

# Lack of Prejudice Bars Cooperation Clause Defense

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In an unpublished opinion, the United States Court of Appeals for the Fourth Circuit, applying Maryland law, has held that the policyholder's failure to cooperate does not bar coverage where the insurer is not prejudiced as a result of the failure to cooperate. *Ball v. NCRIC, Inc.*, 2002 U.S. App. LEXIS 13932 (4th Cir. July 10, 2002). It also held that a demand letter can constitute a "claim."

The insured, a doctor, was sued by a patient for medical malpractice. The patient alleged that the doctor would prescribe certain drugs to her that would put her into a stupor and then have sex with her. Around the same period, in November 1987, the insured was arrested on separate charges of illegally selling narcotics. While free on bond, the doctor fled the country and did not return for his criminal court proceedings. The doctor was apprehended in May 1991.

The patient's attorney notified the doctor's legal malpractice insurer of her claim on December 14, 1987 by telephone and a hand delivered letter. The insurer had issued a claims-made policy and reported medical malpractice policy in force at that time. The insurer indicated that it would investigate the claim. After receiving these communications, the insurer attempted to contact the doctor telephonically at his home and at his office. The insurer also sent letters to several addresses soliciting the insured's cooperation, but was unable to contact him because of his fugitive status.

Approximately four years later, the patient filed a formal arbitration claim against the doctor before the Maryland Health Claims Arbitration Office. About one year later, the patient's attorney notified the insurer that the insured had been served and provided a claim statement and affidavit listing the insured's address in a federal prison. The insurer subsequently denied coverage for the claim on the ground that the claim was made outside the policy period. The insurer did not attempt to contact the doctor in prison.

In 1995, the patient obtained a default judgment against the doctor. She then brought an action against the insurer to collect the judgment. The carrier argued that there was no coverage under the policy for several reasons. First, it asserted that the insured breached his obligation to cooperate, and the insurer was prejudiced as a result. Second, it contended that it was prejudiced by the doctor's failure to notify it of the claim in a timely manner. Finally, the insurer argued that the operative claim was the filing of the Maryland Health Claims Arbitration matter, and it occurred after the expiration of the doctor's claims-made medical

malpractice policy on January 1, 1988.

The Fourth Circuit rejected each of the insurer's arguments. With respect to the asserted lack of cooperation, the court reasoned that there was no evidence that the doctor's failure to cooperate while a fugitive hindered the insurer's ability to defend against the suit that ultimately was filed. Further, no evidence indicated that the doctor refused to cooperate after he was apprehended, particularly since the insurer never contacted him at that juncture. The court also concluded that the doctor's failure to give notice did not prejudice the insurer because the patient herself notified the insurer of the claim in 1987. Finally, the court rejected the argument that no claim was made during the policy period. According to the court, the terms "claim" and "suit" are not synonymous, and the letter in 1987 amounted to a demand that could constitute a "claim" for purposes of the policy.