 269 (1974)); 15-111 HOLMES' APPLEMAN ON INSURANCE 2d § 111.2[A] (2001 ed.). Indeed, in the marketplace for professional liability coverage, most professionals have "a choice of claims-made liability coverage or no coverage at all." *Id.* In short, "the limiting nature of the claims-made policy has attracted liability insurers who do not wish to re-offer occurrence type policies." *Id.*

The insurance industry has made every effort to move away from occurrence policies and towards claims-made policies to avoid legal precedent such as the notice-prejudice rule, which requires insurers to provide coverage for losses under policies of insurance if that was the essence of the bargain and precludes insurers from elevating form over substance. After narrowing coverage through claims-made policies, the insurance industry raised rates on occurrence policies or stopped issuing them. See *California*, 509 U.S. at 771; Carolyn M. Frame, "Claims-Made" Liability Insurance: Closing the Gaps with Retroactive Coverage, 60 TEMP. L.Q. at 165 (citing Shand, "Claims Made" vs. "Occurrence", 28 INT'L INS. MONITOR at 269). Now, the insurance industry points to the premium differential between occurrence policies and claims-made policies as justification for courts to narrow and distinguish prior precedent in the insurance law field. If this Court endorses the insurance industry's hollow distinctions between occurrence and claims-made policies and allows insurers to avoid coverage obligations based on technicalities in the claims-made context, the insurance industry will react

a consortium of large domestic insurers for violation of the Sherman Act in *Hartford v. California*, 509 U.S. 764 (1993).

by raising premiums on occurrence policies to an impracticable level so that policies will not require any showing of prejudice for a late notice defense.⁸

V. THE INSURERS' OBJECTIONS TO THE NOTICE-PREJUDICE RULE ARE UNJUSTIFIED AND SHOULD BE REJECTED.

None of the insurers' arguments in opposition to the notice-prejudice rule withstands scrutiny. The insurers argue in effect that insureds assume the risk of forfeiture – an argument that is inappropriate given the imbalance in the negotiating position of insureds and insurers. *See Thompson*, 84 P.2d at 501-02; *Farmers*, 691 P.2d at 1141. The insurers' contention that the notice-prejudice rule would eliminate insureds' incentive to comply with policy terms fails as a matter of common sense. Insureds would continue to have a substantial incentive to provide timely notice, as doing so would avoid inquiry into insurer prejudice and eliminate the risk that coverage could be lost on this basis.

Almost all of the arguments advanced by the insurers in objection to the notice-prejudice rule are red herrings, because the insurance industry is protected against its policy concerns by the prejudice component of the notice-prejudice rule. The insurers insist that prompt notice allows insurers to assess the strength of a claim and whether coverage exists; allows the insurers to become involved in the defense at an early stage and explore early settlement opportunities; allows the insurers to complete adequate investigations without stale evidence or missing witnesses; and allows insurers to investigate the possibility of fraud or collusion. To the extent an insurer encounters actual problems in investigating, settling, or defending a claim because of

⁸ If this Court does not wish to specifically apply *Clementi* to claims-made policies in the context of this case, requiring insurers to prove substantial prejudice before relying on a late notice defense, then United Policyholders respectfully requests this Court allow for the possibility that insureds should have the opportunity to rebut a presumption of prejudice before an insurer will be allowed to avoid its coverage obligations, or at minimum to leave the issue for another day when the factual circumstances are appropriate.

the timing of notice, however, the insurer can show that its investigation or settlement efforts were prejudiced and avoid coverage under the notice-prejudice rule.

The insurers' argument that a forfeiture rule is efficient fares no better. Any rule that operates to cut off rights is efficient. Nevertheless, courts across the nation overwhelmingly have recognized that a forfeiture approach is gratuitously harsh and that the notice-prejudice rule does not unduly burden insurers. *See Clementi*, 16 P.3d at 230 (observing that few courts still adhere strictly to view that prejudice should not be considered). Further, under established principles of Colorado law, efficiency must be balanced against the obligation of the insurer to provide the protection for which the insured paid premiums, and against considerations of fairness generally. *See, e.g., Thompson*, 84 P.2d at 501-02 (emphasizing the importance of fairness); *Clementi*, 16 P.3d at 230 (reasoning that inequitable results should be avoided).

Ironically, the insurers themselves admit that the facts and equities *do* matter. *See* Brief of Amicus Curiae Complex Insurance Claims Litigation Association at 13 (opposing review on the ground that "[w]ithout an actual case or controversy, this Court cannot evaluate the specific interests and equities involved. Although this Court has recognized certain excuses to late notice, their applicability to any prejudice requirement cannot be determined without specific facts."); Brief of Amicus Curiae London Market Insurers at 15 (acknowledging that fairness is a relevant consideration, and invoking fairness to support its position that the notice-prejudice rule should be rejected).

Finally, the insurers' contention that a notice-prejudice rule would leave insurers without "recourse" misses the point of the notice-prejudice rule, which is precisely to provide insurers recourse, but only where it is necessary to protect insurers from actual prejudice. Nor can the insurers object to the notice-prejudice rule on policy grounds by claiming that it would be difficult or impossible for insurers to establish prejudice. Where prejudice exists, insurers will be able to establish it. If insurers find it difficult or impossible to establish prejudice, it is in all likelihood because there was no material prejudice with respect to insurer interests.

CONCLUSION

The notice-prejudice rule is necessary to prevent serious and sometimes devastating harm to insureds from the ability of insurers to void coverage based on technical grounds. Most jurisdictions now reject this result as offensive to the most basic notions of fairness. United Policyholders respectfully urges this Court to extend the notice-prejudice rule to all liability policies, to protect insureds from the extreme penalty of forfeiture in cases where the insurer has not been harmed by late notice. This approach is fair, consistent with Colorado policy, and consistent with established principles of insurance and general contract law.

DATED this 26th day of July, 2004.

Respectfully submitted,

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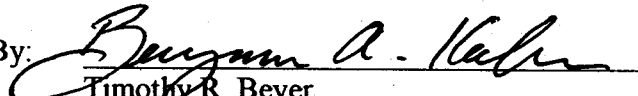
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CERTIFICATE OF MAILING

I hereby certify that on this 26th day of July, 2004, I served a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS** by depositing the same in the United States mail, postage prepaid, addressed to the following counsel of record for the parties in this action:

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