

## New insurance policy is a game-changer in contract litigation

**Sedgwick Detert Moran & Arnold LLP**  
**Gregg N. Dulik**

### USA

September 10 2010

As anyone who has ever been involved in litigation knows, the risk of having to pay for your adversary's attorney's fees is a significant worry.

Now – for the first time – there is a new type of insurance policy that can protect certain parties in litigation from just such a risk. The insurance, called contract litigation insurance or "CLI," is designed to protect a plaintiff or a defendant involved in a lawsuit over a contract containing a "prevailing party" attorney's fee provision from liability for its adversary's attorney's fees if the adversary ultimately prevails in the case.

A "prevailing party" attorney's fee provision typically reads: "In the event of litigation between the parties regarding this contract, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs." As these provisions often are included in construction contracts, design contracts, purchase orders, rental agreements and the like, contractors and other players in the construction industry must be aware of this new form of insurance and its ramifications on the litigation process.

Courts not only routinely enforce these provisions, but also are finding increasingly higher fee requests "reasonable." On occasion, contractual fee awards may even exceed the base judgment.

The CLI policy will cover the amount of the attorney's fees that a court awards to the "prevailing party," after trial or summary judgment, up to the policy's limits. A court order (1) designating the adversary as the "prevailing party," and (2) requiring the policyholder to pay the adversary's fees, will trigger coverage. Statutes usually define "prevailing party," which typically means the party that the court determines is entitled to "greater relief" in the action. (See, e.g., Cal. Civ. Code § 1717(b)(1).)

The CLI policy will cover both plaintiffs and defendants – whether corporate or individual. The party must apply for the policy within a set number of days (typically 60 to 75) after filing or receiving the lawsuit. The carrier plans to handle each application on an individual basis. The underwriting criteria and pricing for this policy are currently unknown.

Presumably, a CLI policy can provide a party in a contractual dispute with some budgeting certainty in the otherwise uncertain process of litigation. In exchange for its premium payment, which a policyholder can budget and plan for, the policyholder can avoid a significant unknown financial exposure. Further, this new policy might enable more plaintiffs with valid claims to seek redress without fear of dire financial consequences.

In the future, each party in this type of case will need to conduct discovery to determine if its adversary has procured CLI. The existence of a CLI policy will bear directly on a party's risk analysis performed in connection with settlement negotiations. It is possible that a plaintiff with this insurance, knowing that it is exposed to less downside risk, will demand a higher settlement amount, and proceed to trial unless it receives it. The same is true on the flip-side for a defendant with this insurance.

For now, CLI is only available to parties involved in lawsuits over contracts containing a "prevailing party" attorney's fee provision. It is not available to parties in other types of cases, who also may have exposure for the other side's attorney's fees. However, a broader scope of coverage may be on the horizon – which could further shake up the rules of the litigation game.

**Tags** USA, Insurance & Reinsurance, Litigation, Sedgwick Detert Moran & Arnold LLP

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