



When Can Recovery From Insurers Exceed Policy Limits?

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Many jurisdictions permit a policyholder, on the right facts, to recover damages exceeding its policy limits for an insurer's breach of its duty of good faith and fair dealing. The Nevada Supreme Court recently went one step further and held that when an insurer breaches its duty to defend, the policyholder may be, under certain circumstances, able to recover consequential damages from the insurer exceeding the policy limits.

In *Century Surety Co. v. Andrew*, the insured, Blue Streak, was an auto detailing business. Michael Vasquez, apparently the owner of Blue Streak, struck Ryan Pretner while driving a truck that Vasquez used for both business and personal activities. Pretner sued Blue Streak and Vasquez. Blue Streak tendered the claim to its insurer, Century, which denied a duty to defend based on a contention that Vasquez was not using the vehicle for business activity at the time. Century contended this excluded the claim from coverage.

As a result of Century's denial of its duty to defend, no one appeared to defend Blue Streak in Pretner's suit, and default judgment was entered against Blue Streak and Vasquez for more than \$18,000,000 – an amount far exceeding the \$1,000,000 limit of the Century policy.

The court in the coverage suit determined that Century breached its duty to defend. The issue that made its way to the Nevada Supreme Court was whether the damages that Century owed were capped at its \$1,000,000 policy limit, or whether it might owe part or all of the \$18,000,000 judgment

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entered against Blue Streak as a result of the default.

Though the Nevada Supreme Court claimed that the “majority” view is that damages for breach of a duty to defend are capped at the policy limit, it nonetheless adopted what it termed the “minority” view: Under certain circumstances, damages for breach of an insurer’s duty to defend may exceed the policy limits.

The court based its decision primarily on Nevada law (similar to many other states’ laws) providing that insurance policies are subject to the same rules as other contracts. Because Nevada’s general contract law allows recovery of consequential damages for a breach of a typical contract, it also allows recovery of such damages, on the right facts, for a breach of a policy obligation to defend.

It is important to note that the Nevada Supreme Court did not hold that damages exceeding policy limits are available in every case involving breach of a carrier’s duty to defend. Rather, recovery of damages exceeding policy limits depends on the facts and circumstances of each particular case.

Thus, where the carrier breaches its duty to defend and the insured is unable to defend itself, resulting in entry of judgment exceeding policy limits, the insured may be able to recover up to the full amount of the judgment as damages for the insurer’s breach. However, if the insured is able to defend in the carrier’s absence, it may not be able to recover damages exceeding policy limits.

The key takeaway: Policyholders in states that have adopted the Nevada approach (or that have not yet adopted any approach) may have the ability – on the right facts – to recover amounts exceeding policy limits as damages for a carrier’s breach of its duty to defend.