

Client Alert

July 2014

Insurer Must Pay Attorneys' Fees & Costs in Bank's Settlement of Class Action Under Financial Institution Professional Liability Policy

The United States District Court for the Western District of Pennsylvania held that an insurer must indemnify an insured bank for amounts paid as attorneys' fees and related costs incurred in settlement of class action claims. See *PNC Fin. Servs. Grp., Inc. v. Houston Cas. Co.*, No. 13-cv-331, 2014 WL 2862611 (W.D. Pa. June 24, 2014).

Background

PNC entered into two settlements resolving class action lawsuits that alleged various improper practices concerning PNC's overdraft fees. The first, a settlement of a multidistrict litigation (the "MDL Settlement"), established a \$90 million fund designed to compensate class members "using a formula to calculate the dollar amount of each additional overdraft fee that resulted as a result of" PNC's policy regarding how debits were posted to an individual's bank account. The \$90 million MDL Settlement fund included \$27 million for class counsel's attorneys' fees, approximately \$180,000 for costs incurred by the class and \$30,000 for incentive awards for the named plaintiffs.

The second settlement resolved federal litigation in the District of Columbia (the "*Trombley* Settlement"). That settlement established a \$12 million fund designed to refund overdraft fees paid by certain PNC account holders. The \$12 million fund for the *Trombley* Settlement included \$3 million for class counsel's attorneys' fees, approximately \$80,000 for the class's costs and \$15,000 for incentive awards for the named plaintiffs.

PNC sought coverage for the settlements from Houston Casualty Company and Axis Insurance Company under financial institution professional liability policies issued by each insurer. The relevant coverages included a \$25 million self-insured retention, over which Houston provided the first \$25 million with Axis providing the next \$25 million. The Axis policy followed the relevant terms, conditions and exclusions of the Houston policy.

After PNC tendered its claim, the insurers denied coverage. PNC brought a declaratory judgment and breach of contract action against both insurers to determine the parties' rights under the insurance policies with respect to the class action settlements.

The Court's Opinion

The insurers contended that the settlements fell within the policies' "Fee Exception," which excluded from coverage certain fees incurred by the insured. According to the insurers, the policies afford coverage for, among other things, "Damages," which are defined as "a judgment, award, surcharge or settlement as a result of a Claim and any award of pre- and post-judgment interest, attorneys' fees and costs." "Damages" does not include "fees, commissions or charges for Professional Services paid or payable to an Insured." It is this carve-out from the covered "Damages" that the insurers relied on as a so-called "Fee Exception."

The insurers claimed that the settlements came within the “Fee Exception” because they “returned overdraft fees to class members.” Although the court agreed that a portion of the settlements came within the coverage exception, the court rejected the insurers’ attempt to broadly apply the exception as a total bar to coverage. Rather, the policies specifically defined the term “Damages” to include, among other things, “attorneys’ fees and costs.” Consequently, the court determined that some \$30 million of the settlement proceeds paid as attorneys’ fees and costs would be covered under the policies, subject to PNC’s self-insured retention. The court also determined that additional portions of the settlements may be covered, but that further factual determinations would be required.

Insurance Implications

The *PNC* decision illustrates that, even where portions of a claim or settlement may be specifically excluded from coverage, a real potential remains for substantial insurance recovery. The decision underscores therefore how the availability of insurance coverage is highly dependent on the relevant policy provisions and the facts of each claim. Policyholders should remain vigilant about locating and reviewing all potentially applicable insurance policies when faced with a loss, claim or settlement, and they should not assume that coverage will be entirely unavailable simply because a portion of a loss may be limited or excluded.

* * * * *

Hunton & Williams insurance recovery attorneys assist policyholders secure the full benefits to which they are entitled in the event of any type of loss, including amounts spent to defend or settle large-scale litigation. For more information, please contact the members of the firm’s [insurance coverage and counseling group](#).

Contacts

Walter J. Andrews
wandrews@hunton.com

Lon A. Berk
lberk@hunton.com

Lawrence J. Bracken II
lbracken@hunton.com

John C. Eichman
jeichman@hunton.com

Robert J. Morrow
rmorrow@hunton.com

Syed S. Ahmad
sahmad@hunton.com

Michael S. Levine
mlevine@hunton.com

Sergio F. Oehninger
soehninger@hunton.com

William T. Um
wum@hunton.com

Patrick M. McDermott
mcdermottp@hunton.com

© 2014 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.