

Attorneys' Fees May Be Covered as Costs

Introduction

Although attorney's fees are not generally "damages" covered by a liability policy, as a matter of policy interpretation, some courts has held that under the language of some old Supplementary Payment provisions, attorney's fees that are taxed as costs pursuant to contract, statute, or law are payable by liability insurance.

Supplementary Payment Provision

Some typical CGL policies issued before 2007 include a Supplementary Payments provision that state: "We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend: (e) All costs taxed against the insured in the 'suit'. These payments will not reduce the limits of insurance." However, some policies issued since 2007 have exclusionary language that covered costs "do not include attorneys' fees or attorneys' expenses taxed against the insured."

Statutory Award of Costs

"[A] prevailing party is entitled as a matter of right to recover costs in any action."¹ "The following items are allowable as costs: (10) Attorney's fees, when authorized by: (A) Contract. (B) Statute. (C) Law."² "When any statute of this state refers to the award of 'costs and attorney's fees,' attorney's fees are an item and component of the costs to be awarded and are allowable as costs."³

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1. Policy Covers Costs

"In a word, the insurance contract obligates the insurer to pay 'costs' whenever it must defend the suit, independent of whether those costs would otherwise be covered by way of the insurer's indemnity obligation."⁴ "Attorney fees are allowable as costs. '[C]ost' assessed against [the policyholder] fall within the Supplementary Payments provision. The Supplementary Payments section provided that [the insurer] would pay "in addition to the applicable limit of liability: (a) all expenses incurred by [the insurer], all costs taxed against the insured in any suit defended by [the insurer]."⁵

2. Covered Costs Are Limited

"We conclude that [a liability insurer's] obligation under the policies' 'supplemental payments' provisions, which promise to pay costs awarded against the insureds, extends *only* to costs arising from claims that were at least potentially covered. These provisions make the insurer's obligation to pay an award of costs against the insured dependent on the defense duty."

¹ Civ. Code § 1032.

² Civ. Code § 1033.5(a).

³ Civ. Code § 1033.5(c)(5).

⁴ *Prichard v. Liberty Mut. Ins. Co.* (2000) 84 Cal.App.4th 890, 895 (*Prichard*); *Insurance Co. of North America v. National American Ins. Co.* (1995) 37 Cal. App. 4th 195, 206-207 (*INA*).

⁵ *INA, supra*, 37 Cal. App. 4th at 206-07 (ellipses and some quotation marks omitted).

[T]he obligation to pay a costs award could arise only if the insurer had a duty to defend the insurer. [A]n insurer is obligated to pay costs awarded against an insured only if the insurer had a duty to defend the insured, regardless of whether the insurer actually provided a defense. An insurer's implied-in-law duty to defend an entire 'mixed' action, including claims that are not even potentially covered, does not give rise to an obligation under a supplemental payments provision to pay costs awarded against the insured that can be attributed solely to claims that were not potentially covered."⁶

3. Attorney's Fee Claim Does Not Trigger Duty to Defend

California courts have "rejected the idea that because the plaintiffs in the underlying action had a substantive claim for attorney fees, there was any possibility of indemnity for damages. Just because the underlying plaintiffs could collect attorney fees as part of the underlying action did not mean those attorney fees were potentially covered damages implicating the duty to defend. [A]ttorney fees are 'inconsistent with the concept of 'damages.'"⁷

⁶ *State Farm Gen'l Ins. Co. v. Mintarsih* (2009) 175 Cal.App.4th 274, 279, 284-86; see, *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.* (2007) 148 Cal.App.4th 976, 992, 996.

⁷ *Cutler-Orosi Unified School Dist. v. Tulare County School etc. Authority* (1994) 31 Cal. App. 4th 617, 630, 632; *Prichard, supra*, 84 Cal.App.4th at 912 (ellipses omitted).