

Damages For Insurer's Breach Of Duty To Defend Not Capped At Policy Limits, Says Nevada Supreme Court

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The Nevada Supreme Court ruled that when an insurer breaches its duty to defend, damages are not capped at policy limits; rather, an insurer may be liable for any consequential damages caused by the breach. *Century Surety Co. v. Andrew*, 2018 WL 6609591 (Nev. Dec. 13, 2018).

The coverage dispute arose out of an automobile accident involving a truck that was used by the driver for both personal and business use. Century provided commercial liability insurance to Blue Streak, the driver's employer. Century refused to defend Blue Streak in the underlying personal injury litigation on the basis that the driver was not acting within the scope of his employment at the time of the accident. After the parties to the underlying litigation settled, the injured party, as assignee of Blue Streak, sued Century, alleging breach of contract and bad faith.

A Nevada federal district court ruled that Century breached its contractual duty to defend but did not act in bad faith. As to the scope of permissible damages, the court certified the following question to the Nevada Supreme Court:

[w]hether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or [whether] the insurer [is] liable for all losses consequential to the insurer's breach.

The Nevada Supreme Court noted that the majority of courts have concluded that where there is no bad faith, damages are ordinarily limited to the amount of policy coverage, plus attorneys' fees and costs. However, the court adopted the minority view, holding that damages arising from a breach of the duty to defend are not automatically capped at policy limits plus defense costs. The court reasoned that the "objective is to have the insurer 'pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract.'" Thus, a party aggrieved by an insurer's refusal to defend may be entitled to recover all consequential damages flowing from that breach, including any underlying judgment, plus interest.

Importantly, the court noted that a policyholder is not automatically entitled to recover the entire underlying judgment as a consequence of the insurer's breach. Rather, the policyholder must establish that an insurer's breach of the duty to defend caused an excess judgment.

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