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Client Alert

Three new Indiana Coverage Decisions on Late Notice

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The requirement that insurers must show prejudice to avoid coverage for late notice in general remains alive and well in Indiana following three recent decisions.

In *Tri-Etch v. Cincinnati Ins. Co.*, the Indiana Supreme Court clarified that a 2006 case, *Morris v. Economy Fire*, did not alter the prejudice standard established 22 years earlier in *Miller v. Dilts*. The Supreme Court observed that in both *Morris* and *Miller* it "specifically distinguished breach of the policy provision in question . . . from breach of a general cooperation clause, which does require that the insurer show prejudice to defeat coverage."

The confusion over whether insurers were still required show prejudice arose in the wake of another recent Indiana Supreme Court decision, *Dreaded, Inc. v. St. Paul Guardian Ins. Co*. In *Dreaded*, the Court held that prejudice was not a relevant consideration with respect to pre-tender defense costs. While *Dreaded* clearly stated that "Indiana case law is inconclusive regarding the necessity and function of prejudice in evaluating an insurer's alleged failure to perform when its insured fails to comply with a policy notice requirement," some insurers argued that *Dreaded* eliminated the necessity of any showing of prejudice for coverage in general. *Tri-Etch* put that issue to rest. Breaches of the cooperation clause—the usual basis for late notice defenses—require the insurer to show actual prejudice to avoid coverage.

Another recent decision, *Great Northern Ins. Co. v. Precision Plastics of Ind.*, echoes the limited impact of *Dreaded* as well as the limiting effect of *Tri-Etch*. In *Precision Plastics*, the Indiana Court of Appeals highlighted the fact that *Dreaded* "limited its ruling to holding that an insurer cannot be held accountable for breaching its duty to defend until it receives notification," as opposed to coverage in general. *Precision Plastics* also underscores another distinguishing feature of *Dreaded*, that its "holding was narrowly tailored to the facts in the case as the case did not involve the insured seeking reimbursement for defense costs incurred based on the insurer's refusal to defend, indemnity for a damages judgment, reimbursement based on a timely yet partially defective notice, or reimbursement based on constructive notice."

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