

Costs of Filing Counterclaim and Third-Party Complaint Not Covered

July 2006

A Maine federal district court, applying Maine law, has held that an insurer did not breach its duty to defend a lawyer under a professional liability policy by: (1) refusing to pay the costs of the lawyer's counterclaim and third-party complaint because these actions sought affirmative relief and were "only tangentially related" to his defense and (2) refusing to defend the lawyer against a complaint made to the state bar association because it did not involve a "formal scheduled hearing," as was required under the policy's "disciplinary proceeding" coverage. *Bennett v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 1313059 (D. Me. May 12, 2006).

An insurer issued two consecutive professional liability policies to a law firm. The policies provided that the insurer "will have the right and duty to defend any protected person against a claim or suit for loss covered by this agreement." The policy also provided "disciplinary proceeding" coverage for expenses that "result from the investigation, settlement, defense or appeal of any disciplinary proceeding," and defined "disciplinary proceeding" as "any formal scheduled hearing by any bar association . . . to investigate any charges alleging professional misconduct in performing legal services."

A lawyer at the insured law firm represented a woman in a divorce and spousal tort action against her husband. During the course of this action, the husband pursued a series of actions against the lawyer including, among other things: (1) filing two "protection from harassment" (PFH) lawsuits, which were eventually dismissed, (2) sending a complaint letter to the Board of Overseers of the Maine Bar and (3) filing a 13-count complaint alleging malicious institution of civil and criminal proceedings, the making of false and defamatory statements and stealing personal property. The insured tendered defense of these actions to the insurer, which acknowledged a duty to defend the PFH lawsuits and the complaint, but refused to defend the lawyer with respect to the Maine Bar complaint.

The insured also sought coverage for three other matters: (1) his counterclaim against the husband alleging liability for harassment, initiating frivolous proceedings and making defamatory statements, (2) his third-party complaint against the husband's brother alleging that he breached an agreement to pay his client's legal expenses and committed various other torts and (3) the cost of 11 trial transcripts from the divorce proceedings in order to prepare for his deposition in the husband's suit against the insured. The insurer refused to cover these costs, asserting that they were not costs of defense and that the trial testimony was unrelated to the lawyer. The insured then initiated coverage litigation alleging that the insurer breached its

duty to defend by refusing to pay for these costs and refusing to defend him against the Maine Bar complaint. The carrier sought summary judgment on each of these issues.

The court first rejected the lawyer's contention that the insurer's duty to defend encompassed the prosecution of his counterclaim and third-party complaint because they were "'defensive' in nature" as they were designed to put pressure on the husband to settle his claims and were "inextricably intertwined with the defense" in that they arose from the "same core of operative facts." The court observed that "numerous jurisdictions have held that the insurer's duty to defend generally does not extend to prosecuting claims for affirmative relief." In the court's opinion, the counterclaim primarily sought affirmative relief that was "only tangentially related" to the husband's complaint. In addition, the court concluded that the policyholder had not demonstrated how prosecuting the third-party complaint would diminish or defeat the husband's complaint, as "[a]t most, [the lawyer] seeks to shift the burden of his liability to [the brother] by arguing that [the brother] induced him to act or provided him false information."

The court also rejected the lawyer's contention that the insurer had to defend him against the Maine Bar complaint because "he was required to respond to every complaint." The court determined that the policy provided only "limited coverage" for disciplinary proceedings, with the insurer obligated to reimburse expenses incurred in the investigation, settlement, defense or appeal of a "formal scheduled hearing to investigate charges of misconduct." Because there was no evidence that a hearing had been scheduled, the court granted summary judgment to the insurer. In doing so, the court also rejected the lawyer's contention that the insurer had violated Maine's Unfair Claims Settlement Practices Act because its claim handler allegedly misrepresented that one of the policies did not provide "disciplinary proceeding" coverage. According to the court, it did not matter whether or not this allegation was true because the insurer was relying on the policy language, and not its employee's representation, to bar coverage.

The court denied the insurer's motion with respect to the court transcripts. The insurer alleged that these costs were not "'reasonable and necessary' to the defense" because the lawyer actually wanted them to prepare his appeal of the divorce case and not to prepare for his own deposition. The court, however, concluded that there was a genuine dispute as to whether the transcripts were necessary and therefore it determined that summary judgment was inappropriate on that issue.