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Fratto v. New Amsterdam Casualty Co.: Insured Plaintiff's Rights in a State Court on a Standard Fire Insurance Contract When the Policy Statute of Limitations Has Run During an Action in a Federal Court Which Does Not Have Jurisdiction

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Notes

FRATTO v. NEW AMSTERDAM CASUALTY CO.: INSURED PLAINTIFF'S RIGHTS IN A STATE COURT ON A STANDARD FIRE INSURANCE CONTRACT WHEN THE POLICY STATUTE OF LIMITATIONS HAS RUN DURING AN ACTION IN A FEDERAL COURT WHICH DOES NOT HAVE JURISDICTION

In *Fratto v. New Amsterdam Casualty Co.*,[1] the Supreme Court of Pennsylvania held that an insured who brought an action on a standard fire insurance policy, which was dismissed for lack of jurisdiction by a federal court, could not relitigate the case in a Pennsylvania court if the statutorily imposed contractual twelve month time limitation for bringing an action had expired during the federal proceedings.[2] There is a conflict of authority among the state courts on the rule of law expressed in the *Fratto* decision,[3] even though these states have very similar standard fire insurance policies and statutes of limitation. This Note will analyze the soundness of *Fratto* by comparing the reasoning of the different courts on the points of law involved.

1. 434 Pa. 136, 252 A.2d 606 (1969).

2. This holding applies if the insurer has not fraudulently induced the insured to bring and maintain his action in the federal forum. This is because "an insurer will not be permitted to take advantage of the failure of the insured to perform a condition precedent contained in the policy, where the insurer itself is the cause of the failure to perform the condition." Fratto v. New Amsterdam Cas. Co., 434 Pa. 136, 139, 252 A.2d 606, 607 (1969), *accord*, Arlotte v. National Liberty Ins. Co., 312 Pa. 442, 445, 167 A. 295, 296 (1933); Fedas v. Insurance Co. of Pennsylvania, 300 Pa. 555, 151 A. 285 (1930).

3. *Compare* Fratto v. New Amsterdam Cas. Co., 434 Pa. 136, 252 A.2d 606 (1969) *with* Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 154 P.2d

CASE HISTORY

The appellants' building was destroyed by fire on January 2, 1962. This building was insured by various insurers, nine of which were the present appellees. In April, 1963 the appellants commenced two actions in the United States District Court against insurance companies not here involved, and on June 21, 1963 they instituted a third federal action against the nine appellees. These three federal actions were consolidated for trial.[4]

On June 7, 1965, the federal district court rendered its opinion allowing recovery for the appellants on the two April 1963 claims, but dismissed the later suit against the appellees for failure to meet the federal jurisdictional amount.[5] While the complaint stated a claim against each of the appellees for $10,000 plus interest, the district court said that interest was not damages. The court instead labeled it interest *eo nomine*,[6] which would not meet the requirements of a claim in excess of $10,000.[7]

On June 24, 1965, the appellants commenced a state action in the Common Pleas Court of Allegheny County on the same facts. The appellees moved for summary judgment under Pennsylvania Rule of Civil Procedure 1035,[8] stating that, since the loss occurred in 1962 and the state court suit wasn't commenced until 1965, the

399 (1944); O'Neil v. Franklin Fire Ins. Co., 216 N.Y. 692, 110 N.E. 1045 (1913); Bellinger v. German Ins. Co., 189 N.Y. 533, 82 N.E. 1124 (1906); Importers & Exporters Ins. Co. v. Farris, 181 Okla. 339, 73 P.2d 831 (1937); Niagara F. Ins. Co. v. Nichols, 96 Okla. 96, 220 P. 920 (1923); George v. Connecticut F. Ins. Co., 84 Okla. 172, 200 P. 544 (1921).

4. Fratto v. Northern Ins. Co., 242 F. Supp. 262 (W.D. Pa. 1965), *aff'd. sub nom.*, 359 F.2d 842 (3d Cir. 1966).

5. The Pennsylvania Supreme Court said the federal district court raised the jurisdictional amount issue *sua sponte*. Fratto v. New Amsterdam Cas. Co., 434 Pa. 136, 138, 252 A.2d 606, 607 (1969). However, correspondence with appellees' counsel indicates that the appellees admitted jurisdiction in their pleadings before the federal district court, but that in the beginning of the trial, at the close of plaintiff's evidence and at the close of the case appellees made motions to dismiss for lack of jurisdiction. Letter from Jones, Gregg, Creehan, Graffam and Gerace (Pittsburgh, Pa.) to Larry Folmar, Sept. 22, 1969.

Whether or not the federal court raised the issue *sua sponte* probably would have had no effect upon the Pennsylvania Supreme Court decision, because the court found the appellees were not estopped from pleading the statute of limitations even after it assumed they had not raised the jurisdictional issue in the federal court. Had appellees themselves raised the jurisdictional issue, their position would be even stronger.

6. Fratto v. Northern Ins. Co., 242 F. Supp. 262, 268 (3d Cir. 1966).

7. 26 U.S.C. § 1332 (1964): "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs. . . ."

8. PA. STAT. ANN. tit. 12, Appendix (1967).

state action was untimely because the standard fire insurance contract provided that suit must be brought within twelve months after the happening of the event.[9] The motion was granted[10] and the plaintiffs appealed.

It is to be noted that, even though there was an initial delay in bringing the first two suits, the federal court was not precluded from hearing them. This is because the delay was due to settlement negotiations in reference to which the federal court said:

> We think the conduct of defendants, through their authorized representatives, misled plaintiffs' attorney into forming a reasonably grounded belief that the claim would eventually be settled. Unwilling to wait longer, he filed the actions in April, 1963. The actions, in our opinion, were timely brought.[11]

Mention should be made of the effect of negotiations before suit upon the statute of limitations and its applicability in this case. An insurance company may induce an insured not to commence an action prior to the running of the policy statute of limitations by negotiating and holding out the possibility that the cause of action will be settled out of court. In such a case, the insurance company will be estopped from pleading the policy statute of limitations after negotiations have ceased and the time to commence an action has expired.[12]

The federal court did not decide the issue of estoppel caused by negotiations when separating the present suit from its two companion suits and dismissing it for lack of jurisdiction. After dismissal, the suit was brought in a Pennsylvania common pleas court and was then appealed to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania assumed that the suit would have been considered timely brought in the federal court had the federal court not dismissed it for lack of jurisdiction.

The court didn't deem it necessary to decide the issue of estoppel caused by negotiations prior to the federal suit.[13] The case was determined on the narrow issue of whether the appellees' admission of jurisdiction in the federal forum lulled the appellant into a false sense of security, thus enabling the appellees to take unfair

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9. Suit. 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 requirements of this policy shall have been complied with and unless commenced within twelve months next after inception of loss.

PA. STAT. ANN. tit. 40, § 636 (Supp. 1969).

10. Fratto v. New Amsterdam Cas. Co., No. 3887 (C.P. Alleg. County Ct., Pa., July Term, 1965).

11. 242 F. Supp. at 270.

12. *E.g.*, Fratto v. Northern Ins. Co., 242 F. Supp. 262 (W.D. Pa. 1965); Meekins v. Aetna Ins. Co., 231 N.C. 452, 57 S.E.2d 777 (1950); Higson v. North River Ins. Co., 152 N.C. 206, 67 S.E. 509 (1910).

13. 434 Pa. at 142, 252 A.2d at 609.

advantage of the appellants. If so, appellees would have been estopped from using the fact that the policy limitation had expired during the federal suit[14] as a bar to the appellants' state suit.

It is implicit in this decision, assuming all factors most favorable to the appellants, that negotiations may have delayed the initial suit so that when it was first brought, it was still timely. However, once the initial suit was begun in the federal court, negotiations could no longer be asserted to further toll the running of the statute. The filing of the suit showed that the appellants were no longer misled to understand that the insurer might settle the claim. Once the appellants understood the intentions of the insurer, the statute began to run.[15] Therefore, the statute began running when the suit was filed in the federal court and ran out while the federal court was considering the claim.[16]

Proceeding from this treatment of the running of the policy statute of limitations, the Supreme Court of Pennsylvania, with two justices dissenting,[17] ruled that the running of the twelve month statute of limitations was a bar to appellants' suit in the state forum.

The court did not consider the broader implication of the case. An appellant in the factual situation of *Fratto* is suffering an injustice when he is denied the opportunity to bring a second suit under the saving clause of a state's general statute of limitations,[18]

14. The federal district court kept the case under consideration for almost two years before granting recovery in two of the combined suits and dismissing the suit in question for lack of jurisdiction.

15. O'Connor v. Allemaina Fire Ins. Co., 128 Pa. Super. 336, 194 A. 217 (1937).

16. If the federal court had dismissed the appellants' suit less than twelve months after they had instituted it, and then had the appellants immediately brought suit in the Pennsylvania courts, then the Pennsylvania courts would have had to decide whether the nature of the negotiations prior to the federal suit were the prejudicial type which would estop the appellees from pleading the policy statute of limitations as a bar to the appellants' suit. Based upon the decision of the federal court as to the companion suits, Fratto v. Northern Ins. Co., 242 F. Supp. 262 (W.D. Pa. 1965), a Pennsylvania court would probably have held the appellees to be estopped from raising the statute as a bar to the suit in question.

17. Fratto v. New Amsterdam Cas. Co., 434 Pa. 136, 143, 252 A.2d 606, 609 (1969) (dissenting opinion).

18. Statutes of limitations are legislative acts which provide for the expiration of a right to bring suit on an accrued cause of action. This expiration occurs after the passage of a given amount of time unless the circumstances surrounding the right fall within the statute's saving clause. Not all statute of limitations have saving clauses, but the usual saving clause provides for the bringing of a second suit when the first suit has been dismissed because of specified technicalities not involving the merits of the case, even though the second suit is brought after the run-

even if the defendant insurer has done nothing to mislead him. This contention involves a consideration of the nature and purpose of a statute of limitations and an examination of the nature of a standard form insurance policy.

MAJORITY IN FRATTO

The appellants contended that the appellees were estopped from invoking the one year policy statute of limitations[19] because the appellees admitted federal jurisdiction in their pleadings in the federal court and therefore lulled the appellants into believing their claim would be settled in the federal forum.[20] The appellees countered with the argument that suits brought in a court without jurisdiction are a nullity, and, therefore, such an action cannot bar appellees' later use of a valid policy statute of limitations.[21]

The court, in holding that the statute of limitations barred the appellants' suit, said that the outcome was controlled in all respects[22] by its decision in *Hocking v. Howard Insurance Co.*[23] *Hocking* held that any act which tends to mislead the plaintiff, while the parties are dealing on friendly terms, will be held to be evidence of a waiver of a statute of limitations; but, after suit has been brought and the parties are dealing at arm's length, the rule doesn't apply with the same strictness.

Hocking deserves analysis in that it is representative of one side of the argument presented in suits involving statutes of limitations in insurance policies. In *Hocking*, the insured plaintiff brought his first action within the twelve month time limit prescribed for suit by the policy, but less than sixty days after he filed a statement of loss with the insurer. This early suit was in contravention of the sixty day grace period given the company by the fire insurance policy. The issue of a premature suit was raised at trial more than twelve months after the fire and the trial court dismissed the plaintiff's suit. A subsequent suit was held untimely. The Supreme Court of Pennsylvania held that the insurer was not estopped from raising the statute of limitations contained in the policy as a bar to the insured's suit. There was no estoppel even though the insurer had not raised the prematurity defense in its answer in time to allow the plaintiff to file a second suit. The court held that the saving clause of the general statute of limitations did not apply.

The *Hocking* decision was correct because the object and spirit

ning of the statute of limitations. These technicalities vary from state to state. The saving clause which would have been applicable in *Fratto* is found in PA. STAT. ANN. tit. 12, § 33 (1953), and is quoted in note 24 *infra*.

19. 434 Pa. at 139, 252 A.2d at 507.
20. *Id.*
21. *Id.*
22. 434 Pa. at 140, 252 A.2d at 608.
23. 130 Pa. 170, 18 A. 614 (1889).

of the agreement was to exclude the general statute of limitations and its saving clause.[24] The words of the policy were that "no action" shall be sustainable more than twelve months after the happening of the event, "any statute of limitations to the contrary notwithstanding."[25] To have sustained the action in the face of this agreement would have been to substitute a new contract for the one the parties had lawfully made for themselves.[26] Courts have usually recognized as valid such contractual periods of limitations which are shorter than the general statute of limitations.[27] However, there is a split of authority as to whether the saving clause of a general statute of limitations does[28] or does not[29] apply to such a valid contractual statute of limitations. When the parties specifically exclude the general statute of limitations, as they did in *Hocking*, a court might very well consider it a requirement that the contract be enforced as written. The *Hocking* court therefore decided the case on whether the defendant by his own dilatory actions had estopped himself from pleading the contractual statute of limitations. It did not decide whether a dismissal

24. The saving clause of the Pennsylvania Statute of Limitations for contract actions is as follows:

> And be it further enacted, that if in any of the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, then and in every such case the party plaintiff, his heirs, executors or administrators, as the case may require, may commence a new action or suit, from time to time, within a year after such judgment reversed or given against the plaintiff aforesaid, and not after.

PA. STAT. ANN. tit. 12, § 33 (1953).

25. The applicable portion of the insurance contract said:

> It is hereby expressly provided that *no suit or action* against this company for the recovery of any claim by virtue of this policy *shall be sustainable* in any court of law or chancery . . . unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

130 Pa. at 179, 18 A. at 614 (emphasis added).

26. *Id.* at 615, 18 A. at 615.

27. *E.g.*, Chichester v. New Hampshire F. Ins. Co., 74 Conn. 510, 51 A. 545 (1902); Murray v. Lititz Mut. Ins. Co., 44 Del. 447, 61 A.2d 409 (1948); Hocking v. Howard Ins. Co., 130 Pa. 170, 18 A. 614 (1889); Schlitz v. Lowell Mut. F. Ins. Co., 969 Vt. 334, 119 A. 516 (1923).

28. American Cent. Ins. Co. v. Noe, 75 Ark. 406, 88 S.W. 572 (1905); Bucholz v. United States Fire Ins. Co., 56 N.E.2d 43, 51 N.Y.S.2d 923 (1944); Cortes v. Fireman's Fund Ins. Co., 5 Ohio App. 109 (1915).

29. *E.g.*, Chichester v. New Hampshire F. Ins. Co., 74 Conn. 510, 51 A. 545 (1902); McElroy v. Continental Ins. Co., 48 Kan. 200, 29 P. 478 (1892); Lewis v. Metropolitan L. Ins. Co., 180 Mass. 317, 62 N.E. 369 (1902); Ward v. Pennsylvania F. Ins. Co., 82 Miss. 124, 33 So. 841 (1903).

not affecting the merits of the claim should be relitigated because it fell within the equity of the saving clause. That court specifically stated, as dictum, that the saving clause of the general statute of limitations would have governed the case had not the parties expressly excluded it.[30]

Hocking was decided in 1889. It was not until 1915 that Pennsylvania enacted its first standard fire insurance policy,[31] which the parties were bound to use if they were to contract at all. Since 1915, the parties have no longer had a choice as to whether they will shorten the period in which suit may be brought to twelve months. The legislature says they must shorten it. The Pennsylvania standard policy does not specifically exclude the general statute of limitations as the private contract between the parties did in *Hocking*.[32] For these reasons *Hocking* is easily distinguished from problems relating to insurance contracts made after the standard policy became effective.

Minority in Fratto

Justice Roberts, speaking for the minority, said "It was appellee's *express admission of jurisdiction which caused appellants to continue their suit in the wrong forum thus preventing a timely action in the proper court.*"[33] This dissenting opinion expressed the view that *Hocking* should be overruled and that the rationale of *Bollinger v. National Fire Insurance Co.*,[34] "a case on all fours with *Hocking* except in result,"[35] should be applied to *Fratto*.

In *Bollinger*, the Supreme Court of California said the appellant's first suit was not untimely brought, since the appellee insurer used dilatory tactics to allow the fifteen month California standard policy statute of limitations to expire before making a motion that the suit be dismissed. The dissent in *Fratto* expressed the view that the appellees' dilatory conduct[36] should estop them from pleading the defense of the contractual statute of limitations *as per Bollinger*.

Another, and equally valid, interpretation of *Bollinger* is that a plaintiff insured should be given the advantage of the saving

30. 130 Pa. at 178, 18 A. at 614.

31. Act of June 8, No. 919, [1915] Pa. Laws, *as amended*, Pa. Stat. Ann. tit. 40, § 636 (Supp. 1969). The limitation clause of the Act of 1921 as amended is quoted in note 9 *supra*.

32. *See* provisions of the statute quoted in note 9 *supra*.

33. 434 Pa. at 143, 252 A.2d 609 (dissenting opinion) (emphasis by the court).

34. 25 Cal. 2d 399, 154 P.2d 399 (1945).

35. 434 Pa. at 145, 252 A. at 610 (dissenting opinion).

36. The dilatory conduct of which the *Fratto* dissent complained was the apparent admission of jurisdiction by appellees in their pleadings before the federal district court, and their apparently contented wait during the running of the statute of limitations until the court raised the jurisdictional issue *sua sponte*.

clause of a general statute of limitations after his first suit has been dismissed for reasons other than those touching upon the merits, even though the statutorily imposed period of limitation of the standard form has run in the meantime. This would apply even if there is a lack of blameworthy conduct on the part of the defendant insurer. This interpretation of *Bollinger* is representative of those jurisdictions which allow the saving clause of a general statute of limitations to apply to the statute of limitations in a standard fire insurance policy.[37] In *Bollinger*, the insured's first and second suit were both brought in a state court. There is, however, a strong analogy between *Bollinger* and the situation in which a first suit is brought in a federal court and a second is brought in a state court as was done in *Fratto*.

A part of the rationale behind the *Bollinger* decision is that an insurer should be estopped from pleading the policy statute of limitations if he misleads the insured by not raising the issue that the first suit was prematurely brought until after the period of limitation has passed. A second ratonale is that once a suit has been brought, the defendant has proper notice of a claim against him, and the purpose for the application of the statute of limitations no longer exists. This is because the purpose of a statute of limitations is to prevent suits from being brought after witnesses have become lost and memories have faded. When a suit has been filed in any forum, a defendant has notice of a claim against him and must be expected to take action to gather his witnesses and prepare a defense. The *Bollinger* court was expressing this rationale when it said that there was no need to make fine distinctions as to who had a duty to disclose the possible prematurity of the first suit, but that:

> It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.[38]

Nature of a Standard Policy

The legislatures of many jurisdictions have adopted a standard

37. *E.g.*, Tracy v. Queen City Fire Ins. Co., 132 La. 610, 61 So. 687 (1913); George v. Connecticut F. Ins. Co., 84 Okla. 172, 200 P. 544 (1921). *But see* Chichester v. New Hampshire F. Ins. Co., 74 Conn. 510, 51 A. 545 (1902); Dahrooge v. Rochester German Ins. Co., 177 Mich. 442, 143 N.W. 608 (1913).

38. 25 Cal. 2d at 411, 154 P.2d at 406.

form of fire insurance policy which prescribes a limitation of time for suing thereon.[39] The courts of some jurisdictions have construed the limitation to be contractual in nature.[40] Other courts have construed it to be a statutory limitation imposed by law,[41] and so subject to a general statute of limitations permitting a renewal of an action concluded other than on the merits.

The standard policy limitation has been construed as contractual by Pennsylvania courts.[42] They have made this construction by holding that judicial interpretations of fire insurance contracts, made previous to the enactment of a standard form, should be applied to the standard form contract.[43]

These pre-standard form judicial interpretations advance the view that an insurance policy, including its limitation of time for bringing suit, is a contract between two consenting parties.[44] By applying this same reasoning to the standard form policy limitation, later courts indirectly labeled the standard form policy limitation as contractual in nature. Therefore, the reasoning continues, if the standard form policy and its statute of limitations are contractual in nature, the saving clause of the general statute of limitations cannot be applied to it.[45] In this manner, the rationale of cases such as *Hocking*, decided before the enactment of the standard form, is applied to decisions affecting policies made after the standard form. The standard form limitation is labeled contractual and the saving clause of the general statute of limitations is made inapplicable.

A plaintiff insured in a court which construes a standard policy as being contractual in nature suffers an injustice if the court does not allow the general statute of limitations to apply. This is because once an initial suit has been brought, the purpose of a statute of limitations is served. The saving clause of the general statute would allow the plaintiff to have a second suit heard on its merits,[46] thus preventing a technical forfeiture of a good cause of ac-

39. *See, e.g.*, CAL. INS. CODE § 2070 (West 1955); N.Y. INS. LAW § 168 (McKinney 1966); PA. STAT. ANN. tit. 40, § 636 (Supp. 1969).

40. *E.g.*, Chauvwin v. Superior Fire Ins. Co., 283 Pa. 377, 129 A. 326 (1925).

41. *E.g.*, Bollinger v. Nat. Fire Ins. Co., 25 Cal. 2d 399, 154 P.2d 399 (1945).

42. *E.g.*, Chauvwin v. Superior Fire Ins. Co., 283 Pa. 377, 129 A. 326 (1925); Gratz v. Insurance Co. of North America, 282 Pa. 224, 127 A. 620 (1925); Telesky v. Fidelity Guar. Fire Corp., 140 Pa. Super. 457, 13 A.2d 899 (1940).

43. Gratz v. Insurance Co. of North America, 282 Pa. 224, 127 P. 620 (1925).

44. Hocking v. Howard Ins. Co., 130 Pa. 170, 18 A. 614 (1889); Waynesboro Mutual Fire Ins. Co. v. Conover, 98 Pa. (2 Outerbridge) 384 (1881); The Farmers' Mutual Fire Ins. Co. v. Barr, 94 Pa. (13 Norris) 345 (1880); The North Western Ins. Co. v. The Phoenix Oil and Candle Co., 31 Pa. (7 Casey) 448 (1858).

45. E.g., Chichester v. New Hampshire F. Ins. Co., 74 Conn. 510, 51 A. 545 (1902); *cf.* Dahrooge v. Rochester German Ins. Co., 177 Mich. 442, 143 N.W. 608 (1913).

46. *See* statute quoted in note 24 *supra*.

tion.

As a practical matter, the parties have no volition as to the time limitation in the standard contract.[47] They must either include the period as commanded by statute or not contract at all. "Where the law directly or indirectly prescribes a limitation of actions, in logic and reason, such limitation should be controlled and governed by the general provisions of the law relating to the subject."[48] And since a fire insurance contract which does not adhere to the statutory form is illegal, it can hardly be said by the parties that the limitation is one bargained for in a private contract. If the policy provision varied in any manner from the standard form, it would be in contravention of the law.[49] For these practical reasons it would seem that a better view would label the standard form policy limitation as statutory rather than contractual in nature. By so doing, courts would give effect to the manner in which the provision became inserted in the insurance policy and would avoid the injustices caused by preventing the operation of the saving clause.

Policy reasons for avoiding a hardship caused by terming a standard policy contractual in nature rather than statutory are no less important than the practical reasons. One such policy reason is that the standard fire insurance policy was:

> . . . basically aimed at protection of the public. The standard policy was a reaction against form contracts drawn up by the companies and the inequality of bargaining power which made one-sided draftsmanship oppressive.[50]

When a court denies an insured the benefit of the saving clause of the general statute of limitations by calling the standard form policy a pure contract, it may defeat a legislative intent to protect the insured from technical forfeitures. There is more reason to allow the plaintiff to take advantage of the saving clause when the legislature has shortened the time for bringing suit on all other contract actions[51] to one year for the standard policy. This is because the dangers of a technical forfeiture are greater when the period is shortened.

Despite all of the above considerations, many courts flatly apply the law of cases decided prior to the enactment of a standard

47. Hamilton v. Royal Ins. Co., 156 N.Y. 327, 336, 50 N.E. 863, 866 (1898).

48. Tracy v. Queen City Fire Ins. Co., 132 La. 610, 614, 61 So. 687, 688 (1913).

49. George v. Connecticut F. Ins. Co., 84 Okla. 172, 177, 200 P. 544, 549 (1921).

50. L. FRIEDMAN, CONTRACT LAW IN AMERICA 160 (1965).

51. PA. STAT. ANN. tit. 12, § 31 (1953).

form.[52] They do so without recognizing the importance of including language which would distinguish cases decided after the enactment of a standard form. Obviously there are issues in which the applicable law is the same, whether or not the questions arose in cases before or after the enactment of a standard form. For example, provisions for proof of loss in a standard policy are the same as those required before the standard form.[53] However, when applying the pre-standard form law in such a case, the court should be careful to limit its decision to the specific facts. Otherwise, insured plaintiffs in later cases may be denied the advantages of the saving clause of a general statute of limitations.

The General Statute of Limitations

If a court has decided that standard insurance policies are statutory in nature, and if there is a factual situation similar to *Fratto*, then it must be decided whether the insured's suit is still viable under the general statute of limitations of the forum.

The statutes of limitations of most states[54] have saving clauses or "journey's statutes" which provide that if an action timely brought is defeated by some technicality[55] unrelated to the merits, a new action may be brought on the same cause within a limited period. This limited period is usually six months to one year.

Saving clauses had their origin in section 4 of the English Limitation Act of 1623.[56] This statute has been construed beyond

52. *E.g.*, Chichester v. New Hampshire F. Ins. Co., 74 Conn. 510, 51 A. 547 (1902).

53. Telesky v. Fidelity Guaranty Fire Corp., 140 Pa. Super. 457, 462, 13 A.2d 899, 901 (1940).

54. No purpose would be served by a lengthy quote of various state statutes of limitations. The main bodies of all of them are similar to that of Pennsylvania (cited in note 24 *supra*, which also quotes its saving clause) and differ mainly in the length of time allowed for suit on the various causes of action. Most of these statutes contain saving clauses, which differ mainly in the types of procedural situations to which the clause applies, and the length of time allowed in which a second suit may be brought after abatement of the first suit.

55. The specified technicalities of the saving clause of the Pennsylvania general statute of limitations are representative of those found in the saving clauses of most jurisdictions. The Pennsylvania technicalities are: "[1] judgment . . . given for the plaintiff, and the same . . . reversed by error, or [2] a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff . . . ." Pa. Stat. Ann. tit. 12, § 33 (1953).

56. 25 Cal. 2d 399, 408, 154 P.2d 399, 404. The English Limitation Act is quoted as saying in its saving clause:

> If in any of the said actions or suits judgment be given for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill; or if in any of the said actions be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such gives against the plaintiff, or

its literal language in various cases[57] because of the hardship which might result from rigid adherence to its terms.[58] An example of such construction is *Swindell v. Bulkeley*.[59] In that case a writ was issued by the defendant's creditors, but before it was served the defendant died. Within a year from the proof of the will by the executors of the deceased, a fresh writ was issued against them for the same cause of action. In the meantime the period of statutory limitation had expired. The court held that even though the saving clause of the English statute did not provide for such a factual situation, the facts fell within the equity of the saving clause. The executors could not rely on the statute of limitations as a defense to the action. In explaining its decision the court said:

> There are certain cases specified in s.4 which alleviate to a certain extent the rigidity of s.3, and the rule is that among those cases there must be included by necessary implication that of a person who commences an action against another within the period of limitation and then that other dies. In such a case the creditor may within a reasonable time bring another action, and this remedy would not be barred by sec. 3.[60]
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> One may perhaps venture to say that the judges took rather a liberty with the statute, but I presume the origin of the doctrine is to be found in the hardship inflicted in particular cases on the litigant or his estate through no fault of his own by a rigid adherence to the terms of s.4.[61]

Most jurisdictions in the United States have statutes of limitations derived from the English Limitation Act. There is a diversity of opinion among these jurisdictions as to whether a new action may be brought after a previous action has been abated for reasons other than those expressly excepted in the statute's saving clause. Most courts hold that abatements such as involuntary dismissal are within the equity of the saving in the statute,[62] even though not within its exceptions. Other courts will not adopt this construction.[63] Courts would probably be more willing to allow a

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outlawry reversed, and not after.
21 Jac. 1, c. 16, § 4. This saving clause should be compared with the saving clause of the Pennsylvania statute of limitations, quoted in note 24 *supra*.

57. *E.g.*, Curlewis v. Mornington, 7 El. & Bl. 285, 119 Eng. Rep. 1252 (1857); Hayward v. Kinsey, 12 Mod. 568, 88 Eng. Rep. 1526 (1698).

58. Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 409, 154 P.2d 399, 405 (1945).

59. 18 Q.B. 250 (1886).

60. *Id.* at 253.

61. *Id.* at 255.

62. *E.g.*, Douglas v. Kelley, 116 Ga. App. 670, 158 S.E.2d 441 (1967); Meyer v. Wilson, 131 Kan. 717, 293 P. 738 (1930).

63. *E.g.*, Williams v. New York Ins. Co., 11 Misc. 2d 823, 174 N.Y.S.2d 392 (1958).

second action after an involuntary dismissal than after a voluntary dismissal. This is perhaps because in an involuntary dismissal the plaintiff has theoretically been diligently pursuing his rights while in a voluntary dismissal the plaintiff merely acquiesced in a technical forfeiture of his rights. Courts are more likely to help those who help themselves.

There is a basic premise which should be considered when deciding whether a liberal construction should be given to a saving clause in a general statute of limitations. That premise is that such statutes "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[64]

Several distinguished justices have held that once this basic purpose of preventing surprises has been fulfilled, a liberal construction should be given the statute in order to avoid hardships on plaintiffs who have mistaken their remedy. In 1915 the New York statute of limitations provided that if a judgment is reversed on appeal and a new trial is not awarded, or the action is terminated in any other manner than by voluntary discontinuance, dismissal for neglect to prosecute, or a final judgment on the merits, the plaintiff might commence another action within one year. In allowing a plaintiff to bring a second action after his first suit had been dismissed for lack of jurisdiction by a city court, Judge (later Justice) Cardozo said:

> We think that, whatever verbal differences exist, the purpose and scope of the present statute are identical in substance with its prototype, the English Act of 1623. . . .
>
> The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts. When that has been done, a mistaken belief that the court has jurisdiction stands on the same plane as any other mistake of law. Questions of jurisdiction are often obscure and intricate.[65]

Mr. Justice Holmes has stated:

> Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.[66]

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64. Order of R. Telegraphers v. Railway Exp. Agency, 321 U.S. 342, 348 (1944).

65. Gaines v. City of New York, 215 N.Y. 533, 539, 109 N.E. 594, 596 (1915).

66. New York Cent. & H. R.R. v. Kinney, 260 U.S. 340, 346 (1922).

These quotations are indicative of the true purpose of the various statutes of limitations and their saving clauses. They explain why courts should invoke principles of equity and justice to allow a second suit after a dismissal for lack of jurisdiction, despite the fact that the statute's saving clause does not include relief for such dismissals.[67] This should apply even if a plaintiff was not misled by a defendant's admission of jurisdiction.

One court, realizing this fact, went so far as to interpret the statute of limitations to be a procedural rule and announced itself ready to adopt new rules of procedure whenever necessary to prevent technical forfeitures.[68] Such circumvention would seem necessary in view of the basic purpose of a statute of limitations.

As mentioned, the purpose of a state's statute of limitation is to prevent surprises, and that purpose is served when an action is commenced. Therefore, the saving clause of a state's statute of limitations should be held to apply to a suit dismissed for lack of jurisdiction by a federal court.[69] This is because

> . . . commencing an action means starting it in a court that has the power to decide the matter involved, to issue process, to bring the parties to the particular cause before it and to render and enforce a judgment on the merits of said cause.[70]

Federal courts have all these powers and exercise them even

> . . . when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause. . . . Their determinations of such questions, while open to direct review, may not be assailed collaterally.[71]

Irrespective of whether a suit is commenced in a state or a federal forum, the defendant is given notice that a claim is being brought against him. This satisfies the purpose of a statute of limitations.

PENNSYLVANIA'S POSITION

It is submitted that the Supreme Court of Pennsylvania should have reached a different conclusion in *Fratto v. New Amsterdam Casualty Co.*,[72] based upon a liberal construction of its general

67. 25 Cal. 2d 399, 411, 154 P.2d 339, 406.
68. *Id.* at 410, 154 P.2d at 405.
69. Roth v. Northern Assurance Co., 32 Ill. 2d 40, 203 N.E.2d 415 (1964).
70. *Id.* at 42, 203 N.E.2d at 417.
71. County Drainage District v. Baxter State Bank, 308 U.S. 371, 376 (1939).
72. 434 Pa. 136, 252 A.2d 606 (1969).

statute of limitations and the fact that *Hocking v. Howard Insurance Co.*,[73] used as support in *Fratto*, was decided years before the enactment of Pennsylvania's first standard fire insurance policy and is distinguishable. *Hocking's* premise, that a fire insurance contract is a bargained for agreement between two consenting parties, should no longer be applicable to the standard form contract. The existing law of Pennsylvania must be briefly considered to determine if it could support a different conclusion in *Fratto*.

Of greatest importance is Pennsylvania's prior treatment of the saving clause of its general statute of limitations. If this saving clause has been given a liberal construction in the past, then it could be more easily construed to encompass a suit dismissed by a federal court for lack of jurisdiction.

Pennsylvania's saving clause originated in the old English Act of Limitations.[74] It is therefore very similar in form to those other state saving clauses which were liberally construed by Holmes and Cardozo.

In the past the courts of Pennsylvania have recognized the importance of allowing a liberal construction to be applied to its saving clause. The Pennsylvania statute has been construed to allow a plaintiff to bring a second action where the plaintiff allowed his first suit to be quashed for failure to join a necessary party and where the writ was abated by the death of the plaintiff or by the marriage of a female plaintiff, if she became a *feme sole*.[75] A Pennsylvania court of common pleas affirmed, on appeal from a justice of the peace court, a judgment for the plaintiff. It then arrested its judgment on the grounds that it lacked jurisdiction to render a judgment, because the justice of the peace court from which the appeal arose had not had jurisdiction. A subsequent suit was allowed under the equity of the saving clause because even though a court has no jurisdiction, it can arrest its own judgment.[76]

These cases show that the saving clause of the Pennsylvania statute of limitations has been and can be liberally construed to avoid hardship in individual cases. It would be a short step to allow it to apply to a case dismissed from a federal court for lack of jurisdiction. In Pennsylvania, technical forfeitures should not deprive a plaintiff of a chance to have his case heard on its merits.

Of course, the courts of Pennsylvania might be hesitant to allow a general statute of limitations to apply to a standard form policy which has previously been construed as contractual in nature. The Pennsylvania courts have reasoned that the entire standard fire insurance policy is a contractual agreement between the parties.

73. 130 Pa. 170, 18 A. 614 (1889).
74. Downing v. Lindsey, 2 Pa. 382, 385 (1845).
75. *Id.*
76. Myers v. Filley, 12 Pa. D. 562 (C.P. 1903).

They have apparently done so in earlier cases because they believed it to be necessary in order to hold that the same judicial interpretations of clauses in insurance contracts made previous to the enactment of the standard form should be applied to policies made under the standard form. These earlier cases dealt with waiver of clauses requiring appraisement of an insured's losses,[77] whether such waiver clauses were conditions precedent to an insured's right of recovery,[78] and whether requirements for proof of loss were the same before and after the standard form.[79]

Such issues as whether a clause requiring appraisement of an insured's losses can be waived could have the same outcome regardless of whether the standard policy is termed statutory or contractual in nature. One means of achieving this would be to apply all previous interpretations of non-standard policies to the standard policy, as long as these interpretations are not inconsistent with the statutory nature of the standard policy.

The Supreme Court of Pennsylvania has never directly concerned itself with construing the nature of the standard policy in relationship to the effect of the general statute of limitations upon it. Perhaps the time has come for the courts of Pennsylvania to recognize the legislative nature of the standard form policy and stop applying the rationale of cases such as *Hocking v. Howard Ins. Co.*[80] to litigation involving standard form policies.

CONCLUSION

The Supreme Court of Pennsylvania decided *Fratto v. New Amsterdam Casualty Co.*[81] on the narrow issue of whether the appellee should be estopped from pleading the statute of limitations as a bar because he may have lulled the appellant into a false sense of security by admitting jurisdiction. In doing so it relied upon *Hocking v. Howard Ins. Co.*,[82] the rationale of which should no longer apply to standard fire insurance policies in Pennsylvania. By making this decision, Pennsylvania has ignored the true purpose of its general statute of limitations and a great body of law which explains the purpose of such statutes.

77. Chauvwin v. Superior Fire Ins. Co., 283 Pa. 377, 129 A. 326 (1925).
78. Gratz v. Insurance Co. of North America, 282 Pa. 224, 127 A. 620 (1925).
79. Telesky v. Fidelity Guar. Fire Corp., 140 Pa. Super. 457, 13 A.2d 899 (1940).
80. 130 Pa. 170, 18 A. 614 (1889).
81. 434 Pa. 136, 252 A.2d 606 (1969).
82. 130 Pa. 170, 18 A. 614 (1889).

The Pennsylvania court could have reached a more salutory conclusion by considering the broad implication of *Fratto* rather than focusing its attention on the question of misleading by admitting jurisdiction. If this decision is followed in Pennsylvania, a plaintiff in the position of the Frattos will have to choose the proper forum initially, a choice involving the technical laws of jurisdiction, or be denied having his case heard on the merits. As it stands now, if an insured plaintiff's first choice is to have his suit heard in the federal forum, he would have to institute two concurrent suits, one in the federal court and one in the state court, if he wishes to eliminate the risk of a technical forfeiture due to the federal court's lack of jurisdiction. Neither the standard fire insurance policy nor the much older statute of limitations was designed to culminate in such a wasteful and expensive process.

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