

No Coverage for Claim Deemed First Made Prior to Policy Period

January 2014

The United States Circuit Court for the Eleventh Circuit, applying Florida law, affirmed a trial court's dismissal of a complaint against an insurer after determining that the underlying lawsuit was deemed a claim first made prior to the inception of the insured's professional liability policy. *Zodiac Group, Inc. v. AXIS Surplus Ins. Co.*, 2013 WL 5718439 (Oct. 22, 2013).

An insurer issued a claims-made professional liability policy to a company that offered psychic hotline telephone services. The policy was issued for the policy period of October 1, 2008 to October 1, 2009, and the insurer issued a renewal policy for the following year. Both policies provided that "all Claims arising from the same Wrongful Act" were deemed to have been made on the same date and that wrongful acts "related by common facts, circumstances, transactions, events and/or decisions" were to be treated as "one Wrongful Act."

In April 2008, a putative psychic sued the insured company and alleged that the company improperly used her name and likeness to imply falsely that she supported the company after her endorsement agreement with the company had ended. This complaint, filed in state court, was dismissed in November 2009 for lack of prosecution, and the insured never provided notice of the action to the carrier. In January 2010, the psychic filed a lawsuit in federal court against the company and two individual insureds. She again alleged that the insureds improperly used her name and likeness to promote the company. The insured gave its insurer notice of this later action, and the insurer denied coverage.

In the ensuing coverage litigation, the insurer moved to dismiss the insured's complaint, which motion was granted. On appeal, the court agreed that the alleged "wrongful acts" in the state and federal complaints were "clearly related by common facts, circumstances, transactions, events and/or decisions" and thus were "one Wrongful Act." The court rejected the insured's argument that the inclusion of additional defendants in the later action resulted in allegations of a "new wrongful act" because the policy did not limit its broad relation language "to only those acts committed by a single actor." As such, under the policy language, the claim for the single wrongful act was treated as if it were made at the time of the earlier lawsuit in April 2008 and therefore prior to the policy period. Accordingly, the court reasoned that a condition precedent to coverage was not met because the claim was not first made during the policy period. The court therefore affirmed the lower court's dismissal of the action against the insurer.