

Insurer Has Duty To Advance Defense Expenses as They Are Incurred

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The United States District Court for the District of Colorado, applying Colorado law, has held that an insurer is required to advance defense expenses as they are incurred. *Aspen Ins. UK, Ltd. v. Fiserv, Inc.*, 2010 WL 5129529 (D. Colo. Dec. 9, 2010).

An insurer issued a bankers professional liability policy to a bank that subsequently was named as a defendant in numerous legal proceedings. The insurer contended that it had no duty to advance defense costs incurred in connection with the underlying matters because certain exclusions barred coverage. The insurer also argued that it need not advance defense costs incurred without the insurer's consent.

The court first addressed the issue of whether the policy exclusions applied to preclude coverage for defense expenses. The lead-in language for the exclusion for which the insurer relied provided that the insurer "shall not be liable to reimburse the Insured for Damages in connection with any claim. . . ." The court focused on the word "reimburse" and distinguished between reimbursement and advancement, concluding that the exclusion applied solely to the duty to indemnify.

The court next determined that the insurer's duty to advance defense costs was not discretionary. Although one policy provision stated that "the [insurer] may in its absolute discretion . . . advance Defense Costs prior to the final disposition of a Claim," the court noted that another policy provision stated that the insurer "shall advance, at the written request of the Insured," defense costs prior to the disposition of a Claim. As such, the court decided that the use of "shall" "creates an obligation and denotes mandatory compliance." The court reasoned that the discretionary component addressed in one policy provision referred to situations in which the insured did not submit a prior written request for the advancement of defense costs.

The court also rejected the insurer's argument that it need not advance defense costs for which the insured did not seek prior consent. The policy provided that "[o]nly those settlements, stipulated judgments and Defense Costs which have been consented to by the [insurer] shall be recoverable as Loss" The court concluded that the word "recoverable" related to the duty to indemnify, not the duty to advance defense costs. As such, the court opined that the insured did not need to obtain prior consent for the insurer to advance defense costs.

Finally, the court agreed with the insured that the insurer had a duty to advance defense expenses on a contemporaneous basis. The court reasoned that the purpose of the policy was to "limit the financial damage that [the insured] could incur defending against claims" and that "given the purposes and object of professional liability insurance policies," defense costs must be advanced as they are incurred.