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Insurance Coverage For Awards of Attorney Fees

By Kirk A. Pasich

Plaintiffs in many complex lawsuits and class actions seek a wide range of awards, including the recovery of attorney fees. One question that should be considered by defendants is whether their insurance policies may cover any awards of attorney fees. Commercial general liability policies typically cover awards of "damages." Other policies, such as directors and officers liability policies and errors and omissions policies, typically provide somewhat broader coverage, applying to awards of "loss." "Loss" often is defined to mean the "total amount" paid, including damages, judgments, settlements, and costs. For policies that insure "loss," coverage should be fairly straightforward. Because the policy covers the total amount paid, without limitations, it reasonably can and should be interpreted to include awards of attorney fees. If an insurer does not want to insure such awards, it should expressly exclude them. Indeed, insurers typically specify other types of awards that they will not insure, such as penalties or fines.

As for policies that insure only "damages," while the analysis may not be as directly straightforward, the results should be the same. This is because awards of attorney fees may be covered either under the policy's coverage for "damages," under a policy's "supplemental payments provision," or as "costs."

In *Prichard v. Liberty Mutual Insurance Co.*, 84 Cal. App. 4th 890 (2000), the court addressed a situation where the insured had been ordered to pay the underlying plaintiff more than \$250,000 in attorney fees pursuant to a "prevailing party" attorney fees provision. The court considered the policy's "supplementary payments" provision, which obligated the insurer to pay, with respect to any claim or suit that it defended, "[a]ll costs taxed against the insured in the 'suit.'" The court noted that the provision "is a function of the insurer's defense obligation." It concluded that because such fee awards "are statutorily defined as costs," the insurer would be obligated to pay them under the supplementary payments provision. See California Code of Civil Procedure Section 1033.5(a) (defining allowable costs as including attorney fees when authorized by contract, statute, or law).

The court rejected the insurer's argument that the insured would benefit in cases where some or all claims against it were not covered by the policy. See also *Ins. Co. of N. Am. v. Nat'l Am. Ins. Co.*, 37 Cal. App. 4th 195, 206 (1995) (payment of attorney fees award covered under "supplementary payments" provision). Thus, when the statutory scheme under which a plaintiff is seeking relief treats attorney fees as costs, an insurer should be obligated to pay those fees under its policy's "supplementary payments" provision.

Coverage also should be afforded in the more common circumstance where a fee is not deemed to be "costs." In fact, the state Supreme Court has recognized that many types of payments that a defendant has to pay a plaintiff constitute compensatory, or consequential, damages. As the court explained in holding that an insured is entitled to recover the attorney fees it incurred in collecting the benefits due under a policy when the insurer has acted in bad faith, the fees "are an economic loss-damages-proximately caused by the tort." *Brandt v. Superior* 37 Cal.3d 813, 817 (1985).

In any event, many courts have recognized that fee awards are covered by policies for various reasons. In *City of Kirtland v. Western World Insurance Co.*, 43 Ohio App. 3d 167, 540 N.E. 2d 282 (1988), an insured sought coverage for a suit under the Civil Rights Act, 42 U.S.C. Section 1983, for equitable relief. No damages were sought. Attorney fees were awarded to the underlying plaintiff. The insurer contended that fees related to an

equitable claim. The errors and omissions policy involved covered "loss," which was defined to "include but not be limited to damages, judgments, settlements, and costs." However, the policy also contained an exclusion for relief "in any form other than money damages" and fees or expenses relating to claims "seeking relief or redress, in any form other than money damages." The court found that the fee award was covered: "[The insured] will not bear the burden of [the insurer's] own uncertainty as to a term in a policy [the carrier] wrote.... Since the term 'money damages' was not defined in the policy, for purposes of this discussion and under these circumstances, this court holds that the attorney fees...were money damages."

In *City of Ypsilanti v. Appalachian Ins. Co.*, 547 F. Supp. 823 (E.D. Mich. 1982), the insured sought coverage for a lawsuit for damages and injunctive relief for discriminatory enforcement of ordinances in violation of the Constitution. The suit had been settled with a judgment imposing an injunction, dismissing the damages claim, and awarding attorney fees. The professional liability policy covered "all sums which the [i]nsured shall become legally obligated to pay as damages." The court found: "[T]he issue is simply one of contract interpretation, as there is no law or public policy which would prevent the [insurer] from agreeing to be liable for awards of attorney fees assessed against its [i]nsured.... It is reasonable to say that an attorney fee award in a civil rights suit is a form of 'damage' which the [insurer] contracted to cover. It would have been simple enough to exclude attorney fee awards had the parties so intended. Since they did not, and since an ambiguity remains, the ambiguity will be resolved against the [i]nsurer."

Hyatt Corp. v. Occidental Fire & Casualty Co., 801 S.W.2d 382 (Mo. Ct. App. 1990), involved a request for coverage under a general liability policy. The insureds had settled a class action lawsuit for injuries arising out of the collapse of two hotel skywalks, agreeing to pay compensatory damages. Thereafter, a class action was filed by "rescuers." The insureds settled as to all but police and fire fighters and sought coverage for the award of attorney fees to class members. The court held that the award was covered: "Such an award of attorneys' fees [to the class action plaintiffs] is indistinguishable from a damages award for coverage purposes.... 'It is common class action practice for the defendants in a class action settlement to agree to pay such plaintiffs' attorneys' fees and expenses as the court may award.'

In a recent pronouncement on this issue, the Ohio Supreme Court confirmed the recoverability of attorney fees. In *Neal-Pettit v. Lahman*, 2010 Ohio 1829 (2010), the court considered coverage for an award of attorney fees under an automobile insurance policy. The insured had been sued for injuries caused in an accident and the jury awarded compensatory damages, punitive damages, and attorney fees because the insured had acted with malice. The insurer argued that it had not contracted to pay attorney fees and that the fees were an element of the punitive damage award, as to which coverage was prohibited by public policy. The court held that "the jury may, in their estimate of [compensatory] damages, take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action." The court held that even though the attorney fees award and the punitive damage fees award may have a similar premise, the fact that they have similar bases is "irrelevant." It also ruled that the while attorney fees have been awarded as a result of an award of punitive damages, they also "stem from the underlying bodily injury." Therefore, it held that attorney fees "fall under the insurance policy's general coverage of 'damages which an insured person is legally obligated to pay' because of 'bodily injury.'"

Even though not all courts have reached similar conclusions, based on the policy language and the decisions above, the possibility of insurance coverage for awards of attorney fees should not be overlooked.

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