NEWSLETTER

Appellate Court Reaffirms Application of Prior or Pending Litigation Exclusion to Lawsuit Arising out of "Overall Scheme"

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A Florida District Court of Appeal has denied a motion for rehearing of its previous decision affirming summary judgment in favor of insurers on the grounds that the insurers properly applied a prior or pending litigation exclusion to deny coverage for a lawsuit that was based on the same or similar allegations at issue in an earlier lawsuit. *Acosta, Inc. v. Nat'l Union Fire Ins. Co.,* 2010 WL 2976519 (Fla. Dist. Ct. App. Jul. 30, 2010). The court, however, withdrew its previous opinion and issued a modified opinion affirming the trial court's grant of summary judgment in favor of the insurer.

Insurers issued D&O policies to a food brokerage company for the November 1, 2002 to November 1, 2003 policy period. The policies barred coverage for Loss in connection with a Claim "alleging, arising out of, based upon or attributable to as of [November 1, 2001], any pending or prior: (1) litigation; or (2) administrative or regulatory proceeding or investigation of which an Insured had notice, or alleging any Wrongful Act which is the same or Related Wrongful Act to that alleged in such pending or prior litigation or administrative or regulatory proceeding or investigation" (the Prior Litigation Exclusion).

In May 2001, a competitor to the insured company filed for bankruptcy, and in June 2001, the competitor filed a complaint for turnover and injunctive relief against the insured company (the Turnover Action). The competitor and the insured company had allegedly executed an interim agreement under which the insured agreed to enter broker agreements with certain of the competitor's clients and to pay for its use of any of the competitor's assets. The competitor moved the bankruptcy court to approve the agreement as memorialized in a term sheet but later withdrew its motion. After the motion was withdrawn, the company allegedly hired many of the competitor's former employees, entered agreements with the competitor's clients, and removed files and laptops from the competitor's offices. The parties resolved the Turnover Action informally. In May 2003, the "Creditors' Trust" filed a lawsuit against the insured company (the Creditors Action). The complaint in the Creditors Action alleged, among other things, that in the May-June 2001 time period, the company used the competitor's property, including its files and computers; obtained the competitor's trade secrets; and obtained the competitor's retail relationships and contracts.

After the insurers denied coverage for the Creditors Action based on the Prior Litigation Exclusion, the insured initiated the coverage action. The trial court granted summary judgment in favor of the insurers. On appeal, the appellate court first considered whether it was necessary to consider extrinsic evidence to determine whether the Prior Litigation Exclusion applied. The court recognized that numerous other courts have held, in specific circumstances, that the applicability of an exclusion depended on facts developed through evidence. The court, however, concluded that the issue of whether to consider extrinsic evidence had to be decided on a case-by-case basis and in some cases, including this case, the "clarity of the pleadings" rendered the consideration of extrinsic evidence unnecessary.

The court next declined to reach the insured's argument that the trial court erred in not making a count-by-count comparison of each count in the Turnover Action and Creditors Action to decide whether the Prior Litigation Exclusion applied. The insurers had argued that only a comparison of the two complaints was necessary. The court noted that the issue would require an analysis of the definition of "Claim" to determine if each count constituted a separate "Claim," but stated that it was unnecessary to engage in such an analysis because, even if the insured were correct that a count-by-count comparison was necessary, the Prior Litigation Exclusion would apply to every count in the Creditors Action.

The court concluded that the insurers were entitled to deny coverage based on the first prong of the Prior Litigation Exclusion because the Creditors A ction "arose out of" the Turnover A ction. The court stated that although the Creditors Action contained a number of different counts, "the two suits were still connected as part of the overall scheme set forth in the underlying suit, as illustrated by the numerous similar factual allegations and shared time frame." The court determined that each count of the Creditors Action was "unmistakably related" to the Turnover Action and that all counts against the insured in the Creditors Action "center[ed] on its efforts to obtain contracts with [its competitor's] clients." The court concluded that the "lack of identical causes of action or damages models is not dispositive of whether the suits are factually related." As such, the court held that the insurers had properly denied coverage based on the Prior Litigation Exclusion. "