

ALERT

No Coverage for Attorneys' Fees Award Where Underlying Contract Action Did Not Allege "Wrongful Act"

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The United States District Court for the Central District of California has held that coverage was not available for an attorneys' fees award entered against an insured in a breach of contract action because the underlying action did not allege a "Wrongful Act." The court reasoned that, "in practical terms . . . if a contracting party fails to pay amounts due under a lawful contract and is sued for failure to pay, it cannot then obtain a windfall by having its payments covered by an insurance policy covering only 'wrongful acts.'" Coverage, the court held, "cannot be bootstrapped based solely on a claim for attorney's fees." *Screen Actors Guild Inc. v. Fed. Ins. Co.*, 2013 WL 3525273 (C.D. Cal. July 11, 2013).

In 2007, an actor and member of the insured union, the Screen Actors Guild, filed a class action suit against the union. The complaint alleged that the union had been collecting "foreign levy funds" due to actors and had held those funds for an "unreasonably long time." The complaint further alleged that the plaintiff class members were entitled to possession of their share of the funds. The union tendered the suit to its insurer, which agreed to provide coverage for defense costs, but stated that "there is no coverage for indemnity" and further reserved its rights. In 2010, the union settled the suit, agreeing to use reasonable efforts to allocate 90% of the foreign levy funds to the proper recipients within three years. In approving the settlement, the court awarded a \$15,000 enhancement payment to the lead plaintiff and \$315,000 in class counsel fees. The union then sought reimbursement from its insurer for the \$330,000 award. The insurer denied coverage for the award, and the union filed suit for breach of

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contract and bad faith.

Ruling on cross-motions for summary judgment, the court held that there was no coverage for the award because the underlying breach of contract allegations—*i.e.*, the allegations that the union had not distributed funds due and owing to the actors—did not allege a "Wrongful Act." Quoting *Health Net, Inc. v. RLI Insurance Co.*, 141 Cal. Rptr. 3d 649 (Ct. App. 2012), for the proposition that "[p]erformance of a contractual obligation . . . is a debt the [insured] voluntarily accepted . . . not a loss resulting from the wrongful act," the court stated that, in the present case, the union's own position was that it was obligated to account for and distribute the funds to actors. The court noted that California courts have reached this result "even in the absence of an express exclusion." Rejecting the insured's attempt to distinguish *Health Net*, the court explained that while the definition of "Loss" in the policy at issue here was broader, that "is irrelevant to the determination whether the claims in this case *arise out of* a 'Wrongful Act.' . . . '[I]f the entire action alleges no covered wrongful act under the policy, coverage cannot be bootstrapped based solely on a claim for attorney's fees.'"