

Settlement Returning Overdraft Fees Deemed Not To Be Restitution Absent Final Adjudication

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The United States District Court for the District of Minnesota, applying Delaware law, has held that a bank's settlements of lawsuits seeking the return of allegedly improper overdraft protection fees collected by the bank from its customers constitutes covered "Loss" under the bank's professional liability insurance policies, rejecting the insurers' argument that the settlements constitute restitution that is uninsurable under Delaware law. *U.S. Bank Nat'l Ass'n v. Indian Harbor Ins. Co.*, 2014 WL 7183851 (D. Minn. Dec. 16, 2014). In so holding, the court ruled that the primary policy's exclusion barring coverage for ill-gotten gains, which includes a final adjudication requirement, means that a final adjudication is necessary in order to bar coverage for restitution.

The bank's customers filed class actions alleging that the bank improperly manipulated the order in which it processed their transactions in order to cause their accounts to be overdrawn multiple times, thus maximizing the number of fees the bank could charge. The bank settled the overdraft lawsuits, agreeing to pay \$55 million to customers who had been charged multiple overdraft fees, and sought coverage for the settlement under its professional liability policies. The policies afforded specified coverage for "Loss," defined to include "the total amount which [the insured] becomes legally obligated to pay on account of each Claim" but not to include "[m]atters which are uninsurable under the law" or "principal, interest, or other monies paid, accrued or due as the result of any loan, lease or extension of credit by [the insured][.]" The policies excluded coverage for "any payment for Loss in connection with any Claim made against [the bank] . . . brought about or contributed in fact by any . . . profit or remuneration gained by [the bank] to which [it] is not legally entitled . . . as determined by a final adjudication in the underlying action." The insurers disclaimed coverage for the settlement, arguing that, the amount paid fell within the specified exceptions to "Loss" and thus was not covered.

In the ensuing coverage litigation, the court granted summary judgment in favor of the bank. In so doing, the court noted, operating under the assumption that Delaware law "precludes coverage for restitution as a matter of public policy," the question presented was whether the settlement at issue constitutes restitution. In holding that the settlement did not constitute restitution, the court stated that, because the exclusion for ill-gotten gains only applies where there has been a final adjudication in the underlying proceeding for which coverage is sought and interpreting the policies consistently with all provisions, "final adjudication in the

underlying action determin[ing] that a payment is restitution [is required] before the payment is barred from coverage as restitution." The court recognized that the underlying settlement "allegedly constitutes restitution but is not a final adjudication" and that "[i]f a settlement resolves claims alleging unlawful activity but excludes an admission of liability for the activity, it does not establish that the underlying allegations are true or false."

The court rejected the carriers' arguments that the exclusion for ill-gotten gains cannot be used to generate a grant in coverage, holding in this regard that, "[b]y excluding from coverage a payment that a final adjudication in the underlying action determined to be restitution, the parties implicitly granted coverage for a payment that is merely alleged to be restitution." The court also distinguished cases holding that restitution is uninsurable, including settlement for allegations of restitution, finding that the cases relied on by the insurers, such as *Level 3 Communications, Inc. v. Federal Insurance Co.*, 272 F.3d 908 (7th Cir. 2001), involved policies that did not include final adjudication requirements. Further, in rejecting the insurers' contention that affording coverage for settlements of allegations of restitution will encourage banks to settle rather than litigate such claims, the court held that insurers "can counter that incentive by not consenting to the settlement . . . [or] condition[ing] consent on an admission of liability for wrongdoing or a stipulation that the payment was restitution."

The court also rejected the insurer's argument that the policy's extension-of-credit provision in the definition of "Loss" barred coverage because the settlement comprised the return of overdraft fees that were the result of overdraft protection, which the insurers contend involved an extension of credit. In finding that overdraft fees are simply fees for a service and overdraft protection is "likely" an extension of credit, the court commented that the "settlement resolved claims that ultimately alleged as injury that [the bank] overcharged overdraft fees through high-to-low posting and not that [the bank] offered overdraft protection in the first place."