

ALERT

Criminal Information Seeking Forfeiture Not a "Claim"

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A Kansas federal court, applying Illinois law, has held that a criminal information seeking a fine and forfeiture did not subject an insured to "binding adjudication of liability for damages or other relief" as required to fall within a policy's definition of "Claim." *McCalla Corp. v. Certain Underwriters at Lloyd's*, 2014 WL 1745647 (D. Kan. May 1, 2014). The court also held that the forfeiture was both uninsurable under Illinois law and was a "fine or penalty" carved out of the policy's definition of "loss."

A restaurant franchisee was investigated by federal officials for immigration-related offenses, which resulted in an information charging the franchisee with aiding and abetting the use of a false identification document. The franchisee pled guilty and paid a \$300,000 fine and \$100,000 forfeiture, and then sought coverage for the forfeiture and defense costs from its D&O carrier, which denied coverage.

The court held that the information did not constitute a "Claim" under the D&O policy. The policy defined "Claim" in relevant part as a "criminal . . . proceeding . . . in which they may be subjected to binding adjudication of liability for damages or other relief" The court rejected the notion that the criminal proceeding sought "damages," as a criminal case is penal in nature. The court also declined to classify the criminal proceeding as subjecting the insureds to liability for "other relief," as it deemed "relief" in this context to refer to a redress or benefit, including restitution, and not a fine or forfeiture.

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The court also held that the \$100,000 forfeiture did not qualify as "loss" under the D&O policy. Although the franchisee conceded that the \$300,000 fine was a "tax, fine or penalty" carved-out of the policy's definition of "loss," it contended that the forfeiture was not. According to the court, the forfeiture statute "strips the lawbreaker of his ownership interest as a punishment." As such, the court "d[id] not hesitate" to conclude that the forfeiture was a "fine or penalty" carved-out of the definition of "loss." Moreover, the court noted that the amounts paid as a forfeiture represented the proceeds of a crime and thus were uninsurable under Illinois law.

The opinion is available [here](#).