

# Court Holds Insured Failed To Meet Its Burden To Allocate Loss in Connection With Settlement

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In a coverage dispute between an insured life insurance company and one of its excess professional liability insurers, a Massachusetts Superior Court has held that a class-action settlement for which the insured life insurance company sought coverage included both covered and uncovered loss. *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London*, 2010 WL 3191802 (Mass. Super. Aug. 3, 2010). The court further held that the life insurance company had failed to meet its burden of proving that the covered loss exceeded the retention and the primary policy's limit of liability. As a result, the court granted summary judgment to the excess professional liability insurer.

A group of individuals filed a class-action against the insured life insurance company alleging that it engaged in improper practices in the sale and marketing of its life insurance policies. The parties ultimately reached a settlement pursuant to which class members could either purchase life insurance at a discount or opt for individualized relief through an alternative dispute resolution (ADR) process. Of the approximately 13,000 class members who opted for individualized relief, the settlement claim adjudicators determined that 3,683 of the claims were without merit. In total, the life insurance company incurred approximately \$39.4 million "in costs arising from the settlement payments, attorneys' fees, administrative costs and implementation of the ADR process," including approximately \$3.9 million in monetary awards.

The excess insurer's policy contained a \$10 million limit of liability, which was excess to a primary policy with a \$20 million limit of liability and a \$2.5 million self-insured retention. The primary insurer agreed to pay its policy limit, interpreting the costs incurred in connection with the settlement as covered loss. The excess professional liability insurer, however, disclaimed coverage for a number of reasons, including on the basis that the insured failed to allocate between covered and uncovered loss.

On the excess professional liability insurer's motion for summary judgment, the court concluded that the settlement consisted of both covered and uncovered loss and that an allocation was required. According to the court, when the insured settles an underlying claim, it "bears the burden to allocate its losses in the coverage action." As such, in this case, the court held that the insured "must show that the amount of its covered loss exceeds [the excess professional liability insurer's] \$22.5 million attachment point." Rejecting the

insured's argument that the allocation of loss between covered and uncovered loss was a question of fact for the jury, the court found that the company had offered "absolutely no evidence or allocation methodology to show that its covered losses exceeded" the excess professional liability insurer's attachment point. As a result, the court granted summary judgment in favor of the excess insurer.