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9th Circ. Leaves Yahoo Atty Fee Award Alone In Coverage Spat

By **Melissa Angell**

Law360 (June 23, 2021, 10:37 PM EDT) -- The Ninth Circuit on Wednesday left Yahoo Inc.'s jury award of more than \$600,000 in attorney fees untouched after an AIG subsidiary accused the tech giant of not presenting the correct recoverable amount, with the panel finding that Yahoo shared adequate billing records.

A three-judge panel unanimously ruled that it would not "disturb" the jury award Yahoo received after hearing out National Union Fire Insurance Co. of Pittsburgh, Pa.'s challenge to the attorney fees. The insurer had argued that Yahoo lumped all legal fees together, including those that are not recoverable.

"Yahoo presented detailed billing records and made its associate general counsel, Daniel Tepstein, available to testify on the nature of the legal work those records referenced," the opinion said. "While Yahoo's request for virtually all of its fees through the summary judgment stage may have been ambitious, Yahoo fulfilled its obligation to 'demonstrate[] how the fees ... should be apportioned.'"

The coverage dispute goes back to January 2017, when Yahoo filed suit alleging National Union had breached its policy by refusing to cover the company in several class actions accusing it of scanning customers' emails.

In October 2018, U.S. District Judge Edward J. Davila found that National Union **largely failed to defend** and indemnify Yahoo for \$4 million in attorney fees that resulted from the class actions. The judge said it was up to a jury, though, to decide whether the insurer acted in bad faith in denying coverage.

Following **a five-day trial** in May 2019, a jury returned a verdict finding that National Union had acted in bad faith and should foot the bill for Yahoo's attorney fees.

But **on appeal**, the insurer asked the Ninth Circuit to reverse the award of over \$600,000 in attorney fees or grant a new trial altogether, arguing that the district court failed to guide a jury on how to allocate and award attorney fees. National Union explained that the tech giant was not able to show which portions of its legal fees were spent on bad faith claims.

Yahoo, however, argued that the record reflects "substantial evidence" in support of the jury's verdict and pointed out that the insurer didn't bother to cross-examine Tepstein about the accuracy of the figures provided.

And on Wednesday, the panel determined that National Union's attempt to overturn the jury's fee award is "unavailing." The challenge is also too little to late, with the panel observing that the insurer's argument was raised "for the first time on appeal regarding the content of Yahoo's billing records."

The appeals court also addressed Yahoo's argument that a lower court got it wrong in determining that it is only entitled to 30 days interest on defense and settlement costs under a previous 2011 contract.

"Here, had both parties fully performed their contractual obligations, National Union would have initially paid all defense and settlement costs, and Yahoo would have reimbursed those costs within thirty days of receiving an invoice," the panel wrote, concluding that Yahoo has not demonstrated that it deserves special damages.

Counsel for the parties could not be immediately reached for comment Wednesday.

U.S. Circuit Judges Ryan Nelson and Bridget Shelton Bade and U.S. District Judge Alvin K. Hellerstein sat on the panel for the Ninth Circuit.

Yahoo is represented by William T. Um and Elizabeth Baldrige of Jassy Vick Carolan LLP.

National Union is represented by Emily V. Cuatto and Mitchell C. Tilner of Horvitz & Levy LLP.

The case is Yahoo Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa., case numbers 19-16475 and 19-17462, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Daphne Zhang, Jeff Sistrunk and Christopher Crosby. Editing by Breda Lund.