

# Binder Provided Coverage Subject to “Related Wrongful Acts” Exclusion, Even Though Binder Did Not Mention “Related Acts” Exclusion

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The United States Court of Appeals for the Fifth Circuit has held that a binder excluding "all prior acts prior to policy inception date" excluded coverage "for related wrongful acts," even though the binder did not mention related wrongful acts, because the ordinary form of the contemplated policy contained such an exclusion. *Med. Care Am., Inc. v. Nat'l Union Fire Ins. Co.*, 2003 WL 21788994 (5th Cir. Aug. 5, 2003).

The insured was a company formed as a result of the merger of two other companies. In anticipation of the merger, the company procured D&O coverage from the insurer. The temporary conditional binder issued to the new company provided that the policy would exclude "all prior acts prior to policy inception date." When the policy issued, that provision was embodied in an endorsement providing that "this policy only provides coverage for Loss arising from claims for alleged Wrongful Acts occurring on or after September 9, 1992 and prior to the end of the Policy Period and otherwise covered by this policy. Loss(es) arising out of the same or related Wrongful Act(s) shall be deemed to arise from the first such same or related Wrongful Act."

Between the time when the binder issued and the policy issued, and after the merger date of September 9, 1992, a shareholder suit was filed against the company and its directors and officers alleging misrepresentations prior to the merger. The lawsuit ultimately settled for \$60 million; however, the insurer denied coverage based on the exclusion for related wrongful acts, contending that the alleged misrepresentations predated the merger.

The Fifth Circuit held that the insurer was entitled to deny coverage. It noted "that under Texas law an insurance binder provides coverage according to the terms and provisions of the ordinary form of the contemplated policy." The court held that the trial court had properly ruled in favor of the insurer at the close of evidence because "the evidence and inferences point so strongly and overwhelmingly in favor of a finding that [the insurer's] standard prior acts endorsement normally or ordinarily used in its D&O liability policies contained related acts language."

The Fifth Circuit also rejected the argument that the insurer was estopped from relying on the prior acts exclusion because that language was not in the binder. The court first noted that there was no evidence that the insurer had "misrepresented or concealed" coverage terms. Furthermore, under Texas law, to make an argument based on estoppel, the policyholder would need to show that it exercised due diligence to ascertain the truth of the matters at issue and that it lacked the means or had been prevented from doing so. The court held that no such showing had been made here.

Finally, the Fifth Circuit held that the trial court had properly granted the insurer's motion for summary judgment as to the bad faith claims against it. The court concluded that "the evidence overwhelmingly shows that there was a bona fide coverage dispute, which [the insurer] subsequently won."

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