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NEWSLETTER

Seventh Circuit Holds That Multiplied Portion of Attorneys' Fees Award Is Covered

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The United States Court of Appeals for the Seventh Circuit, applying Illinois law, has held that an insurer must pay the full amount of a $3.15 million attorneys' fees award, concluding that a provision precluding coverage for "the multiplied portion of multiplied damages" did not apply to the use of a multiplier in calculating attorneys' fees. *Carolina Casualty Ins. Co. v. Merge Healthcare Solutions Inc.*, Nos. 12-2275 & 12-2341 (7th Cir. July 16, 2013).

After the insured agreed to merge with another company in a transaction valuing the insured's shares at $5.35 each, certain shareholders of the insured filed a lawsuit in Massachusetts state court contesting the adequacy of the proxy statement used to seek approval of the merger. The lawsuit eventually was settled, however, when another suitor offered $6.05 a share. The difference resulted in a $26 million gain for the shareholders. The lawyers who filed the shareholder suit then sought attorneys' fees based on the difference between the two suitors' bids. The insurer had issued a policy covering as part of the insured "loss" not only what the insured paid its own lawyers in litigation but also what the insured must pay to opposing counsel. When the state court awarded plaintiffs' counsel $3.15 million, derived from a lodestar of $630,000 times five, the insurer filed a declaratory judgment action in federal court, arguing that the policy limited coverage to the $630,000 lodestar because the policy contained a provision stating that "[l]oss shall not include . . . the multiplied portion of multiplied damages . . . ." The district court disagreed, and held that the insurer owed the entire $3.15 million.

On appeal, the Seventh Circuit affirmed the district court's ruling. Rejecting the insurer's argument that the provision applied to the state court judge's use of a multiplier in calculating attorneys' fees, the court opined that "an award of attorneys' fees differs from 'damages.'" In so doing, the court noted that the underlying litigation rested in part on state and federal securities law, which treated attorneys' fees as "costs" and not "damages." The court further explained that the policy provision "covers a category of losses that insurers regularly exclude to curtail moral hazard." According to the court, the phrase "multiplied portion of multiplied damages" contained in the provision likely was intended to address treble damages, not attorneys' fees.

In addition, the court rejected the insured's argument that the insurer acted in bad faith by contending that its policy covers only 20% of the award. The court explained that the insurer "did just what Illinois prefers" by "fil[ing] a declaratory-judgment action to resolve the meaning of the policy" and paying the insured's costs of separate counsel under a reservation of rights.