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ALERT

No Coverage for Restitution of Illegal Overdraft Fees

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Applying Georgia law, a federal district court has opined that the return of allegedly illegal overdraft fees may constitute uninsurable restitution and would in any event fall within an exclusion for indemnification arising from fee disputes. *Fidelity Bank v. Chartis Specialty Ins. Co.*, No. 1:12-CV-4259-RWS (N.D. Ga. August 7, 2013).

The policyholder bank's depositors alleged that, by charging a flat fee regardless of the amount advanced in an overdraft withdrawal, the policyholder was charging usurious interest. The insurer disclaimed coverage for sums paid to settle the underlying claim. The policy provided that the insurer was not liable for "Loss in connection with any Claim made against any Insured . . . alleging, arising out of, based upon or attributable to, directly or indirectly, any dispute involving fees, commissions or other charges for any Professional Service rendered . . . by the Insured . . . ."

The court found "compelling" the insurer's argument that the return of illegal overdraft fees constituted restitution that is uninsurable as a matter of law. Citing case law from various jurisdictions, the court further opined that allowing the policyholder to recover insurance proceeds for disgorgement of "ill-gotten gains" would allow policyholders to profit from illegal conduct. Noting an absence of Georgia case law on point, however, the court declined to "announce a 'new' Georgia rule" and held instead that the policy's fee-dispute exclusion precluded coverage. The court observed that, even though the underlying complaint classified overdraft charges as usurious "interest," the charges could be classified as "fees" as well.

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