

Insured Entitled To Underlying Defense Costs and Attorney's Fees for Coverage Litigation Where Insurer Breaches Duty To Defend

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The United States District Court for the Southern District of West Virginia, applying West Virginia law, has held that, where an insurer is found to have breached its duty to defend an insured in an underlying action, the insured is entitled to recover the reasonable attorney's fees and costs incurred in defense of the underlying action as well as the reasonable attorney's fees and costs incurred in litigating the coverage action against the insurer. *Graham v. Nat'l Union Ins. Co. of Pittsburgh, PA*, 2013 WL 870298 (S.D. W. Va. Mar. 7, 2013). The court further held that the insured was not entitled to extra-contractual damages or prejudgment interest on the attorney's fees incurred in the coverage litigation.

The State of West Virginia filed a civil action against the insured, the executive director of a charitable organization, for misappropriating the charitable organization's resources for personal and other unauthorized purposes. The insured tendered notice of the civil action under its Wrongful Act Liability Insurance Policy. The insurer denied coverage for the State's civil action based upon several policy exclusions, and the insured filed a declaratory judgment action against the insurer. In a prior ruling, the district court granted summary judgment to the insurer, which the United States Court of Appeal for the Fourth Circuit reversed on appeal. On remand, the parties filed cross-motions for summary judgment concerning (i) the type of damages the insured may recover; and (ii) the amounts owed to the insured as a result of the Fourth Circuit's determination that the insurer breached its duty to defend.

First, the district court rejected the insured's contention that, pursuant to *Hayseeds, Inc. v. State Farm Fire & Casualty Co.*, 352 S.E.2d 73 (W. Va. 1986), which provides for extra-contractual damages against an insurer that breaches its contract in first-party insurance cases, he is entitled to extra-contractual damages as a result of the insurer's breach of its duty to defend. The court noted that it "could find no law extending *Hayseeds* damages to third-party insurance cases" and refused to do so in this case.

Next, the court held that, under *Aetna Casualty & Surety Co. v. Pitrolo*, 342 S.E.2d 156 (W. Va. 1986), "if an insurer breaches its duty to defend an insured, the insured is entitled to recover its litigation expenses, including costs and reasonable attorney's fees." The court therefore held that the insured "is entitled to recover reasonable attorney's fees and costs associated with his defense against the State's lawsuit against

him and reasonable attorney's fees and costs incurred in pursuing the instant lawsuit." The court also rejected the insured's argument that he was entitled to prejudgment interest on the attorney's fees in pursuing the coverage litigation.