

## Insurers Must Cover US Bank's Overdraft Deal, 8th Circ. Told

By **Jeff Sistrunk**

*Law360, Los Angeles (August 14, 2015, 10:26 PM ET)* -- U.S. Bancorp on Thursday urged the Eighth Circuit to uphold a district court's decision that two insurers must cover \$30 million of its \$55 million class settlement of overdraft fee litigation, asserting that the lower court correctly determined that the deal isn't subject to any exclusions.

In its appellate brief, U.S. Bank argued that the provisions in its policy with Indian Harbor Insurance Co., a subsidiary of XL Group PLC, directly establish coverage for allegations in the underlying litigation.

U.S. District Judge Paul A. Magnuson in December granted summary judgment to the bank in its coverage battle with Indian Harbor and Ace American Insurance Co., holding that the underlying settlement is neither restitution nor an extension of credit and is therefore a covered loss under the insurers' policies.

"In arguing that the settlement constitutes uninsurable disgorgement, XL conspicuously distances itself from the express terms of the policy that it sold to U.S. Bank," U.S. Bank's attorneys wrote in the appellate brief.

Judge Magnuson said in his decision that he would assume that Delaware law precludes coverage for restitution "as a matter of public policy" for the purposes of analyzing U.S. Bank's summary judgment motion, without making a definitive ruling on the issue.

However, the judge found that the settlement in the underlying litigation doesn't constitute uninsurable restitution because there was no final adjudication establishing that the bank acted unlawfully and sought a refund of profits from that misconduct.

The judge rebuffed all of the insurers' arguments against his interpretation and application of the uninsurable provision, including that his take on the provision will "incentivize banks to settle rather than litigate these types of lawsuits to obtain coverage for restitution." He noted that the policies at issue required the insurers to consent before U.S. Bancorp entered into a settlement.

Furthermore, U.S. Bank's settlement doesn't constitute an extension of credit as the underlying case revolves around the assessment of overdraft fees rather than the provision of overdraft protection, Judge Magnuson found.

Four months after issuing his ruling on U.S. Bank's summary judgment motion, Judge Magnuson

awarded the bank a total of \$5 million in prejudgment interest from the two insurers, which subsequently appealed to the Eighth Circuit.

In its appellate brief, Indian Harbor said Judge Magnuson's ruling was contrary to its policy and a long line of cases nationwide. If the district court's decision is affirmed, the insurer argued, it would set off a "national flurry" of litigation.

The law is clear that insurance doesn't cover a policyholder's obligation to return money or property, regardless of the circumstances, according to Indian Harbor.

U.S. Bank contended that the Indian Harbor policy's "ill-gotten gains" provision doesn't exclude coverage in the instant case because there was no final adjudication of any wrongdoing in the underlying litigation.

Whether a loss is insurable under the Indian Harbor policy must be determined under Delaware law, according to the brief. Indian Harbor's argument that coverage doesn't exist because disgorgement is uninsurable can't survive because the insurer resorts to inapplicable non-Delaware cases that deal with "palpably different" policies, U.S. Bank said.

In addition, the insurer's contention that the extension of credit provision applies to bar coverage "wrongfully attempts to transmogrify a sensible exclusion for a bank's loan losses into a contractual black hole that would fundamentally undermine the purpose and value of a bank's professional liability insurance," according to U.S. Bank.

U.S. Bancorp is represented by William G. Passannante, Marshall Gilinsky and Vivian Costandy Michael of Anderson Kill PC and John M. Bjorkman, David C. Linder and Paula Duggan Vraa of Larson King LLP.

Indian Harbor is represented by James T. Sandnes, James Skarzynski, Tammy Yuen and George Mustes of Skarzynski Black LLC and Richard T. Thomson and Amy L. Schwartz of Lapp Libra Thomson Stoebner & Pusch Chtd.

Ace is represented by Edward P. Gibbons and Tiffany S. Saltzman-Jones of Walker Wilcox Matousek LLP and Alec J. Beck of Ford & Harrison LLP.

The case is U.S. Bank NA et al. v. Indian Harbor Insurance Co. et al., case number 0:12-cv-03175, in the U.S. District Court for the District of Minnesota.

--Editing by Christine Chun.