



Idaho Supreme Court Holds There Is Coverage for Attorney's Fees Even Though There Are No Covered Damages

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Last week, the Idaho Supreme Court held that Employers Mutual Casualty Company is required to cover attorney's fees awarded against a builder that it defended against faulty workmanship claims, even though the court found the insurer had no duty to cover damages in the underlying suit.

The underlying suit involved a construction defect claim against the insured. A jury concluded that the insured breached its implied warranty of workmanship to a homeowner and awarded \$126,611. The jury also concluded the insured violated two provisions of the Idaho Consumer Protection Act and awarded \$2,000. The homeowners were also entitled to recover their costs and attorney's fees of \$296,933.

The Court held that no insurance coverage was owed for the damages awarded to the homeowners for breach of warranty. However, the commercial general liability policy at issue contained a "Supplementary Payments" provision that provided, in pertinent part, as follows: "We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend: . . . All costs taxed against the insured in the 'suit'." The policy defined "suit" as "a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies *are alleged*." (Emphasis added).

The trial court ruled that the insurer was obligated to provide coverage for the homeowner's attorney's fees, despite the absence of coverage for the construction defect damages. The Idaho Supreme Court agreed: "Under the plain language of the contract, [the insured's] policy states that damages only need to be 'alleged' to trigger coverage, they do not need to be proven. Since the [homeowners] clearly alleged damages that implicate the applicable provisions of the policy, [the insurer] is obligated to pay [a]ll costs taxed against the insured in the 'suit.'"

Regarding the seemingly inconsistent result where the insurer is ordered to make payment when the claim was not covered, a concurring justice wrote: "If [the insurer] does not want to be obligated to pay all costs assessed against its insured in lawsuits that [the insurer] defends, then it simply has to change the wording of its policy. It is certainly free to draft a policy that provides it will pay all costs taxed against the insured in a suit that [the insurer] defends only if the insured is found legally obligated to pay damages to which the insurance applies. It could also have limited its obligation to the payment of costs assessed against its insured on causes of action or theories of liability upon which its insured is found legally obligated to pay damages to which the insurance applies. It is not up to us to rewrite [the insurer's] policy to say what it now wishes it would have said."

Employers Mut. Cas. Co. v. Donnelly, 2013 WL 1693661, Idaho, April 19, 2013 (NO. 38623), can be found [here](#).