To Get Paid, Get Reasonable

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The Devil's Advocate

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Four corners, eight corners, sixteen corners, or whatever – generally the insurance coverage issue comes down to an all or nothing decision that there is or is not a duty to reimburse litigation costs. Duty-to-defend policies may take a different analytical path, but generally end up in the same place when it comes to paying the lawyer. Regardless of the type of policy, one thing is constant: Only *reasonable* legal fees and expenses are covered. No matter what a policy says and no matter what the firm inserts into its billing agreement, the legal fees and expenses must be reasonable.[1] While some of the more notorious court battles have been over coverage, unreasonable fees are a potential issue wherever fees and expenses are billed.

At the high end, multi-million dollar companies have become *multi-billion* dollar companies, the typical securities class action[2] demand has grown from six or seven figures to eight or nine, yet median settlements have consistently been under $10 million. And there are cases where defense legal fees exceed median settlement amounts, even approaching coverage limits. High defense costs enhance the nuisance value of cases even if the intrinsic value of cases has not changed. Besides the direct cost of lawyers, there has also been an explosion in the use of consultants, litigation support providers, and other vendors that can turn the incidental impact of typical litigation expenses like travel and transcripts into a multi-million dollar cancer. If defense costs cannot be managed, insureds and insurance carriers will be financing a spiraling industry of plaintiff firms, defense firms, and third-party vendors – *regardless of whether the underlying case values justify this expense.*

Insured clients with the right to select their own counsel often select counsel without regard to cost and act as though they have no incentive to manage their fees. Indeed, many client-insureds made the mistake of using their transactional firm for litigation or of hiring the first mega-firm they can find because they assume that bigger must be "better." Any combination of inexperience, incompetence, and inefficiency causes legal fees and expenses to explode when firms deploy platoons of lawyers and non-lawyer timekeepers charging average rates over $300 per hour, and fees often well over $100K per month (not including the third-party expenses). Firms that might have used five or so timekeepers a decade ago kept adding more and more, including new categories of quasi-clerical, contract, or temporary staff, because warm bodies multiplied firm

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[1] The implied "reasonableness" limitation for fees incurred by insurance defense counsel is just one manifestation of the universal rule that all legal fees and expenses must be reasonable. Judicial oversight of fees reflects the fact that "a fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients which transcend ordinary business relationships and prohibit the attorney from taking advantage of the client." *Matter of Swartz*, 141 Ariz. 266, 686 P.2d 1236, 1243 (Ariz. 1984). The license to practice law "is not a license to mulct the unfortunate." *Recht v. State Bar*, 218 Cal. 352, 355, 23 P.2d 273, 274 (Cal. 1933).

[2] There are plenty of non-securities claims, but securities cases are closely tracked and annual statistics are easier to find. *See*, The Securities Class Action Clearinghouse, maintained by Stanford Law School, http://securities.stanford.edu/index.html. If anything, the securities class action represents an idealized form of faux litigation since the cases tend to be larger, almost no such cases are actually tried, and the cast of law firms is small.