

## ***Safeway v Twigger: Court of Appeal Prohibits Company From Recovering Fine From Its Former Directors and Officers***

### ***Insurance Law Flash***

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On 21 December 2010, the Court of Appeal struck out a claim brought by a company against 11 of its former directors and employees seeking to recover a fine (on the basis these persons breached their duties to the company) levied against it by the Office of Fair Trading (OFT) for breaches of the Competition Act 1998.

This judgment is of particular interest to directors and officers and their insurers as it potentially limits their exposure to claims by companies seeking to recover certain types of fines and penalties that are levied against them.

### **The Court of Appeal's findings**

In 2007, Safeway admitted certain breaches of the Competition Act 1998 arising out of an exchange of pricing information for dairy products with other supermarkets and dairy producers that led to the price of dairy products increasing. The OFT subsequently informed Safeway that it would impose a substantial penalty against it (subject to a discount reflecting Safeway's co-operation). Although the amount of the penalty has yet to be decided, it could be in excess of £10 million.

In September 2008, Safeway brought a claim against 11 of its former directors and employees asserting that, as a result of their participation in/facilitation of the anti-competitive behavior, they were in breach of their employment contracts/duties and/or negligent.

It appears to have been recognized in the proceedings that the intention of the claim was to seek to open up Safeway's D&O insurance policy to recover the penalty imposed and costs incurred by Safeway in connection with the OFT's investigation.

The former directors and employees applied to strike out the claim against them on the basis of the *ex turpi causa* principle.

The strike-out application did not succeed at first instance because (among other things) the court did not consider Safeway to be "personally" at fault in breaching the Competition Act 1998 as it had not been shown that any of the defendants were the "directing mind and will" of Safeway. However, the court did hold that the relevant contraventions of the Competition Act 1998 were sufficiently serious to potentially engage the *ex turpi causa* principle (this finding was not subsequently disputed by Safeway).

The directors and employees appealed. The Court of Appeal held that a consideration of whether the defendants were the "directing mind and will" of Safeway was not relevant as the company had accepted that it was in breach of the Competition Act 1998 and only Safeway could be held liable

under this legislation (not any of its directors and officers). Consequently, Safeway was personally at fault.

Having determined that Safeway was personally liable for the penalty, the Court of Appeal also held that the general rule of English law (“the Hampshire Land exemption”), which states that acts committed by an agent are not attributable to his/her principal where they are intended to deliberately cause loss to his/her principal, had no effect on the application of the *ex turpi causa* principle in this case.

## Impact

Subject to any appeal, companies will not now be able to pursue claims against their (current or former) directors seeking to recover penalties (and associated costs) incurred by them as a result of any breaches of the Competition Act 1998. The judgment does not alter the standard position under English law that criminal fines are not generally insurable.

The judgment may also have a wider impact, potentially preventing companies from pursuing claims against their directors and employees seeking to recover losses they incur for liabilities arising from other criminal or quasi-criminal offences.

Although the position is complex, the judgment potentially does not impact on the following types of cases:

- Where the relevant offence is one of strict liability and/or the claimant may not have been at fault. For example, the new Bribery Act 2010 (section 7) includes a new strict liability offence that companies can commit if they fail to put in place adequate procedures to prevent bribery. It is arguable whether claims against directors of companies that commit this offence would be prevented by the *ex turpi causa* principle.
- Where the relevant offence does not involve the necessary element of moral reprehensibility for the *ex turpi causa* principle to be engaged.
- Where the company is vicariously liable for the acts of its directors or officers.
- Where claims are pursued against directors and officers by other parties, such as disqualification proceedings, actions by regulators and prosecutions. The *ex turpi causa* principle will provide no defence to these types of claims.

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