

# Insured Must Reimburse Insurer with Interest for Defense Costs Where Claim Made Prior to Policy Period

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The Ninth Circuit Court of Appeals, applying California law, affirmed a district court's holding that an insured must reimburse its insurer with interest for tendered defense costs for a claim made prior to the policy period of a claims-made policy. *Evanston Ins. Co. v. OEA, Inc.*, 2009 WL 1409241 (9th Cir. May 21, 2009). The Ninth Circuit rejected the policyholder's argument that it was a question of fact for the jury whether the policyholder was on notice of the claim prior to the policy period, stating that "[r]easonableness becomes a question of law and loses its triable character if the undisputed facts leave no room for a reasonable difference of opinion."

The insured purchased a general commercial liability policy with a policy period of May 1, 1998 to May 1, 1999, which provided coverage for "CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD." The policy defined a "claim" as "a notice received by the insured of an intention to hold the insured responsible for an Occurrence involving the policy and shall include the service of suit or institution of arbitration proceedings against the insured." The insured was named as a defendant in two suits about which it became aware in June 1997 and November 1997, respectively. The district court ruled that there was no question of fact that the policyholder received notice of the claims and that the claims were first made prior to the policy period. The district court granted the insurer's motion for summary judgment and awarded reimbursement of amounts paid for defense costs and settlement plus pre-judgment interest from the date of payment.

The Ninth Circuit affirmed the district court's holding and rejected the insured's argument that the insurer's right to reimbursement had not vested prior to the district court's grant of summary judgment. Under California Civil Code § 3287(a), "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." The Ninth Circuit held that California courts uniformly have held that vesting occurs at the time the amount of damages becomes certain or capable of being made certain, not the time liability is determined. The court therefore held that the right to reimbursement vested the day the

insurer made its payment to the insured and awarded pre-judgment interest from the time payments were made.