

# Court Holds That Costs Incurred In Affirmative Lawsuit Inextricably Intertwined With Insured's Defense Are Covered

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The United States District Court for the Eastern District of Pennsylvania has held that an insured is entitled to reimbursement for attorneys' fees incurred in the defense of a petition for sanctions and in connection with an affirmative claim for wrongful use of civil proceedings and breach of contract. *Post v. St. Paul Travelers Ins. Co.*, 2010 WL 2490750 (E.D. Pa. June 15, 2010). The court also held that the insurer, having breached its duty to defend, was not entitled to challenge the rates of the insured's defense counsel, which the court determined were within a reasonably acceptable range given the complexity of the matter.

During a medical malpractice trial, a witness for the defendant hospital testified on cross examination that the insured attorney intentionally concealed metadata contained in documents produced in discovery. Shortly thereafter, the hospital and plaintiffs settled the suit for \$11 million. On October 12, 2005, counsel for the hospital's malpractice insurance carrier sent a letter to the attorney informing him that the allegations of misconduct were the primary motivation for the settlement. On October 18, 2005, the attorney retained defense counsel to represent him in connection with the anticipated legal malpractice action. On October 27, 2005, the attorney's firm tendered notice to the attorney's legal malpractice insurer of the allegations and the potential for a claim. Through his defense counsel, the attorney also tendered notice of a potential claim to the insurer on November 3, 2005.

On November 21, 2005, counsel for the plaintiffs filed a petition for sanctions against the attorney for the alleged discovery abuses. The hospital actively participated in the sanctions proceeding and ultimately pled that the attorney had withheld discovery and sought affirmative relief. On November 28, 2005, defense counsel for the attorney wrote a letter to the insurer advising it of the petition for sanctions, noting that it was a "follow-up" to the November 3 notice letter. On December 8, 2005, the insurer's coverage counsel, having not been apprised by the insurer of the November 3 letter, denied coverage for defense or indemnity against the sanctions petition.

In September 2006, the insured filed a defamation and tortious interference suit against plaintiffs' counsel in an effort to disprove the allegations of discovery misconduct. In March 2007, the defamation suit, the sanctions petition and a related petition for interlocutory review were all discontinued with prejudice. In the

wake of the discontinuances, the hospital proposed a mediation with the attorney. In preparation for that mediation, defense counsel for the attorney sent a draft complaint to counsel for the hospital alleging wrongful use of civil proceedings, breach of contract, fraud and misrepresentation and civil conspiracy. The mediation failed and the hospital filed a legal malpractice action on November 19, 2007. The attorney moved forward with his affirmative claims against the hospital on February 6, 2008. The attorney and the hospital ultimately reached a final agreement for a discontinuance with prejudice of both actions in November 2008.

On October 13, 2006, the attorney brought suit against the insurer seeking coverage for defense of the sanctions petition. He later amended his complaint to seek coverage for the related affirmative claims he made against plaintiff's counsel and the hospital. In the coverage litigation that followed, the court granted the attorney's motion for summary judgment in part, holding that the insurer breached its duty to defend the attorney in the sanctions petition and that the attorney was entitled to recover his legal fees. The court then conducted a trial to determine the appropriate amount that the attorney was entitled to recover.

In addressing the reasonableness of the rates charged by the attorney's defense counsel, the court invoked the Pennsylvania rule that where an insurer breaches its duty to defend and thereafter has a duty to reimburse the insured for attorneys fees and costs, the reasonableness of an attorney's fees will be determined by the facts of the specific case. Citing evidence in the record outlining the complex nature of the claims involved, the potentially career-ending character of the allegations at issue, the fact that the attorney paid for his own defense without reassurance of reimbursement and the ultimately favorable outcome obtained, the court concluded that the rates charged by the attorney's defense counsel were reasonable.

The court then addressed coverage for the fees and costs associated with the attorney's affirmative actions against plaintiffs' counsel and the hospital. The court concluded that where separate matters were strategically necessary to the overall defense or were part of the same dispute and could minimize liability, such actions were inextricably intertwined and costs incurred in connection therewith were covered. As the attorney's draft complaint and ultimate suit against the hospital were initially prepared in anticipation of the mediation aimed at preventing the filing of the legal malpractice action, the court found that the associated costs were sufficiently related to the defense of the malpractice action to fall within the scope of coverage. However, the court rejected the attorney's argument that amounts incurred in connection with his affirmative action against plaintiff's counsel were sufficiently related to the sanctions petition to warrant coverage.