

Prior Acts Date Bars Coverage for Continuing Fraudulent Scheme

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The United States District Court for the Northern District of Indiana, applying Illinois law, has held that a prior acts exclusion barred coverage for a fraudulent scheme that began before the prior acts date and continued thereafter. *Bainbridge Mgmt., LP v. Travelers Casualty & Surety Co. of Am.*, 2006 WL 978880 (N.D. Ind. April 10, 2006).

The insurer issued a healthcare D&O policy with a policy period of December 31, 2000, to December 31, 2001. The policy was a claims-made policy covering loss suffered by the insureds because of claims based on wrongful acts. The policy excluded coverage for claims "arising out of or in any way related to any Wrongful Act committed, in whole or in part, prior to October 6, 1998." In the underlying criminal and civil actions, the insured organization was accused of a fraudulent scheme that began in 1995. The organization subsequently pled guilty in the criminal action, stipulating that the scheme began "in or about 1995" and that it continued at least until 2000.

The court held that the policy's prior acts exclusion applied, as "there [was] no doubt that the Claim . . . at the very least, was 'related to' a Wrongful Act—the scheme to defraud—that was committed in whole or in part prior to October 6, 1998." The court noted that the exclusion was unambiguous and that other courts, including at least one Illinois court, had concluded that similar exclusions were unambiguous.

The court rejected the insured's contention that its expectation was that it had coverage under the policy for all wrongful acts occurring between 1998 and 2001. The court rebuffed this argument, stating that the insured was confusing occurrence coverage with claims-made coverage. According to the court, the policy's claims-made coverage applied to "Loss resulting from Claims against Insureds for Wrongful Acts, not the Wrongful Acts themselves." Similarly, the court found no merit in the insured's contention that the underlying claims triggered the insurer's duty to defend because wrongful acts allegedly occurred both before and after the prior acts date. In rejecting this argument, the court observed that the policy imposed only a duty to indemnify, not a duty to defend.

The court then considered the insured's argument that the insurer was estopped from relying on the exclusion because the insurer failed to file a declaratory judgment action to establish that the exclusion applied, as the insured asserted was required under Illinois law. The court noted that Illinois law imposed no such obligation

where the policy at issue did not impose a duty to defend and accordingly rejected the insured's argument.