Carrier Responsible for the Insured's Fees Based Upon Attorney Contingency Fee Agreement

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The Ninth Circuit recently held an insurer liable for the insureds' attorneys fees when the insureds were forced to file litigation to establish coverage under their policies. Moreover, the court held the insureds' contigency fee agreement could form the basis for the amount of fees owing, so long as reasonable under the circumstances.

In *Riordan v. State Farm*, No. 08-35874 (9th Cir., 2009), the insured husband and wife were involved in an auto accident and tendered the claim to State Farm Mutual Auto Insurance Company under their uninsured motorists' coverage. After filing suit against State Farm, and after State Farm paid the remaining benefits under the policies just before trial, the Riordan's sought their attorneys' fees from the carrier.

First, the Ninth Circuit allowed the attorneys' fees claim to be raised for the first time on a motion, as opposed to being plead in the complaint, based upon Federal Rule 52(d)(2).

Next, although Montana follows the "American Rule" that each party is obligated to pay its own attorney, Montana recognizes an exception to this rule when "the insurer forces the insured to assume the burden of legal action to obtain the full benefit of the insurance contract." *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer,* 69 P.3d 652, 660 (Mont. 2003). (In California, these are known as "Brandt Fees," due to the *Brandt v. Superior Court,* 37 Cal.3d 813 (1985) California Supreme Court decision).

Finally, the Ninth Circuit also found that the District Court could award the full amount agreed upon under a contingency fee agreement so long as the ultimate amount of the fee is reasonable.