

ALERT

Fee Exclusion Deemed Ambiguous

May 20, 2013

The United States Court of Appeals for the Ninth Circuit, applying California law, reversed an order granting judgment on the pleadings to an insurer based on the application of an exclusion for claims based on fees, expenses, or costs paid to or charged by the insured. *Ticketmaster, LLC v. Ill. Union Ins. Co.*, 2013 WL 1777735 (9th Cir. Apr. 26, 2013). The court concluded that the exclusion could be reasonably interpreted in at least two ways and was therefore ambiguous.

An insurer issued an errors and omissions liability policy to a company that sells event tickets online. In 2003, certain ticket purchasers filed a class action lawsuit in which they alleged that the company made false representations about delivery fees and order-processing charges for tickets.

After the company sought coverage for the class action lawsuit, the insurer denied coverage based on an exclusion for claims “based on or arising out of . . . any dispute involving fees, expenses or costs paid to or charged by the Insured” (alteration in original).

The company appealed the district court’s decision granting judgment on the pleadings in favor of the insurer. On appeal, the court concluded that the exclusion was “reasonably susceptible to at least two meanings” and was thus ambiguous. Specifically, the court stated that the exclusion (1) “may narrowly refer to a dispute regarding the monetary amount paid to or charged by [the company] for uncontested services” or (2) “may refer to any fee or charge for professional services, including a dispute regarding the relationship between services provided and the fees charged.” The court noted that some allegations in the underlying class action did not involve the amount charged for uncontested services and therefore involved a dispute that would fall only with the second interpretation. Accordingly, the court decided that the insurer did not meet its

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burden to show that its interpretation was the only reasonable interpretation of the exclusion.

The court reversed the judgment on the pleadings in favor of the insurer and remanded the case to the district court.