

FOR IMMEDIATE RELEASE:

Fifth Circuit Rules on Insurance Coverage/Bankruptcy Matter

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[Beirne, Maynard & Parsons](#), a Houston-based civil litigation defense firm, successfully represented National Union in *US Bank, National Association v. National Union Fire Insurance Company of Pittsburgh, PA*; Docket No. 08-20401. The Fifth Circuit ruled in favor of National Union on a complex coverage matter. In this decision, the Fifth Circuit established that money a bankruptcy court orders paid to a fraudulent creditor is not a covered loss because that payment is considered "ill-gotten gains."

At issue was whether an executive and organization (E&O) liability insurance policy issued by National Union obligated them to pay a bankruptcy court judgment.

The bankruptcy court had ordered an insured company's former CEO to pay back millions of dollars he received as severance payments. In rendering judgment against him and ordering him to return the money, the bankruptcy court ruled that the payments were "fraudulent transfers" and "avoidable preferences" as those terms are defined by state and federal law.

After the bankruptcy court entered its judgment, the company's liquidating trustee, U.S. Bank, threatened a garnishment action against its former CEO and his insurers in the event that he did not pay the judgment. Having learned of the threat, National Union filed a declaratory judgment action in U.S. District Court to confirm that it had no obligation to pay the judgment. On cross-motions for summary judgment, Judge Nancy Atlas concluded that the bankruptcy court's judgment did not invoke any policy obligations on the part of National Union, and she rendered summary judgment for the insurer.

Specifically, Judge Atlas concluded that the judgment did not constitute a "loss" as that term was defined in the National Union Policy, because the judgment was "restitutionary" in nature and uninsurable under Texas Law. In addition, she concluded that any claim for coverage was further barred by the Policy's "profit or advantage" exclusion. (Judge Atlas's opinion is reported at *National Union Fire Ins. Co. of Pittsburgh, PA v. U.S. Bank, Nat. Ass'n*, 2008 WL 2405975 (S.D.Tex. Jun 11, 2008) (NO. CIV. A. 4:07-CV-1958)).

U.S. Bank simultaneously appealed Judge Atlas's judgment as well as a judgment from further bankruptcy court issues that were not presented to Judge Atlas and complained that the record did not support the "fraudulent transfer" findings. Without consolidating the appeals, the Fifth Circuit disposed of them with one opinion. The Court found, first, that the record did, indeed, support a finding that the severance payments were fraudulent transfers. Then, addressing the pure coverage issues, the Court concluded that the bankruptcy court's judgment against the former CEO was restitutionary and not insurable. Because National Union's Policy expressly states that "loss" does not include "matters which may be deemed uninsurable under the law," the Court further concluded that the bankruptcy court's judgment did not present a "loss" within

the meaning of the policy and did not trigger any duty on the part of National Union. On this basis, the Court affirmed the underlying judgment. In so doing, it expressly noted that it need not address the district court's analysis of the "profit or advantage" exclusion.

The decision is significant. It rejects the former CEO's claim the bankruptcy court did not find the CEO was not entitled to the payments when he received them and that the bankruptcy court judgment should, therefore, be a covered "Loss."

The case was handled by Beirne, Maynard & Parsons attorneys [Jeff Parsons](#), [Roger McCleary](#), and [Stephen Edmundson](#).

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