

# INDIANA SUPREME COURT CONFIRMS REBUTTABLE PRESUMPTION OF PREJUDICE TO INSURER ARISES FROM DEFENSE OF “LATE NOTICE,” DENIAL OF COVERAGE ON OTHER BASES DOES NOT REBUT PRESUMPTION

Insurance Law Practice Group

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Author: Kenneth C. Newa  
Direct: (248) 594-6968  
knewa@plunkettcooney.com

In the recently-decided *Tri-Etch, Inc. v. Cincinnati Ins. Co.*, 909 N.E.2d 997, 2009 WL 2171119 (Ind. July 21, 2009), the Indiana Supreme Court held that there was no “occurrence” where the event giving rise to the injury at issue was a failure to meet a promised standard of care. The court further confirmed that when an insurer asserts a late notice defense, a rebuttable presumption of prejudice exists, and the fact that the insurer also denied coverage on grounds other than late notice does not rebut that presumption.

Tri-Etch provided security services to a liquor store in Muncie, Indiana. Shortly before the store closed at midnight on the night at issue, Michael Young, an employee of the store, was abducted, tied to a tree, and beaten. At 3:00 a.m., Tri-Etch notified the store’s general manager that the night alarm had not been activated. However, Young was not found until 6:00 a.m., and later died from his injuries.

Young’s estate brought a wrongful death action against Tri-Etch, alleging that Tri-Etch breached its duty to notify the store’s manager by 12:30 a.m. if the night alarm had not been activated. After trial, a \$2.5 million jury verdict was entered against Tri-Etch.

Scottsdale Insurance Company ( Scottsdale) issued a commercial general liability policy to Tri-Etch, which included errors and omissions coverage. Tri-Etch also held a general liability policy with Cincinnati Insurance Company (CIC), which did not include an errors and omissions rider. CIC also issued an umbrella insurance policy to Tri-Etch. Scottsdale received notice of the lawsuit when it was filed in 1999 and defended Tri-Etch in that action. CIC, however, contended that it did not receive notice until March 2004.

After the verdict in the underlying lawsuit, the Estate of Michael Young (the Estate), Tri-Etch and Scottsdale filed a declaratory judgment action against CIC, seeking to recover the unpaid balance of the judgment, plus post-judgment interest. All parties moved for summary judgment. The trial court first held that the claim was covered under the CIC policies, and, on later motions, that the Estate’s notice of the claim to CIC was untimely, that CIC suffered prejudice as a result and, therefore, that CIC owed no coverage.

The Estate and Scottsdale appealed. The Indiana Court of Appeals reversed, holding that the claim arose from an “occurrence,” and that, even if notice was untimely, CIC had not suffered prejudice as a matter of law because it had also denied coverage for reasons other than late notice.

The Indiana Supreme Court examined three issues on appeal: 1) whether Tri-Etch’s failure to notify the store’s manager by 12:30 a.m. that the night alarm had not been activated was an “occurrence,” 2) whether an exclusion regarding alarm monitoring services applied, and 3) whether the Estate and Scottsdale had to rebut a presumption that CIC suffered prejudice as a result of the late notice to CIC.

CIC argued that Tri-Etch’s failure to notify the store manager within 30 minutes of closing that the night alarm had not been activated did not constitute an “occurrence,” which the CIC policy defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The Estate argued that it was an accident because Tri-Etch did not fail to call with the intention of Young being killed.

The court agreed with CIC, reasoning that “lack of intentional wrongdoing does not convert every business error into an ‘accident.’” The court compared the failure to call to a claim for a lawyer’s malpractice or an insurance agent’s failure to secure the desired coverage. “Tri-Etch’s failure was just such an ‘error or omission,’ not an ‘accident,’ and for that reason it is not an ‘occurrence’ covered by [CIC]’s CGL and umbrella policies. The CGL policy does not guarantee the quality of work or products of its insureds.” The court continued by stating that “claims based on negligent performance of commercial or professional services are ordinarily insured under ‘errors and omissions’ or malpractice policies.”

The court then addressed the application of a provision in the CIC umbrella policy excluding coverage for bodily injury “arising out of any act, error or omission of the insured in rendering or failing to render telephone answering, alarm monitoring or similar services.” The court held that the exclusion applied to preclude coverage because the failure to observe and report the lack of the scheduled arming of the alarm was a result of Tri-Etch’s failure to monitor or observe the store’s arming of the alarm, which Tri-Etch agreed to do.

Finally, the court addressed the availability of insurance coverage where the insured does not timely provide notice of a claim or suit to its insurer. The court found that, under *Miller v. Dilts*, 463 N.E.2d 257 ( Ind. 1984), prejudice to the insurer is presumed by the insured’s late notice, but the insured may rebut that presumption with evidence showing that the late notice created no prejudice.

The court further disagreed with the appellate court’s holding that an insurer’s denial of coverage on other grounds rebuts the presumption of prejudice from late notice, holding that “[i]f there is no prejudice to the insurer from lack of notice, the absence of prejudice does not arise from the insurer’s taking the position that it also has other valid defenses to coverage . . . even 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 early settlement. The fact that an

insurer asserts other coverage defenses does not render these opportunities meaningless.” Because the court found that the CIC policies did not apply to the claim in the first instance (per the above analysis), it did not consider whether notice to CIC was, in fact, late, or whether CIC suffered prejudice.

With the *Tri-etch* decision, the Indiana Supreme Court has unquestionably affirmed its prior rulings in *Miller and Dreaded, Inc. v St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267 (Ind. 2009) that, under Indiana law, where an insured does not provide timely notice of a suit or claim, a rebuttable presumption of prejudice arises. It is then the insured’s burden to come forward with evidence rebutting that presumption.

This decision also preserves the late notice defense in cases where the insurer also declines coverage on other bases. The *Tri-etch* decision also confirms that a professional mistake does not constitute an accident and, accordingly, is not an “occurrence,” as that term is commonly defined in CGL policies.

Should you have any questions about *Tri-etch*, or about late notice in general, please feel free to contact any member of Plunkett Cooney’s Insurance Practice Group. A practice group directory can be located by clicking [here](#). In the alternative, please contact Ken Newa at (313) 983-4848 or Patrick Winters at (248) 594-6321.