

Insured May Recover Damages for “Aggravation and Inconvenience” Caused by Insurer’s Breach, but Not Prejudgment Interest on Attorneys’ Fees

March 2014

Applying West Virginia law, the United States Court of Appeals for the Fourth Circuit has held that where an insurer violates its duty to defend or indemnify its insured, the insured may recover consequential damages for aggravation and inconvenience, but not prejudgment interest on unliquidated attorneys’ fees incurred as a result of the insurer’s breach. *Graham v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 2014 WL 350147 (4th Cir. Feb. 3, 2014).

A director of a nonprofit organization was sued by the state of West Virginia based on allegations of misuse of public funds. He tendered the claim to his commercial general liability insurer for a defense. The insurer denied coverage, concluding it had no duty to defend or indemnify the director. After prevailing in the underlying liability proceedings, the director brought a declaratory judgment action against his insurer, claiming the insurer breached its duty to defend him. Although judgment was initially entered for the insurer on the coverage issues, the Fourth Circuit reversed, and judgment was entered in favor of the director. The director then sought prejudgment interest on the portion of his fee award associated with the underlying liability proceedings. He also sought to recover damages for the “aggravation and inconvenience” caused by the insurer’s denial of coverage.

Noting that West Virginia law allows recovery of consequential damages, the court concluded that “there is no logical reason to authorize an award for one item of consequential damages—attorney fees in the enforcement litigation—while simultaneously denying recovery for aggravation and inconvenience.” Thus, the court held that consequential damages consisting of aggravation and inconvenience are recoverable in coverage litigation, regardless of whether the insurer violated its duty to defend or its duty to indemnify.

However, the court rejected the director’s claim for prejudgment interest on the attorneys’ fees expended in the underlying liability proceedings. Relying on West Virginia law, which only allows prejudgment interest for “special or liquidated damages,” the court concluded that the director’s attorneys’ fees, although already paid, were not liquidated until the insurer stipulated to the precise amount of those fees on remand after the

first appeal. Accordingly, the court concluded that “the absence of liquidation is enough to exclude attorney fees . . . from the reach of the West Virginia prejudgment interest statute.”