

Policyholder Not Entitled to Attorneys' Fees or Prejudgment Interest for Dispute Over Reasonableness of Underlying Defense Costs

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The United States District Court for the Eastern District of Wisconsin, applying Wisconsin law, has ruled that a policyholder is not entitled to attorneys' fees and prejudgment interest for costs incurred in coverage litigation with its professional liability insurer over the reasonableness of underlying defense counsel's billing rates. *HK Systems, Inc. v. Admiral Ins. Co.*, 2008 WL 177839 (E.D. Wis. Jan. 17, 2008).

The insured company had been involved in the construction of a building that burned and collapsed. The company was then sued in Milwaukee, Wisconsin. Its professional liability insurer recognized its duty to defend and selected defense counsel to defend the insured in the underlying suit. The company rejected the insurer's chosen counsel and hired a prominent Chicago-based law firm as its lead counsel. The insurer accepted the company's counsel in lieu of its recommended counsel, subject to a \$175-per-hour rate cap. The Chicago law firm's rates were substantially higher. The company proceeded to use the Chicago firm and requested payment in full based on the actual rates charged. The insurer paid the fees but at the capped rate of \$175-per-hour.

The company filed suit against the insurer to recover the full amount of the attorneys' fees. The court granted partial summary judgment in favor of the company, ruling that the insurer had voluntarily permitted the company to select its counsel and, therefore, the insurer was liable for reasonable attorneys' fees. After a bench trial, the court rejected the insurer's contention that the firm's rates were unreasonable. Subsequently, the company filed suit to recover attorneys' fees incurred in the litigation to determine the reasonableness of the rates and prejudgment interest.

The company sought a statutory award of 12 percent prejudgment interest or, in the alternative, a common law award of 5 percent prejudgment interest in addition to an award of its attorneys' fees. The court explained that the applicable statute permits an award of 12 percent prejudgment interest against an insurer when it refuses to pay a claim, within 30 days of receiving notice of the claim unless the insurer has reasonable proof that it is not responsible for the payment. Since an insurer is entitled to limit its duty to pay defense costs to a reasonable amount, the question before the court was whether the insurer had reasonable

proof that it was not responsible for paying fees in excess of \$175-per-hour. During the bench trial on the reasonableness of the Chicago firm's rates, the insurer presented evidence of attorneys' billing rates in the Milwaukee market. The Chicago firm's rate of almost \$500 per hour was significantly higher than the Milwaukee market rates, where only 5 percent of the firms had billing per hour rates in excess of \$330. In light of this evidence, the court determined that the insurer had a reasonable basis for withholding payment.

Next, the court rejected the company's alternative claim for 5 percent prejudgment interest. Wisconsin common law allows 5 percent prejudgment interest when there is a reasonably certain measure to determine the amount that is owed. The court observed that the reasonableness of the attorneys' fees raised a factual question that could not be resolved without trial. As such, the reasonableness of the fees was not readily determinable before the court's decision. The court also noted that the Supreme Court of Wisconsin had upheld the denial of prejudgment interest in a case where the defendant had made a partial payment—similar to the insurer's payment of fees capped at the \$175-per-hour rate in this case.

Finally, the court rejected the company's claim for attorneys' fees because the motion was defective under Rule 54 and on the merits. The court explained that the company's motion was insufficient because it failed to provide a fair estimate of the amount of fees as required by Rule 54. On the merits, the court noted that the narrow exception to the American rule permitted in Wisconsin when an insurer breaches its duty to defend did not apply because the insurer had not breached its duty to defend.