

D&O Policy Covers "Continuing Wrongful Acts" Before and After Date of Prior Acts Exclusion

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In an unreported decision, the United States District Court for the Eastern District of Louisiana held that the prior acts exclusion in a D&O policy did not bar coverage for continuing wrongful acts because of the absence of language in the policy stating that interrelated or continuing wrongful acts would be defined as one wrongful act. *Crescent City Baptist Church v. Church Mutual Ins. Co.*, 2006 WL 508060 (E.D. La. Feb. 22, 2006).

The insurer issued a D&O policy to a church. The policy stated that the insurer had a duty to defend against a "suit," which was defined as "a civil proceeding in which a 'loss' because of injury to which this insurance applies is alleged." The policy also obligated the insurer to indemnify "'loss' arising from any claim or claims because of injury arising out of a 'wrongful act.'" The policy defined "wrongful act" as "[a]ny actual or alleged . . . act or omission" as a director, officer, or trustee. The policy defined "loss" as "damages, judgments, settlements, and 'defense expenses.'" The policy also contained a prior acts exclusion barring coverage for "injury that arises out of a 'wrongful act,' which occurs before the retroactive date" of February 1, 2004.

The school board of the church and members of the congregation first filed a Petition for Mandamus, Petition for Declaratory Judgment, Petition for Independent Audit and Petition for Expenses and Attorney's Fees against the church's pastor on October 1, 2003. On the same day some of the petitioners also filed a Petition to Revoke Donations. On November 7, 2003, the parties agreed to arbitrate the dispute. Based largely on the same actions by the pastor, counsel for additional petitioners sent a demand letter to the church on March 29, 2004, seeking injunctive relief. The church responded on April 9, 2004, denying the relief demanded. On May 4, 2004, the petitioners filed their demand in court as a Petition for Writ of Mandamus and Rule to Show Cause. After the insurer denied coverage, litigation ensued.

The church first argued that the demand letter constituted a suit under the policy, requiring the insurer to both defend and indemnify. The court considered the definition of suit, which requires a civil proceeding, an arbitration or other alternative dispute resolution proceeding. The court agreed with the insurer that a demand letter could not be construed as any of those sorts of actions.

The court next considered whether coverage was barred because the substance of the actions against the church related to acts prior to February 1, 2004. The court noted that there was a provision in the policy stating that claims arising out of "interrelated wrongful acts" would be treated as one "loss" and subject to one retention. However, it also noted that the insurer did not "choose to lump 'interrelated' or continuing wrongful acts together as one 'wrongful act.'" The court therefore rejected the insurer's argument that coverage was barred because the post-policy wrongful acts were related to the pre-policy wrongful acts. The court also ruled that, in any event, the letter sent by the church specifically refusing to comply with the demand letter would be considered a separate wrongful act because it was a "new decision."

Finally, the court rejected the insurer's argument that the policy did not cover a suit seeking only injunctive relief. The court noted that, under the policy, the insurer has only a duty to defend a suit seeking payment for loss. However, the court reasoned that the duty to indemnify extends to the legal obligation to pay for loss, which was defined to include "defense expenses." Because the church hired attorneys to defend itself, the court determined that the church was legally obligated to pay defense expenses, which constitute loss under the policy. Therefore, the court determined that although the insurer had no duty to defend when only injunctive relief was sought, the policy required the insurer to indemnify the defense expenses incurred in defending the action.