

WASHINGTON CASE UPDATE

case in point...

To Defend, or Not to Defend? Trial Court Cannot Delay This Determination

From the desk of Kyle Riley: Can the court delay a ruling on an insurer's duty to defend and allow discovery to proceed in the coverage lawsuit that is potentially prejudicial to the insured in the underlying lawsuit?

Claims Pointer: No. The trial court must look to the complaint and the insurance policy to determine if the insurer has a duty to defend the insured and may not delay such a ruling for discovery issues. Also, the court may conclude that an insured can withhold documents that are prejudicial to it in the underlying action. Further, all discovery logically related to the underlying claims should also be withheld until such claims are fully adjudicated.

Expedia, Inc. v. Steadfast Ins. Co., 180 Wash2d 793, 329 P3d 59 (2014).

Beginning in 2004, approximately 80 lawsuits were filed against Expedia, Inc. ("Expedia") by states, counties, and municipalities for allegedly failing to collect the right amount of local occupancy taxes from its hotel customers. Expedia tendered most of the suits to Zurich, although some were tendered late. Zurich refused to defend Expedia on a number of grounds, including late tender and that the underlying suits may be excluded from the policies' coverage. The policies provide Expedia with coverage for any liability for "damages arising out of a negligent act or negligent omission . . . in the conduct of Travel Agency Operations." The policies further specify that Zurich has a "duty to defend any Suit against [Expedia] seeking damages." Finally, the policies require Expedia to notify Zurich as soon as is practicable of an "Occurrence, a negligent omission or an offense."

In November 2010 Expedia filed suit against Zurich for a declaratory judgment as to Zurich's duty to defend, insurance bad faith, and a violation of Washington's Consumer Protection Act. Zurich responded and claimed that no coverage existed and that there is no duty to defend or indemnify Expedia. Zurich also asserted various defenses including late tender, known loss, material misrepresentation, and mistake.

Expedia then moved for summary judgment regarding Zurich's duty to defend it. Zurich moved for a continuance to seek discovery relating to, among other things, Zurich's late notice, misrepresentation, mistake, and known loss defenses. Expedia declined to provide all the documentation that Zurich had requested on the grounds that the requested information was potentially prejudicial to Expedia's interests in the underlying actions. The trial court agreed with Expedia that there was a dangerous

overlap between the discovery seeking Expedia's knowledge or intent regarding its liability for the payment of the certain occupancy tax amounts. However, the trial court declined to decide the issue of Zurich's duty to defend until discovery was complete because the court could not decipher which discovery requests would be prejudicial to Expedia in the underlying actions. Expedia sought appellate review of the court's denial to hear its duty to defend motion.

The issues on appeal were: (1) whether the trial court was incorrect in delaying ruling on Zurich's duty to defend Expedia from third-party lawsuits; and (2) whether the trial court was incorrect in allowing discovery to proceed that was potentially prejudicial to Expedia in third-party lawsuits.

In Washington, the duty to defend is different from and broader than the duty to indemnify. The duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint. The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage. A late tender defense to the duty to defend requires the insurer to prove that it was actually and substantially prejudiced by the late tender.

The Washington Supreme Court concluded that the trial court should have heard Expedia's motion and determined whether Zurich had a duty to defend Expedia. Once the trial court concluded Zurich's duty to defend, the Court advised, then Zurich could have attempted to prove its defenses. In the meantime, however, Zurich should have been required to defend Expedia if the trial court found that the duty to defend had been triggered. Thus, the Court concluded, the trial court was incorrect to delay the ruling on Zurich's duty to defend.

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The Court also concluded that the trial court ruled incorrectly on the discovery issue. Prior Washington case law makes it clear that the duty to defend must be determined from the complaint and the insurance policy. Thus, the Court concluded that the duty to defend cannot be delayed by discovery. Accordingly, the Court remanded the case to the trial court to determine Zurich's duty to defend Expedia in each of the underlying cases and further ordered the trial court to stay discovery in the coverage action until the trial court can make a factual determination as to which parts of discovery in the coverage action are potentially prejudicial to Expedia in the underlying litigation.



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