

Washington Supreme Court Narrows Efficacy of Late Notice Defense

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Even when the claims in a lawsuit arguably fall within the coverage terms of the defendant's liability insurance policy, the circumstances might suggest facts that would establish a defense to coverage. In that case, the insurer might be permitted to explore those facts in discovery. But in *Expedia Inc. v. Steadfast Ins. Co.*, the Supreme Court of Washington held that the insurer nevertheless has a duty to provide a defense, at least until that discovery bears fruit. The court further suggested that the discovery might have to wait until resolution of the underlying action. Expedia, Inc., a popular travel website operator, sued its insurers for breach of contract and bad faith, based on their refusal to defend cases brought by various states, municipalities, and other taxing authorities. The underlying cases generally alleged that Expedia improperly calculated the sales tax charged to consumers who reserved hotel rooms using the site. Expedia calculated the taxes based on the *reduced* rates Expedia obtains for its customers, not on the rooms' full retail value. Expedia's 10-K filings with the SEC show that it learned of its problem with taxing authorities not later than 2002. The first lawsuit against it was filed in December 2004. Expedia did not notify its insurers or tender defense of the suit until June 2005. The insurers denied the claim and refused to defend, based on certain exclusions for alleged "willful and knowing" violations, and also on the ground of late notice. In 2010 and 2011, Expedia tendered another 62 suits, for which defense was also denied. Expedia moved for summary judgment on the duty to defend, and the insurers moved for a continuance, pursuant to Washington's procedural rules, to pursue discovery regarding late notice. The trial court granted the motion and allowed the discovery, effectively staying adjudication of the duty to defend. Expedia's motion for discretionary appellate review was denied by the Court of Appeals, but the Washington Supreme Court granted a petition for review. Reversing the trial court, the Supreme Court emphasized that the duty to defend is "determined from the 'eight corners' of the" policy and the underlying complaint. Therefore, "[d]etermining **whether the duty to defend has been triggered is a separate inquiry from whether an insurer may be relieved of its duty ... due to a defense** such as a claim of late tender." The Supreme Court also directed the trial court to *stay* the insurers' discovery, pending a determination of *whether any part of it might prejudice Expedia* in the underlying suits.

That issue is likely to arise in many cases in which there is evidence of the insured's knowledge about acts or conditions for which it has been sued. But the ruling was especially harsh because it followed a statement that an insurer which ultimately establishes a late notice defense will be relieved *only* "of the duty to pay the cost of defense *incurred after* the insurer obtains a ... declaration that it owes no duty to defend."

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