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NEWSLETTER

D&O Carriers Ordered to Pay Insureds' Attorneys Fees in Coverage Dispute

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The United States Court of Appeals for the Tenth Circuit has concluded that insureds who prevail in coverage litigation against their D&O carriers may recover attorneys fees under Oklahoma law. *Stauth v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 98-6405, 2001 U.S. App. LEXIS 232 (10th Cir. Jan. 9, 2001).

Directors and officers of Fleming Corporation successfully challenged the determination of their D&O carriers (National Union and Federal Insurance Company) that a lawsuit filed against them in 1996 related back to prior litigation (and hence a policy period in which the limits already had been depleted significantly). See *Stauth v. Federal Ins. Co.*, No. 97-6437, 1999 U.S. App. LEXIS 14006 (10th Cir. June 24, 1999) (discussed in August 1999 issue of the *Executive Summary*). They then sought attorneys' fees for the coverage litigation under an Oklahoma statute that requires insurers to offer a settlement or deny coverage within 90 days of submission of a "proof of loss." If litigation ensues over the insurer's decision, the prevailing party is entitled to attorneys' fees. See 36 Okla. Stat. §3629(B).

The court first held that the statute applied to declaratory judgment actions regarding coverage under third-party liability policies such as a D&O policy. It further concluded that it applied to claims for defense costs and indemnity, thus expanding prior Tenth Circuit precedent allowing attorneys' fees under the statute for a wrongful failure to defend.

Second, it rejected the carriers' argument that the statute did not apply because the insureds did not submit a "proof of loss." According to the court, all that was required to trigger the insurers' obligations under the D&O policies was a notice of claim. Thus, the court reasoned that the insurers could not insist on a further requirement that the insureds submit a "proof of loss" not required by the policies as a condition to coverage.

Finally, the court held that the award of fees was mandatory and not discretionary. Focusing on the operative phrase indicating that fees "shall be allowable," it followed Oklahoma appellate courts that concluded that the use of the word "shall" made an award of fees mandatory upon compliance with the statute.