

Attorneys Fees Constitute Monetary Judgment

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In an unreported decision, an Ohio appellate court has held that attorneys fees awarded in an underlying lawsuit constitute a "monetary judgment" under an E&O policy issued to a township. *Sylvania Township Bd. of Tr. v. Twin City Fire Ins. Co.*, 2004 WL 226115 (Ohio Ct. App. Feb. 6, 2004).

The insurer issued an E&O policy to a township board of trustees. The policy provided that the insurer would "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of errors or omissions injury to which this policy applies." The policy provided that "damages" means a "monetary judgment, award or settlement but does not include fines or penalties or damages for which insurance is prohibited by law applicable to the construction of this policy." The policy did not define the terms "monetary judgment," "fine" or "penalty."

In the underlying action, the court ordered the board of trustees to pay attorneys fees for violations of Ohio's Public Records Act and Sunshine Act. After the insurer took the position that attorneys fees are punitive in nature and denied coverage, this coverage litigation ensued.

The Ohio appellate court held that attorneys fees constituted damages under the policy. The court distinguished an earlier Ohio case that did not involve insurance coverage, which had held that attorneys fees are not "monetary damages" within the meaning of common law damages. In that case, the court had considered whether the court of common pleas or the court of claims had jurisdiction to award attorneys fees. By contrast, in the insurance context, the appellate court explained that a court must evaluate the contract language, not the common law concept of damages. Since the policy did not define "monetary judgment" or "penalties," the court applied the "common" meaning of these terms to find that attorneys fees qualify as a monetary judgment. The court also reasoned that the underlying award of attorneys fees was discretionary, not punitive. "Because this award was handled pursuant to statute, the attorneys fee award is regarded as part of costs. Therefore, the award of attorneys fees did not constitute a 'fine' or a 'penalty,' and as a result, none of the exceptions to the broad definition of 'damages' applied."

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