

## 11th Circuit Holds Potential Attorneys' Fee Award Alone Constitutes Potential "Loss" Triggering Duty to Defend under Professional Liability Policy

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Highlighted by a decision this past week in the 11th Circuit, a small divide may be beginning to emerge in the treatment of coverage for underlying plaintiff's attorneys' fees under professional liability policies, a split that can be traced to how policies define the term "loss."

The decision came in *Aegis Elec. & Gas Int'l Servs. v. ECI Mgmt., LLC*,<sup>[1]</sup> which arose from a class action against a property management company alleging the improper withholding and failure to return security deposits, in violation of Georgia statute.

ECI Mgmt. LLC (ECI) was insured under a Real Estate Services Professional Liability Insurance Policy, which provided coverage for claims made against the insured seeking to hold the insured liable for any loss as a result of a "wrongful act." "Loss" was defined as "a compensatory monetary amount for which the Insured may be held legally liable, including judgments (inclusive of any pre-judgment or post-judgment interest), awards, or settlements negotiated with the prior approval of the Insurers, but shall not include" the following:

1. any disgorgement, return, withdrawal, restitution or reduction of any sums which are or were in the possession or control of any Insured, or any amounts credited to any Insured's account;
2. fines, sanctions, taxes, penalties or awards deemed uninsurable pursuant to any applicable law;
3. punitive, exemplary, treble damages or any other damages resulting from the multiplication of compensatory damages; [or]
4. equitable relief, or fees, costs or expenses incurred by the Insured to comply with any such equitable relief.

In its opinion, the court concluded that, under the applicable Georgia statute, the return of security deposits to a plaintiff was not a "loss" under Georgia law. Importantly, the court analyzed the applicable statute concluding that the amounts potentially owed for improperly retained security deposits were a "return" of those deposits, which fell within the first "loss" definition carve-out.

However, the court then turned to the issue of whether the underlying plaintiff's statutory attorneys' fees could constitute a "loss" under the policy. The court primarily looked at the punitive and treble damages carve-out in this analysis. The court noted that an award of attorneys' fees was not provided for without intentional action by the landlord, potentially tying the award to an award of treble damages. Nonetheless, the court did not agree that an attorneys' fee award itself flowed from an award of treble damages under the statute to invoke the treble damages carve-out. The court further recognized 11th Circuit precedent, holding that attorneys' fees did not constitute "damages," effectively distinguishing "attorneys' fees" from treble damages and the term "damages" from the term "loss." Based upon this analysis, the court concluded that attorneys' fees met the definition of a "loss," and exposure to potential attorneys' fees triggered a duty to defend.

This raises an important distinction in policy language, which was alluded to by the court. Multiple courts, including the 11th Circuit, have held that attorneys' fees are not damages. See *Alea London Ltd. v. Am. Home Servs.*, 638 F.3d 768 (11th Cir. 2011). As a result, some professional liability policies that include "damages" within their definition of "loss" have been held to not afford coverage for attorneys' fee awards. See, e.g., *Health Net, Inc. v. RLI Ins. Co.*, 206 Cal.App.4th 232 (Cal. App. 2012), but see *Republic Franklin Ins. Co. v. Albemarle County Sch. Bd.*, 670 F.3d 563, 569 (4th Cir. 2012) (holding that attorneys' fees and liquidated damages constituted

"damages" within the definition of a "loss"). Conversely, for policies that do not include "damages" within their definition of "loss", the 11th Circuit now joins other courts in concluding that attorneys' fees may constitute a "loss" when the definition of "loss" is not limited to damages. See, e.g., *Continental Casualty Co. v. Board of Education*, 489 A.2d 536 (Md. 1985).

Given the limited number of cases to address this issue, room still exists for insurers with the instant policy language to argue that attorneys' fees are not covered under a similar "loss" definition carve-out, though caution must be employed, as some states already hold that statutory attorneys' fees are compensatory in nature. See, e.g., *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007); *Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827, 832 (Wa. 2012); *Hess v. Volkswagen Grp. of Am., Inc.*, 398 P.3d 27, 33 (Ok. App. 2017), *Brown v. Quicken Loans, Inc.*, 2013 W.V. Cir. LEXIS 8039 (W.V. Cir. June 17, 2013). Insurers with broad definitions of "loss" within their policy language, as in *ECI Mgmt.*, should carefully review their individual language before denying coverage for attorneys' fees.

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[1] 2020 U.S. App. LEXIS 24037 (11th Cir. July 30, 2020).

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