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EXPERT ANALYSIS

Billing Rates Should Not Discourage Policyholders' Selection of Independent Counsel

By Walter J. Andrews, Esq., and Jennifer E. White, Esq.
Hunton & Williams

It is well known that insurance companies negotiate low attorney hourly rates for defense of their policyholders.[1] When a conflict arises that requires policyholders to retain independent counsel, insurers frequently try to impose those same rates on the policyholders' selected attorneys. The ensuing fight over billing rates can discourage policyholders from selecting the best attorneys for the job. But there are many reasons why insurers' preferred hourly billing rates should not dissuade policyholders from selecting experienced independent counsel who charge higher rates commensurate with their experience. This commentary examines the business, economic and legal reasons that policy-holders may want or need to hire attorneys whose rates are higher than what the insurer wants to pay and what the circumstances are under which insurers will be required to foot the bill.

DEFENSE COUNSEL AND COSTS

An insurance contract's language governs the scope of defense duties if a policyholder is sued or faces legal action. However, it is generally accepted that insurers must pay for policyholders' defense costs as long as there is a possibility the contract covers the underlying allegations. This is consistent with the view that liability policies generally impose broad defense duties on insurers.[2]

Typically, insurers select defense counsel for their policyholders because of their obligation to cover defense costs. However, policyholders are entitled to choose independent counsel — for which the insurer must pay — in a variety of circumstances, depending on the language of the policy itself, state law and the circumstances of the underlying claim.[3] Common circumstances include a reservation of right to deny coverage, above-policy-limits exposure to liability, punitive damages claims, covered and non-covered claims, or a significant difference of opinion regarding case strategy and tactics.[4]

When a policyholder exercises the right to select independent counsel, the insurer must cover all "reasonable attorney fees." However, what is considered "reasonable" can become a point of dispute, as insurers frequently seek to limit these fees to the same rates they negotiated with local insurance defense counsel.

Yet, most courts will not rely on the insurer's parameters to determine what is "reasonable."[5] Instead, numerous factors are relevant to that determination, including:

- The nature of the case and the issues presented.
- The time and labor required.
- The amount of damages.
- The result obtained.

- The attorney's experience, reputation and ability.
- The usual price attorneys charged for similar services in the same area.
- The amount of awards in similar cases.[6]

Policyholders should consider these factors as well when determining what independent counsel to retain. Though the lure of below-market rates is hard to ignore, there are distinct reasons that policyholders should resist pressure from their insurers and look beyond billing rates when faced with complex cases.

EXPERIENCED INDEPENDENT COUNSEL: THE BENEFITS

Institutional knowledge

Policyholders can find support in case law for hiring defense counsel already familiar with their businesses and the issues they face in litigation. Hiring defense counsel with this type of "institutional knowledge" arguably gives the policyholder an advantage in litigation, which is important to justify relatively higher billing rates because of the higher probability of achieving a favorable result.

Most courts will not rely on the insurer's parameters to determine what is a "reasonable" attorney fee.

Moreover, hiring counsel familiar with the policyholder's business and litigation risks may be a more economical solution than hiring less expensive counsel who would have to work a substantial number of hours to gain the same familiarity. Such conversance in the business can also result in large savings in time and money during discovery, when the most time and money are usually expended.[7]

Also, experienced and familiar counsel may be best situated to coordinate defenses against similar, repetitive claims that together pose large risks to a policyholder's business. For example, the retention of national counsel has proved beneficial in asbestos litigation. Because asbestos claims usually arise in multiple jurisdictions, national counsel not only coordinates local attorneys who deal with the day-to-day litigation, but also considers the effect of those claims — individually and collectively — on business demands, insurance and overall litigation and settlement strategy.

And, by coordinating efforts, national counsel can reduce duplication and improve consistency, thereby making the policyholder's defense more effective and efficient and, ultimately, less costly.[8] Yet, the breadth of national counsel's responsibilities in such circumstances demands infrastructure and experience that are also accompanied by higher billing rates. Thus, when there are many moving parts to a claim or series of claims, it pays to consider attorneys who the insurer may not consider because of their higher rates.

Experience or expertise

Subject matter expertise may be another reason for more expensive independent counsel. Courts have recognized that experience litigating the subject matter of the dispute is worth the rates that accompany such ability.[9] For example, a Web development start-up faced with data breach lawsuits may want to find counsel familiar with cyberliability issues or personal and advertising injury clauses and exclusions. A produce distributor may want to hire counsel familiar with defending against food contamination claims.

Familiarity with the opposing party, opposing counsel, judge or court also can prove important to a successful defense and, therefore, may justify hiring counsel at a higher hourly rate. Likewise, experience with cases of similar risk may make a more expensive choice the best bet. For example, as many courts have recognized, the high risk of a high-damages verdict can justify hiring skilled defense counsel who has faced similar risks and charges a higher hourly rate commensurate with that experience. The need for good results in the face of such "high-stakes" litigation has justified as much as a four-digit hourly rate.[10]

Capacity to handle the litigation

Complex cases also require that counsel have the capacity to handle such litigation. In its most basic form, this means that the firm needs people and technology. "People" includes not just

experienced attorneys and staff to handle the litigation itself, but also enough attorneys and staff to handle the firm's other work while the policyholder's attorneys focus their attention on the policyholder's matter. Firms that have cut their rates low to accommodate an insurer's demands may not have the bandwidth to take on more involved litigation and keep up on the rest of their cases.

Another capacity-related benefit is the people who accompany insurance attorneys who are billing at higher rates — other practitioners in the firm. Complex litigation often raises questions that touch other areas of the law. A personal injury case arising from a pollution event, for example, may implicate federal or state regulations, raise insurance coverage issues, or affect workers' compensation. A large, diverse practice gives the policyholder access to not only the trial attorneys who handle the litigation, but also other members of the firm who can weigh in on trial strategy in light of those other (or competing) concerns.

Technology should be another capacity consideration. The right technology can make it easier and less expensive to manage, review, organize and disseminate the vast quantities of data exchanged in complex litigation. Likewise, in an era of near-constant data breaches, the right software, hardware, encryption and firewalls can protect sensitive materials exchanged between client and counsel, or between opposing parties, during high-risk cases.

But the right technology — along with staff trained to use that technology — can be expensive. Frequently, the firms with lower billing rates do not have the capital to implement the technological improve-ments or plans needed to manage more complex, multifaceted litigation. In contrast, attorneys with higher billing rates usually have invested in technology that, ultimately, can save significant attorney time and client money by streamlining document review and research.

Conclusion

It is widely understood that insurance companies negotiate economical billing rates with counsel they frequently employ. But bargain rates often will not cut it when there is a dispute between the policy holder and insurer about coverage, exposure or case strategy. Complex cases demand counsel with particularized skills and experience — and their rates are often higher than what insurance companies would prefer to pay.

But policyholders should not be dissuaded from selecting the best attorneys for the job just because insurers balk at the cost. Experienced representation comes at a price — a worthwhile price that insurers are increasingly forced to pay when the complexity and risk of the case justify the expense.

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NOTES

[1] *See, e.g., Watts Water Techs. v. Fireman's Fund Ins. Co.,* No. 05-2604-BLS2, 2007 WL 2083769, at *10 (Mass. Super. Ct., Suffolk County July 11, 2007) (recognizing that insurers "retain so many attorneys in so many cases" and therefore "have the leverage to obtain billing rates lower than the usual rates charged by law firms, since many firms are willing to reduce their rates in return for the hope or promise of obtaining a substantial volume of legal work").

[2] *See, e.g., County of San Bernardino v. Pac. Indem. Co.,* 65 Cal. Rptr. 2d 657, 664 (Cal. Ct. App., 4th Dist. 1997) ("It is by now a familiar principle that a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity.") (citation and internal quotation marks omitted); *Buss v. Super. Ct.,* 939 P.2d 766, 775 (Cal. 1997) ("To defend meaningfully, the insurer must defend immediately. ... To defend immediately, it must defend entirely.").

[3] *Compare, e.g.,* Fla. Stat. § 627.426(2)(b)(3) (insurer must retain counsel mutually agreeable to the parties) and *Armstrong Cleaners Inc. v. Erie Ins. Exch.,* 364 F. Supp. 2d 797, 801 (S.D. Ind. 2005) ("[T]he policyholders are entitled to select their own counsel to defend the underlying claim, subject to reasonable approval by the insurer, with reasonable fees and expenses paid by the insurer."), with Alaska Stat. § 21.96.100(d) (where conflict of interest or reservation of rights, insurer only obliged to pay rate "actually paid by the insurer to an attorney in the ordinary course of business in the defense of a similar civil action in the community in which the claim arose or is being defended") and Cal. Civ. Code § 2860(c) (where conflict of interest, insurer obliged to pay "rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended").

[4] *See, e.g., Prashker v. U.S. Guar. Co.,* 136 N.E.2d 871 (N.Y. 1956) (policyholder entitled to independent counsel, paid for by insurer, when defense counsel's duty to defeat liability on any grounds conflicted

with insurer's interest in having defense counsel defeat only covered causes of action); *69th St. & 2nd Ave. Garage Assocs. v. Ticor Title Guar. Co.,* 207 A.D.2d 225 (N.Y. App. Div., 1st Dep't 1995) (same when conflicting trial strategies); *Ansonia Assocs. v. Pub. Serv. Mut. Ins. Co.,* 693 N.Y.S.2d 386 (N.Y. Sup. Ct., N.Y. County 1998) (same when insurer refused to settle underlying claim and, thereby, exposed insured to substantial punitive damages claim), *aff'd,* 257 A.D.2d 84 (N.Y. App. Div., 1st Dep't 1999); *Parker v. Agric. Ins. Co.,* 440 N.Y.S.2d 964 (N.Y. Sup. Ct., N.Y. County 1981) (same where claim exceeded policy limits and included punitive damages).

[5] *See, e.g., Watts Water Techs.,* 2007 WL 2083769 at *11 (considering "the usual price charged for similar services by other attorneys in the same area ... *not the usual price paid by insurance companies* to other attorneys for similar services in the same area") (emphasis added) (citation and internal quotation marks omitted). *But see Danaher Corp. v. Travelers Indem. Co.,* No. 10 Civ. 0121, 2014 WL 4898754, at *6 (S.D.N.Y. Sept. 30, 2014) ("[E]ven where a client has actually paid counsel's hourly rates after its insurer breaches its duty to defend, the court must still determine whether such rates are reasonable.").

[6] *Linthicum v. Archambault,* 398 N.E.2d 482, 488 (Mass. 1979), *abrogated on other grounds by Knapp Shoes Inc. v. Sylvania Shoe Mfg. Corp.,* 640 N.E.2d 1101 (Mass. 1994); *Oscar W. Larson Co. v. United Capitol Ins. Co.,* 845 F. Supp. 458, 462 (W.D. Mich. 1993) (reasonable rates where "(1) plaintiff's attorney possessed extensive experience and high professional standing; (2) the litigation involved significant time and labor, and plaintiff's attorney's time and labor were commensurate with that of other attorneys engaged in the same litigation; (3) the underlying action presented liability of potentially significant magnitude; and (4) plaintiff's attorney fees were comparable to those of attorneys in similar professional relationships with their clients in similar litigation"), *aff'd,* 64 F.3d 1010 (6th Cir. 1995). But see Cal. Civ. Code § 2860(c) (limiting rates to those "which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended").

[7] *See ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* No. 501-CV-100, 2005 WL 6124839, at *2 (W.D.N.C. May 31, 2005) (approving rates higher than those charged by typical in-forum attorneys because existing defense counsel had represented the policyholder "throughout years of negotiations with and litigation against other insurance companies involved with the [same type of cases] brought throughout the country"), *aff'd,* 472 F.3d 99 (4th Cir. 2006); *State Nat'l Ins. Co. v. White,* No. 8:10-cv-894, 2012 WL 6021462, at *3 (M.D. Fla. Oct. 26, 2012) ("nature and length of the professional relationship with the client" relevant to determining propriety of relatively high fees), report and recommendation adopted as modified, No. 8:10-CV-894, 2012 WL 6025761 (M.D. Fla. Dec. 4, 2012).

[8] *See Watts Water Techs.,* 2007 WL 2083769, at *8 ("By retaining national counsel, [policyholder] reasonably can have [national counsel] prepare a litigation strategy common to all the 300 lawsuits, research legal issues common to all the claims, allocate work among the various local counsel, and ensure that work product valuable to all is shared with all local counsel to avoid needless duplication of work.").

[9] *La. Generating LLC v. Ill. Union Ins. Co.,* No. 10-516, 2014 WL 1270049, at *5 (M.D. La. Mar. 27, 2014) (approving relatively high hourly rate for counsel from nationally recognized law firm who had "decades ... of experience, honed expertise, and the complex nature of the issues involved justify such an hourly rate"); *State Nat'l Ins. Co.,* 2012 WL 6021462, at *3 ("novelty and difficulty of questions involved" and "skill required to perform the legal services properly" relevant to appropriate hourly fee).

[10] *See Watts Water Techs.,* 2007 WL 2083769, at *10.

The need for good results in the face of "high-stakes" litigation has justified as much as a four-digit hourly rate.

Walter Andrews (L) is head of **Hunton & Williams**' insurance litigation and recovery practice and focuses on complex insurance litigation and counseling and reinsurance arbitrations. He works out of the firm's offices in Miami and McLean, Va., and can be reached at wandrews@hunton.com. **Jennifer White** (R) focuses her practice in the firm's McLean office on complex civil litigation, with an emphasis on insurance coverage and reinsurance matters. She can be reached at jewhite@hunton.com. This commentary presents the views of the authors and does not necessarily reflect those of Hunton & Williams or its clients. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the commentary.