INSURANCE—LIMITATION OF ACTION—STATUTORY PERIOD TOLLED WHILE INSURER DETERMINES LIABILITY—*Peloso v. Hartford Fire Insurance Co.*, 56 N.J. 514, 267 A.2d 498 (1970).

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity . . . unless commenced within twelve months next after inception of the loss.[1]

On October 20, 1964, Hartford Fire Insurance Company issued a fire insurance policy to Mr. and Mrs. Arthur Peloso on their multiple dwelling in Belmar, New Jersey. This three year policy was in effect when, on September 12 and 13, 1965, a fire occurred and damaged the premises. It was only after five years and a classic display of judicial exegesis by the New Jersey Supreme Court that the Pelosos collected on their policy.

After receiving notice of the fire,[2] the insurer informed the Pelosos that it intended to investigate their claim, and that they would be duly notified of its findings. Between November 1965 and March 1966, plaintiffs were advised by defendant that their claim was still under investigation. Pursuant to the terms of the policy, an examination of Mr. Peloso was conducted on April 6, 1966, concerning the details of the fire. Thereafter, in May 1966, in response to an inquiry by Mr. Peloso's attorney, defendant's counsel advised him that the claim would be rejected and suggested that suit be commenced on the policy. In June 1966, Mr. Peloso, who was no longer represented by counsel, contacted defendant's attorney and was told that defendant was denying liability on his claim. Pursuant to Mr. Peloso's request, a formal letter dated June 15, 1966, declining liability, was sent to him.

A month later, Mr. Peloso again called defendant's attorney, stating that he would sue, and he was then told that such would be the appropriate course. Thereafter, there was no contact between plaintiffs and defendant until a complaint was filed on March 10, 1967, some eighteen months after the date of the fire and about nine months after the written denial of liability.

In its answer, the defendant set up by way of separate defense plaintiffs' failure to institute suit within the requisite twelve month period. The plaintiffs countered that this time limitation did not begin to run until the formal denial of liability, and alternatively,

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1 N.J. STAT. ANN. § 17:36-5.20, lines 157-61 (1963).

2 Peloso v. Hartford Fire Ins. Co., 56 N.J. 514, 517 n.2, 267 A.2d 498, 499 n.2 (1970). Defendant's records indicated that notice was furnished on September 15, 1965.

that defendant either waived its rights to this defense or was estopped by its conduct from asserting it.

The trial court granted defendant's motion for summary judgment on the ground that the plaintiffs had failed to commence an action within the applicable one year period of limitation.[3] The appellate division affirmed per curiam,[4] and plaintiffs' petition for certification to the New Jersey Supreme Court was subsequently granted.[5] In a landmark decision,[6] the supreme court reversed, holding that plaintiffs' suit was timely because the statute was tolled from the time that plaintiffs gave notice of their claim until the time that defendant formally[7] denied liability.

The statute involved in this case, modeled after the 1943 New York standard policy which has been adopted by forty-six states,[8] is intended to insure a fair and certain contract between the insurance company and the policyholder. The time limitation provision of the statute allows twelve months from the "inception of the loss" within which to commence suit. In arguing that a literal interpretation should apply, the defendant contended that the only reasonable construction of the statute was that an insured would be precluded from commencing an action more than one year from the date of the casualty. Plaintiffs countered that the term "inception of the loss" refers not to the physical loss, but rather to the denial of liability. The court accepted neither view, instead adopting a unique approach to the problem.

Two divergent schools of thought had developed prior to *Peloso* as to when the time limitation commences on a fire insurance claim. The vast majority of states has held that the meaning of the phrase "inception of the loss" is clear and unambiguous, and that the limitation period begins to run uninterrupted at the time of the actual physical loss.[9] Three states, Louisiana,[10] West Virginia,[11] and Ten-

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3 Peloso v. Hartford Fire Ins. Co., 102 N.J. Super. 357, 246 A.2d 52 (L. Div. 1968).

4 Peloso v. Hartford Fire Ins. Co., 105 N.J. Super. 474, 253 A.2d 183 (App. Div. 1969).

5 Peloso v. Hartford Fire Ins. Co., 54 N.J. 253, 254 A.2d 797 (1969).

6 Peloso v. Hartford Fire Ins. Co., 56 N.J. 514, 267 A.2d 498 (1970).

7 Defendant's attorney advised plaintiff on June 13, 1966 that defendant was denying liability on his claim. Upon request this denial of liability was put in writing in a letter dated June 15, 1966. In arriving at its decision the court stated that the tolled statute did not begin to run again until this latter date. Quaere: Is it necessary that denial of liability be in writing?

8 56 N.J. at 518-19, 267 A.2d at 500.

9 Sager Glove Corp. v. Aetna Ins. Co., 317 F.2d 439 (7th Cir.), *cert. denied*, 375 U.S.

nessee,[12] have adopted the minority view that the time should be calculated from the accrual of the cause of action, *i.e.*, the time from which the insured is able to commence suit. In most states this occurs sixty days after the insured files his proof of loss which has to be filed with the insurer within sixty days of the loss. This minority view is based on the reasoning that the insured should not be deprived of any of his statutorily allotted twelve months, since this period of limitation is for the benefit of the insurance company.[13]

In prior cases where the question had arisen, the New Jersey courts, with but one exception,[14] adhered strictly to the majority rule. For example, the New Jersey position was succinctly expressed in *Warren v. Employers' Fire Insurance Co.*[15] where, referring to the limitation period, the court stated:

> The clause in the policy was unambiguous and required that suit for that loss be instituted within twelve months thereafter . . . . The only losses for which defendant continued liable were those which occurred within twelve months prior to May 24, 1966 [the date of the suit].[16]

Similarly, in *Sherwood Jewelers-Newark, Inc. v. Philadelphia National Insurance Co.*,[17] the federal district court rejected the contention that the period of limitation began to run on the date the company denied liability and held that the action was barred since it was

921 (1963); Naghten v. Maryland Cas. Co., 47 Ill. App. 2d 74, 197 N.E.2d 489 (1964); Olson Enterprises, Inc. v. Citizens Ins. Co., 255 Iowa 141, 121 N.W.2d 510 (1963); Proc v. Home Ins. Co., 17 N.Y.2d 239, 217 N.E.2d 136, 270 N.Y.S.2d 412 (1966); Lardas v. Underwriters Ins. Co., 426 Pa. 47, 231 A.2d 740 (1967); Ramsey v. Home Ins. Co., 203 Va. 502, 125 S.E.2d 201 (1962).

10 Finkelstein v. American Ins. Co., 222 La. 516, 62 So. 2d 820 (1952).

11 Kirk v. Firemen's Ins. Co., 107 W. Va. 666, 150 S.E. 2 (1929).

12 Phoenix Ins. Co. v. Brown, 53 Tenn. App. 240, 381 S.W.2d 573 (1964).

13 Finkelstein v. American Ins. Co., 222 La. at 523, 62 So. 2d at 822-23; Phoenix Ins. Co. v. Brown, 53 Tenn. App. at 243-44, 381 S.W.2d at 574-75; Kirk v. Firemen's Ins. Co., 107 W. Va. at 668, 150 S.E. at 2.

14 In Krauss v. Brooklyn Fire Ins. Co., 130 N.J.L. 300, 33 A.2d 100 (Ct. Err. & App. 1943), the court held that the twelve months commenced at the accrual of the action. This decision actually resulted from the fact that the insured had disappeared shortly after the fire and there was, therefore, no one available to prosecute a suit until such time as the statutory presumption of death had arisen. Because of these unusual circumstances, the court held that the action did not accrue until there was a person who would be competent to sue, and that the twelve month period would commence at that time. It is apparent, however, that the unusual nature of the *Krauss* case prevents it from giving strong support to the plaintiffs' position in *Peloso*.

15 100 N.J. Super. 464, 242 A.2d 635 (App. Div. 1968), *rev'd. on other grounds*, 53 N.J. 308, 250 A.2d 578 (1969).

16 100 N.J. Super. at 472, 242 A.2d at 639.

17 102 F. Supp. 103 (D.N.J. 1952).

not "commenced within twelve (12) months next after the date of the occurrence which gives rise to the loss."[18] Likewise in *Staehle v. American Employers Insurance Co.*,[19] the plaintiffs presented a claim on June 17, 1966, under their homeowners policy for the disappearance of a diamond pin which they said had occurred two days previous. By letter dated July 15, 1966, the defendant denied liability; plaintiffs subsequently instituted their action under the policy on June 21, 1967, more than twelve months after the loss, but less than twelve months after the defendant denied liability. In affirming summary judgment for the defendant, the appellate division relied on the statutory limitation of suit, and held that the plaintiffs were precluded from maintaining their action because of noncompliance with the limitation provision.

As a result of *Peloso,* the limitation period will still be calculated from the date of the casualty insured against, but will now be tolled from the date of notice of such loss until the date of formal denial of liability. In most cases the insured will thus have nearly a full year after the formal denial of liability in which to sue, since notice is normally given to the company very soon after the loss. This is substantially different from having one year from the "inception of the loss" in which to sue, as the statute reads.

The court's rationale was based upon a supposed incongruity between the provision in the policy calling for a suit limitation period of twelve months from the date of loss, and the provision giving the insurance company immunity from suit for part of the twelve months. (The insurer is allowed sixty days after receipt of proof of loss within which to investigate the claim, during which time no cause of action can accrue.) This period of immunity can be as long as four months, since the statute requires that the insured file a proof of loss with the company within sixty days after the loss,[20] and then allows the company another sixty days from the filing of the proof of loss in which to pay the claim.[21] The court overlooked the fact, however, that nowhere in the statute is the insured given a clear twelve months in which to sue. The statute simply states that suit must be brought within twelve months of the loss.

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18 *Id.* at 104.

19 103 N.J. Super. 152, 246 A.2d 745 (App. Div. 1968).

20 N.J. STAT. ANN. § 17:36-5.20 (1963) provides in part:

> [W]ithin sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss . . . .

Lines 97-99.

21 N.J. STAT. ANN. § 17:36-5.20 (1963) provides in part:

The court further justified its interpretation of the statute by pointing out that the twelve month time limitation provision for this type of contract is much shorter than the six year limitation for ordinary contracts and the sixteen years for contracts under seal, and that since the shorter limitation is for the benefit of the company, the insured should be allowed the full statutory period.[22] However, the New York Court of Appeals in the recent case of *Proc v. Home Insurance Co.*[23] held, on a contention similar to the view espoused by *Peloso*, that "[t]he argument not only disregards the plain meaning of the policy language but ignores both its history and the intention of those who wrote it."[24]

If the court merely allowed the limitation period to commence sixty days after the filing of the proof of loss, it would simply have been following the minority view advocated by Tennessee, West Virginia and Louisiana. However, the court went much further. In

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> The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company . . . .

Lines 150-53.

22 56 N.J. at 520, 267 A.2d at 501.

23 17 N.Y.2d 239, 217 N.E.2d 136, 270 N.Y.S.2d 412 (1966).

24 *Id.* at 245, 217 N.E.2d at 139, 270 N.Y.S.2d at 415.

The court further stated:

> Many years ago, before there was the statutory standard fire policy, a similar problem of construction arose over an insurance provision that suit must be brought within a specified time "after the loss or damage shall have occurred." The court held that the period of limitations was to be computed from the time the cause of action accrued rather than from the occurrence of the event insured against. . . . It was expressly noted, however, that an insurer might provide, if it did so clearly, that "the time of the fire should be looked to as the event, from the happening of which the limitation should run." . . . Thereafter, and following legislative authorization (in 1887 and again in 1918), a standard fire policy was adopted which provided that an action on the policy had to be commenced "within twelve months next *after the fire*". . . . This clause was, of course, interpreted to mean that the period of limitations ran from the date of the fire, in consequence of which the insured was compelled to satisfy all conditions precedent as well as institute suit within the same 12-month period. . . .
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> With the expansion of insurance coverage to include risks in addition to fire—for instance, "theft," "lightning," "windstorm," to mention a few—it became necessary, in order to have the one-year limitation apply to such other risks . . ., that the language of the provision be broadened. Accordingly, the Legislature in 1943 enacted a standard policy in which the words *"after the fire"* were replaced by the words *"after inception of the loss"* . . ., an unmistakable indication that the period of limitations encompassed every casualty insured against, including fire, and that, even though a cause of action could not accrue until some later time, the 12 months were to be measured, as they had previously been in the case of fire alone, from the occurrence of the destructive event.

Id. at 243-44, 217 N.E.2d at 138, 270 N.Y.S.2d at 414-15.

deciding to toll the period of limitation from the date of notice until the date of formal denial of liability, the court disregarded the fact that under the statute the insured may commence suit sixty days after the proof of loss is filed,[25] irrespective of the insurer's position as to liability. Hence, in situations where the company does not formally deny liability until well after its sixty day period of immunity, the insured will have more than twelve months in which to sue. Consequently, a period of time is created during which the insured can bring suit and yet not have the statute run against him.[26] Rejecting the traditional concepts of waiver and estoppel, the court felt that this new approach was "more satisfactory, and more easily applied."[27]

In his dissenting opinion, Justice Hall aptly stated that "[t]here is nothing incongruous or ambiguous about the provisions thereof here involved,"[28] pointing out that the legislature recognized the other provisions of the policy, and nevertheless dictated that the action must be brought within one year of the loss "without time out."[29] In addition, Justice Hall, citing *Proc*, expressed the proposition that if there are any inequities on the part of the company, then relief can be granted in the traditional form of waiver and estoppel.[30]

From a comparison of the various interpretations of the statute under consideration, it can be seen that there are now three divergent views: the majority view, to which New Jersey formerly adhered; the minority view, espoused only by Louisiana, West Virginia and Tennessee; and the newly conceived New Jersey view. Since the

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25 In the instant case plaintiffs never filed a proof of loss, but they were still entitled to institute their suit. N.J. STAT. ANN. § 17:36-6 (1963), provides in part:

> The failure of any person, insured against loss or damage by fire in any insurance company doing business under the authority of the department, to furnish proofs of loss shall not be considered a waiver of any rights accruing under the policy of insurance, and shall not debar the person so holding insurance from a recovery under the policy or the collection of the sum which should be paid thereunder . . . .

26 For example, consider a situation where circumstances render necessary a detailed investigation and the insurer is unable to give a formal denial to the insured until six months after the proof of loss is filed. This would result in a period of time of one year and four months during which the insured could file suit as opposed to the twelve month limit as expressed by the statute.

27 56 N.J. at 521, 267 A.2d at 502.

28 *Id.*, 267 A.2d at 502 (dissenting opinion).

29 *Id.* at 522, 267 A.2d at 502.

30 If conduct or action on the part of the insurer is responsible for the insured's failure to comply in time with the conditions precedent, injustice is avoided and adequate relief assured, without doing violence to the plain language used by the Legislature, by resort to traditional principles of waiver and estoppel.

Id. at 523, 267 A.2d at 503 (citing *Proc*).

time period will still commence to run from the date of the casualty, the court has recognized that "inception of the loss" means the date of the actual physical loss, but it has added its own unique formula of computing the period of limitation by allowing a "time out."

One method which insurance companies doing business in New Jersey might consider in adapting to *Peloso* is to decline liability within sixty days of the filing of the proof of loss on all claims still under investigation. In this way the twelve month limitation period will at least commence when the action accrues, rather than at a later date when the insurer finally decides against liability. And if it subsequently decides to pay, it would be easy enough to inform the insured that upon reconsideration his claim will be paid. However, it is conceivable that this procedure would result in a flood of suits, many of which would disintegrate once the insurer decided to pay.

In reaching its decision, the court in *Peloso* disregarded the legal precept that the judiciary is obliged to interpret and enforce the legislative will as written and may not, under the guise of construction, substitute a different meaning even though it might honestly regard the alternative as more desirable.[31] "When the legislature has spoken so plainly, its command should not be open to judicial change."[32]

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31 *See* Application of Howard Savings, 32 N.J. 29, 48, 159 A.2d 113, 123 (1960); Watt v. Mayor and Council, 21 N.J. 274, 277, 121 A.2d 499, 500 (1956); Duke Power Co. v. Patten, 20 N.J. 42, 49, 118 A.2d 529, 533 (1955); Dacunzo v. Edgye, 19 N.J. 443, 454, 117 A.2d 508, 514 (1955); Bergen Cty. Bd. of Taxation v. Borough of Bogota, 104 N.J. Super. 499, 505, 250 A.2d 440, 444 (L. Div. 1969); State Bd. of Med. Examiners v. Warren Hospital, 102 N.J. Super. 407, 413, 246 A.2d 78, 81 (Warren Cty. Dist. Ct. 1968).

32 56 N.J. at 522, 267 A.2d at 502 (dissenting opinion).