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## Client Alert

### Indiana Supreme Court decision emphasizes importance of prompt notice

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In the April 28, 2009 decision of *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*, 904 N.E.2d 1267 (Ind. 2009) the Indiana Supreme Court held that an insurer's duty to defend "does not arise" until the policyholder provides notice of a claim or suit. 904 N.E.2d at 1273.

*Dreaded* involved an enforcement action by the Indiana Department of Environmental management ("IDEM") against a commercial building supplies business for site characterization and cleanup of petroleum contamination which resulted from the activities of prior site owners. *Dreaded* did not provide notice to St. Paul until roughly three and one half years after receipt of the initial cleanup demand letter from IDEM. St. Paul defended the claim subject to a reservation of rights and paid all post-notice costs incurred by *Dreaded* in investigating and remediating the contamination. However, St. Paul refused to pay any pre-notice costs, and *Dreaded* filed suit.

The trial court granted St. Paul's motion for summary judgment, holding that St. Paul had no duty to reimburse pre-notice defense costs. The trial court found that St. Paul was not required to demonstrate any prejudice as a result of the late notice because it did not decline coverage, it merely declined to pay pre-notice costs. The trial court found that even if a showing of prejudice were required, prejudice could be presumed from unreasonably late notice, *Dreaded* failed to rebut that presumption, and St. Paul had independently proved prejudice.

On appeal, the Indiana Court of Appeals followed the Indiana Supreme Court's prejudice analysis as set forth in *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984) and reversed the trial court, holding that a question fact remained as to whether St. Paul was prejudiced by the late notice. *Miller* addressed two kinds of policy provisions—notice and cooperation—that insurers often raise to avoid paying pre-notice costs. The difference between the two defenses, under *Miller*, relates to the burden of showing prejudice. "[T]he notice provisions in insurance policies are not equivalent to the cooperation clauses and do not serve the same objectives." 463 N.E.2d at 265. "An insurance company must show *actual prejudice* from an insured's noncompliance with the policy's *cooperation* clause before it can avoid liability under the policy." *Id.* (emphasis added). In contrast, under the *notice* provisions of an insurance policy, "[p]rejudice to the insurance company's ability to prepare an adequate defense can . . . be presumed by an *unreasonable* delay in notifying the company about the accident or about the filing of the lawsuit." *Id.* (emphasis added).

The Indiana Supreme Court's opinion acknowledged, but did not resolve, an apparent conflict between *Miller* and *Morris v. Econ. Fire and Cas. Co.*, 848 N.E.2d 663 (Ind.2006), a case involving a first-party property claim and a policy provision which required that the policyholder submit to an examination under oath. *Morris* held that prejudice is not a necessary consideration in determining the enforceability of policy provisions other than cooperation clauses.

The Supreme Court noted substantial authority indicating that other states require insurers to demonstrate that prejudice resulted from a policyholder's late notice in order to avoid coverage, and distinguished the facts of *Dreaded* from situations where the insurer denied coverage for indemnity or post-notice defense costs. Whether Indiana will move away from *Miller* and follow the trend of other states to require insurers to show actual prejudice in order to disclaim coverage for indemnity costs and post-notice defense costs remains to be seen.

The Supreme Court also distinguished the facts of *Dreaded* from circumstances where late notice was "legally excused," leaving open the argument that circumstances such as lost policies or an insurers' practice of denying certain kinds of claims regardless of when notice is provided will excuse late notice and allow recovery of pre-notice defense costs.