

A wooden gavel with a brass band is positioned diagonally across the frame, resting on a stack of US dollar bills. The background is a light blue gradient with abstract wavy lines. The title text is overlaid in a light blue, serif font.

No Coverage for Attorney's Fees

Rob Witmeyer
Aaron G. Stendell
Cooper & Scully, PC

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Award of Attorney's Fees

IT IS ORDERED, ADJUDGED, AND DECREED, that Defendant Satterfield & Pontikes Construction, Inc. shall comply with the terms of the Final Award of the AAA Arbitration Panel. This Court renders Final Judgment in favor for Zapata County to recover from Satterfield & Pontikes Construction, Inc., in the amounts as follows:

Actual Damages in the amount of:	\$6,072,000.00
Reasonable and Necessary Attorney Fees for the Prosecution of the AAA Award:	\$1,500,000.00
Prejudgment Interest:	\$430,458.00
Additional Expenses:	\$29,909.74
Total:	\$8,032,367.74



What does the policy provide?

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. The insuring agreement provides coverage for “damages” because of bodily injury or property damage.
2. Supplementary Payments Provision: Attorney’s fees can be considered “costs” considering the policy language.



ISO Form CG 00 01 12 04

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 typically held that prevailing party fees are covered “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.



ISO Form CG 00 01 12 07

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.
- Courts interpreting this provision hold that prevailing party fees are not “costs” within the meaning of the policy.



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.



In re Nalle Plastics Family Ltd. P'ship

- Texas Supreme Court case *In re Nalle Plastics Family Ltd. P'ship.*, 406 S.W.3d 168 (Tex. 2013)
 - Law firm sued Nalle, its client, for unpaid legal fees and was awarded \$132,000 for damages and another \$150,000 in attorney's fees
 - Pending appeal, Nalle deposited \$132,000 with the trial court to suspend enforcement of the judgment
 - Law firm argued that deposit did not include \$150,000 for attorney's fees, so judgment not properly superseded



In re Nalle

- Supersedeas statute required posting appeal bonds “equal [to] the sum of . . . the amount of compensatory damages awarded in the judgment”
- Are attorney’s fees “compensatory damages”?
 - Appellate courts were split
 - No statutory definition of “compensatory damages”
 - But, long history that distinguished attorney’s fees from damages
 - Other expenses (e.g. court costs and interest) are not damages



In re Nalle

- Court found attorney's fees are not compensatory damages for purpose of supersedeas statute
- “While attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages.”

Travelers Lloyds Ins. Co. v. Cruz Contracting of Texas, LLC, No. 5:16-CV-759-DAE, 2017 WL 5202891 (W.D. Tex. Sept. 7, 2017) (Ezra, J.).

- The general contractor hired a subcontractor to perform utility work. After the subcontractor performed the utility work, the general contractor and other third parties performed road work above the subcontractor's utility work. At some point prior to final completion of the road work, the general contractor became aware that the utility subcontractor's work was defective.
- The general contractor had to remove the almost-completed road work to access and replace the subcontractor's defective utility work. This resulted in physical injury to the road and loss-of-use damages.




Travelers Lloyds Ins. Co. v. Cruz Contracting of Texas, LLC

- After establishing that the CGL insurance policy covered some of the property damage, the insured sought coverage for the plaintiff's attorneys' fees assessed against the insured in the underlying litigation.
- The insurer argued that the policy did not provide insurance coverage for those fees because such attorneys' fees are not "damages."
- The CGL insuring agreement provided coverage only for "damages because of . . . property damage to which this insurance applies."

Travelers Lloyds Ins. Co. v. Cruz Contracting of Texas, LLC

- The court addressed the hot-button coverage issue—whether the CGL policy provides insurance coverage for the plaintiff’s attorneys’ fees assessed against the insured.
- Following a recent trend in Texas federal court opinions, the court answered that question in the negative. The court determined that the CGL insuring agreement cannot provide coverage for such attorneys’ fees because those fees are not “damages.”
- *See also AGLIC v. US Fire*, 255 F. Supp. 3d 677, 695 n.1 (S.D. Tex. June 1, 2017) (Rosenthal, J.) (attorney’s fees are not damages)



Mid-Continent Cas. Co. v. Petroleum Solutions, Inc., 2016 WL 7491858 (S.D. Tex. Dec. 30, 2016)

- Mid-Continent issued a CGL policy to Petroleum Solutions, Inc. (“PSI”)
- PSI was sued by Bill Head for faulty fuel storage system
- PSI filed third-party petition against Titeflex, supplier
- Titeflex filed a countersuit against PSI, asserting TEX. CIV. PRAC. & REM. CODE 82.002(a) [indemnity] and (g) [attorney’s fees]
- At trial, Head awarded \$1.1 million and \$91,500 in attorney’s fees
- Titeflex awarded \$382,334 in attorneys fees



PSI

- Mid-Continent filed a Declaratory Judgment Action, asserting various policy exclusions and the cooperation clause.
- Mid-Continent also maintained that the Titeflex Judgment (including \$382,334 in attorneys fees) 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.’”



PSI

- Mid-Continent argued that pursuant to *In re Nalle Plastic Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013), “attorney’s fees do not constitute compensatory damages.”
- The Court granted the motion in part.
- Section 82.002(g) allows a party to recover attorney’s fees for pursuing an indemnity claim. These are costs, not damages, “because of” property damage.



PSI

- 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 82,002, 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.



PSI - The Appeal

- PSI appealed to the Fifth Circuit, 917 F.3d 352 (2019)
- PSI maintained that the Professional Liability Exclusion (“PLE”) provides coverage for the Titeflex attorney’s fees. PSI also contended that the insuring agreement provides coverage for the attorney’s fees.
- Fifth Circuit found that the PLE extends coverage when PSI has rendered professional services that result in “bodily injury”, “property damage”, or “money damages”
- “Money damages” is defined as “monetary judgment, award, or settlement”, so it is broader than common-law definition of damages
- Here, money damages arose out of PL services, so coverage for fees. The court decided not to address the coverage for attorney’s fees under the insuring agreement issue.

Anadarko Petroleum Corp. v. Houston Cas. Co.

- *Anadarko Petroleum Corp. v. Houston Cas. Co.*, No. 16-1013, 2019 WL 321921, at *8 (Tex. Jan. 25, 2019)





Anadarko

- Anadarko owned a 25% minority interest in Deepwater Horizon
- Anadarko accrued attorney's fees of over \$100 million in defending the resulting DH lawsuits which were settled for \$4 billion
- Anadarko has Underwriters Lloyd's "energy package" policy
 - Section III of policy provides excess-liability coverage of \$150 million
 - Section III states that it will **reimburse** Anadarko for its "Ultimate Net Loss", which includes defense expenses (different from typical CGL policy where carrier pays)



Anadarko

- Joint Venture Provision endorsement limits coverage:
 - “[A]s regards any **liability** of [Anadarko] **which is insured** under this Section III and which arises in any manner whatsoever out of the operation or existence of any joint venture . . . in which [Anadarko] has an interest, the **liability** of Underwriters under this Section III shall be limited to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded [Anadarko] under this Section III.
 - So, 25% (of DH interest) of \$150m limit = \$37.5 million



Anadarko

- Anadarko argues that this endorsement only applies to its “liabilities” and not attorney’s fees.
- Trial court found the Joint Venture Provision limits reimbursement for Anadarko’s defense expenses
- Appellate court agreed
- Texas Supreme Court reversed, found no JVP limit for defense expenses



Anadarko

- We have explained that, in the insurance context, “liability insurance” generally covers “damage the insured does to others.” We have also held that an insured's defense expenses are not “damages” a third party sustains and “claims.” Even in the broader common, ordinary sense, “damages” are “[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury,” and thus “attorney's fees are generally not damages, even if compensatory.” The policy at issue here consistently uses the terms liability, damages, and defense expenses consistent with these common legal meanings.



What does it all mean?

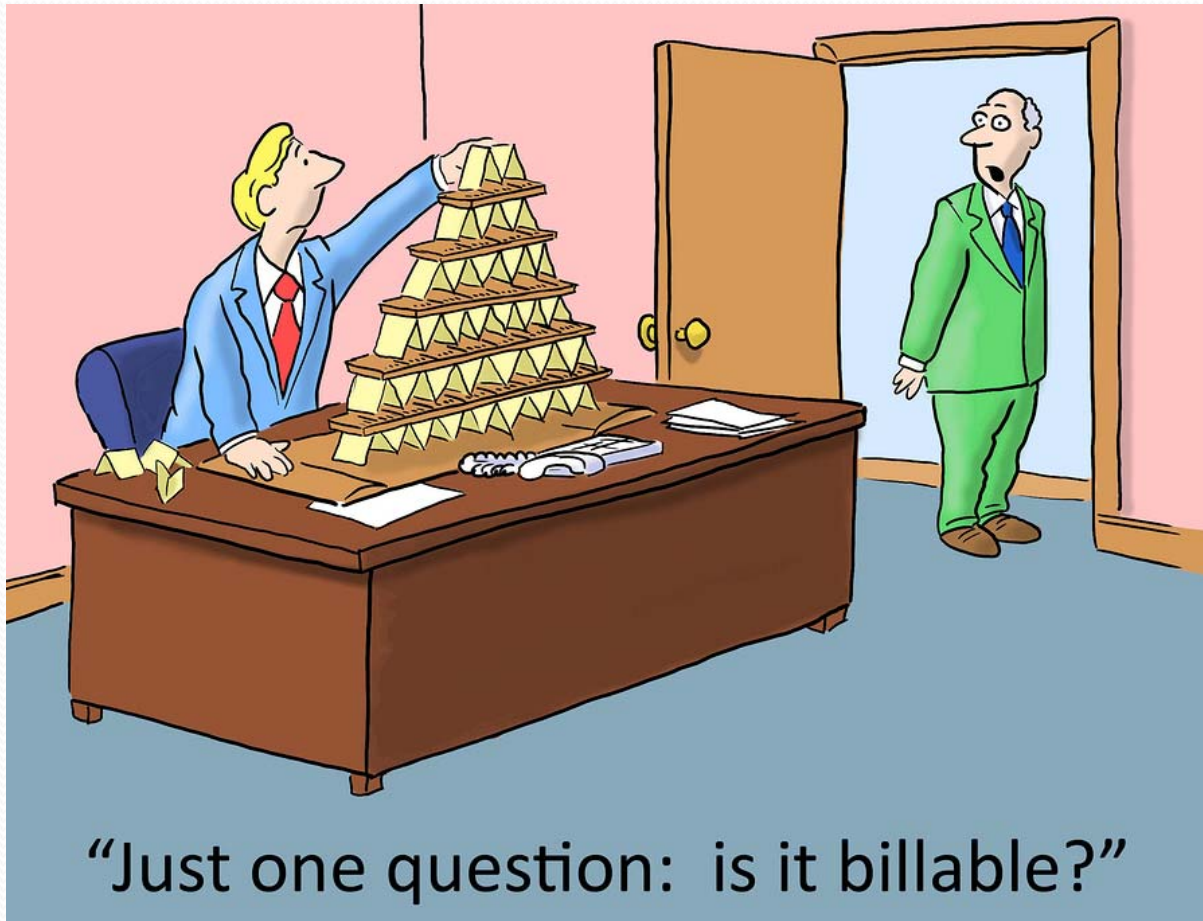
- Go back to CGL language:
 - “We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.”
- Under *Anadarko*, *Cruz*, and *AGLIC*, there is no coverage for attorney’s fees because they are not damages sustained by a third party.
- But in *PSI*, there was coverage because the term “money damages” found in a policy endorsement is broader than the term “damages”



Implications

- The plaintiffs' attorneys' fees are often a major issue at mediation. The outcome of that mediation may be substantially different if the defendants have no insurance coverage for those fees, particularly if the insureds are not collectible
- May affect coverage under other policies, such as professional liability policies, that often use the term "damages" in their definitions of "loss"

Attorney's Fees



“Just one question: is it billable?”



Questions?

Robert J. Witmeyer

214-712-9554

Rob.Witmeyer@cooperscully.com

Aaron G. Stendell

214-712-9524

Aaron.Stendell@cooperscully.com

COOPER & SCULLY, P.C.

900 Jackson Street, Suite 100

Dallas, TX 75202