No. 03SC681
Supreme Court of Colorado. En Banc

Friedland v. Travelers Indem. Co.

105 P.3d 639 (Colo. 2005)
Decided Jan 31, 2005

No. 03SC681.

640 January 31, 2005. *640

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HOBBS, J.

We issued a writ of certiorari pursuant to C.A.R. 50 to review the trial court's grant of summary judgment for defendant, the Travelers Indemnity Company (Travelers), and to determine whether the notice-prejudice rule announced in *Clementi v. Nationwide Mutual Fire Ins. Co.*, 16 P.3d 223 (Colo. 2001) applies to liability policies.[1] Although we adopt the notice-prejudice rule for liability policies, in the case before us the insured gave notice of claim and suit to the insurer after the insured had defended and settled the case. In such a circumstance, the delay is unreasonable as a matter of law and the insurer is presumed to have been prejudiced by the delay. However, the insured must have an opportunity to rebut the presumption of prejudice; thus, we reverse the trial court's grant of summary judgment in favor of the insurer here and remand the case for further proceedings consistent with this opinion.

[1] We granted a writ of certiorari on the following issues:

> 1. Whether the traditional late notice rule announced in *Marez v. Dairyland Ins. Co.*, 638 P.2d 286 (Colo. 1981) (" *Marez*") should be overruled with respect to liability insurance policies.
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> 2. Whether the District Court erred in characterizing the instant case as a "no notice" case, rather than a "late notice" case, because notice was given after the underlying litigation was settled.
>
> 3. Whether the District Court erred in concluding, as a matter of law, that untimely notice barred Mr. Friedland's claim despite the presence of disputed material facts regarding the reasonableness of, and justification for, the timing of the notice.

> 4. Whether the District Court erred in denying coverage even for defense costs incurred before the date that the Court determined that Mr. Friedland first had access to the Travelers policies and could have given notice.

I.

In the trial court, Plaintiff Robert M. Friedland, sought compensation from defendant, Travelers, for the defense and indemnification costs he incurred in connection with an environmental lawsuit brought against him by the United States and the State of Colorado under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. sections 9604 and 9606 (CERCLA). That suit arose out of pollution caused by a mining operation in Conejos County, Colorado.

Summitville Consolidated Mining Company, Inc. (SCMCI) operated a gold mine and cyanide heap leach facility in the San Juan Mountains south of Del Norte. In April of 1984, Friedland became an officer and director of SCMCI. He resigned this position in January of 1987.

In December, 1992, SCMCI declared bankruptcy. That same month, the Environmental Protection Agency took over management of the site, seized the corporate documents and records located there, and began response actions pursuant to CERCLA, to protect against further environmental degradation.

In May, 1996, the United States and the State of Colorado filed suit against Friedland and other parties seeking recovery under CERCLA of response, investigation, remediation and other costs incurred at the site. *See United States v. Friedland*, 173 F.Supp.2d 1077 (D.Colo. 2001). Friedland defended the lawsuit. After approximately four years of litigation, he settled the claims against him by paying twenty million 642 dollars *642 to the United States and the State of Colorado.

During its viability, SCMCI had obtained comprehensive general liability insurance policies from Travelers. These policies were marked on their face "Comprehensive General Liability Form." They provided coverage for bodily injury, property damage, and medical payments to third parties resulting from accidents or occurrences for which the insured was legally obligated. These were not policies specifically negotiated and designed by the parties to address particular circumstances such as CERCLA liability.

Friedland contends that these policies provide him coverage as an additional insured for defense costs and liability payments in connection with the CERCLA case. He also asserts that he had no specific knowledge of this coverage until after he had defended and settled the CERCLA action against him. The trial court did not actually decide whether the policies provided coverage for the environmental contamination costs and damages caused by the Summitville operation. Instead, in dismissing Friedland's claims against Travelers, the trial court found that Friedland did not provide notice of the CERCLA lawsuit to Travelers until more than six years after that action had been filed and approximately six months after he had incurred attorneys' fees in defense of those claims and settled the CERCLA action against him.

Friedland brought suit against Travelers for the defense costs and liability payments allegedly owed under the policy as reimbursement of his expenses incurred in defending and settling the CERCLA suit. He asserted claims for declaratory judgment, anticipatory breach of contract, and breach of contract, based on two insurance policies Travelers issued to SCMCI in 1984 and 1985 that included him as an additional insured person.

Travelers filed a motion for summary judgment, alleging under the terms of the policies, that (1) Friedland's failure to provide notice of claim and notice of suit until after the settlement precluded his recovery under the policies, (2) recovery of amounts Friedland paid in settlement were barred by the "no voluntary payment" provisions of the policies, and (3) under the applicable law, Friedland could not recover for pre-notice defense costs.

The applicable provisions of the liability policies state as follows:

> INSURED'S DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT
>
> 1. In the event of an **occurrence**, written notice containing particulars sufficient to identify the **Insured** and also reasonably obtainable information with respect to the time, place and circumstances of the **occurrence**, and the names and addresses of the injured and of available witnesses, shall be given by or for the **Insured** to the Company or any of its authorized agents as soon as practicable.
>
> 2. If claim is made or suit is brought against the **Insured**, the **Insured** shall immediately forward to the Company every demand, notice, summons or other process received by the **Insured** or the **Insured's** representative.
>
> 3. The **Insured** shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **Insured** because of injury or damage with respect to which insurance is afforded under this Section; and the **Insured** shall attend hearings and trials and assist in securing and giving evidence and obtain the attendance of witnesses. The **Insured** shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

(emphasis in original).

Applying our decision in *Marez v. Dairyland Ins. Co.*, 638 P.2d 286 (Colo. 1981), the trial court granted summary judgment in favor of Travelers. It determined that Friedland's claims against Travelers were not recoverable because of the insured's material breach of the policies' notice provisions. The trial court did not consider whether *643 Travelers had been prejudiced by Friedland's failure to give timely notice.

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Having disposed of the case on summary judgment because of unreasonably late notice, the trial court did not address the other issues Travelers raised in its summary judgment motion.

II.

In this case, we apply the notice-prejudice rule to liability policies. In doing so, we overrule *Marez* to the extent it applies to late-notice liability cases. However, in the case before us, Friedland gave notice of claim and suit only after he defended and settled the case. In such a circumstance, we conclude that the delay is unreasonable as a matter of law and the insurer is presumed to have been prejudiced by the delay. However, the insured

must have an opportunity to rebut the presumption of prejudice; thus, we reverse the trial court's grant of summary judgment in favor of the insurer here.

A. Standard of Review

We review de novo the trial court's grant of summary judgment under C.R.C.P. 56. *BRW, Inc. v. Dufficy Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004). A motion for summary judgment should be granted only when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; *Clementi*, 16 P.3d at 225. In determining whether summary judgment is proper, the nonmoving party is entitled to any favorable inferences that may reasonably be drawn from the facts, and all doubts must be resolved against the moving party. *Bebo Constr. Co. v. Mattox O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999).

B. Notice-Prejudice Rule

Most insurance policies require the insured to provide the insurer with prompt notice of a claim at or about the time that the claim arises or becomes known to the insured, or within a reasonable period of time thereafter. Further, most policies require the insured to notify the insurer promptly when the insured is served process in a legal proceeding. Most policies also contain a requirement for the insured to cooperate reasonably with the insurer in the investigation and defense of the claim. *See* David P. Hersh, *The Requirement for a Showing of Prejudice in Cases of Late Notice of Claim*, 30 Colo. Law. 83, 83 (May 2001).

When late notice occurred, our jurisprudence under *Marez* and similar cases traditionally enforced the standard notice of claim or suit provision by discharging the insurer's obligation to defend against the suit and pay any judgments covered under the policy. By the time of our *Clementi* decision, an ever-growing majority of jurisdictions had adopted the notice-prejudice rule, whereby late notice does not result in loss of coverage benefits unless the insurer proves prejudice to its interests by a preponderance of the evidence. *See* 13 Lee R. Russ Thomas F. Segalla, *Couch on Insurance*, § 193:49 at 194-60 (3d ed. 1999 Supp. 2004); *see also* Charles C. Marvel, LL.B., Annotation, *Modern Status of Rules Requiring Liability Insurer to Show Prejudice to Escape Liability Because of Insured's Failure or Delay in Giving Notice of Accident or Claim or In Forwarding Suit Papers*, 32 A.L.R.4th 141 (1984).

Addressing an uninsured motorist (UIM) policy in *Clementi*, we adopted a two-step approach to trial court implementation of the notice-prejudice rule. This approach requires a preliminary determination of whether an insured's notice was timely. Such a determination should include an evaluation of the timing of the notice and the reasonableness of any delay. Once a court has determined that an insured's notice was untimely and that the delay was unreasonable, it should then turn to the issue of whether the insured was prejudiced by such untimely notice. *Clementi*, 16 P.3d at 231.

In *Clementi*, we concluded that the insurer has the burden of demonstrating by a preponderance of the evidence that its significant interests were prejudiced by the delayed notice. *Id.* at 232. These significant interests include the opportunity to investigate or defend the insured's claim and to receive the insured's cooperation in the process of gathering information, negotiating settlements, 644 securing and giving evidence, *644 attending hearings and trials, and assisting witnesses to attend hearings and trials. *See id.; State Farm Mut. Auto. Ins. Co. v. Brekke*, No. 03SC585, 105 P.3d at 188-189 (Colo. as modified Jan. 31, 2005).

We rejected the notion that the insured must, at a minimum, put on evidence of the reason for not complying with the insurer's notice requirement. We found such approach problematic because insurer prejudice is not relevant to the reasonableness of the insured's delayed notice. *Clementi*, 16 P.3d at 231. Instead, we established

the standard that, if the insured has unreasonably provided delayed notice to an insurer, the insurer may deny coverage benefits only if it can prove by a preponderance of the evidence that it was prejudiced by the delay. *Id.* at 232.

Under the *Clementi* facts, we upheld the trial court's determination that the notice the insured gave to the contesting insurer — five months after the latest date on which the insured should have reasonably done so — was untimely and unreasonable as a matter of law. We then proceeded to the prejudice issue. Because the trial court had applied the *Marez* line of cases, it had not heard and considered evidence relating to whether the delayed notice had prejudiced the insurance company. In remanding the case for a trial court determination on the prejudice issue, we observed that the insurer had the opportunity to investigate the accident several months prior to the insured's settlement with another carrier and that other entities had made accident investigations. Nevertheless, the record contained no detailed evidence concerning whether the other investigations were adequate to protect the insurer's rights under the policy. We therefore remanded the case for further proceedings on the issue of prejudice to the insurer.

C. *Clementi* 's *Applicability to Liability Policies* 1. Stare Decisis

In *Clementi*, we limited our holding to cases involving a UIM policy because we did not have a case before us that involved a liability policy. *Clementi*, 16 P.3d at 228 n. 5 ("We need not consider today whether our ruling in *Marez* continues to apply to liability insurance cases because this issue is not presented by the case at bar.").[2]

[2] We also made a statement in *Clementi* that *Marez* was a "no-notice liability case," and we found it to be "inapplicable in determining whether insurer prejudice should be considered in the UIM late-notice case at bar." *Clementi*, 16 P.3d at 228. We recognize that this statement might be read as reaffirming the *Marez* rule as to all cases other than UIM cases. We clarify that we did not intend to make a holding to this effect; rather, we were distinguishing *Marez* at that time and chose to leave the potential applicability of our *Clementi* rationale to a liability policy case to some future time. Here, the parties before us have had the opportunity to argue whether the *Clementi* rationale should apply only to UIM cases and whether *Marez* should be overruled in whole or in part.

Under stare decisis principles, we must now decide whether the *Clementi* rationale applies to liability policies and, if so, whether we should overrule *Marez*.

Stare decisis is a judge-made doctrine that promotes uniformity, certainty, and stability of the law and the rights acquired thereunder; but the rule is not inflexible or immutable, because the courts must take into account statutory or case law changes that undermine or contradict the viability of prior precedent. *In Re Title, Ballot Title, and Submission Clause, and Summary for 1999-2000 No. 29*, 972 P.2d 257, 262-63 (Colo. 1999).

We will apply prior precedent unless we are clearly convinced that (1) the rule was originally erroneous or is no longer sound due to changing conditions and (2) more good than harm will come from departing from precedent. *Giampapa v. American Family Mut. Ins. Co.*, 64 P.3d 230, 239 (Colo. 2003); *People v. Blehm*, 983 P.2d 779, 788 (Colo. 1999). We "must be willing to overrule a prior decision where sound reasons exist and where the general interests will suffer less by such departure than from a strict adherence." *Title, Ballot Title, and Submission Clause and Summary for 1999-2000 No. 29*, 972 P.2d at 262 (citation omitted). *645

Undertaking the stare decisis analysis here, we examine whether the *Clementi* rationale applies to a liability policy, whether it has displaced *Marez*

as the prior precedent we must apply to the case now before us, and whether we should overrule *Marez* in whole or in part.

In *Marez*, the insurer received absolutely no written or verbal notice of claim from the insured, and the insurer brought the declaratory judgment action to disavow any obligation to provide coverage under those circumstances:

> It was stipulated that neither Bernadette Valdez nor Julia Montoya ever provided written notice of the accident to Dairyland . . . (The trial court found) as a fact that no verbal notice of the accident was ever given.
>
> . . . .
>
> 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.

Marez, 638 P.2d at 288-89.

We carefully couched our preclusion of coverage holding in that case to the absolutely no-notice circumstances:

> 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 and to indemnify them with respect to any judgment holding them liable for the injuries to Marez.

Id. at 289.

We have a heightened responsibility to scrutinize insurance policies for provisions that unduly compromise the insured's interests; provisions of an insurance policy that violate public policy and principles of fairness may be unenforceable. *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 344 (Colo. 1998).

In adopting the notice-prejudice rule in *Clementi*, we implemented our heightened-duty inquiry responsibility, as we do here. Courts must take into account statutory or case law changes that undermine or contradict the viability of prior precedent.

Clementi was a late-notice case. Although it did not involve a liability policy, we conclude that the grounds on which we applied the notice-prejudice rule in that case also apply to liability policies. In *Clementi*, citing *Marez*, we observed that "for twenty-five years Colorado has adhered to the traditional approach that an unexcused delay in giving notice relieves the insurer of its obligations under an insurance policy, regardless of whether the insurer was prejudiced by the delay." *Clementi*, 16 P.3d at 227. After limiting ourselves to the particular context of that case, a UIM policy, we then stated that "(f)ew 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." *Id.* at 228.

Thus, in *Clementi*, we departed from our early Twentieth Century case, *Barclay v. The London Guarantee and Accident Company, Ltd.*, 46 Colo. 558, 105 P. 865 (1909), that formulated the traditional approach we continued to apply in *Marez.* Because of its reasoning and departure from the *Barclay* and *Marez* line of cases in favor of the notice-prejudice rule adopted by the majority of jurisdictions throughout the United States, we find that *Clementi*, not *Marez*, is the applicable stare decisis precedent. Accordingly,

for the reasons we now state, we overrule *Marez* to the extent it applies to liability policies involving late notice.

2. Applicability of *Clementi*

In *Clementi*, we cited three reasons for joining the majority of jurisdictions in applying the notice-prejudice rule: (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 and the insured not
646 receiving *646 policy benefits, due to a technicality. *Clementi*, 16 P.3d at 229. We restricted our holding and our discussion to the UIM policy then before us. Because we limited our holding in this way, we declined to state whether the *Clementi* rationale, rather than *Marez*, would apply to a liability policy. *Clementi*, 16 P.3d at 228.

Nevertheless, insurers and the legal profession did not mistake a reasonably apparent implication that the *Clementi* rationale would also apply to liability policies, despite *Marez.* A Colorado commentator, for example, observed that the notice-prejudice standard of *Clementi* would likely be made applicable to liability and UIM policies alike. *See* Hersh, 30 Colo. Law. at 85-86.

We agree. The three concerns we articulated in *Clementi* — the adhesive nature of insurance contracts, the public's interest in compensating tort victims, and the inequity of an insurer receiving a windfall from a technicality — also apply to liability policies.

First, an insured has an unequal bargaining position when contracting for either liability coverage or UIM coverage. As we discussed in *Brekke* and *Goodson v. American Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 414 (Colo. 2004), insurance contracts are unlike ordinary bilateral contracts. Insureds enter into insurance contracts for the financial security obtained by protecting themselves from unforeseen calamities and for peace of mind, rather than to secure commercial advantage as with a negotiated business contract. *See Goodson*, 89 P.3d at 414. In both liability and UIM contracts, as with the case now before us, the insured is typically provided with form contracts promulgated by the insurer, and there is a disparity of bargaining power. *See Brekke*, 105 P.3d at 188.

Second, liability coverage is for the protection of the insured against liability to a third party and for the protection of the innocent tort victim who suffers personal injury or property damage for which the insured is liable. A UIM policy protects the insured who invokes it for injuries caused by another, but the underlying principle of such coverage is that the tort victim (the insured) should be made whole within the limits of the coverage due to non-payment by the liable party.

In Colorado, there is a strong public policy in favor of protecting tort victims; this is a fundamental purpose of insurance coverage, whether or not the state makes the particular coverage mandatory to obtain. As discussed in *Clementi*, the General Assembly has enacted the Motor Vehicle Financial Responsibility Act, stating that it was "very much concerned with the financial loss visited upon innocent traffic accident victims by negligent motorists who are financially irresponsible." § 42-7-102, C.R.S. (2004); *Clementi*, 16 P.3d at 229. General comprehensive liability policies are not mandated by law, as opposed to UIM coverage, but nevertheless serve the purpose of compensating tort victims.

Third, as with UIM coverage, the insured pays premiums for the protection provided by the liability policy, and the insurer should not reap a windfall through a technicality it invokes to deny coverage. *See Clementi*, 16 P.3d at 230 (*citing Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193, 198 (1977)). The notice of claim and notice of suit provisions of the general comprehensive liability policies at issue here constitute the parallel technicality to which we applied the notice-prejudice rule in *Clementi.*

In short, no aspect unique to liability insurance renders the notice-prejudice rule any less compelling than it was in the *Clementi* context. Although differences in liability and UIM motorist coverage may influence the motivation for an insured to give timely notice to the insurer, *see State Farm Mutual Automobile Ins. Co. v. Burgess*, 474 So.2d 634, 636-37 (Ala. 1985) (distinguishing between UIM insured's and liability insured's motivations for giving notice for purpose of determining whether late notice was reasonable), those differences do not alter the underlying rationale for the notice-prejudice rule.

In protecting themselves against liability and damages, corporations and their officers and directors, like other persons, seek insurance to defend against possible claims and lawsuits for negligence and to obtain payment of damages, 647 within policy limits, on *647 their behalf to victims if the insured is negligent. In turn, insurers price their premiums to spread the risk of loss among the population of insureds, they typically offer their policies on a take it or leave it basis and write them with a particular eye for inclusions and exclusions other carriers also employ. *See* 15 Eric Mills Holmes, *Holmes' Appleman on Insurance*, § 113.1 at 383-384 (2d ed. 1998 Supp. 2003).

D. Presumption of Prejudice Where Notice Given Only After Defense and Settlement of Claim and Suit

In adopting the notice-prejudice rule for UIM cases in *Clementi*, we examined precedent applicable to liability policies and UIM policies alike, *see Clementi*, 16 P.3d at 226-28, but reserved the issue of liability policies for a future case. This is that future case. We apply in this case the notice-prejudice rule to a liability policy, as other jurisdictions have done. *See, e.g., Brakeman v. Potomac Ins. Co.*, 371 A.2d at 197 (adopting two-part notice-prejudice rule to liability policies); *Foundation Reserve Ins. Co. v. Esquibel*, 94 N.M. 132, 607 P.2d 1150, 1152 (1980) (insurer must demonstrate substantial prejudice resulting from material breach of policy by the insured before it will be relieved of its obligations under an automobile liability policy); *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 409 N.E.2d 185, 188 (1980) (holding that for liability policies not covered by notice-prejudice statute, an insurance company must nevertheless prove prejudice).

Because we adopt the notice-prejudice rule for liability cases, we expressly overrule *Marez* to the extent it applies to a late-notice liability case. Travelers argues that, even if we apply *Clementi* to liability cases, Friedland's claims are barred because his notice came so late as to constitute no notice. However, we decline to adopt a rule that treats notice after settlement as no notice. We observe that the insurer in *Marez* never received notice directly from the insured, whereas the insurer received notice from the insured in the case before us. Nevertheless, we recognize that our decision today leaves little, if any, vitality to *Marez* because disputes will likely arise only in the context of late notice by an insured and because we adopt, as set forth below, the approach expressed by Justice Quinn in his *Marez* dissent.[3]

> [3] "In cases where the insured fails to provide the insurer with any notice whatever of the accident or claim . . . there is a presumption of prejudice to the insurer in such cases and the insured has the burden of going forward with some evidence to dispel the presumption; if such evidence is presented, `the presumption loses any probative force which it may have had and it is then up to the (insurer) to go forward with the evidence that actual prejudice existed.'" *Marez*, 638 P.2d at 292 (Quinn, J. dissenting) (*quoting Jennings v. Horace Mann Mut. Ins. Co.*, 549 F.2d 1364, 1368 (10th Cir. 1977)).

In *Clementi*, we adopted a two-step approach applicable to cases involving late notice by an insured to an insurer. The trial court determines whether the notice was untimely and the delay was unreasonable; if so, the trial court addresses

whether the insurer was prejudiced by such untimely notice. *Clementi*, 16 P.3d at 231. In the prejudice phase, we rejected "the presumption of prejudice approach in favor of placing the burden on the insurer to demonstrate that it was prejudiced." *Id.* at 232. We now add a third step for instances where the late notice occurs after the insured's settlement of the liability case; we adopt a presumption of prejudice in favor of the insurer in such cases.

Unlike the insureds in *Clementi* and *Brekke*, Friedland gave notice after he had defended and settled the litigation. Accordingly, under the circumstances of this case, Friedland's delay was unreasonable as a matter of law, and we presume that Travelers has been prejudiced by the late notice.

Our discussion in *Clementi*, as further elucidated by *Brekke*, emphasizes the substance of the insured-insurer relationship as including significant reciprocal duties. The insurer typically owes the insured good faith defense of suit and the payment of damages to the tort victim up to the policy limits if the insured is negligent. In turn, the insured owes the insurer cooperation in the process of obtaining information, raising legitimate defenses, securing and giving evidence, 648 attending *648 hearings and trials, assisting witnesses to attend hearings and trials, and negotiating settlements. *Brekke*, 105 P.3d at 188-189. If these duties are fulfilled, the insured will have provided extensive information to the insurer, and the insurer will be able to investigate the case long before suit is filed, its interests will be protected, and there will be little if any necessity for the insurer to also appear in the tort litigation. *Id.*

In *Clementi*, notice was given before settlement. Thus, the analysis in *Clementi* assumed that an insurer would not be prejudiced if that insurer had an adequate opportunity to investigate the claim, present legitimate defenses to its insured's liability, and be involved in settlement negotiations. *See Clementi*, 16 P.3d at 232; *Brekke*, 105 P.3d at 191-192.[4]

[4] Indeed, in *Brekke*, in view of the assumption that an insured would discharge its duty of cooperation, we limited the insurer's participation in the liability phase of insured motorist actions to presenting legitimate defenses the uninsured motorist failed to raise, but we also recognized discretion in the trial court to allow broader participation in the damages phase. *Brekke*, 105 P.3d at 192-193.

However, in a case such as the one before us, where notice is not given until after settlement, we must assume that the insurer had none of these opportunities; thus, prejudice must be presumed.

Nevertheless, in some circumstances, an insurer might not be prejudiced despite notice occurring after defense and settlement of a case. *See Northwest Prosthetic Orthotic Clinic, Inc. v. Centennial Ins. Co.*, 100 Wash.App. 546, 997 P.2d 972, 976, (2000) (holding that insurer there was prejudiced as a matter of law, but concluding that in some factual circumstances, failing to notify an insurer of completed litigation will not amount to actual prejudice as a matter of law, because the litigation achieved a clear cut result that is essentially beyond dispute).

Therefore, we also conclude that the insured, despite having made a unilateral settlement without notice to the insurer, must have an opportunity to rebut this presumption of prejudice based on the specific facts of the case, before a trial court may bar the insured from receiving coverage benefits.

In so holding, we adopt the standard Justice Quinn urged in his *Marez* dissent: (1) there is a presumption of prejudice to the insurer in instances where the insured provides notice after disposition of the liability case, (2) the insured has the burden of going forward with evidence to

dispel this presumption, (3) if such evidence is presented, the presumption loses any probative force it may have, and (4) it is then up to the insurer to go forward with the evidence that actual prejudice existed. *Marez*, 638 P.2d at 292-93 (Quinn, J. dissenting) (citing *Jennings v. Horace Mann Mut. Ins. Co.*, 549 F.2d at 1368).

Otherwise, as Justice Quinn also wrote and we subsequently held in *Clementi*, in cases where an insurer has received unreasonably delayed notice of the suit but such notice came prior to the suit's disposition, there should be no presumption of prejudice and the insurer is required to prove prejudice. *Marez*, 638 P.2d at 293, n. 2 (Quinn, J. dissenting).

Accordingly, under the circumstances of this case, we apply a presumption of prejudice to Travelers, even though Friedland's and Travelers's interests in resisting liability and damages were arguably aligned when Friedland was making his defense and settlement decisions. In rebuttal of this presumption, Friedland should have the opportunity to introduce evidence that, in the conduct of his defense and settlement of the CERCLA claims against him, all material information that could have been obtained was obtained, all legitimate defenses were raised, his liability in the case was reasonably clear under the facts and the law, and Travelers, had it received notice, could not have obtained any materially better outcome than what Friedland obtained without Travelers's assistance. *See* Russ Segalla, 649 *Couch on Insurance*, § 193:29;[5] *649 *Pulse v. Northwest Farm Bureau Ins. Co.*, 18 Wash.App. 59, 566 P.2d 577, 579 (1977) (concluding that insurer was not prejudiced as a matter of law despite receiving notice after judgment because "it is highly questionable whether they could have been more persuasive than the plaintiffs' counsel in keeping the amount of the damages down. At best, it would have chosen different counsel, would have demanded a jury, and may or may not have chosen a different judge to preside over the trial.").

5 Under this section of the treatise, Couch states the matter as follows: "In proving prejudice as a result of a delay in providing notice, it has been stated that an insurer is not required to show precisely what outcome would have been had timely notice been given to make showing of substantial prejudice. However, an insurer must show the precise manner in which its interests have suffered, meaning that an insurer must show not merely the possibility of prejudice, but, rather, that there was a substantial likelihood of avoiding or minimizing the covered loss, such as that the insurer could have caused the insured to prevail in the underlying action, or that the insurer could have settled the underlying case for a small sum or smaller sum than that for which the insured ultimately settled the claim."

If Friedland successfully rebuts the presumption of prejudice, Travelers must show by a preponderance of the evidence that it suffered actual prejudice from the delayed notices of claim and suit in order to be excused from paying policy benefits. What form the proceedings on remand shall take regarding in the issues of prejudice, Friedland's unilateral settlement, and the policy coverage, we leave to the trial court's further determination.[6]

6 We do not address the other issues Travelers raised in its summary judgment motion, because the trial court did not address them in its summary judgment ruling.

III.

Accordingly, we set aside the trial court's grant of summary judgment, and we remand this case for further proceedings consistent with this opinion.

Justice KOURLIS dissents.

Justice COATS dissents.

Justice BENDER does not participate.