

Insurers Ordered To Contribute \$30 Million Toward Overdraft Settlement

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Earlier this week, a decision from the United States District Court for the District of Minnesota required Indian Harbor Insurance Co. and Ace American Insurance Co. to cover \$30 million of U.S. Bancorp's \$55 million class settlement of overdraft fee litigation and related defense costs. In the coverage suit, U.S. Bancorp sought coverage related to the settlement of three class actions alleging that the bank changed the order of customers' debit card transactions from highest to lowest, rather than processing them chronologically, so that it could maximize overdraft fees.

In defense of the suit, the insurers argued that coverage was not afforded under the respective policies because the underlying suits sought restitution, which the policies expressly excluded from the definition of loss. In granting summary judgment to U.S. Bancorp, the court held that the bank's settlement did not constitute restitution or an extension of credit, and was therefore a covered loss under both policies.

Both the Indian Harbor and Ace policies excluded coverage for restitution resulting from a final adjudication. Based on this language the court found that the policies implied coverage for restitution stemming from a settlement. Thus, U.S. Bancorp's settlement in the underlying litigation did not constitute restitution because there was no final adjudication. The court reasoned, "If allegations of unlawful activity are never determined to be true, a payment to dispose of those allegations is not restitution because restitution can only occur if that which is being returned was wrongfully taken."

The court rejected insurers' arguments that this interpretation would "incentivize banks to settle rather than litigate these types of lawsuits in order to obtain coverage for restitution." In doing so, the court noted that the policies at issue required the insurers to consent before the bank entered into a settlement. Additionally, the court found that the bank's settlement did not constitute an extension of credit, as the underlying case sought recovery based on the bank's assessment of overdraft fees rather than the provision of overdraft protection.

This decision underscores the importance for policyholders to not simply accept an insurer's interpretation of policy language, in justifying its denial of coverage. Even if the policy at issue purports to exclude restitution from the definition of loss, a policyholder should critically analyze the provision to determine whether the exclusion actually applies, and when appropriate, push back in order to realize the full value of its coverage asset.

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