

Plaintiffs' Third Suit Against Town Distinct from Prior Two and Thus a New "Claim"

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The Appeals Court of Massachusetts has held that a state insurers insolvency fund did not owe a duty to defend a 2005 lawsuit filed against a town and town officials because the claims-made public entity errors and omissions policy it assumed expired in 2002. *Mass. Insurers Insolvency Fund v. Redland Ins. Co.*, 2008 WL 3342991 (Mass. App. Ct. Aug. 13, 2008). The court, rejecting the argument that the 2005 suit arose out of two 2002 suits filed by the same plaintiffs, also held that the insurer on a subsequent policy in effect at the time of the 2005 lawsuit had a duty to defend the town.

The town had purchased an errors and omissions policy covering the period from July 2001 to July 2002 from an insurer that later became insolvent, causing the insolvency fund to assume the insurer's rights and duties under the policy. The town purchased another policy from a separate insurer covering the period from July 2002 to July 2005. Both policies were claims-made policies. In 2002, town residents brought two separate actions in state court against the town, its zoning board of appeals and its building commissioner after the town revoked a building permit needed to construct a home addition. The suits sought declaratory relief but not damages. The insurer on the 2001-2002 policy, prior to its insolvency, declined to provide a defense because the plaintiffs did not seek damages. In 2005, the same plaintiffs filed another suit against the town in federal court under 42 U.S.C. § 1983, demanding money damages. The insurer on the 2002-2005 policy disclaimed coverage, and the insolvency fund, after providing a defense under a reservation of rights, brought a declaratory judgment action against the insured town. The trial court granted summary judgment in favor of the fund, holding that fund had no duty to defend the 2005 suit, and the insurer appealed.

The Appeals Court affirmed, noting that the 2005 suit was filed nearly three years after the expiration of the 2001-2002 policy and that neither the insurer on that policy nor the fund was on notice of the 2005 claim when the policy expired. The court also held that the insurer on the 2002-2005 policy was obligated to defend the 2005 suit, which was filed while its policy was in effect. The court rejected the insurer's argument that the acts underlying the 2005 suit were so connected to the 2002 suits that they should all have been treated as stemming from the same "wrongful act"—that is, the revocation of the building permit in 2002. Although all three suits were connected to the denial of necessary permits and named the town as a defendant, the court noted that the 2005 suit named different town officials as defendants and involved factual allegations that occurred after a decision was reached in the 2002 suits and while the 2002-2005 policy was in effect. Given

these characteristics, the court also held that exclusions for known prior acts, prior uninsured acts, and pending or prior litigation did not apply.