

# Texas Court Finds Ambiguity Between Related Claims Provision and Prior or Pending Litigation Exclusion

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Applying Texas law, a Texas intermediate appellate court has held that a prior or pending litigation exclusion conflicted with a related claims provision contained in a D&O liability policy, creating an ambiguity construed in favor of coverage for the insured. *Gastar Exploration, Ltd. v. U.S. Specialty Ins. Co.*, 2013 WL 3693603 (Tex. App. Ct. July 16, 2013).

The insurers issued claims-made primary and excess D&O liability policies to the insured covering a policy period from November 1, 2008 to November 1, 2009. The policies contained an interrelated claims provision providing that “[a]ll Claims, alleging, arising out of, based upon or attributable to the same facts, circumstances, situations, transactions or events or to a series of related facts, circumstances, situations, transactions or events will be a single Claim and will be considered to have been first made at the time the earliest such Claim was made.” In addition, the policies contained an endorsement with a prior or pending litigation exclusion, which barred coverage for any claim “arising out of, based upon or attributable to any pending or prior litigation as of 5/31/2000, or alleging or derived from the same or essentially the same facts or circumstances as alleged in such pending or prior litigation.”

The insured was named in 10 lawsuits alleging fraud in an investment scheme involving thoroughbred breeding mare leases. Seven of these lawsuits were filed during the policy period, but three had been filed in 2006, prior to the inception of the policies. The insurers denied coverage for the seven lawsuits filed during the policy period on the grounds that the claims were related to the three previously filed lawsuits pursuant to the related claims provision. The insured filed the instant coverage action, contending that the related claims provision was ambiguous and conflicted with the prior or pending litigation endorsement because the endorsement excluded only related claims filed prior to May 31, 2000. The trial court granted summary judgment to the insurers and the insured appealed.

The Texas intermediate appellate court reversed the trial court, holding that the related claims provision was ambiguous when applied in conjunction with the prior or pending litigation endorsement. First, the appellate court rejected the insurers' argument that the related claims provision differed from the prior or pending litigation exclusion because it was a condition to coverage under the policies. According to the appellate

court, the related claims provision “is effectively an exclusion because it narrows the coverage originally created by the Insuring Agreement.” In turn, the appellate court determined that the related claims provision “renders [the prior or pending litigation exclusion] meaningless because any ‘Claims’ that would be excluded from coverage by [the prior or pending litigation exclusion] would already be excluded by operation of” the related claims provision. As such, the appellate court concluded that the provisions conflict or, at a minimum, create an ambiguity that must be construed in favor of coverage for the insured. According to the appellate court, the prior or pending litigation exclusion was endorsed to the policies and “demonstrates the parties’ intent to restore coverage for claims that arose out of the same facts as litigation filed between May 31, 2000, and the inception date of the policy.”