

## Rejecting Latent Ambiguity Argument, Sixth Circuit Enforces Consent-To-Settle Clause

12.21.16



(Article from *Insurance Law Alert*, December 2016)

For more information, please visit the [Insurance Law Alert Resource Center](#).

The Sixth Circuit ruled that a consent-to-settle provision in an excess policy is unambiguous and that the insurer has no obligation to indemnify settlements made without its consent. *Stryker Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 842 F.3d 422 (6<sup>th</sup> Cir. 2016).

In this longstanding coverage litigation arising out of defective knee replacement parts, Stryker sought indemnification for settlements under excess liability policies issued by TIG. TIG disputed coverage, arguing that the direct product liability claims that were the subject of the settlement do not constitute “ultimate net loss” under TIG’s policy. TIG’s policy defines “ultimate net loss” as “the amount of the principal sum, award or verdict actually paid or payable in cash in the settlement or satisfaction of claims for which the insured is liable, either by adjudication or compromise with the written consent of [TIG].” Stryker argued that, as applied to the particular facts presented, the ultimate net loss provision is latently ambiguous. In particular, Stryker argued that it “was forced to present its direct settlements to TIG years after they were made” because the underlying primary insurer gave priority payment to claims against Pfizer (a partially-owned subsidiary of Stryker), before addressing any direct liability claims against Stryker. A Michigan district court agreed and granted Stryker’s summary judgment motion. The Sixth Circuit reversed.

Applying Michigan law, the Sixth Circuit held that TIG’s policy required written consent for any and all settlements. The court rejected Stryker’s contention that “the unusual facts” of this case give rise to a latent ambiguity. The court ruled that TIG employees’ testimony about the provision did not create a latent ambiguity. The court also rejected Stryker’s assertion that TIG waived its right to enforce the consent provision, explaining “that contention rests on the false premise that [the primary insurer]’s denial of coverage should be imputed to TIG, simply because the excess-liability policy followed form.”

### Authors and Contacts

[Bryce Friedman](#)  
Partner

[bfriedman@stblaw.com](mailto:bfriedman@stblaw.com)

+1-212-455-2235

