

Indiana Supreme Court Precludes Recovery of Pre-Tender Defense Costs, Clarifies Insurer's Duty to Defend

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On April 28, 2009, the Indiana Supreme Court reversed the Indiana Court of Appeals, and affirmed the trial court's grant of summary judgment in favor of St. Paul Fire and Marine Insurance Company ("St. Paul"), holding that St. Paul is not obligated to reimburse the policyholder, Dreaded, Inc., for the defense costs that it incurred prior to its tender of the underlying claim to St. Paul. *Dreaded Inc. v. St. Paul, et al.*, No. 49S02-0805-CV-244 (April 28, 2009).

In *Dreaded*, the policyholder tendered the defense of an underlying claim by the Indiana Department of Environmental Management (IDEM) nearly 3.5 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 site investigation at the subject site. After Dreaded provided notice to St. Paul, St. Paul agreed to participate in the defense and indemnify of Dreaded from the date of tender forward, but declined any duty to reimburse any defense costs incurred prior to tender.

Dreaded 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 trial court denied Dreaded'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 3.5-year delay in tendering the claim. As a result, the trial court ruled that St. Paul

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had no duty to reimburse Dreaded for any defense costs incurred prior to its tender of the underlying IDEM claim to St. Paul.

The Indiana Court of Appeals reversed, concluding that Dreaded designated sufficient evidence to raise a genuine issue of material fact as to whether St. Paul was prejudiced. The Indiana Supreme Court granted transfer.

The Supreme Court held that St. Paul had no duty to reimburse Dreaded's pre-tender, pre-notice costs regardless of whether it was prejudiced by Dreaded's failure to comply with the policy's notice requirement. The court emphasized that St. Paul was not claiming late notice in order to disclaim all prospective coverage obligations after receiving notice. Instead, it sought only to preclude coverage for the defense costs incurred prior to notice.

Noting that Dreaded's claim was predicated solely on its contention that St. Paul breached its duty to defend, the court found that "an insurer cannot defend a claim of which it has no knowledge. The function of a notice requirement is to supply basic information to permit an insurer to defend a claim. The insurer's duty to defend simply does not arise until it receives the foundational information designated in the notice requirement. Until an insurer receives such enabling information, it cannot be held accountable for breaching this duty." The court specifically stated that the issue of prejudice was "irrelevant." As the court explained, "The issue is simply whether the insurer had any duty to defend at all. St. Paul's duty to defend did not arise until Dreaded complied with the policy's notice requirement."

This decision is significant in that pre-tender costs often make up a large component of policyholder damage claims in Indiana. This decision also makes clear that a duty to defend on the part of the insurer does not arise until the insurer receives notice of the claim against its policyholder. Thus, under Indiana law, insurers are no longer obligated to reimburse defense costs incurred by their policyholders before the insurer receives knowledge of the claim.

Kenneth C. Newa and Jeffrey C. Gerish of Plunkett Cooney represented St. Paul in this matter. Should you have any questions about *Dreaded*, or questions concerning the pre-tender costs issue in general, please feel free to contact any member of Plunkett Cooney's Insurance Practice Group. To review a practice group directory, [click here](#) or call Ken Newa at (313) 983-4848 or Chuck Browning at (248) 594-6247.

[Click here](#) to review the *Dreaded* decision.