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Insurance Coverage Litigation: Recovery of Attorneys' Fees and Costs in Declaratory Judgment Actions

TUESDAY, MAY 3, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Policyholder and Insurer Strategies for Recovering
Attorneys' Fees in Insurance Coverage Litigation

Presented by: Katherine J. Henry and Eliot M. Harris

With an assist from Jeffrey W. Sheehan, Bradley

May 3, 2022

Today's Speakers



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Today's Agenda

1. Guidelines
2. American Rule
3. Statutory Responses
4. Judicial Responses
5. Litigation Strategies
6. Questions

Guidelines

Guidelines

- Liability policies typically require the insurer to defend or pay defense costs
 - “We will pay those sums that the insured becomes obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages.”
 - “The Company shall pay . . . all Loss . . . which the Insured Person becomes legally obligated to pay on account of any Claim”

“Loss means the total amount which any Insured Person becomes legally obligated to pay on account of each Claim . . . Made against them for Wrongful Acts for which coverage applies, including but not limited to, damages, judgments, settlements, costs, and Defense Costs.”

“Defense Costs means that part of Loss consisting of reasonable costs, charges, fees (including but not limited to attorneys’ fees and experts’ fees) and expenses . . . incurred in defending or investigating Claims”
- Property and casualty insurance policies typically do not expressly address the recoverability of attorneys’ fees incurred in coverage litigation

American Rule

American Rule

- “Usually, under the American Rule, attorney’s fees are not awarded to the winning party in a common law action.”

Bucci v. Essex Ins. Co., 393 F.3d 285, 292 (1st Cir. 2005)

- Insurance coverage litigation can trigger exceptions.
 - Statutes can displace the common law American Rule
 - Common law exceptions can alter the American Rule

Statutory Responses

Statutory Responses

- Generally applicable statutes (benefiting both insurer and insured)
 - Prevailing (Alaska R. Civ. P. 82) 
 - Unreasonableness (Col. Rev. Stat. § 13-17-102) 
 - Special Circumstances (Mo. Rev. Stat. § 527.100) 
- Insurance-specific statutes (generally benefiting insured)
 - Prevailing (Ark. Code Ann. § 23-79-209) 
 - Unreasonableness (N.M. Stat. § 39-2-1) 
- Statutes modeled on UDJA (generally benefiting insured)
 - Equity Principles (Wis. Stat. § 806.04(8)) 

Statutes Applicable to All Types of Litigation

Ariz. Rev. Stat. Ann. § 12-341.01(A)

Recovery of attorney fees

In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees. This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.

Statutes Applicable to All Insurance Litigation

Oregon law on timely payment on proof of loss, ORS § 742.061(1):

[I]f settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon

Attorney fees allowed if coverage suit is brought six months after an insured files a proof of loss, and the insured's recovery exceeds the amount offered by the insurer

Statutes with Additional Requirements

Washington's Insurance Fair Conduct Act, RCW 48.30.015(3):

The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

Washington's Consumer Protection Act Claims (RCW 19.86.090):

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, ... may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee.

Insurance-Specific Statutes

42 Pa. C.S.A. § 8371

Actions on insurance policies

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

UNIFORM DECLARATORY JUDGMENTS ACT

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS**

And by it

**APPROVED AND RECOMMENDED FOR ENACTMENT IN
ALL THE STATES**

At its

**CONFERENCE IN SAN FRANCISCO, CALIFORNIA
AUGUST 2-8, 1922**

WITH PREFATORY NOTE

Uniform Declaratory Judgments Act

SECTION 8. [Supplemental Relief.] Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefore shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

SECTION 10. [Costs.] In any proceeding under this act the court may make such award of costs as may seem equitable and just.

Statutes Modeled on UDJA

Wis. Stat. Ann. § 806.04(8) & (10)

Uniform declaratory judgments act

(8) Supplemental relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

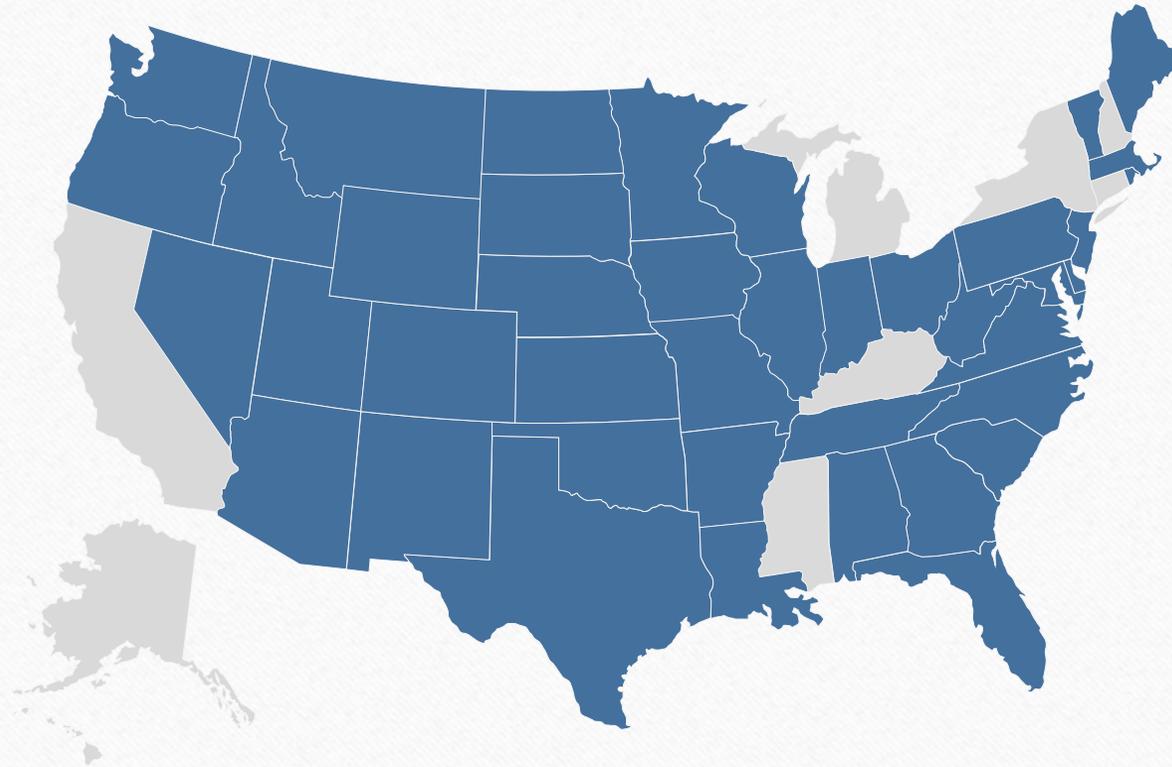
(10) Costs. In any proceeding under this section the court may make such award of costs as may seem equitable and just.

Ohio Rev. Code Ann. § 2721.16(A)(1)

Attorney's Fees; remedial nature of provisions

“A court of record shall not award attorney’s fees to any party on a claim or proceeding for declaratory relief under this chapter unless . . . [a] section of the Revised Code explicitly authorizes . . . attorney’s fees on a claim for declaratory relief under this chapter.”

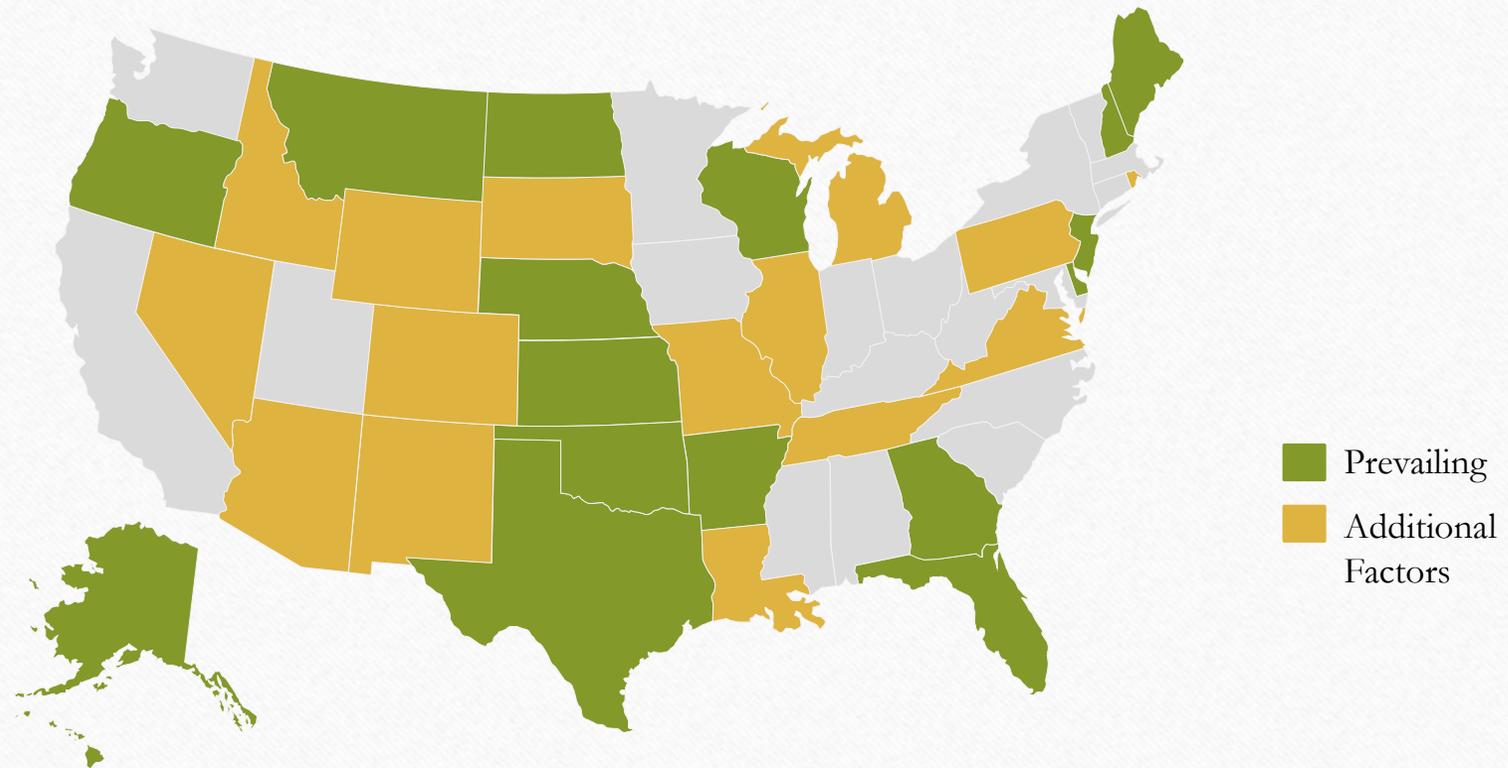
States Enacting UDJA



Remaining States:

- Alaska
- California
- Connecticut
- Hawaii
- Kentucky
- Michigan
- Mississippi
- New York

Standards for Awarding Statutory Fees



Judicial Responses

Judicial Responses in States without Governing Statutes

- Generally pro-policyholder
- Benefit of the bargain and breach of contract damages
 - *Olympic Steamship Co. v. Centennial Ins. Co.*, 811 P.2d 673, 681 (Wash. 1991)
 - “An insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees.”
- Tort standard regarding unreasonable conduct
 - *Brandt v. Superior Court*, 693 P.2d 796, 798 (Cal. 1985)
 - “When an insurer’s tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney’s fees are an economic loss—damages—proximately caused by the tort.”

Frequent Issues in Fee-Shifting Analyses

- Definition of prevailing party
 - *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 778 N.W.2d 433 (Neb. 2010)
 - “The pretrial offers were for more than the amount of the final judgment awarded by the court.”
- Difference between determination of coverage and quantification of loss or damages
 - *Dayton v. Farmers Ins. Grp.*, 876 P.2d 896 (Wash. 1994)
 - “Legitimate differences of opinion in the value of a claim negotiated in good faith do not deprive an insured of the benefit of coverage bargained for and mandated by statute.”
 - *Long v. Farmers Ins. Co.*, 388 P.3d 312 (Or. 2017)
 - “A declaration of coverage is not sufficient to make ORS 742.061 applicable; an insured must obtain a monetary recovery after filing an action, although that recovery need not be memorialized in a judgment.”

Frequent Issues in Fee-Shifting Analyses

- Merits or strength of insurer defense to coverage
 - *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352 (Nev. 1986)
 - “Attorney’s fees are appropriate when a claim is brought without reasonable ground or to harass the prevailing party. NRS 18.010. AEI's conduct in filing suit was not unreasonable. The coverage issue was one of first impression. Additionally, awards of punitive damages are improper where the evidence fails to show either a willful wrong or the damage as an intended or necessary consequence.”
- Insurer tactics
 - *Westfield Cos. v. O.K.L. Can Line*, 804 N.E.2d 45 (Ohio Ct. App. 2003)
 - “In failing to defend, Westfield breached its duty under the insurance contract, warranting an award of attorney fees incurred in litigating the Alcoa lawsuit. In ‘acting with a stubborn propensity for needless litigation,’ Westfield was also properly ordered to pay the attorney fees OKL incurred in establishing the breach.”

Litigation Strategies

Policyholder Strategies

- Forum selection is critical.
- Consider applicable substantive law.
- Comply with any statutory notice requirements.
- Document any insurer misconduct pre-litigation.
- Document any prejudice to policyholder.

Insurer Strategies

- Pleading Strategies
 - Pure “Coverage” Issues v. Other Disputed Issues (i.e., Claim Value)
- Forum Selection
 - Forum-Non Motions
 - Motions to Transfer
- Split Decisions on “Coverage” Issues
 - Is There a “Prevailing Party”?
 - Partial Award of Fees/Costs
- Extra-Contractual Claims
 - Statutory Authority for Award of Fees/Costs
 - Split Decisions on EC Claims

Questions?

Today's Speakers



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Katherine Henry is the Chair of Bradley's Policyholder Insurance Coverage Practice. Her practice spans all aspects of policyholder insurance coverage, from initial policy placement and renewals to claims management and litigation, both in the United States and abroad. Her clients range from Fortune 100 public companies to small privately-held entities, as well as educational institutions and nonprofits.

Katherine has litigated cases involving virtually every type of property and casualty insurance policy available in the market today in state and federal courts at all levels (including bankruptcy courts), arbitrations, mediations, and regulatory proceedings before state insurance commissioners.



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Eliot Harris is a Member based out of the Seattle Office of Williams Kastner and serves on the Board of Directors for the firm. His practice encompasses the Pacific Northwest, and he is licensed to practice law in Washington, Oregon, and Alaska. Eliot is a commercial litigator and has represented a wide-range of clients in insurance coverage disputes, as well as non-coverage related matters. He regularly advises and represents clients in pre-litigation claim and coverage analysis, as well as litigating coverage disputes and insurance bad faith claims. Eliot has advised clients in insurance claims involving various lines of coverage, including CGL, EPLI, E&O, D&O, liquor liability, homeowners, commercial property, personal and commercial auto, and marine insurance.

It Pays to Be Covered™

Developments and Trends in Insurance Coverage for Commercial Policyholders

- Legal developments
- Industry trends
- Coverage for COVID-19
- Insurance placement and renewals
- Practical risk management strategies
- Claims management and resolution



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