

Claim Deemed Made Before Policy Period and Settlement Held Not To Constitute Loss

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The Superior Court of New Jersey, Appellate Division, applying New Jersey law, has affirmed a lower court's ruling that a lawsuit was not covered because the allegations were first asserted prior to the policy's inception in a different suit and that agreeing in a settlement to provide services and to surrender certain assets did not constitute "loss" as defined in another prior policy. *Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 2010 WL 772299 (N.J. Super. Ct. App. Div. Mar. 8, 2010).

The policyholder, a governmental entity that operated a sewer system, both issued regulations governing certain industrial users and competed with those industrial users for governmental contracts. One such industrial user sued the policyholder in 1997 for alleged regulatory abuse and unfair competition. The underlying plaintiff dismissed the suit pending settlement efforts, but filed suit again in 2000 after the settlement efforts failed. The 2000 suit explicitly referred to the 1997 suit and characterized the policyholder's alleged wrongs as a continuation of the conduct that led to the 1997 suit. An insurer with a policy in force in 1997 agreed to defend the policyholder and allowed the policyholder to use its own counsel. The underlying litigation eventually settled. The policyholder and the insurer disputed the amount of defense costs, but eventually settled that dispute.

The claims-made policy in force in 2000 contained a clause stating that the insurer would "consider all claims or suits arising out of the same wrongful acts or series of related wrongful acts to be one claim or suit and to have been made or brought on the date that the first of such claims or suits was first made or brought, regardless if that date is before or during the policy period." The appellate court affirmed the trial court's holding that the policy did not cover the 2000 suit because it was a claim deemed first to have been brought before the policy inception.

The policy in force in 1997 defined "Loss" as "Money Damages which the insured becomes legally obligated to pay by reason of a Wrongful Act," and in turn defined "Money Damages" as "monetary compensation for past harms or injuries." The policyholder settled the underlying suit by agreeing to provide certain services to the plaintiff and its customers and by surrendering certain assets, including waiving certain penalties that could have been levied against the plaintiff. The policyholder sought indemnification for the value of the settlement. The appellate court affirmed the trial court's holding that the settlement did not constitute "money damages" as unambiguously defined in the policy, and, therefore, did not constitute loss.

In addition, both the trial and appellate courts rejected the policyholder's assertion that the insurer breached its duty to defend by refusing to pay what the insurer considered to be inflated defense costs.