Duty to Appeal

Examining Insurers' Obligations to Their Insureds Post-Verdict

By Susan Knell Bumbalo

An insurer's obligation to defend its insured may not conclude with an adverse judgment against the insured.

After several hours of deliberation the jury has returned a verdict against the insured and in favor of the plaintiff. The insured had general liability insurance in place with limits of $1 million per occurrence. The jury, however, awarded $2 million to the plaintiff, plus another $100,000 in punitive damages. Punitive damages are precluded from coverage under the policy. The insured, who has no excess coverage, insists that the insurer fund an appeal of the entire verdict, even though only certain aspects of the awarded damages are covered under the policy. The insurer has retained you as coverage counsel and asks for your advice regarding its rights and obligations regarding an appeal. Where do you begin?

As discussed in detail below, this article examines the circumstances in which an insurer will likely have a duty to prosecute an appeal from an adverse judgment, its obligations if an insured does not want to appeal, the approaches that courts have taken when covered and uncovered claims are at issue, and the consequences for failing to appeal. This article also reviews how various courts have addressed coverage for the costs associated with an appeal.

Defense Provisions in Standard Commercial General Liability Policies

The insuring agreement of Coverage A in standard commercial general liability (CGL) policies obligates insurers to pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies. In addition, the insuring agreement provides that the insurer will defend the insured against any suit seeking those damages. Standard CGL policies also generally contain "supplementary payments" provisions that specifically identify the types of costs and expenses that the insurer agrees to pay when defending an insured. Such costs typically include such things as pre- and post-judgment interest, and occasionally, they include premiums for appellate bonds. According to the terms of the policy, these costs are generally paid outside the limits of the insurance policy.

Although standard CGL policies generally contain a provision specifying that an insurer's defense obligations end "when we have used up the applicable limit of insurance in the payment of judgments or settlements," the policies typically do not include any additional provisions address-

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ing whether the duty to defend continues post-verdict or whether the duty extends to prosecuting an appeal on behalf of the insured, or both.

Determining an Insurer's Rights and Obligations to Prosecute an Appeal

Before you advise your client, you will want to become reacquainted with the jurisdiction's approaches to the duty to appeal generally as well as the "reasonable grounds" that would generate a duty to appeal.

Duty to Appeal Generally

Although liability policies ordinarily do not address whether an insurer has an obligation to prosecute an appeal, the vast majority of courts that have addressed this issue have held that the duty to defend extends to the duty to prosecute an appeal when there are "reasonable grounds" to believe that the insured's interests will be served by an appeal. *See, e.g., MedMarc Cas. Ins. Co. v. Forest Healthcare, Inc.*, 359 Ark. 495, 501, 199 S.W.3d 58, 62 (Ark. 2004); *Davis v. Allstate Ins. Co.*, 434 Mass. 174, 180, 747 N.E.2d 141, 146 (Mass. 2001); *Delmonte v. State Farm Fire and Cas. Co.*, 90 Haw. 39, 49, 975 P.2d 1159, 1169 (Haw. 1999). *See generally* Barry R. Ostrager, *Handbook on Insurance Coverage Disputes* §5.04(b) (18th ed. 2016); Allan D. Windt, *Insurance Claims & Disputes* §4:17 (6th ed. 2013). A surprising number of states, however, appear not to have addressed this topic at all. Other states have addressed the issue only in dicta. *See, e.g., Goddard ex rel. Estate of Goddard v. Farmers Ins. Co.*, 173 Or. App. 633, 641, 22 P.3d 1224, 1229 (Or. Ct. App. 2001) ("[A]n insurer's duty to defend does not necessarily end with a judgment. The duty to defend includes the duty to appeal in an appropriate case.").

Some courts have held that the contractual obligation to defend any "suit" includes the obligation to prosecute an appeal in court. *See, e.g., Ursprung v. Safeco Ins. Co. of America*, 497 S.W.2d 726, 730–31 (Ky. Ct. App. 1973); *Grand Union Co. v. General Acc., Fire & Life Assur. Corp.*, 4 N.Y.S.2d 704, 711 (N.Y. App. Div. 1938), *aff'd*, 279 N.Y. 638 (N.Y. 1938). Other courts, relying on the absence of explicit policy language, conclude that the phrase "defend any suit" is ambiguous and must be construed against the insurer. For example, in *Cathay Mortuary (Wah Sang), Inc. v. United Pacific Ins. Co.*, 582 F. Supp. 650, 655 (N.D. Cal. 1984), the court noted that while the policy explicitly required the insurer to pay premiums on appeal bonds, the policy did not explicitly provide that the insurer was required to pursue the appeal. The court concluded that the policy was ambiguous, stating that "the duty to appeal is not precluded by contract unless the contract very specifically exempts the insurer from the duty to appeal." *Id.* at 655–656. As a result of the purported ambiguity, the court concluded that California law supported imposing a duty to pursue post-trial remedies—including a duty to appeal. *Id.* at 659. In *Associated Automotive, Inc. v. Acceptance Indem. Ins. Co.*, 705 F. Supp. 2d 714, 724 (S.D. Tex. 2010), the court made an "*Erie* guess" pertaining to how the Texas Supreme Court would address an insurer's duty to appeal, holding that because the policy at issue did not have an express provision to the contrary, the "insurer's duty to defend includes a duty to appeal an adverse judgment against its insured if there are reasonable grounds for the appeal." *Id.* at 725.

Other courts have based a duty to fund an appeal on different grounds, such as finding that an insurer has a fiduciary duty to file and prosecute an appeal. *Sanchez ex rel. Sanchez v. Kirby*, 131 N.M. 565, 567–68, 40 P.3d 1009, 1011–12 (N.M. Ct. App. 2001). Still others have found that "the obligation of good faith and fair dealing requires the insurer to prosecute an appeal in circumstances where reasonable grounds are present." *Illinois Founders Ins. Co. v. Guidish*, 248 Ill. App. 3d 116, 122, 618 N.E.2d 436, 441 (Ill. App. Ct. 1993). In one unusual case, after determining that the insurer's reservation of rights letter created a new contract, the court concluded that the letter was ambiguous because the insurer did not limit its defense obligation to trial costs, so the insurer was also responsible for the costs of the appeal. *MMG Ins. Co. v. Myer*, No. 1:07-CV-4, 2008 WL 822082, at *3 (D. Vt. Mar. 26, 2008).

A minority of courts have decided that an insurer has a duty to prosecute an appeal using a standard different from the "reasonable grounds" standard. The most widely cited case is *Palmer v. Pacific Indem. Co.*, 74 Mich. App. 259, 254 N.W.2d 52 (Mich. App. Ct. 1977), *holding modified on other grounds by Harts v. Farmers Ins. Exch.*, 597 N.W.2d 47 (Mich. 1999). The court rejected the "reasonable grounds" standard, believing that it placed "a harsh burden on the insured." 74 Mich. App. at 264, 54 N.W.2d at 55. Instead, the court held that an insurer "will be expected to proceed with an appeal, if requested by an insured, if it writes a broad 'duty to defend' clause into its insurance contracts." 74 Mich. App. at 265, 54 N.W.2d at 55. Another case that did not adopt the reasonable grounds standard is *Hawkeye-Security Ins. Co. v. Indem. Ins. Co.*, 260 F.2d 361, 363 (10th Cir. 1958), in which the Tenth Circuit Court of Appeals held that an insurance company can only be liable for refusing to appeal in cases of bad faith or fraud.

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2009) (holding that the insurer was liable for the costs and expenses of an appeal because the general liability policy provided that the insurer would "'indemnify [the city] all costs and expenses incurred in the investigation, adjustment, settlement, defense *and appeal* of any claim or suit....'") (emphasis in original).

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Reasonable Grounds

Generally, courts have recognized at least three different scenarios under which "reasonable grounds" exist for the purposes of giving rise to an insurer's duty to appeal. They include (1) advice of counsel; (2) the existence of unsettled law on the issues that are the subject of the appeal; and (3) the success of the appeal. However, an unsuccessful appeal does not prove a lack of reasonable grounds.

Some courts have relied on the opinion of defense counsel when determining whether reasonable grounds exist. In *Reichert v. Continental Ins. Co.*, 290 So. 2d 730 (La. Ct. App. 1974), after a judgment in excess of the policy limits was entered, defense counsel informed the insurer that although the insured's liability was no longer an issue, the amount of the judgment was excessive and likely would be reduced on appeal. Defense counsel also informed the insurer that the law was unsettled whether the insurer had a duty to pursue an appeal. Although the insurer paid its policy limits and posted the appeal bond, it chose not to provide counsel for the appeal. The insured hired counsel at its own expense, but on appeal, the amount of the judgment was confirmed. The insurer argued that it had no duty to defend the appeal when the only issue was the extent of the insured's exposure in excess of its policy limits. The Louisiana Court of Appeal rejected this argument and held that "where, after trial on the merits, reputable counsel gives cogent reasons for an appeal on behalf of the insured, and urgently recommends that, in his professional opinion, an appeal is in order, an insurer must appeal on behalf of its insured." *Id.* at 734.

Similarly, in *Jenkins v. Ins. Co. of North America*, 220 Cal. App. 3d 1481, 272 Cal. Rptr. 7 (Cal. Ct. App. 1950), after a judgment in excess of the policy limits was entered against the insured, defense counsel informed the insurer that several of the trial court's rulings provided grounds for appeal. Nevertheless, the insurer deposited its policy limits and interest with the court and refused to defend the appeal. The court held that the trial court properly instructed the jury regarding an insurer's duty to appeal if reasonable grounds exist, noting that the insurer's "own counsel believed the ruling to be in error and subject to appeal. [The insurer's] refusal to follow its attorney's advice left [the insured] to personally finance his appeal, and is indicative of bad faith." 220 Cal. App. 3d at 1490, 272 Cal. Rptr. at 12. *See also Truck Ins. Exchange v. Century Idem. Co.*, 76 Wash. App. 527, 533, 887 P.2d 455, 459 (Wash. Ct. App. 1995) (reversing summary judgment in favor of the insurer because a material issue of fact existed regarding reasonable grounds to appeal when defense counsel indicated that the jury instructions on damages were a "fertile area for appeal"); *Aetna Ins. Co. v. Borrell-Bigby Electric Co., Inc.*, 541 So. 2d 139, 141 (Fla. Ct. App. 1989) (finding that the insurer acted in its own best interest rather than its insured's interest when it disregarded advice of counsel and refused to appeal). *But see Hawkeye-Security*, 260 F.2d at 363 (finding, by the Tenth Circuit, that while worth considering, the insurer's failure to follow the recommendation of its defense counsel was not sufficient to show that the insurer breached its duty to its insured).

An insurer may likewise rely on counsel's advice that an appeal of an adverse judgment is not appropriate. In *Ursprung*, the court concluded that the insurer had not unreasonably failed to appeal since "the insured was represented by counsel who advised the insurer that appeal was not necessary and that the insured's interests were otherwise protected." 497 S.W.2d at 731. *See also Chrestman v. U.S.F.& G. Co.*, 511 F.2d 129, 130 (5th Cir. 1975) (finding that the insurer was not obligated to fund appeal after defense counsel obtained a remittitur from the trial judge and concluded there were no reasonable grounds to appeal).

Some courts, when addressing whether reasonable grounds existed for an insurer to prosecute an appeal, concluded that such grounds exist when the law on the particular issue is unsettled. In *Associated Automotive, Inc.* the insurer argued that reasonable grounds did not exist because at the time that the judgment was entered against the insured, various Texas appellate courts had recognized the particular legal theory upon which the insured was found liable. 705 F. Supp. 2d at 726. The court disagreed, holding that there was a genuine issue of material fact whether reasonable grounds existed, noting that at the time that the judgment against the insured was entered, the Texas Supreme Court had warned against the viability of that theory of liability. 705 F. Supp. 2d at 726–27. In *Schneider v. Commonwealth Land Title Ins. Co.*, 844 N.Y.S.2d 657, 661 (N.Y. App. Div. 2007), the court concluded that the insureds had reasonable grounds to appeal the portion of a judgment that was adverse because at the time of the appeal, the particular real property issue was an unsettled area of the law. *Id.*

Courts across the country uniformly have held that an appeal need not be successful to demonstrate that there were "reasonable grounds" to appeal. In *Heshion Motors, Inc. v. Western Int'l. Hotels*, 600 S.W.2d 526 (Mo. Ct. App. 1980), the insured sought reimbursement from its insurer for the attorney's fees and costs in its unsuccessful appeal. The court considered whether an unsuccessful appeal was evidence that the insured had no reasonable grounds to appeal and stated, "[i]f this question is answered in the affirmative, then doing so would be tantamount to holding that 'reasonable grounds' for an appeal are non-existent in every unsuccessful appeal regardless of the nature of the case, the issues tendered on appeal, and the presence or lack of definitive authority." *Id.* at 540. The court concluded that "reasonable grounds" could not be based solely on

whether the appealing party was successful. *Id.* It reviewed that the law was unsettled, no party to the appeal argued that it was frivolous or in bad faith, and concluded that reasonable grounds existed despite the lack of reversal of the judgment in the underlying action. *Id. See also, Ginder v. Harleysville Mut. Cas. Co.*, 49 F. Supp. 745, 748 (E.D. Pa. 1942), *aff'd*, 135 F.2d 215 (3rd Cir. 1943) (noting that a court must examine whether reasonable grounds exist not in light of an unsuccessful appeal, "but rather as of the time [the insured] was told the defendant would not pay [the] judgment and there was no merit in an appeal."); *Reichert*, 290 So. 2d at 734 ("[T]he ultimate success or failure of an appeal may not constitute the criteria for determining whether or not reasonable grounds existed for taking an appeal. In such instances, the pivotal issue is whether reasonable grounds for taking an appeal to protect a substantial right of the Insured existed at the conclusion of the trial on the merits.").

A successful appeal is strong evidence of reasonable grounds. In *Kaste v. Hartford Acc. & Indem. Co.*, 170 N.Y.S.2d 614 (N.Y. App. Div. 1958), the insurer refused its insured's request to prosecute an appeal. The insured then paid for the appeal, which resulted in the court granting the motion to set aside the verdict. In addressing whether the insured had reasonable grounds to appeal, the court acknowledged that "[i]n light of the result of the appeal, it would seem that the issue relative to the presence of reasonable grounds for the appeal has been determined." *Id.* at 616.

To the extent that courts have addressed which party has the burden of proof, they have concluded that the burden falls on the insured to prove that "reasonable grounds" exist for an appeal. This corresponds with the general rule that it is the insured's burden to prove coverage. In *P. Gioioso & Sons, Inc. v. Liberty Mut. Ins. Co.*, No. 123738BLS1, 2016 WL 5372570 (Mass. Super. Ct. Aug. 27, 2016), defense counsel advised that the appeal had only a 5 to 10 percent chance of success. Nevertheless, the insured maintained that its insurer's defense obligation included a duty to appeal, arguing that any likelihood of a successful appeal indicated that there were reasonable grounds. The court rejected this argument, stating, "At a minimum, the insured must point to a particular appellate issue and explain why the trial court committed error and why this error was sufficiently prejudicial that judgment for the plaintiff might be reversed." *Id.* at *8. In *Jenkins*, the court affirmed the trial court's jury instruction that the insured had the burden of proving that the insurer refused to appeal, despite reasonable grounds for an appeal. 220 Cal. App. 3d at 1492, 272 Cal. Rptr. at 13. *See also Chrestman*, 511 F.2d at 130 (noting that the insured had burden of proving reasonable grounds for pursuing an appeal to recover damages from the insurer's failure to appeal).

Insurer's Obligations if Insured Does Not Want to Appeal

Not surprisingly, few courts have addressed what an insurer's obligation is if an insured does not want to appeal. This is common sense because the decision whether to appeal most frequently arises when it is in the best interest of an insured to appeal, such as with a judgment in excess of the policy limits, or if an insurer has taken the position that the damages are not covered by the policy. Moreover, the language of the policy typically gives an insurer the *right* and the duty to defend. Although only a handful of decisions have even touched on this subject, it seems unlikely that an insured could prevent its insurer from pursuing an appeal.

In deciding whether the costs and interest for a judgment that accrued during the pendency of an appeal constituted defense or indemnity payment, the Tennessee Supreme Court remarked that the insured has no control over the course of litigation once the insurer undertakes the defense, including having "no voice whatever in determining the propriety of an appeal." *Casey-Hedges Co. v. Southwestern Sur. Co.*, 201 S.W. 137, 138 (Tenn. 1918).

In *Johnson v. Maryland Cas. Co. of Baltimore*, 171 N.W. 908 (Neb. 1919), the Supreme Court of Nebraska, while address-

ing whether the insurer was responsible for posting the appeal bond, commented that the policy did not prevent the insurer from taking an appeal. Under unique circumstances, in *Sanchez ex rel. Sanchez*, the insured was served by publication after his whereabouts could not be determined and an attorney hired by the insurer filed an answer on his behalf. 131 N.M. at 566, 40 P.3d at 1010. The attorney, however, presented no witnesses and filed a motion for partial summary judgment on behalf of the insurer, arguing that there was no coverage for punitive damages. After a verdict in excess of the policy limits and awarding punitive damages, the insurer paid its policy limits. Two months later, the insured was located and assigned all his rights against his insurer to the plaintiff in exchange for a covenant not to execute the remainder of the judgment. Nevertheless, the insurer filed an appeal on his behalf, which the court dismissed as moot. 131 N.M. at 568, 40 P.3d at 1012. The court, suspecting that the appeal had at least something to do with trying to prevent a bad-faith action, reasoned that while it would be in the insured's best interest to reverse the verdict, based on the insured's inaction and silence, it was apparent that the insured had no interest in having the insurer protect his rights. *Id.*

Some courts have concluded that an insurer has an obligation to prosecute an appeal from an underlying judgment that rendered the claim uncovered, if there is potential that the claim would be covered, based on the appeal.

Appeals Involving Covered Versus Uncovered Claims

Some courts have concluded that an insurer has an obligation to prosecute an appeal from an underlying judgment that rendered the claim uncovered, if there is potential that the claim would be covered, based on the appeal. In *Iacobelli Construction Co. v. Western Cas. & Sur. Co.*, 130 Mich. App. 255, 265–66, 343 N.W.2d 517, 522 (Mich. Ct. App. 1984), the court held that the insurer had a duty to pay its insured's defense costs on appeal of a judgment in which the insured had been found guilty of intentional trespass. The insured argued that his liability insurer should have prosecuted the appeal because the jury instructions in the underlying action failed to advise that negligent trespass was an option. Although the intentional trespass award was affirmed on appeal, the court held that the insurer breached its duty to defend, noting that if the insured had been vindicated on appeal, there would have been coverage under the policy. *Id.*

A California Court of Appeal took the same approach in *Pritchard v. Liberty Mut. Ins. Co.*, 84 Cal. App. 4th 890, 101 Cal. Rptr. 2d 298 (Cal. Ct. App. 2000). At the close of evidence in the underlying trial, the insurer informed defense counsel that it would not pursue an appeal because the alleged defamatory statements first occurred before the beginning of its policy period. The court held that the insurer was required to continue defending during the appeal because, had a new trial been granted, the defamation judgment may have been overturned, and thus "the potential for indemnification liability continued into the appeal period." 84 Cal. App. 4th at 904, 101 Cal. Rptr. 2d at 307. *See also Reller, Inc. v. Hartford Ins. Co. of the Southeast*, 765 So. 2d 87, 88 (Fla. Dist. Ct. App. 2000) (holding that the insurer that defended an underlying action in which compensatory damages and injunctive relief were awarded and had satisfied the award of the former "had no further obligation because 'the claims giving rise to coverage have been eliminated from the suit.'"); *Crist v. Ins. Co. of N. America*, 529 F. Supp. 601, 606 (D. Utah 1982) (concluding that the insurer did not have a duty to defend an appeal when the trial court dismissed the covered claims against the insured, leaving only uncovered claims for temporary and permanent injunctions on appeal); *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 417 (Minn. 1997) (ruling that "an insurer cannot withdraw from a defense until its duty to defend all arguably covered claims has been completely extinguished—in other words, when no further rights to appeal those arguably covered claims exist").

Courts have taken varied approaches when the only remaining claim on appeal is for uncovered punitive damages. In *Executive Builders, Inc., v. Motorists Ins. Cos.*, No. IP00-0018-C-T/G, 2001 WL 548391, at *9–10 (S.D. Ind. Mar. 30, 2001), the district court predicted that the Supreme Court of Indiana would hold that an insurer had no obligation to prosecute an appeal when the only remaining claim was for punitive damages because it was contrary to Indiana public policy and would unfairly require an insurer to "appeal from a risk for which no consideration was given." In contrast, the Supreme Court of Kansas held that although an insurer had no duty to indemnify its insured for the punitive damages award that was reduced on appeal, the insurer nevertheless breached its duty to prosecute the appeal, stating, "we do not look with favor upon an insurance company that abandons its insured and refuses to appeal relying on its immunity from a claim for punitive damages." *Guarantee Abstract and Title Co. v. Interstate Fire and Cas. Co.*, 228 Kan. 532, 539, 618 P.2d 1195, 1200 (Kan. 1980), *superseded by statute on other grounds by Southern American Ins. v. Gabbert-Jones, Inc.*, 13 Kan. App. 2d 324, 769 P.2d 1194 (Kan. Ct. App. 1989)). In *Hatfield v. 96-100 Prince St., Inc.*, 972 F. Supp. 246, 248 (S.D.N.Y. 1997), the court concluded that the insurer had a duty to prosecute an appeal of an award of attorney's fees even though the award was based on an uncovered award of punitive damages because the attorney fee award was compensatory in nature.

Costs Associated with Appeal

After you conclude that a duty to appeal exists, you will want to determine which costs your insurer client is obligated to pay when prosecuting an appeal.

Posting Appellate Bonds

The 1973 ISO primary policy form expressly required that the insurer pay for

appeal bonds as a part of the Supplementary Payments. When amended in 1985, standard ISO CGL policies removed that express requirement; but many excess policies include a provision in the Supplementary Payments section of their policy form obligating the insurer to pay the premium on an appeal bond, but the provision *will not* require that the insurer actually furnish the bond. Courts have interpreted primary policy language, including the cost of bonds to release attachments, to mean that the insurer is not obligated to fully fund the bond or to post the bond collateral. In *Graf v. Hospitality Mut. Ins. Co.*, 956 F. Supp. 2d 337, 340 (D. Mass. 2013), *aff'd*, 754 F.3d 74 (1st Cir. 2014), the policy required that the insurer pay "[t]he cost of bonds to release attachments" but not "to furnish these bonds." The *Graf* court recognized that there was "a clear difference in this provision between the 'cost' of the bonds to release attachments and 'bond amounts.'" *Id.* at 343. *See also Hyundai Motor America v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. SACV 08-0020 JVS (RNBx), 2011 WL 13134897, at *3 (C.D. Cal. Sept. 1, 2011) (holding that when the policy required the insurer to pay costs of bonds but not furnish the bond, the insurer was responsible for bond premiums but not for posting bond collateral).

Similarly, in *James River Ins. Co. v. Interlachen Propertyowners Ass'n.*, No. 14-3434 ADM/LIB, 2016 WL 3093383, at *1 (D. Minn. June 1, 2016), *aff'd*, 2017 WL 1379483 (8th Cir. 2017), the professional liability policy stated that the insurer would pay "claims expenses," which the policy defined to include the cost of appeal bonds. The policy also stated that the insurer was not "obligated to apply for or furnish appeal bonds on your behalf." *Id.* The insurer continued to represent the insured during the appeal, but it refused the insured's request to post the appeal bond after the plaintiff filed an appeal of the judgment for damages that were not covered by the policy. The insured settled by assigning its claims against its carrier to the plaintiff. When determining whether the settlement was enforceable, the court rejected the argument that the definition of "cost' of the appeal bond was subjective and could vary, noting that there was a distinction between the meaning of the words "cost" and "furnish." *Id.* at *6. The court also reasoned that if the insurer posted the full amount of the bond, and the appeal was unsuccessful, the insurer would have functionally indemnified its insured for uncovered claims.

In another case, heard in the U.S. District Court for the Eastern District of Pennsylvania, when reviewing policy provisions for defense and supplementary payments, the court interpreted an insurer's agreement to pay "the costs of bonds" to mean "whatever amount would be necessary to secure a bond." *Charter Oak Ins. Co. v. Maglio Fresh Food*, 45 F. Supp. 3d 461, 474 (E.D. Pa. 2014), *aff'd*, 629 Fed. App'x. 239 (3rd Cir. 2015). The court remarked that the insurer should consider the financial strength of its insured when deciding whether "cost" meant merely the premium or the full amount of the bond. *Id.* In this case, because the insured was a financially weak company, the "cost" of the bond would be the full amount necessary for the appeal. *Id.*

If the policy does not include a condition requiring an insurer to pay for the premium of an appeal bond, courts across the country nevertheless have concluded that insurers have such an obligation if the insurer has the right to control the defense. These decisions tend to be older, reflecting a change in the policy language over the years. In *Johnson*, decided in 1919, the policy at issue provided that the insurer would "at its own cost... investigate all accidents and defend all suits." 171 N.W. at 909. The Supreme Court of Nebraska held that this language required the insurer to post the appeal bond. *Id. See also, Reserve Ins. Co. v. McPeak*, 181 So.2d 662, 664 (Fla. Dist. Ct. App. 1966) ("Having elected to appeal, it became the duty of the insurer to protect the insured to whatever extent necessary, against any damages or property losses"); *Larson v. Dauphin Realty Co.*, 228 F. Supp. 952, 954 (E.D. Pa. 1964) ("The insurer, having assumed the complete and exclusive control of the defense in this action, has adopted the liability of its insured with all of the attendant consequences flowing from a final judgment"); *Holmes v. Hughes*, 125 Cal. App. 290, 293, 14 P.2d 149, 150 (Cal. Dist. Ct. App. 1932); *Ferry v. National Motor Underwriters*, 244 Ill. App. 241, 249 (Ill. App. Ct. 1927); *Rochester Mining Co. v. Maryland Cas. Co.*, 128 S.W. 204, 206 (Mo. Ct. App. 1910).

In contrast, in a more recent decision by the Nebraska Court of Appeals, the supplementary payments section of the policy provided that the insurer would pay, with respect to any claim or suit that it defended, bail bonds and the cost of bonds to release attachments, but the section did not mention supersedeas bonds. The court held that the policy was unambiguous and did not require the insurer to post such a bond in connection with the appeal of an adverse judgment. *Wiegert-Stathes v. American Family Mut. Ins. Co.*, No. A-08-1041, 2009 WL 3381578, at *7 (Neb. Ct. App. Oct. 20, 2009).

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The Amount of the Appellate Bond

Standard CGL policies typically contain a provision addressing appellate bonds that provide that the insurer will pay the costs of bonds "but only for bond amounts within the applicable limit of insurance." In addressing this or similar language, the majority of courts have concluded, logically, that an insurer's responsibility for a bond extends only to the limits of the policy. *See Graf*, 956 F. Supp. 2d at 337; *Miami International Realty Co. v. Paynter*, 807 F.2d 871, 874 (10th Cir. 1986) (allowing the carrier to post $500,000 bond, which was the policy limits, on a $2.1 million judgment); *Cansler v. Harrington*, 231 Kan. 66,

73, 643 P.2d 110, 115 (Kan. 1982) (allowing the insurer to post $15,000 bond, which represented the policy limits, on a $25,000 judgment); *Fletcher v. Ratcliffe*, No. 89C-06-160 SCD, 1995 WL 790992 (Del. Super. Ct. Dec. 7, 1995) (allowing the insurer to post a $40,000 bond on a $1.5 million judgment). One court has suggested that an insurer's duty to act in good faith "requires it to assist the insured in attempting to arrange bond for the amount of the judgment in excess of the policy limits." *Bowen v. Government Employees Ins. Co.*, 451 So. 2d 1196, 1198 (La. Ct. App. 1984). Capping an insurer's obligation for an appellate bond at the policy limits makes sense since a successful claimant, post-appeal, can generally levy judgment directly against the bond. Requiring an insurer to post an appellate bond in excess of the policy limits would effectively result in an insurer paying in excess of the policy limits if the claimant satisfied the judgment through the collection of the appellate bond.

An insurer's failure to appeal cannot be bad faith if there was no proof of grounds for an appeal.

A minority of courts, however, have taken the opposite approach and held that an insurer must post an appellate bond in excess of its policy limits. In *Buford Equipment Co., Inc. v. Centennial Ins. Co.*, 857 F. Supp. 1499, 1501 (M.D. Ala. 1994), the policy at issue provided that the insurer would pay, in addition to the applicable limits of liability, the "premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability, and cost of bail bonds...." The court found that unless the insurer no longer had a duty to defend, it had "a clear duty to pay the premiums on the appeal bond, regardless of whether the amount of the bond exceeded the policy's limits because the language of the policy couched the duty to post bond as one 'in addition to the applicable limits of the policy.'" *Id.* at 1504–05. *See also Seessel v. New Amsterdam Cas. Co.*, 204 S.W. 428, 429 (Tenn. 1918) ("The law does not release a party to a contract from liability already incurred, because, in order to remove that liability, it becomes necessary to incur the risk of greater liability.").

When faced with policy language that clearly limits an insurer's obligation to post appellate bonds only up to the policy limits, some insureds have sought to force insurers to post a bond in excess of the policy limits by alleging that such costs are an element of damages as a result of bad-faith claims handling. Any alleged bad faith on the part of the insurer in handling the underlying litigation, of course, should not require the insurer to post a bond amount in excess of its policy limits. The Supreme Court of New Jersey wrestled with this issue in *Courvoisier v. Harley Davidson of Trenton, Inc.*, 162 N.J. 153, 742 A.2d 542 (N.J. 1999). The insured claimed that the insurer acted in bad faith for failing to settle the underlying litigation within the policy limits. After holding that in general an insurer need only post a bond within its policy limits, the court acknowledged that if the insurer were ultimately found to have acted in bad faith and was liable for the excess judgment, it followed that the bond should reflect that amount. 162 N.J. at 165, 742 A.2d at 549. Ultimately, however, the court held that the insurer's alleged bad faith could not be taken into account during the bonding process. 162 N.J. at 166–167, 742 A.2d at 549.

Appellate courts in other jurisdictions reached similar conclusions. *See, Wilcox v. Board of Education of Warren Co.*, 779 S.W.2d 221, 224 (Ky. Ct. App. 1989) (finding that the insurer's alleged bad faith for failure to settle the underlying action within the policy limits could not be part of an appeal bond inquiry but rather was to be "determined by some future trial proceeding which should include [the insurer] as a party"); *Fitzgerald v. Addison*, 287 So.2d 151, 154 (Fla. Dist. Ct. App. 1973) (same).

Consequences for Failing to Appeal

Your advice to your insurer client will want to take into account the consequences for failing to fund an appeal if a court later finds that the insurer should have done so. A court will generally award damages to the insured. If a court finds that your client also acted in bad faith, the court will factor this into the damages award.

Damages Awardable for Failing to Appeal or Fund an Appeal

When deciding whether to appeal an adverse judgment, insurers often ask what the consequences would be if they elected not to fund the appeal. In most instances, if an insurer fails to prosecute an appeal of an adverse judgment and a court in subsequent coverage litigation finds that the insurer should have funded the appeal, the damages awarded to the insured include the attorney's fees for the appeal, interest, and the costs of the appeal. Courts, however, generally stop short of holding the insurer responsible for paying the portion of the judgment above the policy limits.

In *Mannheimer Bros. v. Kansas Cas. & Sur. Co.*, 184 N.W. 189, 191 (Minn. 1921), the Minnesota Supreme Court rejected the argument that the insurer was responsible for the full amount of the loss because it wrongly failed to appeal a judgment in excess of the policy limits, commenting that the insurer's failure "cannot be held to enlarge the limitation as to the amount fixed as reimbursement for injuries to persons." Courts in other jurisdictions have generally taken the same approach. *See Pharmacists Mut. Ins. Co. v. Myer*, 187 Vt. 323, 335 (Vt. 2010); *Cornwall v. Safeco Ins. Co. of America*, 346 N.Y.S.2d 59, 71 (N.Y. App. Div. 1973); *Travelers Indem. Co. v. East*, 240 So.2d 277 (Miss. 1970); *New York & New Brunswick Auto Express Co. v. Mass. Bonding and Ins. Co.*, 67 N.J. Super. 401, 405, 170 A.2d 519, 521 (N.J. Super. Ct. Law Div. 1961). Whether an insurer must reimburse the attorney's fees and costs in any coverage litigation relating to the failure to appeal largely depends on whether the jurisdiction allows insureds to recover attorney's fees in coverage litigation generally. *See, e.g., Iacobelli Construction Co.*, 130 Mich. App. at 267, 343 N.W.2d at 523 (rejecting the insured's argument that the fees incurred in the coverage litigation were consequential damages and upholding the Michigan rule that an insured may not recover attorney's fees to enforce insurance coverage).

Depending on a particular state's laws, the insurer may also be liable to the in-

sured for additional damages. For example, in *Reichert*, the court awarded a penalty, based on a section of the Louisiana insurance code, for failure to pay a claim without probable cause. 290 So.2d at 734–35. Also, a Michigan court held that damages for mental distress would be a proper matter for a jury to consider after an insurer failed to prosecute an appeal of a malpractice judgment excess of the policy limits. *Palmer*, 74 Mich. App. at 266, 254 N.W.2d at 56.

Some courts have recognized that an excess carrier that steps up to fund an appeal if the primary carrier refuses to do so is entitled to have the primary carrier reimburse it for those costs. In *Fidelity General Ins. Co. v. Aetna Ins. Co.*, 278 N.Y.S.2d 787 (N.Y. App. Div. 1967), the court held that the excess insurer, in discharging the primary insurer's duty to appeal, "was entitled to be reimbursed for the reasonable expenses thereof as equitable subrogee to the rights of the insured." In *Borrell-Bigby Electric Co.*, the court held that the primary insurer had an obligation to appeal the adverse judgment and could not walk away from its defense obligation by interpleading its policy limits. 541 So.2d at 141. The court further concluded that the primary carrier had to reimburse the excess carrier for the defense costs that it incurred in connection with the appeal. *Id.*

At least one court has addressed whether an insurer is responsible for the loss of use of the bond collateral if it wrongfully failed to defend. In *Hyundai Motor America*, the insured had to obtain the appeal bond from another insurer because its insurer failed to prosecute the appeal of a patent infringement suit. 2011 WL 13134897, at *1. The insured, therefore, argued that it was entitled to damages for the loss of the use of the $25 million that it used as collateral for the bond. The court rejected this argument and held that because the policy did not require the first insurer to post the collateral for the bond in the first instance, there were no contract damages for loss of use of the amount that the insured posted to secure the bond. *Id.* at *3.

Failing to Appeal and Bad Faith

As discussed in detail above, courts generally hold that an insurer has an obligation to prosecute an appeal on behalf of its insured if "reasonable grounds" exist to support an appeal. Courts have held that the converse is likewise true. An insurer's failure to appeal cannot be bad faith if there was no proof of grounds for an appeal. *Koppie v. Applied Mut. Ins. Co.*, 210 N.W.2d 844, 847 (Iowa 1973) ("We are not now inclined to encourage expansion of our appellate case backlog with utterly hopeless appeals brought to gain negotiating time."). *See also Wynnewood Lumber Co. v. Travelers Ins. Co.*, 91 S.E. 946, 947 (N.C. 1917) (failure to prosecute an appeal is not of itself a tort or breach of the implied contract of good faith).

If the insurer has been found to have acted in bad faith, however, additional damages may be awarded. In *Jenkins*, the court affirmed the jury's award of compensatory and punitive damages in favor of the insured after noting that the evidence indicated that the insurer never evaluated the legal basis for an appeal and ignored its attorney's advice. 220 Cal. App. 3d at 1491, 272 Cal. Rptr. at 13. In *Cathay Mortuary*, the court held that the insurer breached its contractual duty of good faith by failing to prosecute the appeal. 582 F. Supp. at 659. The federal district court, applying California law, further held that the insurer was liable for the full amount that the insured paid to settle the underlying action, even though that amount was awarded for uncovered damages. 582 F. Supp. at 659–60. An insurer found to have acted in bad faith may also be required to reimburse its insured for the full amount of the bond, in excess of the policy limits. In *Zahler v. DeSantis*, No. 4326, 1980 WL 194170 (Pa. Com. Pl. Apr. 10, 1980), the court suggested that if an insurer, which controlled the litigation, failed to settle and acted in bad faith, it would be liable for the full amount of the appellate bond.

Conclusion and Recommendations

The end of a trial resulting in an adverse judgment against an insured does not necessarily mean that the insurer's obligation to defend its insured has concluded. In fact, most jurisdictions typically require the insurer to appeal an adverse judgment if "reasonable grounds" exist to support an appeal. This somewhat amorphous standard does not find its support in policy language; instead, it is grounded in the case law addressing an insurer's obligations post-judgment. When faced with the decision to appeal, it is incumbent on insurers to consider defense counsel's advice regarding whether "reasonable grounds" exist. It is equally incumbent on the insurer to know precisely which types of expenses that it is obligated to pay, and whether any such obligations are restricted to the policy limits.

As discussed above, an insurer that is held to have wrongfully failed to appeal can face various extracontractual damages associated with its decision. Similar to other areas of insurance law, insureds can often increase and expand the nature and the amount of damages if they are able to convince a court that an insurer acted in bad faith in failing to satisfy its appeal obligations. Accordingly, an insurer facing an adverse judgment against an insured should proceed carefully and fully evaluate its rights and obligations when deciding whether to prosecute an appeal of the adverse judgment. FD