



Seeking Reimbursement for Non-Covered Claims

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Settlement Payments for Non-Covered Claims Are Also Recoverable, With Limitations

The other potential reimbursement scenario arises when an insurance company seeks to recover settlement payments made for non-covered claims. The Blue Ridge case, using the same principles of restitution relied upon in Buss, established the process by which an insurer can reserve its rights for reimbursement.

First, an insurer must put its policyholder on notice that it is reserving its rights to seek reimbursement for settlement amounts attributable to non-covered claims. Second, an insurer must give its insured an opportunity to object to the reasonableness of the settlement amount and to assume its own defense. Most often, an insured will have

no choice but to accept an insurer's decision to settle for the decided amount. If an insured accepts settlement of a case, it may not later claim bad faith for the settlement amount.

As with defense fees, an insurer may recover settlement fees if it can prove that some or all claims are not covered. However, the Blue Ridge court noted that insurance companies bear a substantial risk that their policyholders will not be able to reimburse them. Overall, reimbursement for defense and indemnity costs are available, but only practical in certain situations.

If you have any further questions, Bolender & Associates has available a detailed written analysis of the case law summarized above. Please call or email Jeffrey S. Bolender for a free copy at jbolender@bolender-firm.com.



Insurance Law Advisor

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Supplementary Payments: Hidden Liabilities

The obligations under the Supplementary Payments provision go beyond the duties imposed by Coverage A and Coverage B. Such duties can include paying an attorneys' fees award or paying for the defense of an insured's indemnitee. This article highlights these 'hidden liabilities,' including changes affected by recent editions of the Insurance Services Office's commercial general liability coverage form.

Costs Taxed Against the Insured

Perhaps the most common supplementary payment issue is whether an award of attorneys' fees to a prevailing party falls under the Supplementary Payments provision. Much like attorneys' fees paid to defend an insured, an attorneys' fees award that falls under the Supplementary Payments provision does not count toward the exhaustion of policy limits. For an award to fall under the Supplementary Payments provision, it must be considered a "cost" rather than a "damage."

The Supplementary Payments provision requires an insurer to pay for "costs taxed against the insured in the 'suit.'" On the other hand, damages are those "sums that the insured becomes legally obligated to pay" because of bodily injury or property damage. An

insurer pays damages pursuant to its duty to indemnify. Unlike costs, damages count toward exhaustion of the policy limits.

Numerous statutes and contracts allow an award of attorney fees to the prevailing party. Whether an award of



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attorney fees are deemed "costs" under the Supplementary Payments provision often depends on the specific language of the contract or statute. More inclusive language such as "costs, including attorney fees"

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rather than simply referring to “costs and attorney fees” makes an award of attorney fees more likely to be considered “costs taxed against the insured.”

For example, many California statutes authorizing fee awards use the phrase “attorney fees together with costs of suit.” This language suggests that attorney fees are separate from costs, such that the supplementary payments provision does not apply. But, the California Code of Civil Procedure deems “costs taxed” to include attorneys’ fees awards when authorized by contract, statute, or law. Thus, California courts would likely treat all attorneys’ fees awards as costs within the supplementary payments provision, regardless

of the specific wording of the enabling statute.

An insurer’s obligation to pay an award of attorneys’ fees to the prevailing party and other litigation costs is independent of its duty to indemnify, and payments made under the Supplementary Payments provisions do not count towards exhaustion of the policy limits. In some cases, these fees and costs can exceed “damages,” thereby increasing an insurer’s exposure well beyond policy limits.

Defense of the Insured’s Indemnitee

Prior to 1996, the CGL policy did not provide coverage to indemnitees who the insured promised a defense in a hold harmless agreement. Now, under the second half of the Supplementary Payments provision, an insurer agrees to defend the insured’s indemnitee if certain conditions are met.

First, the duty to defend an indemnitee exists only when the insured and its indemnitee are both being sued. In other words, claims brought

only against the indemnitee do not give rise to a duty to defend. Second, the insured’s obligation to defend an indemnitee must be an explicit part of an agreement with the insured in an “insured contract.”

Third, there must be no conflict of interest between the insured and the indemnitee. Fourth, both the insured and the indemnitee must request that the insurer defend the indemnitee. Finally, the indemnitee must agree to notify any other insurer whose coverage is available to the indemnitee and to cooperate in coordinating such coverage. Insurers should be aware of these and other hidden liabilities within the Supplementary Payments provision.

If you have any further questions, Bolender & Associates has available a detailed written analysis of the case law summarized above. Please call or email Jeffrey S. Bolender for a free copy at jbolender@bolender-firm.com.

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Seeking Reimbursement for Non-Covered Claims: Defining Insurers’ Rights

As claims professionals know well, insurers have two basic responsibilities to their policyholders. First, an insurer has a broad duty to defend a suit that contains at least one potentially covered claim. Second, an insurer has a narrower obligation to indemnify covered claims. Each duty creates situations in which insurers are obligated to pay costs or settlements for non-covered claims.

In the past decade, two California Supreme Court decisions have defined liability insurers’ reimbursement rights for defense costs and settlement payments. Insurer expenditures related to non-covered claims can be recovered under certain, limited circumstances.

Certain Defense Costs Are Recoverable

In the Buss case, the California Supreme Court determined that insurers are entitled to reimbursement for defense payments towards claims that are not potentially covered, based on the legal theory of restitution. Under that theory, a party who has been unjustly enriched is required to return the unintentional benefit. In other words, when a policyholder does not pay a premium for a particular type of coverage, it is unjust for an insurer to be forced to absorb the attendant defense costs. Those defense costs may be recovered, however, there are three important limiting factors.

First, an insurer must specifically reserve its right to seek reimbursement before it assumes a defense, to give policyholders the option of assuming their own defense. Second, an insurer is only able to success-

fully seek reimbursement where defense costs are solely attributable to the non-covered claims. Finally, many policyholders lack the financial resources to make a reimbursement action worthwhile. The Buss case is an exception, in that the policyholder, Jerry Buss, is a wealthy sports-entertainment magnate.

Sometimes, a potential claim for reimbursement can arise in “mixed actions.” In a mixed action, one or more claims are potentially covered under the policy, while at least one of the claims is not covered. Public policy dictates that an insurer must provide a complete defense to all of the claims in a suit, even if only one claim is potentially covered. The question then becomes: can an insurance provider that defends a mixed action obtain reimbursement for defense costs allocated to those claims that are not potentially covered under the policy? The answer is yes, but an insurer’s burden of proof is usually difficult.

In reality, it is often difficult to parse out which, if any, defense activities were dedicated entirely to a particular non-covered claim. An insurance provider has the burden of proving, by a preponderance of the evidence, that the defense activities for which it is seeking reimbursement were directed solely at claims that were not potentially covered. For instance, if time is spent doing research that pertains to both covered and non-covered claims, no reimbursement is recoverable. In summary, insurers can obtain reimbursement of defense costs attributable solely to non-covered claims.

Overall, reimbursement for defense and indemnity costs are available, but only practical in certain circumstances.

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