

Stipulated Judgment Coupled with Covenant Not to Execute Against Assets Other than Insurance Not "Loss" Because Insured Was "Absolved from Payment"

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The United States Court of Appeals for the Eighth Circuit, applying Missouri law, has held that a \$56 million stipulated judgment against an insured, coupled with a covenant not to execute against any asset other than insurance, did not give rise to a "Loss" under a primary D&O liability policy and several layers of excess coverage because the insured had been "absolved from payment" for the judgment. *U.S. Bank Nat'l Assoc. v. Fed. Ins. Co.*, No. 10-3472 (8th Cir. Dec. 13, 2011). The court also held that a doctrine of estoppel could not be used to expand coverage beyond the terms of the policy. Wiley Rein LLP represented the primary insurer in the case.

An insured corporation filed for bankruptcy. As part of its plan for reorganization, the corporation assigned its claims against its former officers and directors to a litigation trust, subject to the condition that the trust could only pursue the corporation's D&O insurance to satisfy any judgment against its former officers and directors. Thereafter, the trust sued one of the former officers, and the claim was tendered to the primary D&O insurer and several excess carriers. The primary insurer denied coverage on multiple grounds, including that the assignment triggered the express carve out from the definition of "Loss" for "any amount not indemnified by the Insured Organization for which the Insured Person is absolved from payment by reason of any covenant, agreement, or court order." The officer then entered into a stipulated judgment for \$56 million and assigned his rights to insurance coverage to the litigation trustee, which then filed suit against the insurers in the United States District Court for the Western District of Missouri. The district court ruled in favor of the insurers, holding that the judgment did not give rise to a "Loss." The trustee appealed.

The United States Court of Appeals for the Eighth Circuit affirmed. To begin, the court held that it did not need to address the split of authority, unresolved in Missouri, as to whether an insured is "legally obligated to pay" an amount covered by an agreement not to execute. The court explained that the definition of "Loss" in the policy before it contained an express carve out for amounts for which an insured was "absolved from payment," and that it was clear the officer was "absolved from payment" by virtue of the terms of the assignment.

The court rejected the trustee's argument that the officer was not "absolved" because he might suffer other adverse consequences, such as a "stigma" from the judgment or less future insurance coverage. The court explained that the policy language focused on being absolved from "payment," and held that the trustee's exclusive focus on the term "absolved" was an "impermissible and unnatural parsing of the policy language." The court also rejected the trustee's attempt to analogize the case to a recent Eighth Circuit case holding that a criminal prosecution triggered a D&O policy even though the prosecution did not seek a monetary remedy because the defense costs gave rise to a "Loss." The court noted that, in contrast, the trustee here sought coverage for a judgment, not defense costs, and further that coverage for "Defense Costs" under the policy extended only to covered "Claims."

In the alternative, the trustee argued that because the insurer had declined to defend the officer, the officer was free to enter into a reasonable settlement and assign his rights under an "abandoned insured" doctrine. The court disagreed, holding that a prior Eighth Circuit case, *Esicorp, Inc. v. Liberty Mutual Insurance, Co.*, 193 F.3d 966, 970 (8th Cir. 1999), precluded the use of an estoppel theory to expand coverage beyond the terms of the policy. The cases cited by the trust, the court explained, applied estoppel where the coverage defenses were based on cooperation and consent clauses tied to the insurer's handling of the litigation, not to the definition of "Loss."