

# Wrongfully Withheld Compensation Not “Disgorgement”

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The United States Court of Appeals for the Sixth Circuit, applying Michigan law, has held that a settlement based upon wrongfully withheld compensation was not based upon “disgorgement” as used in a carveout from a definition of “Loss” in an insurance policy. *William Beaumont Hosp. v. Fed. Ins. Co.*, 2014 WL 185388 (6th Cir. Jan. 16, 2014). The court also held that Michigan public policy did not bar coverage for wrongfully withheld compensation.

A putative class of nurses sued eight hospital systems, arguing that the hospitals engaged in anticompetitive behavior designed to depress the wages of the nurses. The district court in the underlying action allowed the nurses to pursue a claim under the Sherman Act under the theory that the hospitals had improperly shared compensation information in a manner designed to depress the nurses' wages. The nurses eventually settled with one of the hospitals. That hospital had an insurance policy that provided specified coverage for antitrust claims, but explicitly carved out “disgorgement” from the definition of “Loss.” The carrier denied coverage for the settlement, arguing that the settlement amount was based upon wrongfully withheld wages and thus constituted disgorgement. In the ensuing coverage action, the Sixth Circuit affirmed a lower court's grant of summary judgment to the insured hospital, holding that settlements based upon wrongfully withheld wages do not constitute “disgorgement.”

The court noted that the policy stated that only “disgorgement” was not a covered loss. The court distinguished disgorgement from restitution and explained that “money unlawfully *retained* is not the same in its legal character as money wrongfully *acquired*.” According to the court, because the hospital never gained possession of the nurses' wages illicitly, but merely kept them illicitly, the money paid in settlement was not “disgorgement.”

The court also held that Michigan public policy did not bar coverage for the settlement. The court looked to cases discussing Michigan public policy, and concluded that it generally prohibited insurance coverage for losses related to an insureds' intentional tortious or criminal acts. The court noted that a “rule of reason” violation of the Sherman Act was not per se illegal and that Michigan did allow coverage for some intentional acts.