

Preliminary Injunction for Advancement of Attorneys' Fees Denied

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A New Hampshire federal court denied a policyholder's request for a preliminary injunction that would require a professional liability insurer to continue to advance legal costs in connection with the policyholder's affirmative claims, finding that the policyholder had failed to demonstrate the required irreparable harm because monetary damages could remedy the insurer's alleged breach of contract. *Bennett v. St. Paul Fire & Marine Ins. Co.*, 2005 WL 1523377 (D.N.H. June 28, 2005).

The insurer issued a professional liability policy covering shareholders in a law firm. One of the insured lawyers filed a divorce action for his client against her husband. Subsequently, the husband filed for bankruptcy and sued the attorney for alleged violations of the bankruptcy automatic stay by litigating the divorce action after the bankruptcy petition was filed. Upon tender, the insurer hired a lawyer to defend the suit, who successfully moved to dismiss. The husband then sought to drop the bankruptcy action. The bankruptcy court denied that request in order to consider whether the husband filed the bankruptcy petition to avoid consequences in the divorce lawsuit and whether the policyholder's claims filed against the husband were non-dischargeable. The lawyer hired by the insurance company then sought approval from the insurer to file claims against the husband in bankruptcy court on behalf of the policyholder and the insurer agreed.

Subsequently, the insurance company revised its position and stopped advancing legal fees in connection with the counterclaim filed in bankruptcy court. The attorney hired by the insurer sought to withdraw, but the bankruptcy court denied the request. The policyholder then sought a preliminary injunction that would require the insurance company to resume funding the bankruptcy claims filed by the insured.

The court explained that preliminary injunctions are granted if the plaintiff shows: "(1) that the plaintiff is likely to succeed on the merits; (2) that the plaintiff will suffer irreparable harm if the injunction is not granted; (3) that the injury to the plaintiff outweighs any harm which granting the injunction would inflict on the defendant; and (4) that the public interest will not be adversely affected by the granting of the injunction." Applying this test, the court denied the policyholder's request for a preliminary injunction, finding that there was no risk of "irreparable representational harm" because the attorney hired by the insurer continued to defend him in the bankruptcy action, even though the insurer was no longer paying his legal fees. The lawyer was still bound diligently to defend the policyholder. As such, the court found that the policyholder's argument "that his representation will somehow be marred by [the insurer's] failure to provide funding up-front" lacked merit.

Additionally, the court rejected the policyholder's argument that the insurer's failure to pay would result in reputational harm. "[T]he only injuries [the policyholder] could claim he suffers from stem from the litigation costs that his lawyers have generated and continue to generate in post-trial activity." As the court explained, a breach of contract claim against the insurer would remedy these injuries. Because the "money damages will fully alleviate harm, then the harm cannot be said to be irreparable" and a preliminary injunction is not proper.

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