

# Prior Proceeding Exclusion Does Not Bar Coverage for *Qui Tam* Action

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The Supreme Court of the State of New York, New York County, has denied a motion to dismiss filed by insurance company defendants, holding that a policy's "pending and prior proceedings" exclusion did not bar coverage for a *qui tam* action brought against an insured lender. *Ciena Capital LLC v. XL Spec. Ins. Co.*, No. 651452/2010 (N.Y. Sup. Ct. Mar. 26, 2012). The court also concluded that an E&O exclusion for "[c]laims for the rendering of services to others for a fee" was ambiguous and did not bar coverage.

In September 2008, the insured lender became aware of a *qui tam* action brought against it. According to the underlying complaint, the lender had engaged in fraudulent practices in connection with certain loans. The lender tendered the claim to its insurers, which had issued separate management liability and professional liability policies. The insurers denied coverage on the grounds that the *qui tam* action was "based upon, arising out of, directly or indirectly resulting from, [or] in consequence of" other proceedings and investigations that had commenced before the start of the policy period. The insurers pointed to Securities and Exchange Commission (SEC) and U.S. Attorney investigations, charges against a vice president of the lender and a 2005 suit brought by the relators who brought the *qui tam* action.

Emphasizing the relaxed pleading standards at the motion to dismiss stage, the trial court denied the insurers' motion, concluding that "there is an issue of fact as to whether the Other Proceedings bear a substantial enough relationship to the [*qui tam* action]." In particular, the court emphasized that the specific loans at issue in the *qui tam* action were not mentioned in any documentary evidence relating to the earlier proceedings. In addition, the court noted that the indicted vice president had been charged with personal fraud, was not a defendant in the *qui tam* action and had not implicated the lender or its management in the charged misconduct. Thus, the court concluded, "[t]hough the [insurers] have pointed to some similarities between the [*qui tam* action] and [the] Other Proceedings, they have not conclusively established that coverage . . . is barred by the Pending and Prior Proceedings Exclusion."

The court next held that the management liability policy's E&O exclusion for "[c]laims for the rendering of services to others for a fee" did not support dismissal. According to the court, the undefined term "services" did not unambiguously apply to the insured's loan origination and servicing activities. If the insurers had intended to exclude claims arising from such activities, the court reasoned, they could have defined "services" to include loan origination and servicing as they did in the professional liability policy. As a result, the court

denied the insurers' motion to dismiss.