

**Restitution of Monies Wrongfully Taken Is Not “Damages” -
One Beacon v. City of Granite City
(U.S. District Court—Southern District of Illinois)**

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Addressing an issue that professional liability, EPL, D&O and CGL insurers often face, the United States District Court for the Southern District of Illinois recently held that restitution of monies wrongfully taken does not constitute “damages” within the meaning of an insurance policy. *OneBeacon Am. Ins. Co. v. City of Granite City*, 2013 U.S. Dist. LEXIS 19474, 8-9 (S.D. Ill. Feb. 13, 2013) (granting the insurer’s motion for summary judgment).

The case arose from a class action suit filed by David Funkhouser (“Funkhouser”) against the City of Granite City (“the City”) seeking a refund of a fee he alleged the City wrongfully collected (“Underlying Action”). *Id.* at 2. Funkhouser alleged that the City charged him and other similarly situated plaintiffs a release fee of \$400 for the return of his vehicle after the City towed it following his arrest. *Id.* The fee was alleged to be a processing fee that owners were required to pay before their vehicles were returned. *Id.*

In the coverage action, OneBeacon sought a declaratory judgment that it did not owe the City a duty to defend or indemnify it for any judgment entered on the Underlying Action. *Id.* The OneBeacon policy included several coverage parts, including comprehensive general liability, professional liability, employment practices liability and employee benefits administration liability, and OneBeacon requested a declaration as to all of them. Relying on Seventh Circuit and Illinois precedent, OneBeacon argued that “damages” within the meaning of a liability policy do not include restitution of funds wrongfully obtained, and that if the City were to lose the Underlying Action, the result would be that the City would have to return monies to which it was not entitled. *Id.* at 4. The City contended that OneBeacon had a duty to defend and indemnify under the policy for any claim of monetary relief, regardless of whether the claim was denominated as “money damages” or “restitution.” *Id.*

In analyzing whether OneBeacon owed the City any coverage obligations, the court relied heavily on the

Seventh Circuit’s opinions in *Level 3 Commc’ns, Inc. v. Fed. Ins. Co.*, 272 F.3d 908 (7th Cir. 2001) (holding that “a ‘loss’ within the meaning of an insurance contract does not include the restoration of an ill-gotten gain”, and the insured does not incur a loss for insurance purposes when the party is compelled to return property it has stolen), and *Ryerson Inc. v. Fed. Ins. Co.*, 676 F.3d 610 (7th Cir. 2012) (restitution of monies wrongfully obtained was not a loss within the definition of a directors and officers liability insurance policy). The District Court reasoned that the Seventh Circuit is clear in its holdings that restitution of monies wrongfully taken does not constitute “damages” within the meaning of an insurance policy. *Id.* at 8. Because the City’s only potential damage in the Underlying Action was restitution, the District Court found that there was no basis on which a reasonable jury could find OneBeacon liable under its insurance policy for monies the City allegedly wrongfully appropriated. *Id.*

Comment: While courts throughout the country have weighed in on the question of coverage for restitution of wrongfully obtained money, Federal and state courts in Illinois have been especially active on the subject in recent years. In addition to the two decisions on which the *OneBeacon* court relied, the “restitution is not loss” rule carried the day in *St. Paul Fire & Marine Ins. Co. v. Village of Franklin Park*, 523 F.3d 754 (7th Cir. 2008), *Continental Cas. Co. v. Duckson*, 826 F.Supp.2d 1086 (N.D. Ill. 2011), and *Local 705 Int’l Brotherhood of Teamsters Health & Welfare Fund v. Five Star Managers, LLC*, 735 N.E.2d 679 (Ill. App. 2000).

If you have any questions about this Insurance Coverage Update, please contact one of the authors listed below or the Aronberg Goldgehn coverage attorney with whom you normally consult:

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