Attorney's Fees as Damages Under a CGL Policy

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Mid-Continent Cas. Co. v. Petroleum Solutions, Inc., 4:09-0422, 2016 WL 5539895 (S.D. Tex. Sept. 9, 2016), as amended in 2016 WL 7491858 (S.D. Tex. Dec. 30, 2016)

Issue:

Whether a Commercial General Liability ("CGL") policy "provide[s] coverage for a judgment against a manufacturer for ***loss*** incurred in meeting its statutory obligation under § 82.002 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, which requires manufacturers to indemnify an innocent seller for losses incurred by the seller in a products liability action."

Underlying Theory:

In re Nalle Plastics Family Ltd. P'ship., 406 S.W.3d 168 (Tex. 2013): Prevailing party fees are not "damages," but merely "costs" for purposes of calculating the amount needed by a judgment debtor to secure a supersedeas bond.

Holding:

1. Attorney's fees recoverable as ***loss*** under TEX. CIV. PRAC. & REM. CODE § 82.002(a) are "damages because of"..."property damage" under a CGL policy.

2. Attorney's fees awarded under TEX. CIV. PRAC. & REM. CODE § 82.002(g) -- a fee-shifting provision -- are not.

Why is This Even an Issue?

1. CGL policies are *general* liability policies. Unlike policies issued to cover a specific type of loss, CGL policies cover a broad range of risks.

2. Directors and Officers ("D&O") liability policies, on the other hand, cover economic "loss" arising out of shareholder derivative actions, and wrongful acts committed by a company's officers and directors on the company's behalf. The insuring agreement of a D&O policy is narrow, while the exclusions are very specific. In addition, because of the specific types of claims unique to D&O liability, the definition of "loss" is typically defined to *include* or *exclude* precisely what damages are covered; namely, fines, penalties, punitive damages, and/or attorney's fees.

3. Supplementary Payments: Attorney's fees can be considered "costs," or "damages," depending on the jurisdiction, or even the particular claim.

Insuring Agreement of a CGL

SECTION I - COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

(a) We will pay those sums that the insured becomes legally obligated to pay as damages ***because of*** "bodily injury" or "property damage" to which this insurance applies...

1986 ISO Form CG 00 01 11 85

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

We will pay, with respect to any claim or "suit" we defend:

5. All *costs* taxed against the insured in the "suit."

- Courts interpreting this provision hold that prevailing party fees are "costs" within the meaning of the policy.

- Consider the implications for the insurer of having to pay the prevailing party's fees awarded in a class action products liability suit, in relation to the relatively miniscule policy limits -- typically $1,000,000 at the primary tier.

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SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

    e. All court costs taxed against the insured in the "suit." However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

Emp'rs Mut. Cas. v. Donnelly, 300 P.3d 31 (Idaho 2013); ***Prichard v. Liberty Mut. Ins. Co.***, 84 Cal. App. 4th 890 (2000); ***State Farm Gen. Ins. Co. v. Mintarsih***, 175 Cal. App. 4th 274 (2009); ***Mid-Continent Cas. Co. v. James T. Trece***, 186 So. 3d 11 (Fla. Dist. Ct. App. 2015); ***Geico Gen. Ins. Co. v. Hollingsworth***, 157 So. 3d 365 (Fla. Dist. Ct. App. 2015).

The Underlying Lawsuit

- On February 13, 2006, Head filed the Underlying Lawsuit against PSI, contending PSI was responsible for installing a faulty flex connector and the resulting fuel leak.
- Mid-Continent assumed PSI's defense under a reservation of rights.
- On October 5, 2006, PSI filed a third-party action against Titeflex, alleging Titeflex was responsible for the failure of the UST and, therefore, liable to PSI under §82.002 of the Texas Civil Practice and Remedies Code.
- On January 30, 2007, Head filed an amended petition, adding a strict products liability claim against Titeflex.
- On January 4, 2008, Titeflex moved for a spoliation instruction against PSI for PSI's failure to produce the flex connector.

The Underlying Lawsuit

- On March 7, 2008, Head non-suited its claims against Titeflex without prejudice and, thereafter, filed an amended petition alleging claims only against PSI.
- On May 19, 2008, Titeflex filed a counterclaim against PSI requesting indemnification from PSI under §82.002(a) and (g) of the Texas Civil Practice and Remedies Code.
- Early in 2008, PSI and Mid-Continent discussed whether to dismiss PSI's affirmative claim against Titeflex.
- On June 1, 2008, defense counsel purportedly told Mid-Continent and PSI that Titeflex offered to dismiss its counterclaim if PSI dismissed its affirmative claim.
- On August 12, 2008, PSI dismissed its affirmative claim without prejudice. The next day, Titeflex informed PSI that it only would dismiss its counterclaim if PSI agreed to mutual dismissals *with* prejudice.

The Underlying Lawsuit

- Defense counsel and Mid-Continent urged PSI to accept the Titeflex settlement offer.
- PSI refused.
- The underlying lawsuit proceeded to trial with PSI's affirmative claim and Titeflex's counterclaim.
- The judge gave the jury a spoliation instruction.
- The jury returned verdicts for Head and Titeflex, awarding Head over $1,000,000 in damages, prejudgment interest, and attorneys', fees and awarding Titeflex over $450,000 in attorneys' fees, expenses, and costs, plus post-judgment interest.
- PSI appealed the Head Judgment and the Titeflex Judgment. The Court of Appeals affirmed. The Supreme Court reversed and remanded the Head Judgment, but affirmed the Titeflex Judgment.

The Underlying Lawsuit

- Mid-Continent sent six reservation of rights letters to PSI over the course of the underlying lawsuit.

- The fifth letter, did not address the Titeflex counterclaim, but generically stated that "Mid-Continent reserves its right to decline any duty to PSI, including, but not limited to, PSI's failure to cooperate "in its investigation and defense of the lawsuit.

- In the sixth letter, Mid-Continent explained that its coverage position in the fifth
- letter applied to the Titeflex Counterclaim.

- On July 30, 2014, after the Supreme Court affirmed the Titeflex Judgment, Mid-Continent denied coverage on the basis that PSI's rejection of the settlement offer in 2008 constituted a failure of cooperation.

The Declaratory Judgment Action

- On February 12, 2009 Mid-Continent filed a Declaratory Judgment Action, asserting various policy exclusions and the cooperation clause.

- Mid-Continent also maintained that the Titeflex Judgment was not covered as “damages”

  - The Titeflex Judgment did not satisfy the definition of “Money Damages” within the meaning of a professional liability endorsement;
  - The attorney’s fees awarded in the Titeflex Judgment were not “damages because of ‘property damage’.”

The Declaratory Judgment Action

- Mid-Continent filed a Motion for Summary Judgment on the basis that prevailing party fees did not fall within the meaning of the term “damages” under the policy.

- Mid-Continent argued that pursuant to *In re Nalle Plastic Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013), that “attorney’s fees do not constitute compensatory damages.”

- The Court granted the motion in part.

- The Court first addressed the Titeflex Judgment in context of Tex. Civ. Prac. & Rem. Code § 82.002(a). According to the Court Section 82.002(a) creates a cause of action for an innocent seller to obtain indemnity from a manufacturer. Under § 82.002(a):

  > A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller’s negligence, intentional misconduct, or other act or omission...for which the seller is independently liable.

The Declaratory Judgment Action

- The court held that a "products liability action" is "any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories."

- Under Section 82.002, "an innocent seller who suffers a loss is protected regardless of whether it is upstream or downstream of [the] product's manufacturer. The spoliation of the component part made Titeflex and "innocent seller"

- According to the court, the purpose of § 82.002 is to "allocate losses attributable to products liability actions under Texas law." § 82.002(a) requires the manufacturer to indemnify allegations of liability against the seller, even if the manufacturer is not ultimately held liable. Under § 82.002(b), the manufacturer is liable for "***loss***," including court costs, reasonable attorney's fees, and reasonable damages.

The Declaratory Judgment Action

- Under § 82.002(b), the manufacturer is liable for "***loss***," including court costs, reasonable attorney's fees, and reasonable damages. These, according to the Court, ***are*** damages "because of" property damage if otherwise covered.

- Section 82.002(g), on the other hand, allows a party to recover attorney's fees for pursuing an indemnity claim. These are ***costs*** no damages "because of" property damage.

- The Court also addressed an alternative argument that attorney's fees awarded to Titeflex were "Money Damages" under a professional liability endorsement in the policy.
  - "Money Damages" was defined in the endorsement to mean "a monetary judgment, award or settlement."
  - The Court held that while the definition of "Money Damages" was broad enough to encompass the fees awarded under both §§ 82.002(a) *and* (g), the endorsement did not create additional coverage, but simply deemed "Money Damage" arising out of the rendering or failure to render professional services to be caused by an occurrence.

Other Jurisdictions

- *Neal-Pettit v. Lahman*, 928 N.E.2d 421 (Ohio 2010)
  - The Ohio Supreme Court addressed whether attorney's fees awarded as part of a punitive damage award were damages because of "bodily injury" in relation to an underlying personal injury claim.
  - The trial court granted judgment in favor of Neal-Pettit. Allstate appealed, arguing that public policy precluded coverage for the punitive award, as well as the attorney's fees award, which was based solely on the punitive damage claim. The Ohio Supreme Court agreed with Neal-Pettit.
  - The question is whether the attorney fees awarded are damages that Lahman is legally obligated to pay because of the bodily injury sustained by Neal-Pettit. The policy does not define the word "damages." Allstate argues that the award is not covered under the policy, because attorney fees are not damages themselves, but are derivative of punitive damages and thus are not awarded as a result of bodily injury…the fact that the awards have similar bases is irrelevant. We have recognized that attorney-fee awards and punitive damage awards are distinct…Although, in this case, attorney fees were awarded as a result of an award of punitive damages, they also stem from the underlying bodily injury. The language of the policy does not limit coverage to damages *solely* because of bodily injury.

Other Jurisdictions

- *City of Ypsilanti v. Appalachian Ins. Co.*, 547 F. Supp. 823 (S.D. Mich. 1982).
  - The Southern District of Michigan determined whether attorney's fees awarded in an underlying discrimination lawsuit filed by residents of adult foster care facilities against police officers who were enforcing city housing and zoning ordinances were "all sums the insured became legally obligated to pay as damages because of 'bodily injury'."
  - The Court held that the attorney's fees could not be construed to encompass "costs" under the Supplementary Payments part of the policy,
  - The Court then held that a "reasonable person in the position of the Insured would believe the words 'all sums which the Insured shall become legally obligated to pay as damages' would provide coverage for all forms of civil liability, including attorney fees."

Other Jurisdictions

- *Cotton Hollybrook Cottonseed Processing, L.L.C., v. American Guarantee & Liability Insurance Co.*, No. 15-31090, 2016 WL 6541585 (5th Cir. 2016),
  - The Fifth Circuit re-framed the issue to be: "whether the attorney's fees were 'damages' caused by property damage. Because the policy does not define the word 'damages' it is given its *ordinary meaning*, and any ambiguity must be resolved against the insurer in favor of coverage."
  - However, the Court interpreted a product liability statute allowing for the recovery of damages for indemnity as loss.

Other Jurisdictions

- *Ass'n of Apartment Owners of the Moorings, Inc. v. Dongbu Ins. Co., Ltd.*, 15-00497 BMK, 2016 WL 442952 (D. Hawaii Aug. 18, 2016)
  - The Court held that attorney's fees awarded to underlying plaintiffs in a construction defect case were "damages because of 'property damage'" under a liability policy.
  - The Court reasoned: "[t]he Policy does not define the term 'damages' and does not expressly state whether attorneys' fees are damages. Hawaii courts have not addressed the specific issue before this Court, but in other contexts, the Hawaii Supreme Court has acknowledged that attorneys' fees are in the nature of damages."
  - The Court held that the plain and ordinary meaning of the word "damages" meant "any remunerative payment made to an aggrieved party, including the restitutive and punitive measures." The term "because of" was defined by the court to mean "arising out of" or "originating from." The Court held that based on the terms as defined, the attorneys' fees awarded in the underlying arbitration were covered by the policy because they were restitutive payments flowing from the property damage sustained by the underlying Plaintiffs.

Other Jurisdictions

- *Am. Fam. Mut. Ins. Co. v. Spectre West Bldg. Co.*, No. CV09-968-PHX-JAT, 2011 WL 488891 (D. Ariz. Feb. 4, 2011)
  - The Court held that both the damages awarded to a prevailing party in an underlying construction defect claim were "damages because of 'property damage'" under a CGL policy, but not "property damage" themselves for purposes of applying the contractual liability exclusion.
  - "Attorneys' fees and non-taxable costs qualify as damages an insured becomes legally obligated to pay *because of*… 'property damages.' But the court does not find that the attorneys' fees and non-taxable costs qualify as 'property damage,'" as "required for the exclusion to apply."

Other Jurisdictions

- *Alea London, Ltd. v. Am. Home Svcs., Inc.* , 638 F.3d 768 (11th Cir. 2011).
  - The Court held that, under Georgia law, statutory attorneys' fees recoverable as "expenses of litigation" in an underlying suit for violations of the Telephone Consumer Protection Act ("TCPA") were not "damages" under a CGL policy.
- *Sullivan Cnty., Tenn. v. Home Indem. Co.*, 925 F.2d 152 (6th Cir. 1991).
  - The Court addressed whether attorneys' fees awarded in an underlying civil rights lawsuit were "costs" or "damages" under an errors & omissions policy that was similar to the standard ISO CGL. The policy also contained a Supplementary Payments provision obligating Home Indemnity to pay "all costs taxed against the insured," which was rendered inapplicable by endorsement.
  - Contrasting 42 U.S.C. § 1988 with other statutes authorizing for the recovery of attorneys' fees as *damages*, the court held that § 1988 clearly only authorized the award of litigation expenses as "costs" to a party prevailing in the action.

The Appeal

- PSI maintains that *In re Nalle* only stands for the proposition that attorney's fees are not "compensatory" damages attorney's fees are neither compensatory damages or costs for purposes of superseding enforcement of a money judgment."

- PSI maintains that even if attorney's fees are not "compensatory damages" they are still "damages because of" property damage.

The Potential Implications

- *Stowers*
  - Makes claimant's attorney's fee part of the equation in determining the insured's exposure to an excess judgment.
  - Ripe for fraud.
  - Drains policy limits available for indemnity in case where the claimant has not paid attorney's fees.