

ALERT

Court Holds Louisiana Statutory Damages and Attorneys' Fees Do Not Constitute Covered "Damages," But Insurer Must Defend

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A federal district court in Louisiana has held that statutory damages and attorneys' fees awardable for alleged violations of the notification provisions within the Louisiana public health code are punitive in nature and are not covered "damages" as defined in an errors and omissions policy. *Indian Harbor Ins. Co. v. Bestcomp Inc.*, 2010 WL 5471005 (E.D. La. Nov. 12, 2010). Nonetheless, the court held that the insurer had a duty to defend the insured under the policy for the underlying action alleging violations of the statute.

The insurer issued an errors and omissions policy to the insured, a medical services provider. The policy provided coverage for "damages," defined in the policy as "any compensatory sum and includes a judgment, award or settlement." "Damages" did not include "[f]ines, penalties, forfeitures, or sanctions," "punitive or exemplary amounts," or "[t]he multiplied portion of any multiplied awards." A class action suit was filed against the insured alleging that, by entering into a series of preferred provider organization agreements pursuant to which the insured negotiated discounts with medical providers for services, the insured qualified as a "group purchaser" as defined by Louisiana law. As such, the class action alleged that the insured violated the notice provisions of a Louisiana statute by failing to provide adequate notice when applying discounts to workers' compensation medical bills for medical services. Pursuant to the statute, damages are imposed on group purchasers who violate the notice requirements in an amount "double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand

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dollars, together with attorney fees." The insured tendered the claim to the insurer, and the insurer denied coverage. The insurer filed a declaratory judgment seeking a determination that no coverage exists because the statutory damages do not constitute "damages" as defined by the policy.

The court held that the statutory damages were not covered by the policy because they were punitive in nature. According to the court, "[g]iven that the statute permits aggrieved parties to receive compensation that exceeds the discounts applied, it cannot be said that such damages are compensatory in nature." The court determined that the statutory damages provision is punitive because its purpose is to punish group purchasers for failure to provide notice of discounts to health care providers. Moreover, the court held that the plain language of the policy expressly excluded coverage for the damages because the policy precluded coverage for "the multiplied portion of any multiplied awards." In addition, the court held that the policy did not apply to attorney's fees recoverable under the same statute because they "are not recoverable but for a violation of a penal statute."

Finally, the court held that the insurer had a duty to defend the insured in the underlying action. According to the court, a duty to defend existed because the underlying action constituted a claim, and the policy explicitly provided coverage for claims expenses. The underlying action constituted a claim because it was a demand for money arising out of alleged omissions in the provision of professional services. As such, the court held that the insurer must indemnify the insured for the claims expenses incurred in defending against the underlying action.