No. 3–09-0456

Order filed February 1, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

CATERPILLAR, INC., Plaintiff-Appellee, v. CENTURY INDEMNITY COMPANY, as successor to CCI INSURANCE COMPANY, as successor to INSURANCE COMPANY OF NORTH AMERICA, Defendant-Appellant, CENTURY INDEMNITY COMPANY as successor to CCI INSURANCE COMPANY as successor to INSURANCE COMPANY OF NORTH AMERICA, Third-Party Plaintiff, v. EMPLOYERS INSURANCE OF WAUSAU, a mutual company, Third-Party Defendant.	)	Appeal from the Circuit Court for the 10th Judicial Circuit, Peoria County, Illinois No. 04–L–119 Honorable Michael E. Brandt and Joe R. Vespa, Judges, Presiding

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JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

Held: The trial court did not err in granting Caterpillar's motions for partial summary judgment on INA's duty to defend and to indemnify. The evidence demonstrated INA had a duty to defend and breached it and that the breach estopped INA from asserting coverage defenses on its indemnity duty. The trial court did not err in awarding Caterpillar its reasonable defense costs of $17,772,980 and $4,630,717 in prejudgment interest. As previously determined by this court, the proper allocation of INA's defense duty is on an all sums allocation.

Plaintiff Caterpillar Inc. filed this action for declaratory judgment and breach of contract against defendant Century Indemnity Co. (hereinafter INA), which issued primary and excess comprehensive general liability insurance to Caterpillar with policies spanning a multi-year period. The action arises out of underlying claims brought against Caterpillar by third parties alleging bodily injuries from exposure to asbestos. INA did not defend Caterpillar in the underlying actions and the parties each filed motions for partial summary judgment on INA's defense obligation. The trial court granted partial summary judgment in favor of Caterpillar, finding that INA had a duty to defend the asbestos claims, that INA breached its duty, and that as a result of the breach, INA was estopped, in part, from raising coverage defenses on its duty to indemnify. The trial court entered judgment against INA in the amount of $22,393,697 for defense costs and prejudgment interest. INA appealed. We affirm.

FACTS

Caterpillar filed this declaratory judgment action in April 2004, seeking a declaration of INA's defense and coverage obligations for underlying bodily injury complaints resulting from exposure to asbestos in Caterpillar equipment that were filed against Caterpillar beginning in 1998. By December 2004, 2,185 complaints involving 5,560 claimants were pending against Caterpillar

and it had expended approximately $30 million in defending them. Caterpillar continues to incur both defense and indemnity costs in connection with the asbestos claims.

INA's defense obligations arose from comprehensive general liability (CGL) policies it issued to Caterpillar between 1962 and 1981. The INA insuring agreement, which is substantially similar in all the policies, obligates INA to pay "all sums" which Caterpillar becomes legally obligated to pay because of bodily injury. The policies include both primary and excess coverage and provide a duty to defend. The policies issued between 1962 and 1971 contain no limits or deductibles as to defense obligations; the policies issued between 1971-81 include some deductibles as to defense and indemnity obligations. The primary policies set forth as INA's defense obligation that INA:

> "shall defend in the name and on behalf of the insured any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company."

The 1962 to 1979 policies state that INA's duty to defend is in addition to the policy's dollar amount of coverage. The policies issued between 1971 and 1981 required Caterpillar to pay the defense costs within the deductible and provide that INA "shall not be obligated to *** defend any suit after the applicable limit of [its] liability has been exhausted by payment of judgments or settlements." The deductible policies allow the insured to select defense counsel "for any occurrence within the deductible area to which this insurance applies."

The primary policies require that Caterpillar provide:

> "Upon the happening of an occurrence, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable after notice thereof has been received[.] *** If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons, or other process received by it or its representatives."

The primary policies include a provision, "Assistance and Cooperation of the Insured" that states "[t]he insured shall cooperate with the company. *** The insured shall not, except at its own cost, voluntarily make any payment, assume any obligation, or incur any expense ***."

The 1962-68 policies include the following language in the "Other Insurance" clause:

> "If the insured has any other policy or policies of insurance with the company covering a loss also covered by this policy, the insured shall elect which policy shall apply and the company shall be liable under the policy so elected and the company shall not be liable under any other policy."

INA did not defend Caterpillar in the underlying actions and Caterpillar defended and paid the defense costs itself. In order to handle the asbestos claims, Caterpillar used Caterpillar Insurance Company Limited (CICL), which self-insured Caterpillar for its deductibles from 1973 to 1985, for

administrative and accounting purposes. CICL developed a database to track the asbestos lawsuits, and for a short period of time paid initial defense costs, subject to reimbursement by Caterpillar. CICL was fully reimbursed by Caterpillar for its expenditures.

In July 2003, the parties entered into a standstill agreement while they attempted to negotiate the defense and indemnity issues. They were unable to reach a settlement prior to the April 24, 2004, expiration of the agreement. In early 2004, just prior to Caterpillar filing this action, INA offered and Caterpillar accepted, a $7.3 million contribution for the costs of asbestos-related claims. Caterpillar filed this declaratory judgment action in April 2004.

In June 2005, Caterpillar filed a motion for partial summary judgment in order to resolve INA's duty to defend or pay defense costs. INA cross-moved for partial summary judgment as to the extent of its defense obligation. The trial court found that Caterpillar provided sufficient notice of the underlying claims, that INA had a duty to defend Caterpillar in all lawsuits in which the allegations could potentially result in recovery from Caterpillar, including the complaints that failed to allege dates of injury, and that questions of fact existed as to the reasonableness of defense costs. The trial court ordered a *pro rata* allocation of defense costs but certified for appeal the question of what method should be used to allocate defense costs. This court reversed the trial court's determination that defense costs should be allocated *pro rata*, finding that the policy language mandated defense costs be allocated with an "all sums" formula. *Caterpillar, Inc. v. Century Indemnity Co.*, No. 3-06-0161 (2007) (unpublished order under Supreme Court Rule 23). We remanded for an all sums allocation of defense costs.

In May 2008, Caterpillar renewed its motion for partial summary judgment on INA's duty to pay defense costs. In September 2008, Caterpillar also filed a motion for partial summary

judgment on INA's duty to indemnify. In November 2008, INA filed a cross-motion for summary judgment and in opposition to Caterpillar's motion for partial summary judgment. INA also filed a response in opposition to Caterpillar's motion on the indemnity duty. Both parties filed exhibits and affidavits in support of their motions.

An affidavit and a supplemental affidavit of Douglas Grandstaff, Caterpillar litigation counsel in charge of asbestos litigation, were presented in support of Caterpillar's motion. Starting in the mid-to-late 1980's, Caterpillar promptly and systematically provided notice to its insurance brokers and carriers, including INA, of the asbestos claims, and sought protection under the applicable policies. Because INA failed to meet its coverage obligations, Caterpillar was forced to defend itself and pay its own defense costs. In 2001, due to the increased number of underlying actions, INA agreed to a quarterly notification of new asbestos cases. Caterpillar used regional teams with day-to-day responsibilities for handing the claims and retained national coordinating counsel (NCC) to implement a uniform, nationwide, common defense strategy. NCC activities were applicable to each and every case. All "asbestos administrative" and "asbestos litigation" costs were "legitimate defense costs incurred by Caterpillar for services from outside defense counsel and experts in the defense of the underlying asbestos claims." Caterpillar regularly updated INA regarding the underlying actions and provided detailed explanations of the defense provided by NCC and regional counsel, defense and indemnity costs incurred and paid, and exhaustion of deductibles. INA never raised an issue with respect to the defense of the underlying claims or questioned Caterpillar's retention of NCC or regional counsel, and did not challenge the reasonableness of defense costs. INA recognized the need for NCC and its projects, "what INA called defense 'building blocks,' in order to have an aggressive and efficient national defense strategy."

The affidavit of William Jones was filed in support of Caterpillar's renewed motion. Jones was managing director of Navigant Consulting, Inc., which was retained by Caterpillar to analyze the defense costs expended in the asbestos litigations, to allocate the costs to the various INA policies, and to determine prejudgment interest. An allocation report was prepared under his supervision. The report is dated May 16, 2008, and provides that as of December 31, 2004, there were 5,560 alleged injured parties. Claimant data included, in part, first and last exposure dates and diagnosis date. Exposure data was analyzed in two ways. Under the "Face of Complaint Allocation Scenario," available first and last exposure dates from the complaints were used. The second analysis, "Database Scenario," involved the creation of first and last exposure dates determined from the NCC and Caterpillar databases and supplemented by complaint information. The report compiled defense costs as both case specific and general. The general costs referred to those for regional and national coordinating counsel that were not tied to specific cases. The report explains that, using an "all sums" methodology, allocation to specific INA policies was made based on potential exposure, dates of sickness, and diagnosis date. When multiple polices were triggered, allocation was made to the earliest primary policy "by dates of exposure that was not previously consumed or did not contain a deductible." Defense costs of $343,018 were allocated to 154 claims for which the complaints were missing. Costs for those complaints were allocated to various policies in percentages comparable to the policy allocations for the complaints which were available. The defense costs questioned by INA's expert were deducted on a percentage basis of undisputed amounts allocated to each policy. Prejudgment interest was calculated at 5%, accruing from the date Caterpillar paid each defense counsel invoice. INA's prior $7.3 million payment was credited against the principal owed by INA as of May 2004, when the payment was made, and a percentage

discount was applied to each invoice. As of December 31, 2004, $22,393,697 was owed by INA under the first scenario and $21,736,669 under the second scenario.

The affidavit of James Wagner, Caterpillar's counsel, was also submitted in support of Caterpillar's motion. Wagner reviewed 53 exhibits attached to his affidavit. The exhibits included a number of notice letters sent by Caterpillar's broker to INA beginning in February 1988, to "give [INA] formal notice of [the] claim" and requesting that INA "please do all that is necessary to protect the rights and interests of the Insured in accordance with the terms and conditions of these and any other applicable policies." A December 1991 notice letter included a list of INA policies issued to Caterpillar dating back to 1962. A July 8, 1997 letter from INA indicated that defense of asbestos claims was tendered regarding excess policies and that INA could not determine which carrier, if any, was obligated for particular losses for which an injury date had not been established. The letter further set forth a number of reasons for non-coverage under the policies and stated "you may wish to retain other counsel at your expense to protect Caterpillar's rights under its insurance policies" with INA. A January 2001 letter from Caterpillar's coverage counsel stated that the "purpose of this is to reiterate Caterpillar's request under policies issued to Caterpillar from at least 1959 through 1981, [INA] defend Caterpillar against these claims and reimburse and pay Caterpillar for amounts paid to date for these claims."

The evidentiary deposition of Alexander Giftos, a litigation attorney at Caterpillar, was submitted in support of Caterpillar's motion. He described that when a summons and complaint arrived in the legal department, the insurance broker would be notified who would then send notice to the appropriate insurance carriers. The complaints were also assigned to various outside counsel who were retained to handle the lawsuits. In the mid-2000 to early 2001 time period, Giftos

"unequivocally *** asked that the insurance company defend" Caterpillar. According to the reservation of rights letters Caterpillar received, it was directed to retain counsel to defend the claims. Around June of 2000, he initiated discussion with INA's Blaine Stanley, who indicated that INA was reserving its rights under post-1985 policies, that there was coverage in prior years and that in certain years a deductible needed to be satisfied. Based on his discussions with Stanley in 2000 and 2001, he understood that INA had questions regarding Caterpillar's self-insured retentions and that Stanley was concerned that Caterpillar was unable to show, to INA's satisfaction, whether an injury occurred within the policy periods or within which policy period. Before that was determined, INA was not accepting the defense or agreeing to indemnify Caterpillar. INA did not object to Caterpillar's selection of defense counsel and did not offer to take over any defense.

In support of its cross-motion for partial summary judgment, INA submitted the affidavit of Stanley, vice president and counsel with INA who handled Caterpillar's asbestos claims from July 1998 to July 2005. Between 1998 and 2001, she received notice of asbestos claims under excess policies INA issued to Caterpillar in the 1980's. Caterpillar did not request that INA assume defense of the claims under the excess policies. She "was aware from [the broker's] correspondence that Caterpillar already had retained defense counsel before sending notices" under the excess policies. In 2001, Caterpillar began to give notice of claims under the primary policies and "reiterated" its request for coverage. Caterpillar did not respond to her request for documentation evidencing Caterpillar's initial request for coverage under the primary policies. During discussions with Caterpillar's outside coverage counsel during 2001, he never stated that Caterpillar was seeking INA to assume control of its defense under the primary policies. Caterpillar never requested that INA pay the entirety of Caterpillar's defense costs. Outside counsel did request reimbursement for past

defense and indemnity costs. INA's participation in defense costs from 2001 on was discussed and INA agreed to participate in payment but did not agree to pay 100% of the costs. Her notes from the meetings indicated that Caterpillar described NCC as a "building block." She agreed to quarterly notification of claims in 2001 only because Caterpillar was assuming its own defense. Caterpillar never provided defense invoices to her.

The affidavit and deposition testimony of Joseph Mundy were submitted by INA. He worked as a claims adjuster in INA's major claims area handling long-term exposure cases from 1988 to 1998. His job was to identify coverage and reach a cost-sharing agreement with the insured. He did not recall reaching a cost-sharing agreement with Caterpillar. He recalled a reservation of rights letter he sent to Caterpillar in November 1988 on an asbestos claim which included a list of policies under which the claim would fall. In discussing an internal INA memo dated January 1992, he stated that he thought that INA "made offers to Caterpillar, and they had decided to hold off on us doing anything until they formalized their position in some letters that had gone back and forth. Although we made the offer to participate, I think at that point in time, they chose to handle these matters themselves." He stated that INA and Caterpillar did not agree with each other's positions regarding coverage, and "for us, it wasn't an active account." He posited that "Caterpillar was handling and maybe even allocating the way they wanted to - by themselves[,]" possibly for tax purposes.

INA offered the affidavit of Mark Muth, general counsel of Resolute Management. He was a claims specialist for INA in the early 1990's and became issues manager for long-term exposure claims in 1995. He handled Caterpillar environmental pollution claims for the policies INA issued to Caterpillar from 1962 to 1981. During his communications with Caterpillar regarding the environmental claims, Caterpillar never requested that INA provide a defense for its asbestos claims.

INA also submitted the affidavit of Michael Dinenberg, assistance vice president for Resolute Management, Inc., which managed Caterpillar's claims for INA. He began working on the Caterpillar account at Resolute in 2005. He was not aware that Caterpillar asked INA to defend any asbestos case. He had not refused to defend any case. It was his understanding that Caterpillar desired to defend itself. In October 2008, he offered to defend Caterpillar upon receipt of any underlying complaint but Caterpillar never responded.

INA submitted the deposition testimony of John Trunko, an expert it retained to review the defense costs incurred by Caterpillar in the underlying complaints and to present an opinion on the reasonableness and necessity of the work performed. He received from INA's counsel CD-Roms containing approximately 50,000 pages of bills and 13 or 14 boxes of bills in paper form. His team inputted the information from defense invoices submitted by four law firms used by Caterpillar for the underlying complaints, including NCC. He questioned various defense costs, including for services he termed administrative and clerical which related to the internal operation of a law firm and did not involve the performance of a legal service. In all, he questioned approximately $3 million in defense costs.

In October 2008, INA notified Caterpillar that it "agrees to provide the defense for all pending and future asbestos bodily injury lawsuits." In December 2008, a hearing ensued on Caterpillar's motions for partial summary judgment on INA's duty to defend and duty to indemnify, and on INA's cross-motion. In February 2009, the trial court entered an order that stated "the Court agrees with and adopts the arguments propounded by the Plaintiff in its motion, memoranda and reply documents *** including the question of reasonableness of defense costs by resorting to the testimony of defense expert." The order entered judgment in favor of Caterpillar in the amount of

$22,393,697, including $17,772,980 for undisputed defense costs incurred as of December 31, 2004, and $4,620,717 in pre-judgment interest. Resolution of "the 'questionable' costs" was reserved. The trial court also granted Caterpillar's motion regarding INA's duty to indemnify, finding that there was no genuine issue of material fact regarding whether Caterpillar sought a defense from INA and holding that INA was estopped from raising policy defenses, including trigger of coverage. The trial court determined that estoppel only precluded INA's coverage defense prior to the parties' standstill agreement and did not apply to claims after July 15, 2003. INA moved for reconsideration, objecting to the trial court's failure to review all the underlying complaints and to the methods used by Caterpillar's allocation expert to allocate defense costs. Following a hearing in May 2009, the trial court denied INA's motion for reconsideration. INA appealed.

ANALYSIS

On appeal, INA challenges the trial court's grant of partial summary judgment in favor of Caterpillar on its claim that INA breached its duty to defend and on the amount of damages for defense costs owed by INA and the award of prejudgment interest. INA also urges this court to reconsider its decision that defense costs should be allocated on an all sums basis.

The first two issues raised by INA involve the trial court's grant of summary judgment in favor of Caterpillar on INA's duty to defend and the reasonableness of its defense costs. INA argues that summary judgment on these issues was in error because genuine issues of material fact exist concerning them.

Summary judgment is proper when the pleadings, depositions, admissions and affidavits on file establish that there is no genuine issue of material fact and the movant has clearly established that it is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Schultz v.*

Illinois Farmers Insurance Co., 237 Ill. 2d 391, 399 (2010). In deciding a motion for summary judgment, the trial court's function is not to decide disputed issues of fact but to determine whether a factual dispute exists. *Smith v. State Farm Insurance Cos.*, 369 Ill. App. 3d 478, 482 (2006). This court reviews a trial court's grant of summary judgment *de novo*. *Progressive Universal Insurance Co. v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 128, (2005).

We first consider whether the trial court erred in granting summary judgment on INA's duty to defend. INA argues that the evidence establishes issues of fact as to whether it breached its duty to defend Caterpillar. INA contends that Caterpillar's failure to provide the underlying complaints to the trial court precludes summary judgment because the trial court was unable to review the complaints to determine its defense duty. INA also argues that it was relieved of its duty to defend by Caterpillar's failure to provide it timely notice and decision to forgo INA's defense of the underlying actions.

To determine an insurer's duty to defend, the court must look to the allegations in the underlying complaints, and if they allege facts within or potentially within the policy coverage, the insurer is obligated to defend the insured. *The Aetna Casualty & Surety Co. v. O'Rourke Bros., Inc.*, 333 Ill. App. 3d 871, 877 (2002). The facts alleged in the complaints must be sufficient to enable the court to make the determination. *O'Rourke Bros., Inc.*, 333 Ill. App. 3d at 877. When the underlying complaint presents an issue of potential coverage, an insurer that believes the claim is not covered under its policy may not refuse to defend but must either defend under a reservation of rights or seek a declaration of no coverage. *American National Fire Insurance Co. v. National Union Fire Insurance Co.*, 343 Ill. App. 3d 93, 101 (2003). An insurer is relieved of its duty to defend if the insured indicates it does not want the insurer's assistance. *The Cincinnati Cos. v. West American*

Insurance Co., 183 Ill. 2d 317, 326 (1998).

In its January 24, 2006, order, the trial court determined that INA had a duty to defend Caterpillar "in all the lawsuits wherein the allegations of the asbestos complaints could potentially result in recovery from CAT," including the complaints that failed to allege a specific injury date. The trial court also found that INA acquiesced to Caterpillar's defense of the claims, rejecting its argument that it had insufficient or ambiguous notice of the claims. INA argues in this appeal that the trial court did not previously find that it breached its duty to defend. Based on the language of the trial court's order, we disagree. The 2006 order also provided for INA's payment of Caterpillar's defense costs, a finding that would be unnecessary if the trial court had not found a breach of INA's duty to defend. In addition, this court's finding in the prior appeal was premised on the fact that INA had breached its duty to defend. *Caterpillar, Inc. v. Century Indemnity Co.*, No. 3-06-0161 (2007) (unpublished order under Supreme Court Rule 23).

The February 2009 order which is the subject of the instant appeal expressly accepts Caterpillar's arguments in its motion for partial summary judgment. In its motion, Caterpillar references the prior findings of breach and requests defense costs. While INA continues to argue in this appeal that it did not breach its duty to defend, we find that the issue has been conclusively determined and no question of fact remains regarding whether it owed a duty to defend Caterpillar or breached its duty. We further determine that INA's breach supports the trial court's finding of estoppel regarding INA's coverage defenses. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150-51 (1999) (estoppel doctrine provides that insurer who failed to either defend under reservation of rights or seek a declaratory judgment that there is no coverage and is later found to have wrongfully denied coverage is estopped from raising policy defenses to coverage.

INA puts a new spin on its repeated argument that it does not owe a duty to defend by asserting in this appeal that the trial court failed to review the underlying asbestos complaints to determine the duty issue. Caterpillar presented to the trial court a summary of the underlying complaints as part of the Navigant Report which allocated the defense costs to various INA policies. Attached to the report were a number of exhibits which indicated the first and last exposure dates in the underlying complaints. INA contests the use of this summary data as sufficient to inform the trial court of the trigger dates in the complaints, information it argues is necessary to determine whether it owes Caterpillar a duty to defend. We reject INA's argument. Summaries are admissible when the underlying records are voluminous and cannot be conveniently examined to discover the facts to be proven. *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 166 (1993). Here, there are over 2,000 underlying complaints, many with multiple claimants and counts. Requiring the trial court to review each underlying complaint would be a burdensome, time-consuming and unnecessary task. Moreover, in order to create the Navigant Report, the underlying complaints had to be reviewed and the trigger dates, including first and last exposure, had to be entered into a database. The trial court, as well as INA, had the report and its supporting documents that substantiated the trigger dates as set forth in the underlying complaints. INA fails to point to any specific complaint that does not fall within its policy years, despite the fact that it was provided the complaints with the notice letters and as part of discovery in this action.

Because INA's duty to defend was triggered by the potential of coverage, the fact that the underlying complaints failed to specify a date of injury did not extinguish INA's duty. As noted by the trial court in its 2006 order, due to the broad liability triggers in conjunction with the history and duration of Caterpillar's products, the facts alleged in the underlying complaints were sufficient to

trigger INA's duty to defend, even for complaints without specific injury dates. Similar reasoning incorporates the 154 missing complaints. Given the duration of policy coverage by INA and the three triggers of liability, it is not unreasonable to conclude that the allegations in the missing complaints set forth facts similar to the thousands of other allegations in the complaints on file. *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 47 (1987) (finding coverage for asbestos claims under triple applicable triggers of bodily injury, sickness or disease). We are not persuaded by INA's argument that Caterpillar's motion for partial summary judgment is defeated because the missing complaints cannot be reviewed to determine whether they trigger INA's duty to defend.

The record supports the findings that INA had a duty to defend and breached it. The record also establishes that Caterpillar notified INA of the underlying asbestos claims arguably as early as 1988 and requested coverage under the policies. In its January 2006 order, the trial court properly found that a 1991 notice letter constituted actual notice to INA triggering its defense duty under *Cincinnati Cos. Cincinnati Cos.,* 183 Ill. 2d at 325 (actual notice, that is, notice sufficient to permit the insurer to locate and defend the lawsuit against the insured, triggers insurer's duty to defend). The 1991 letter, and the subsequent notice letters regularly sent to INA, stated that Caterpillar was requesting INA to "do all that is necessary to protect the rights and interests of the insured in accordance with the terms and conditions of these and any other applicable policies." There is no question that Caterpillar systematically and regularly notified INA of the underlying claims. Although INA objects to Caterpillar's use of a quarterly notification method, the record establishes that it agreed to the streamlined procedure.

INA submits that Caterpillar's failure to provide timely notice of the underlying actions

relieved it of its duty to defend. As discussed above, it has been conclusively determined that INA owed and breached its duty to defend and INA's notice defenses rejected. In its 2006 order, the trial court held that notice was sufficient. In addressing the merits of INA's argument, we do not find that notice was untimely. Beginning in 1988, INA and Caterpillar began discussions regarding Caterpillar's coverage under the INA policies. As set forth in the deposition of INA's Joseph Mundy and the supporting exhibits, INA was unwilling to provide an all sums defense and Caterpillar would not accept INA's offer to contribute *pro rata*, insisting that INA had a duty to defend under its policies. A 1988 internal memo from Mundy indicates that Caterpillar's broker was asserting coverage under the 1969-70 policies. INA challenged coverage based on trigger date and was unwilling to accept the defense. Another internal memo from 1988 states that INA continued to place the claim in the post-1971 deductible policies and insisted that Caterpillar participate in a *pro-rata* allocation of defense costs.

This continuing disagreement colored the subsequent interactions between the parties, arguably supporting Caterpillar's assertion that notice was futile. *Davis v. United Fire & Casualty Co.*, 81 Ill. App. 3d 220, 225 (1980) (finding that where an insurer refuses to defend, insured's further notice would be useless). However, in spite of the ongoing coverage controversy, Caterpillar continued to provide notice to INA and forward summons and complaints to it. INA points to a number of complaints from 1991, 1992 and 2001 which were not forwarded to it until weeks or months after they were served on Caterpillar. As discussed above, by 1991, the parties were in disagreement over INA's defense obligations and Caterpillar determined that it was necessary to undertake its own defense. Under these facts and circumstances, we find nothing in the record that raises an issue of untimeliness of notice. *Employers Reinsurance Corp. v. E. Miller Insurance*

Agency, Inc., 332 Ill. App. 3d 326, 337 (2002) (although timeliness of notice is generally a question of fact, it may be resolved as matter of law where no material facts are in dispute).

INA also relies on Caterpillar's actions as support for its arguments that Caterpillar opted to forgo a defense by INA, choosing instead to defend itself and relieving INA of its defense obligation. It submits that the evidence at least raises an issue of fact as to whether Caterpillar waived INA's defense obligation. As support for its claim that an issue of fact exists, INA points to Caterpillar's hiring of its own defense counsel, its assignment of cases to years with deductible or excess policies for tax purposes, and its payment of defense costs under its deductibles. We do not find that these actions raise a genuine issue of fact that Caterpillar waived INA's defense obligation.

INA looks to the deposition of Mundy and the affidavits of Stanley, Muth, and Dinenberg as support for its claim that Caterpillar opted to forgo a defense. The testimony of claims adjuster Mundy is equivocal regarding Caterpillar's lack of request for coverage. His conclusion Caterpillar was choosing to forego INA's defense for tax purposes is based on his own impression and conflicts with the other documents from the late 1980's which indicate that Caterpillar was seeking a defense from INA. His affidavit indicates that INA and Caterpillar were in disagreement about coverage. Mundy stated only that he "believed" Caterpillar was handling things itself. Mundy's belief of Caterpillar's actions cannot establish a genuine issue of material fact. He presented no definitive testimony regarding Caterpillar's refusal of an offer to defend by INA. Similarly, the affidavit of Blaine Stanley, who handled the Caterpillar account from 1995 to 2003, does not offer any evidence that raises an issue of fact that Caterpillar waived INA's defense. Her early response to Caterpillar regarding INA's defense duty referred only to later-issued policies which included asbestos exclusions or provided excess coverage. Her reference to the later non-applicable polices occurred

in spite of lists of earlier policies with primary coverage being included with Caterpillar's notice letters as discovered in INA's files. She never indicated to Caterpillar that INA was denying coverage or offering to defend with a reservation of rights. In January 2001, Caterpillar expressly reiterated its demand for a defense to Stanley under the polices issued from 1959 to 1981. INA's use of the Muth affidavit as support for its position is also unavailing. Muth handled environmental claims and was not involved with the asbestos claims. His statement that Caterpillar did not request a defense is irrelevant. The insured does not have to request a defense once it has put the insured on notice of a claim. *Cincinnati Cos.*, 183 Ill. 2d at 328. The affidavit of Dinenberg does not support INA's position. He did not begin handling Caterpillar's claims for INA until 2005. His belated letter in October 2008 offering a defense does not establish that Caterpillar opted to forgo INA's defense nearly 20 years earlier.

The Grandstaff affidavits establish that Caterpillar hired outside counsel to defend itself in the underlying actions as a result of INA's failure to defend. INA cannot now argue that Caterpillar waived its request for an INA defense by defending itself due to INA's failure to defend. Because INA did not definitively respond to Caterpillar's notice letters, Caterpillar understandably undertook its own defense, as noted in the trial court's January 2006 order. We agree with the trial court's earlier findings that INA acquiesced to Caterpillar's defense of the claims by failing to expressly deny coverage, defend under a reservation of rights, or seek a declaration of its obligations. There remain no genuine issues of material fact regarding INA's breach of its duty to defend Caterpillar. The trial court did not err in granting summary judgment to Caterpillar on this issue. In addition, the trial court properly found that, based on its failure to defend, INA was estopped from asserting policy defenses prior to the parties' standstill agreement.

The second issue INA raises concerns the trial court's grant of summary judgment to Caterpillar on the amount of its defense costs. INA contends that material issues of genuine fact exist regarding the reasonableness of defense costs incurred by Caterpillar that preclude a grant of summary judgment. According to INA, Caterpillar has not shown that the defense costs were reasonable, particularly those associated with its national coordinating counsel, pre-tender costs, and allocation of costs to deductible and excess policies. INA also contends that the recovery of fees incurred before June 1993 are barred by the 10-year statute of limitations applicable to breach of contract actions.

An insurer who breaches its duty to defend must reimburse its insured for the reasonable costs of defending the underlying action. *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 199 (1976). A voluntary payment provision in an insurance policy provides that the insurer will not be liable for expenses voluntarily incurred by the insured before defense is tendered to the insurer. *Westchester Fire Insurance Co. v. G. Heileman Brewing Co.*, 321 Ill. App. 3d 622, 637 (2001). Actions on written contracts must be commenced within 10 years after accrual of the cause of action. 735 ILCS 5/13-206 (West 2008); *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 466 (2008). In an insurance coverage dispute, the insured's cause of action accrues when coverage is denied by the insurer. *Broadnax v. Morrow*, 326 Ill. App. 3d 1074, 1081 (2002).

The trial court ordered INA to pay all the undisputed defense costs Caterpillar had accrued as of December 2004. Both Caterpillar and INA had experts look at the defense costs and eliminate irrelevant and questionable charges. While INA asserts that costs associated with Caterpillar's NCC and pre-tender expenses were improperly included in the judgment, all expenses that were objected to by INA's expert were excluded from the final amount. INA's contention that Trunko questioned

the NCC costs as impermissible "administrative costs" is not accurate. The record indicates that while Trunko did question various costs he categorized as administrative and clerical, these did not include costs incurred for NCC although Caterpillar characterized those costs as administrative for its own purposes. We emphasis that the amount INA was ordered to pay in defense costs included only costs that were approved by Trunko. The trial court's order specified that defense costs were awarded per the testimony of Trunko.

INA also argues that NCC costs are not covered under the policy because they were not incurred in "defense" of an underlying action and that Trunko did not opine as to whether they were covered expenses. The policy language does not preclude the services of NCC from covered defense costs. Rather, the policies state that INA "shall defend in the name and on behalf of the insured any suit." INA did not present any expert as to the reasonableness of defense costs other than Trunko and his analysis does not indicate that he found NCC costs were not viable expenses incurred in defense of the asbestos actions. Contrary to INA's argument, Grandstaff averred in his affidavit that NCC activities were applicable to each and every case and they were "legitimate defense costs incurred by Caterpillar for services from outside defense counsel and experts in the defense of the underlying asbestos claims."

INA similarly complains that Caterpillar allocated defense costs to the deductible policies but did not submit evidence that the deductibles were exhausted. INA asserts that a genuine issue of material fact exists as to whether allocation of defense costs to those policies was proper. Trunko did not challenge allocation of costs to the deductible policies and INA did not offer any other expert to challenge the use of those policies for the defense obligation. In addition, the record indicates that INA presented a chart of the deductible policies and amounts assigned to those policies

indicating exhaustion of the deductibles. We note that Caterpillar has asserted that even if there was conflicting evidence that the deductibles were not exhausted, defense costs allocated to the deductible policies could be reallocated to other policies where the deductibles were undisputedly exhausted or to policies without deductibles. We thus conclude that there is no genuine issue of material fact regarding allocation of defense costs to deductible policies.

INA also asserts that any fees incurred before July 1993 are barred by the 10-year statute of limitations applicable to contracts. The record indicates that INA initially told Caterpillar it was investigating the claims but did not explicitly deny coverage. The statute of limitations did not begin to run until Caterpillar knew that its request for a defense was denied. We find that there were no issues of fact to be resolved regarding the reasonableness of defense costs and that the trial court properly granted summary judgment in the amount of $17,772,980 in favor of Caterpillar.

We next consider whether the trial court erred in its calculation of prejudgment interest. INA complains that the trial court erred in calculating the prejudgment interest it was ordered to pay Caterpillar. INA argues that prejudgment interest does not begin to accrue until the underlying defense is completed and after the invoices are provided to the insurer. It states that Caterpillar did not submit its defense invoices to INA until April 2005 and that the award of prejudgment interest before that time was improper.

Prejudgment interest is allowed for creditors at a 5% annual rate for all amounts after they become due on any instrument of writing. 815 ILCS 205/2 (2008). An insurance policy constitutes an "instrument of writing" under the statute and prejudgment interest may be recovered from the time that money becomes due under the policy. *Ervin v. Sears, Roebuck & Co.*, 127 Ill. App. 3d 982, 991 (1984). Interest begins to accrue when the defense fees became due and payable and capable

of exact computation. *Conway v. Country Casualty Insurance Co.*, 92 Ill. 2d 388, 399 (1982). Determination of the method of calculating of prejudgment interest is a question of law we review *de novo*. *Raintree Homes, Inc. v. Village of Long Grove*, 389 Ill. App. 3d 836, 871, (2009).

The amount of prejudgment interest awarded to Caterpillar was calculated from the date it paid each defense invoice. At that point, INA was already in breach of its duty to defend and responsible for the costs that Caterpillar had incurred when forced to defend itself. INA's contention that interest does not accrue until it reviewed the defense invoices is without merit. The statute's plain language establishes that prejudgment interest begins "for all amounts after they become due." When Caterpillar paid the defense invoices, the amounts owed as reimbursement from INA were due and capable of exact computation. As discussed above, the amounts of the defense invoices which the trial court awarded Caterpillar were undisputed. Accordingly, the prejudgment interest of $4,620,717 awarded on those amounts was proper.

The final issue on appeal is whether this court should reconsider its decision that defense costs should be allocated on an "all sums" basis. INA submits that in light of the decision of the Illinois Supreme Court in *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102 (2007), the defense costs should be allocated on a *pro rata* basis. INA argues that this court misinterpreted *Zurich Insurance Co. v. Raymark Industries,* 118 Ill. 2d 23 (1987), and should now reverse itself and order that Caterpillar's defense costs be allocated *pro rata*, rather than on the "all sums" basis as determined in the first appeal.

We have previously rejected INA's *pro rata* argument as well as denied INA's petition for rehearing on our decision ordering an "all sums" allocation. *Caterpillar, Inc. v. Century Indemnity Co.*, No. 3-06-0161 (2007) (unpublished order under Supreme Court Rule 23). INA looks again for

support to the cases which this court distinguished in its prior order. See *AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.*, 355 Ill. App. 3d 275 (2005); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 283 Ill. App. 3d 630 (1996); *Missouri Pacific R.R. Co. v. International Insurance Co.*, 288 Ill. App. 3d 69 (1997). Also distinguished is the supreme court's *Kajima* decision which INA wrongfully asserts compels a different result than the "all sums" allocation ordered by this court. In *Kajima*, at issue was whether targeted tender supersedes horizontal exhaustion in the context of primary and excess insurance. *Kajima Construction Services, Inc.*, 227 Ill. 2d at 117 . The court determined that targeted tender does not supercede horizontal exhaustion and that when defense and indemnity costs exceed the primary limits of a targeted insurer, the other insurer is obligated for the loss based on its primary policy before the targeted insurer is responsible under its excess policy. *Kajima Construction Services, Inc.*, 227 Ill. 2d at 116. The *Kajima* decision does not alter the applicability of the "all sums" approach this court determined in the prior appeal.

Because there were no genuine issues of material fact, the trial court did not err in granting partial summary judgment to Caterpillar on INA's breach of its duty to defend and the amount of defense costs. We also conclude that the calculation of prejudgment interest was proper and that the "all sums" approach to allocating defense costs previously found applicable by this court stands as the proper method of allocation.

For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

Affirmed.