

ALERT

# Prior Acts Exclusion Bars Coverage for Suit Against Bank Alleging Lending Act

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The United States District Court for the Middle District of Georgia, applying Georgia law, has held that a lawsuit against a bank alleged a “lending act” and was barred from coverage by a prior acts exclusion because the suit arose from extensions of credit made by the bank before the prior acts date. *Bank of Camilla v. St. Paul Mercury Ins. Co.*, 2013 WL 1333519 (M.D. Ga. Mar. 29, 2013). The court also held that the insurer did not waive its coverage defense by failing to disclaim coverage based on the prior acts exclusion because the insurer had a duty to advance defense costs and not a duty to defend.

The insured, a bank, was sued by the investors of one of its customers. The investors first filed suit in April 2009 and alleged that the bank destroyed the customer’s business by seizing and selling the customer’s assets after the customer defaulted on promissory notes, which the customer allegedly issued to the bank with the bank’s knowledge of improprieties by the customer. The bank did not tender the suit to the insurer because the bank did not believe that coverage was available for the suit. In October 2010, the investors filed an amended complaint alleging that the bank assisted the bank in a Ponzi scheme and misrepresented the customers’ financial condition to investors. After receiving notice of the amended complaint, the insurer denied coverage for the investors’ suit and later disclaimed coverage for the suit based on a prior acts exclusion in the policy’s lending act coverage part.

The court first held that the insurer did not waive its right to deny coverage based on the prior acts exclusion, although the insurer failed to disclaim coverage for the investors’ suit on that basis in its denial letter. The court distinguished Georgia law holding that an

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insurer waives its right to rely on a coverage defense if the insurer does not raise the coverage defense when denying coverage for a claim. The court held that the waiver doctrine applied only in the context of duty to defend policies. Because the insurer only had a duty to advance defense costs and not a duty to defend, the insurer did not waive its right to rely on the prior acts exclusion to bar coverage for the investors' suit.

The court held that the amended complaint fell within the policy's lending act coverage part, which defined "lending act," in relevant part, as "with respect to a loan, lease, or extension of credit, any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed . . . in connection with or relating to any agreement or refusal to grant or extend any such loan, lease or extension of credit." Because the amended complaint alleged that the bank made misrepresentations to investors by extending credit to the customer through payment of overdrafts and allowed the customer to cover up the Ponzi scheme through that and other extensions of credit, the court held that the amended complaint alleged a "lending act" against the bank.

The court then held that the prior acts exclusion in the lending act coverage part barred coverage for the amended complaint. The prior acts exclusion barred coverage for "any Claim made against any insured based upon, arising out of, or attributed to any Lending Act . . . taking place prior to January 19, 2010." Because, the lending acts alleged in the amended complaint took place before December 2007, the court held that the prior acts exclusion barred coverage for the amended complaint.