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# Indiana Court Rules No Duty for Insurer to Reimburse Pre-Tender Defense Costs

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In an order dated July 20, 2006, the Marion County, IN Superior Court held that a policyholder was not entitled to recover the defense costs it incurred in the years prior to tendering a claim to its insurer. This decision is in line with a recent Indiana Court of Appeals' ruling in which the insurer was held not to be liable for pre-tender defense costs.

In *Dreaded, Inc. v. St. Paul Guardian Insurance Company, St. Paul Protective Insurance Company and St. Paul Fire and Marine Insurance Company*, Cause No. 49D10-0503-PL-011747, the policyholder tendered the defense of an underlying claim by the Indiana Department of Environmental Management (IDEM) nearly 3 ½ years after first receiving notice of that claim.

During that period of delayed tender, the policyholder retained legal counsel to represent it in connection with the IDEM claim and also retained an environmental contractor to perform a soil investigation at the subject site. St. Paul agreed to participate in the defense of the policyholder with respect to the IDEM claim on a going-forward basis, but refused to reimburse any costs incurred prior to tender.

The plaintiff filed a declaratory judgment action against St. Paul, seeking to recover those pre-tender costs, and the parties cross-moved for summary judgment on that issue. The court denied the plaintiff's motion, and granted St. Paul's counter-motion. In its ruling, the court held that the policyholder has a duty to tender claims to its insurers in order to trigger a duty to defend, and that it is otherwise required to comply with the notice provisions in such policies. The court also ruled that St. Paul was not required to demonstrate prejudice arising from the delay in tender, but that even if such a showing was required, a presumption of prejudice arose as a result of the nearly 3 ½-year delay in tendering the claim.

As a result, the court ruled that St. Paul had no duty to reimburse the plaintiff for any defense costs incurred prior to its tender of the underlying IDEM claim to St. Paul, which was represented

in this case by Kenneth C. Newa of Plunkett & Cooney, P.C.'s Detroit office.

The decision in *Dreaded*, which may still be appealed by the policyholder, is notable in that it is the second recent decision by an Indiana court in favor of an insurer on the issue of pre-tender defense costs. This decision comes on the heels of the Indiana Court of Appeals' decision in *Liberty Mut. Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192 (Ind. Ct. App. 2005), *trans. den.* 841 N.E.2d 190 (Ind. 2005).

In that case, the Indiana Court of Appeals found that the policyholder's delay of 14-18 months in notifying the insurer of a claim was "unreasonable as a matter of law." Additionally, the court found that because the insurer was denied the opportunity to offer settlement or guide the course of litigation, was not given the opportunity to select its attorney of choice to defend the suit, and was unable to negotiate the amount of attorney's fees, the insurer was not liable for any fees or costs incurred by the policyholder prior to the date of tender. *Id*. at 204.

These decisions offer insurers growing support for the position that, under Indiana law, defense costs incurred by the policyholder prior to the date of tender are not recoverable. Insurers should, however, continue to examine each case on its merits and undertake an independent evaluation regarding the viability of such a defense in a given case, as the result may be dependent in part on the fact pattern presented.

Should you have any questions about *Dreaded*, or about the pre-tender cost issue in general, please feel free to contact any member of Plunkett & Cooney's Insurance Practice Group. A practice group directory can be found at www.plunkettcooney.com, or call Ken Newa at (313) 983-4848 or Chuck Browning at (248) 594-6247.

To review a copy of the ruling in Dreaded, *Inc. v. St. Paul*, click here.

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