

NO. 88673-3
SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
SUPREME COURT
STATE OF WASHINGTON
2013 MAY 10 P 3:43
BY RONALD R. O'NEILL
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EXPEDIA, INC., a Washington Corporation; EXPEDIA, INC., a Delaware Corporation; HOTELS.COM, L.P., a Texas Limited Liability Partnership; HOTELS.COM, GP, LLC, a Texas Limited Liability Company; HOTWIRE, INC., a Delaware Corporation; TRAVELSCAPE, a Nevada Limited Liability Company,

Plaintiffs/Petitioners,

v.

STEADFAST INSURANCE COMPANY, a Delaware Corporation;
ZURICH AMERICAN INSURANCE COMPANY, a New York Corporation; ROYAL & SUN ALLIANCE, a Foreign Corporation;
ARROWPOINT CAPITAL CORP., a Delaware Corporation;
ARROWOOD SURPLUS LINES INSURANCE COMPANY, a Delaware Corporation; ARROWOOD INDEMNITY COMPANY, a Delaware Corporation,

Defendants/Respondents.

PLAINTIFFS/PETIONERS' RESPONSE TO BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

In their brief, *amici curiae* highlight the harm that can befall Washington policyholders under the procedures endorsed by the Court of Appeals and the Superior Court. *Amici curiae* also show that the situation facing Expedia is in no way unique, but instead is common and of substantial interest to virtually all policyholders facing complex liabilities whose insurers initially, and wrongly, deny defense coverage. Expedia joins *amici* in urging this Court to accept review and enforce the duty to defend as Washington law requires.

II. ARGUMENT

A. Delaying Adjudication of the Duty to Defend Threatens to Rob Policyholders of One of the Main Benefits of Liability Insurance.

“The duty [to defend] is one of the main benefits of the insurance contract.” *Truck Ins. Exch. v. VanPort Homes Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (citing *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992)). This duty, in contrast to the duty to indemnify, provides a policyholder with protection from the outset of a lawsuit and for so long as the policyholder faces the threat of liability. An insurer that refuses to provide the duty to defend leaves the policyholder to bear the risk and burden of defending a lawsuit itself. Even worse, refusing the defense obligation also forces a policyholder to “double

down” and fund separate litigation to pursue the coverage its insurer promised.

Amici curiae identified the harms facing Washington policyholders if their insurers do not honor the duty to defend and the rules that the Washington courts have crafted to protect policyholders from those harms. The harm caused to Expedia by Zurich’s conduct—as endorsed by the Court of Appeals and the Superior Court—is illustrative of the issues created for all policyholders if Zurich’s conduct becomes the rule in Washington.

For example, *amici* identified that one of the reasons entities obtain liability insurance is to ensure that their available funds are used to fulfill their intended corporate, governmental, or charitable purposes. Expedia has had its funds diverted to the defense of dozens of underlying lawsuits—and the prosecution of this coverage action—for years. The delay caused just by the erroneous rulings of the Court of Appeals and Superior Court alone has forced Expedia to fund the defense of lawsuits that Zurich should be defending for over a year at substantial cost.

Amici also identified the risk of unequal treatment to policyholders if large corporate insureds are subject to different rules and procedures. As an initial matter, that unequal treatment is contrary to Washington law, which holds that any rules on liability coverage “will bind policyholders

throughout the state regardless of the size of their business.” *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 883, 784 P.2d 507 (1990). Yet the Superior Court treated Expedia differently because it found that Expedia had “adequate funds” and “drove the bus” on its underlying defense for several years. Of course, Expedia “drove the bus” only after its insurers initially refused to do so—Expedia promptly tendered the very first lawsuit and received a denial of coverage. Once it tendered the remaining lawsuits, the response it received was no different, even for those cases filed very shortly before the subsequent tenders. Expedia happily would have placed its insurers in the driver’s seat for the defense of the underlying lawsuits from the outset. Washington courts should not permit an insurer that has refused to defend to use the circumstances of that refusal to justify further delay to its coverage obligations.

Amici also illustrate the issues that arise when a policyholder is forced to pursue coverage through litigation while the underlying lawsuits against it remain pending. Chief among these is the problem facing Expedia as a result of the erroneous rulings below—Expedia cannot obtain adjudication of its right to a defense unless it completes costly and overlapping (and thus potentially prejudicial) discovery concerning issues that are also being litigated in the underlying lawsuits. That result is fundamentally contrary to two of the main principles governing the duty to

defend: first, that it exists and continues in force until an insurer can conclusively prove the absence of coverage, *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693 (2010), and second, that the insurer may not put its own interests ahead of its policyholder's by seeking to resolve matters that properly belong in the underlying lawsuits, *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 918, 169 P.3d 1 (2007); Thomas V. Harris, *Washington Insurance Law* § 14.2 at 14-4 (2d ed. 2006).

B. The Circumstances Facing Expedia Are Not Unique.

The Court of Appeals and the Superior Court relied on the circumstances of Expedia's notice to find that Expedia's case was "unique" and therefore entitled to different treatment under Washington law than any other coverage lawsuit. *Amici* established that the late notice defense is, in their experience, a frequent part of coverage litigation.

The Washington courts have also established rules and procedures for handling a late notice defense within the general framework governing the duty to defend. Washington law places a heavy burden on an insurer seeking to negate its duty to defend by relying on a late notice defense. As the very case cited by the Court of Appeals makes clear, even if a policyholder has made a late tender, "the insurer must demonstrate actual prejudice before it will be relieved from its duties to its insured." *Mut. of*

Enumclaw Ins. Co. v. USF Ins. Co., 137 Wn. App. 352, 360-61, 153 P.3d 877 (2007). The duty to defend remains unless and until the insurer “*proves* actual and substantial prejudice.” *Id.* at 361. (emphasis added). Thus, asserting a defense of late tender does not allow an insurer to shirk its duty to defend until that defense is resolved. *See Nat’l Sur. Corp. v. Immunex Corp.*, 297 P.3d 688, 695-696 (Wash. 2013). Excusing Zurich from its duty to defend while it attempts to gather evidence necessary to meet its heavy burden to prove prejudice runs contrary to these well-established rules.

An insurer cannot evade its duty to defend by asserting a late notice defense. The existence of the duty to defend still is based on the potential for coverage, as determined from the eight corners of the relevant policy and complaint. *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 53-55, 164 P.3d 454 (2007). The insurer must still continue to provide a defense until it has affirmatively extinguished the possibility for coverage. *Am. Best Food, Inc.*, 168 Wn.2d at 405. And disputed issues of fact concerning the late notice defense still do not excuse an insurer from complying with its duty to defend. *Immunex*, 297 P.3d at 695-696.

The sequence followed by the court in *Time Oil Co. v. Cigna Property & Casualty Insurance Co.*, 743 F. Supp. 1400, 1415-16 (W.D. Wash. 1990), illustrates the course that the courts below should have

followed here. Like Zurich, one of Time Oil's insurers asserted a late notice defense that depended on facts beyond the policy and complaint to attempt to show that the insurer suffered actual and substantial prejudice. 743 F. Supp. at 1416. When Time Oil and its insurers brought cross-motions for summary judgment, including a motion by Time Oil as to the triggering of the duty to defend, the court denied the insurer's late notice motion because of outstanding factual issues. Notwithstanding that unresolved defense, the court found that Time Oil "has established the existence of a duty [to defend]" because the allegations of the underlying complaint raised a claim potentially covered by the policies. *Id.* at 1420. The court thus granted Time Oil's motion for summary judgment as to the duty to defend. *Id.* at 1422. It did not force Time Oil to complete overlapping and potentially prejudicial discovery before adjudicating its duty to defend motion. Nor did it delay a ruling on that issue once Time Oil brought the motion before the court. Expedia was entitled to a similar result.

III. CONCLUSION

This Court should grant Expedia's Motion for Discretionary Review to uphold the protections Washington law affords to liability policyholders and to make clear that unresolved defenses to coverage do

not excuse insurers from providing a defense for so long as the possibility of coverage remains.

DATED this 10th day of May, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Heather Bond, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the parties listed below were served in the manner listed below:

On May 10, 2013, I caused a copy of and Plaintiffs/Petitioners' Response to Brief of *Amicus Curiae* in Support of Petition for Review and this Declaration of Service to be delivered on this date via Legal

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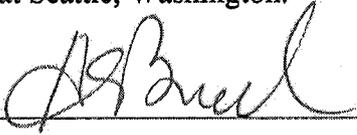
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On May 10, 2013, I further served via FedEx copies of the above-referenced documents to Defendants/Respondents' out-of-state co-counsel:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of May, 2013, at Seattle, Washington.



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Expedia, Inc., et al. v. Steadfast Insurance Company, et al.
Case No. 88673-3 (Court of Appeals Case No. 69341-7-1)

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