

ALERT

Covered Loss Includes Enhanced Portion of Fee Award in Bump-Up Suit

January 31, 2012

Applying Illinois law, the United States District Court for the Northern District of Illinois has held that the carve-out in the definition of "loss" for the "multiplied portion of multiplied damages" did not apply to the enhanced portion of a fee award in a "bump-up suit" even though the total award was calculated by multiplying by five the amount of fees arrived at through the "lodestar" method – *i.e.*, reasonable hourly rate times reasonably expended hours. *Carolina Cas. Ins. Co. v. Merge Healthcare Solutions, Inc.*, 2012 WL 123987 (N. D. Ill. Jan. 13, 2012).

The underlying suit was initiated in state court by shareholders seeking to enjoin an acquisition of the named insured at a price that they believed to be too low. Following acceptance of a competing offer that resulted in an additional \$26 million for the shareholders, the court dismissed as moot the claim for injunctive relief but retained jurisdiction for purposes of awarding attorneys' fees. The state court applied the lodestar method to arrive at \$630,000 in fees and then applied an enhancement multiplier of five to arrive at a total fee award of \$3.15 million. According to the state court, the enhancement multiplier was warranted because the attorneys devoted substantial resources to the case without a guarantee of payment, their actions served a public purpose by policing the proposed acquisition, and the \$26 million additional consideration for the acquisition was an "exceptionally favorable result."

Acknowledging that the definition of covered "loss" under its directors and officers liability policy included an award of reasonable attorneys' fees, the insurer agreed to pay the \$630,000 lodestar amount. The insurer, however, refused to pay the enhanced portion of the fee award, contending that the enhanced portion fell within the

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carve-out to the definition for “the multiplied portion of multiplied damages.”

In the coverage litigation that followed, the court found that there were a number of permissible methods to calculate an award of reasonable attorneys’ fees and held that if coverage were to be restricted to an award calculated by a particular method, the policy had to include language to this effect. The court determined that no such language was present here, and rejected the notion that the “multiplied portion of multiplied damages” carve-out “clearly and unambiguously” limited covered attorneys’ fees to those calculated by rates-times-hours. Accordingly, the court denied the insurer’s motion for summary judgment.