



Insurance Coverage Alert

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INSURER HAS NO OBLIGATION UNDER SUPPLEMENTARY PAYMENTS PROVISION TO PAY ATTORNEY FEES OR COSTS ARISING SOLELY FROM UNCOVERED CLAIMS

California's Second Appellate District Disagrees with Fourth Appellate District

In Prichard v. Liberty Mutual, California's Fourth Appellate District held that the supplementary payments provisions of a liability insurance policy, providing for payment of "all costs taxed against the insured" in a suit the insurer defends, apply to attorney fees awarded as costs "despite the absence of even the possibility of coverage for the causes of action that generated the large cost award."¹ However, on June 25, 2009, in the State Farm v. Mintarsih case, the Second Appellate District disagreed, holding that attorney fee awards resulting from claims that were never potentially covered under the policy are not covered under supplementary payment provisions.²

The Mintarsih court examined the Prichard court's rationale that attorney fees generated by uncovered claims are covered as supplementary payments because supplementary payments are a function of the insurer's defense obligation, and an insurer must defend both covered and uncovered claims. Prichard did not distinguish between the insurer's contractual obligation to defend potentially covered claims, and the insurer's implied-in-law duty to defend an entire mixed action involving both covered and uncovered claims. Because the contractual duty to defend extends only to potentially covered claims, the Mintarsih court concluded that the obligation to pay costs awarded in suits the insurer defends encompasses only those claims the insurer agreed to defend under the contractual terms of the policy. Therefore, the implied-in-law obligation to defend claims that are not covered does not give rise to an obligation to pay costs awarded against the insured that can be attributed solely to the uncovered claims.

In Mintarsih, the underlying lawsuit against the insured involved potentially covered claims for false imprisonment of a household employee (Mintarsih), as well as an uncovered wage and hour claim based on Labor Code violations. Mintarsih's statutory right to recover attorney fees was based solely on the Labor Code violations, which she conceded were not covered. The Mintarsih court therefore held that, absent a potential for coverage, there was no basis to hold the insurer liable for the attorney fees awarded as costs against the insured.

Mintarsih is a welcome ruling for insurers. It is well-reasoned and clearly explains why the analysis in Prichard was misplaced. However, it is likely that the California Supreme Court will be petitioned to resolve the issue, either by Mintarsih or the next party who receives an adverse ruling based on Prichard or Mintarsih.

¹Prichard v. Liberty Mutual Insurance Company, 84 Cal. App. 4th 890, 912, fn. 22 (2000).

²State Farm General Insurance Company v. Mintarsih, (Case No. B202888) ____ Cal. App. 5th ____; 2009 Cal. App. Lexis 1021 (2009).

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