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NEWSLETTER

Insurer Not Liable for $1.3 Million in Pre-Tender Defense Costs

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Applying Michigan law, a federal district court has held that an insurer was not obligated to reimburse $1.3 million in defense expenses incurred by its insured during the 15 months between the commencement of the underlying action and tender of that action to the insurer. *AMI Entm't Network, Inc. v. Zurich Am. Ins. Co.*, 2012 WL 5199668 (E.D. Mich. Oct. 22, 2012).

The policy included a "voluntary payments" provision and also required the insured promptly to notify the insurer of "an occurrence or offense which may result in a claim under the policy . . . and to notify [the insurer] promptly of any . . . suit." The policy further provided that, "in the event of noncompliance [with the reporting provisions], [the insurer] shall not be required to establish prejudice resulting from the noncompliance, but shall be automatically relieved of liability with respect to the claim." On receiving notice of a 15-month-old suit, the insurer disclaimed any obligation to reimburse the defense costs that predated the tender. In the coverage litigation that followed, the court ruled in favor of the insurer, finding that the insured "incurred over $1.3 million in defense fees and costs before it provided notice . . . to [the insurer]" and concluding that this delay violated both the policy's notice terms and voluntary payment provision. The court, in turn, summarily rejected the insured's counterargument that "the duty to defend arises at the commencement of the Underlying Lawsuit irrespective of whether notice was given or the request to defend was sought."