

# No Attorneys Fees to Insured for Coverage Litigation

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November/December 2002

In an unpublished decision, a federal court of appeals has held that, under New York law, an insurer who has not acted in bad faith is not liable for the insured's attorneys' fees in a coverage action, and need not provide coverage for legal expenses incurred in the underlying litigation after the insured rejected a settlement.

*Cowan v. Codelia*, No. 02-6035, 2002 WL 31478922 (2d Cir. Nov. 1, 2002).

This coverage litigation arose after a professional corporation was sued and requested coverage from its professional liability carrier. The insurer initially denied coverage, and the professional corporation sued for coverage. After the court held that the insurer had a duty to defend, the insurer provided a defense until the underlying case settled. Thereafter, the parties litigated whether the insurer was liable for the settlement and whether the law firm was entitled to its attorney's fees in the coverage litigation.

The court held that the law firm was not entitled to fees because it could not make "a showing of such bad faith in [the insurer's] denying coverage that no reasonable carrier would, under the given facts, be expected to assert it." The court found no such bad faith, noting that the insurer's arguments in support of no coverage had merit and been given serious consideration. The court next held that it was appropriate for the trial court to impose a cut-off date and cap for the professional corporation's recovery based on its rejection of a settlement in the underlying case. The court rejected the law firm's argument that it has no duty to consent to the settlement under the policy because the insurer's initial refusal to defend excused the law firm's obligations under the policy. The court reasoned that even though the insurer had initially disclaimed coverage, the policy's provisions governing the insured's duty to cooperate and the consent-to-settle clause still governed because the insurer had subsequently complied with the district court's order to defend the case. Finally, the court held that the professional corporation could recover only the reasonable value of legal services rendered in defense of the underlying litigation prior to the cut-off date, and that the lower court properly used the lodestar method as an aid in, rather than as the exclusive basis for, rendering its decision as to what fees were "reasonable."

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130