

# AICA BULLETIN

FEBRUARY 2010

VOLUME 8, ISSUE 6

## February Meeting

*Guest Speaker—Eileen Atkinson, RN, BS, CCM, MSCC, QRP,  
National Medicare Set Aside Specialist, GENEX Services, Inc.*



Ms. Atkinson provides guidance and education for Mandatory Reporting requirements of the MMSEA Section 111. Ms. Atkinson is responsible for implementation of Mandatory Reporting for GENEX customers. She is also responsible for assisting customers with Medicare Set Asides through development of educational programs enabling customers to remain abreast of this rapidly changing industry. Ms. Atkinson is also responsible for development of internal programs for GENEX MSCC certified personnel.

Ms. Atkinson has multi state case management, USL&H (Longshore), and Medicare Set Aside experience. She is a registered nurse for the past nineteen years, a Qualified Rehabilitation Provider, and is nationally certified in Case Management, as well as in Medicare Set Aside. She has active nursing licenses in the states of North Carolina and Florida. Ms. Atkinson clinical experience includes working in Medical Surgical specialty, Home Health Nursing, and coordination of home health services.

Ms. Atkinson's educational accomplishments include an Associates Degree in Science in Engineering Secretarial and Nursing, and Associates of Arts in Liberal Arts. She has her Bachelor's Degree in Health Service Administration. She is a member of National Alliance of Medicare Set-Aside Professionals, Inc. and Suncoast Case Management Association.

Thursday, February 18th

5 pm  
Social Hour

6 pm  
Meeting/Dinner

Doubletree  
Hotel  
44th & Van Buren  
Phoenix, Arizona



by February 16th  
at  
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## President's Message

We hope you made it through the storms that rolled through last month. The storm did have an effect on our January meeting but even with the storm, we had over sixty attendees.

The free dinner and meeting for the company adjusters was a success. We had a lot of new adjuster faces. Thank you for supporting us and we hope you return next month.

As a reminder, we can only give free dinners to the first 25 company adjusters who RSVP.

We have some changes on the board since the November elections. Todd Van Sant, President, and Ana Garcia, Secretary, have resigned from the board. As a result I have moved up from the Vice President's position to President and Bruce McNeil has moved up to Vice President from Treasurer. This leaves two positions open for the board, Secretary and Treasurer. If you would like to sign up for either position for a special election during February, please

contact any board member. The qualification for either position is being a currently employed adjuster.

There have been some questions from vendors about the number of hits on our website for advertising purposes. We don't have the ability right now to get the exact number of hits however with the recent addition of being able to RSVP for our dinner meetings, the website hits have increased enormously. In fact, last month the website went down due to the activity on it. We are working with our web master to be able to get better information on the activity of the website.

We look forward to seeing you in February and I look forward to representing you as the new President.

*Robin Link*

480-635-3760  
[robin.link@fbfs.com](mailto:robin.link@fbfs.com)

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Thank you to our generous January meeting Door Prize Donors:

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To donate a door prize, please bring to the meeting or if you are unable to attend, contact a Board Member to make arrangements.

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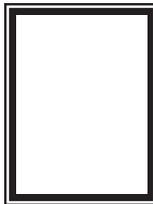
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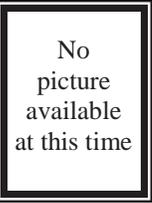
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 February



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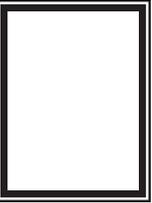
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 in February



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*Interested in running for one of our open offices? If you are an Adjusting Member, contact any of the listed Board Members for information*



*Don't forget your Valentine! - February 14th*



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## Expert's Corner—Late Notice Revisited

BY **Robert D. Laurie and Elizabeth F. Ahlstrand**  
Published 1/11/2010 in *Claim Magazine*

When applied within the context of insurance coverage, the otherwise uncomplicated phrase “late notice” often elicits confusion and doubt. Indeed, the timely notice of claims is generally an express requirement of an insurance policy and fundamental to the efficient and predictable administration of claims. However, the modern trend by U.S. courts and legislatures has been to diminish “late notice” as a defense to coverage.

Specifically, numerous U.S. jurisdictions have moved away from strict enforcement of the requirement of timely notice — that is, failure to notify timely constitutes a forfeiture of coverage — to one that requires a showing of harm to the insurer before coverage is lost. Dubbed the “notice-prejudice” rule, the basic premise is that unless the insurer has been prejudiced by an insured’s late notice, coverage will not be forfeited. As explained in more detail below, recent litigation and legislation from around the country has bolstered this trend and further obscured the viability of a late notice defense.

### New York Amends Insurance Law 3420

For decades, New York law instructed that where an insurance policy required the insured to notify the insurer of an occurrence “as soon as practicable,” the absence of timely notice constituted a failure to comply with a condition precedent, which, as a matter of law, vitiates the contract. The burden was placed on the insured to show that the delay was not unreasonable — meaning that there was a reasonable excuse for the delay — and delays of less than ten months and even as short as 29 days were routinely found to be unreasonable as a matter of law.

Recently, however, this longstanding common-law tradition

was obviated by legislation prohibiting liability insurers from denying coverage based on the policyholder’s failure to provide timely notice unless the insurer was prejudiced by the late notice. Effective January 17, 2009, Insurance Law 3420 now requires insurance companies to show prejudice as a condition to denying coverage based on late notice of claim if notice is provided within two years of the time it was due. If notice is provided more than two years after it was due, then the insured must show a lack of prejudice. Proponents of the bill argued that New York was in the minority of states requiring no showing of prejudice to deny coverage based on late notice and allowing insurers to deny coverage based on what they deemed “an inconsequential technicality.” As amended, the statute only applies to policies issued on or after January 17, 2009. Thus, over time, how the New York courts apply the statute and what constitutes “prejudice” to an insurer will dictate the ultimate impact of the statute on the viability of late notice claims in New York.

### Texas Supreme Court Extends Notice-Prejudice Rule to Claims-Made Policies

Equally unsettling for insurers is the Texas Supreme Court’s recent decision in *Prodigy Communications Corporation v. Agriculture Excess & Surplus Insurance Company*. This 6-3 decision, written over a forceful dissent, instructs that under Texas law a claims-made policy provision requiring notice be given “soon as practicable” does not, in the absence of prejudice to the insurer, defeat coverage.

Writing for the majority, Chief Justice Wallace B. Jefferson framed the question before the Court as “whether, under a claims made policy, an insurer can deny coverage based on its insured’s alleged failure to comply with a policy provision requiring that notice of claim be given ‘as soon as practicable’ when 1) notice of claim was provided before the reporting deadline specified in the policy; and 2) the insurer was not prejudiced by the delay.” After reviewing the role of the



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## Expert's Corner cont'd

notice provisions within claims made policies generally, the Court concluded that the insured's obligation to provide notice "as soon as practicable" was not a material part of the bargained-for exchange. Therefore, when an insured gives notice of a claim within the policy period or other specified reporting period, the insurer must show that the insured's noncompliance with the policy's "as soon as practicable" notice provision prejudiced the insurer before it may deny coverage. Notably, the majority did not consider it determinative that notice as "as soon as practicable" was identified in the policy as a "condition precedent" to coverage.

The majority opinion in *Prodigy* is further confirmation that the trend amongst U.S. courts is to apply the "no harm, no foul" principle to late notice coverage denials, regardless of the clarity of policy terms and the circumstances of the late notice.

### Sixth Circuit Predicts "Notice-Prejudice" Rule Extension

Early this year, the Sixth Circuit Court of Appeals predicted that the Kentucky Supreme Court would extend the "notice-prejudice" rule to the excess-liability context and instructed the District Court to reconsider whether a reasonable trier of fact could conclude that, with timely notice, there is a reasonable probability that the excess carrier would have achieved more favorable resolution of the underlying claim. In so holding, the Court considered the various factors identified by the Kentucky Supreme Court in *Jones v. Bituminous Casualty Corporation* — the fact that modern insurance policies are contracts of adhesion; the doctrine of reasonable expectations; the public policy underlying statutorily mandated insurance coverage; and the possibility of creating a windfall for insurers — and concluded that they weighed in favor of extending the "notice-prejudice" rule to excess liability insurance.

Accordingly, the Court found that to avoid coverage an ex-

cess insurer must show a reasonable probability that it was substantially prejudiced by the late notice. The Court explicitly rejected the insurer's contention that prejudice should be presumed where notice is extremely late (between six and 16 years). Concurring in part and dissenting in part, Judge Daughtrey disagreed. She concluded that given the extreme lateness of notice the Court should impose a rebuttable presumption that the delay caused prejudice.

This policyholder-friendly decision is interesting in that it leaves more unanswered questions than it resolves. As an initial matter, the decision merely predicts the development of Kentucky law, thus whether the Kentucky Supreme Court will follow suit is yet to be seen. Further, Judge Daughtrey's dissent raises the possibility that in extreme late notice cases Kentucky courts will shift the burden of proving prejudice to the insured.

### Looking Forward

The decisions and legislation discussed above illustrate the uncertainty and disorder of U.S. law regarding the viability of a late notice defense to coverage. Consequently, insureds and insurers alike must continue to be vigilant. Insureds must be careful to comply fully with all policy conditions or they may be found to have waived their rights to insurance coverage. Likewise, insurers must be aware of the law in each of the jurisdictions in which they issue policies to ensure a denial of coverage based upon an insured's noncompliance with a notice provision remains supported by the ever changing controlling law.

*Robert D. Laurie is a partner and Elizabeth F. Ahlstrand is an associate with Seiger Gfeller Laurie LLP, where they represent insurance companies in insurance coverage and extra-contractual litigation.*

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# AICA Golf Outing—Team Registration

When: Friday, April 30, 2010 7:00 am Shotgun Start

Where: Stonecreek Golf Club  
4435 E Paradise Village Parkway South



Cost: \$110 per golfer  
Scramble Format  
Green Fee, Cart, Driving Range, Prizes, and BBQ included.

Dress: Proper Golf Attire Required

Deadline: All Forms & Payments Must be **Received by March 31, 2010**  
After March 31, \$120 per golfer

LIMITED TO FIRST 36 TEAMS (144 GOLFERS)

Player #1 \_\_\_\_\_  
E-mail \_\_\_\_\_  
Phone \_\_\_\_\_  
Employer \_\_\_\_\_

Player #3 \_\_\_\_\_  
E-mail \_\_\_\_\_  
Phone \_\_\_\_\_  
Employer \_\_\_\_\_

Player #2 \_\_\_\_\_  
E-mail \_\_\_\_\_  
Phone \_\_\_\_\_  
Employer \_\_\_\_\_

Player #4 \_\_\_\_\_  
E-mail \_\_\_\_\_  
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BBQ Meal Tickets # \_\_\_\_\_ x \$25 = \_\_\_\_\_  
(Required for attendees NOT a registered golfer)

**Entry must be accompanied by admission fees  
No faxed entries will be accepted**

**RETURN ENTRY FORMS & PAYMENTS TO:**

AICA Golf Tournament  
Schantz Construction, LLC  
P.O Box 11175  
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Dale Schantz, (623) 825-7872

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## AICA Golf Outing—Sponsorship Opportunities

**When:** Friday, April 30, 2010 7:00 am

**Where:** Stonecreek Golf Club  
4435 E Paradise Village Parkway South

**Cost:** \$250 Chipping, Beverage Cart, Hole Sponsorships  
Includes Company Sign & 2 BBQ Meal Tickets\*  
\$125 Breakfast Sponsor  
\$125 Grab Bag Sponsorship  
\$950 18 Green Pin Logo Flags – Deadline March 1, 2010  
\$650 Golfers Cart Sponsor



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Contact Person: \_\_\_\_\_

Phone No: \_\_\_\_\_ Cell Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

\*Additional BBQ Meal Tickets # \_\_\_\_\_ X \$25 = \_\_\_\_\_

Enclosed Check: \$ \_\_\_\_\_ Payable to Arizona Insurance Claims Association

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