

Court Rules Prior Litigation Exclusion Is Broad and Unambiguous

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The Eleventh Circuit, applying Alabama law, ruled that a prior litigation exclusion was both broad and unambiguous, barring coverage despite the fact that the two lawsuits were separated by several years, contained different plaintiffs and alleged different theories of relief. *HR Acquisition I Corp. v. Twin City Fire Ins. Co.*, 2008 WL 4767256 (11th Cir. Nov. 3, 2008).

The insured in this case was a former affiliate of HealthSouth that had purchased an insurance policy that included a prior litigation exclusion for "Loss in connection with any Claim . . . based upon, arising from, or in any way related to any demand, suit, or other proceeding against any Insured which was pending on or existed prior to [December 17, 1997], or the same or substantially the same facts, circumstances or allegations which are the subject of or the basis for such demand, suit, or other proceeding."

On December 15, 1997, a HealthSouth employee filed a False Claims Act *qui tam* suit against the insured asserting, among other things, that the insured defrauded the federal government by engaging in transactions in which HealthSouth sold certain properties to the insured, which then leased them back to HealthSouth at artificially high prices. The former HealthSouth employee alleged that HealthSouth then sought reimbursement for the artificially inflated lease payments under Medicare. Although the insured was named as a defendant in this lawsuit, the plaintiff never served the insured and the insured never participated as a party to the litigation.

The insured then sought coverage for a later-filed shareholder derivative lawsuit alleging that the insured participated in "a scheme in which HealthSouth sold property to [the insured] and then leased it back at artificially high prices." The insurer denied coverage for this suit, and coverage litigation followed.

Although the district court denied the insurer's motions for summary judgment, the Eleventh Circuit ruled that the prior litigation exclusion barred coverage. The court noted that the exclusion requires the court first to determine whether the second suit was "based upon, arising from, or in any way related to" the prior suit and, second, determine whether the first suit was "pending" or "existed" on or before December 17, 1997. Considering the first issue, the court explained that the exclusion creates a very low standard of relatedness and concluded that the second suit "clearly meets that low standard—it is certainly 'in any way related' to" the

first suit. The court held that it was irrelevant that the two suits were brought on behalf of different parties and were based on different theories of recovery, stating that the exclusion "does not require that the parties, claims, or theory of recovery in each suit be identical. . . ."

The court then concluded that the first suit was "pending" prior to December 17, 1997, despite the fact that the insured was never served and never participated as a party to the suit. The court reasoned that Alabama courts have concluded that a case is "pending" or "exists" when it has been filed by the plaintiff, even if none of the defendants have yet been served. The court also explained that "a court must read each phrase in an insurance contract 'in the context of all of other provisions' to determine the parties' intent." In this regard, the court noted that the definition of "Claim" requires "service" of a complaint on the insured and that similar language is missing from the prior litigation exclusion. The court concluded that "the Policy drafters knew how to specify when service of a complaint was required,—and such an express service requirement is noticeably *absent* from the 'prior litigation' exclusion."