

**ALERT**

# Insurer Must Defend Claim for Non-Covered Damages

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Applying Louisiana law, the United States Court of Appeals for the Fifth Circuit has held that an insurer had a duty to defend even though the damages sought in the lawsuit were not covered. *Indian Harbor Insurance Co. v. Bestcomp, Inc.*, 2011 WL 6091131 (5th Cir. Dec. 7, 2011).

The lawsuit against the insured was brought as a putative class action and alleged that the insured discounted medical bills without proper notice in violation of state law. The complaint sought from the insured statutory damages of “double the fair market value of the medical services provided, but in no event, less than the greater of \$50 per day of non-compliance or \$2,000, together with attorney fees to be determined by the court.”

In the coverage litigation that followed, the court determined that the policy did not cover the statutory damages at issue because those damages “are properly considered penalties” and “the policy excludes fines, penalties, forfeitures [and] sanctions from the definition of ‘damages.’” According to the court, however, this determination did not negate the insurer’s obligation to defend the insured or to pay claim expenses arising out of the lawsuit. The court pointed out that the policy imposes on the insurer “the duty to defend any claim against [the insured]” and defines “claims expenses” for which the insurer is responsible to pay as reasonable and necessary fees, expenses and costs resulting from the defense of a claim. Because, as the court found, the underlying lawsuit constituted a “claim” within the meaning of the policy in that the complaint set forth a demand for money against the insured, the suit triggered the insurer’s defense obligations under the policy.

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