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Taking the First (Legal) Step: Fee Shifting in Insurance Coverage Litigation

When embarking on litigation, a common question clients ask is: Can I recover my attorneys' fees? Short of a contractual fee-shifting provision, the answer is almost invariably, "No." A potentially valuable exception exists, however, in New York insurance coverage cases.

The Defensive Posture Exception

In New York, the "defensive posture" exception provides that an insured who prevails in a declaratory action brought by an insurance company seeking to deny coverage can recover its fees expended in defending that action. In deciding whether the exception applies, the key question is which party took the first "legal step" in the dispute over the duty to defend and/or indemnify. A recent case from the Southern District of New York discussed the application of the defensive posture exception to two litigants in one complex litigation and arrived at two vastly different results.

The Case: *Hervochoon v. Iona College*

In *Hervochoon v. Iona College*, coverage disputes arose among defendant Iona College, third-party defendant Hennessey Construction Co., Inc., and Gotham Insurance Company in connection with the underlying personal injury action. Magistrate Judge Paul E. Davison determined that Hennessey was entitled to the defensive posture exception, but Iona was not. Judge Cathy Seibel agreed and affirmed Judge Davison's Report & Recommendation.

To simplify a complicated procedural history, Iona College filed a letter with the federal court seeking leave to file a third-party complaint against Gotham Insurance. In response, Gotham Insurance commenced litigation against Hennessey Construction in New Jersey state court. Iona and Hennessey then each filed a complaint against Gotham in the federal action. Based on that sequence of events, Judge Seibel found Iona had taken the first legal step by filing the letter and was not entitled to the defensive posture exception. In so doing, the court rejected Iona's argument that *only* commencing an action can satisfy the "first legal step" requirement. Hennessey, however, was entitled to the defensive posture exception and reimbursement of its fees. Judge Seibel reasoned that Gotham's commencement of the state court proceedings against Hennessey was the "first legal step" and so put Hennessey in a defensive posture. That posture did not change when Hennessey filed its complaint against Gotham in the federal action because that claim was only a "mirror image" of the state court proceeding.

Takeaway

Fee shifting is available in insurance coverage disputes for insureds who fall within the defensive posture exception. Attorneys representing insureds in pre-litigation coverage disputes should tread carefully as disputes move towards litigation to maximize

the application of that exception to their clients.