

Prejudice from Late Notice Is Not Precluded Simply Based on Denial on Other Grounds

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The Supreme Court of Indiana has held that an insurer's denial of coverage on other grounds does not preclude a late notice defense to coverage, nor does it conclusively rebut the presumption that the untimely notice of a claim prejudiced the insurer. *Tri-etch, Inc. v. Cincinnati Ins. Co.*, 2009 WL 2171119 (Ind. July 21, 2009).

The claim at issue was a wrongful death suit brought against a contractor for security services in 1999. The contractor did not tender the suit to its commercial general liability insurer until approximately five years later. At that time, the insurer denied coverage on a number of grounds, including that the insured failed to provide timely notice, that the claim did not involve an "occurrence" within the meaning of the policy's insuring clause and that an exclusion for claims arising out of alarm monitoring services applied. In the coverage litigation that followed, the insured disputed each of these bases for the disclaimer. With respect to late notice, the insured argued that this was not a viable defense to coverage in light of the other grounds asserted by the insurer. The state high court disagreed.

First, the court recognized that Indiana law requires a showing of prejudice to the insurer to void coverage based on late notice but that the insured's failure to provide timely notice gives rise to a rebuttable presumption of prejudice. Next, the court held that the presumption is not conclusively rebutted by the fact alone that the insurer asserted other defenses to coverage. According to the court, "[t]here is no reason why an insurer should be required to forego a notice requirement simply because it has other valid [bases to deny] coverage." In this regard, the court pointed out that "[e]ven if an insurer consistently denies coverage, timely notice gives the insurer an opportunity to investigate while evidence is fresh, evaluate the claim, and participate in an early settlement." The assertion of other coverage defenses does not, in the court's view, "render these opportunities meaningless." Accordingly, the court held that the question for the fact finder is "whether the other defenses would have caused the insurer, if given timely notice, to do nothing with respect to the claim."