

Prior or Pending Litigation Exclusion Bars Coverage for Lawsuit Arising Out of "Overall Scheme" at Issue In Earlier Lawsuit

June 2010

A Florida District Court of Appeal has affirmed summary judgment in favor of insurers and held that the insurers properly applied a prior or pending litigation exclusion to deny coverage for a lawsuit that was based on the same or similar allegations at issue in an earlier lawsuit. *Acosta, Inc., v. Nat'l. Union Fire Ins. Co. of Pittsburgh, PA*, 2010 WL 1709176 (Fla. Dist. Ct. App. Apr. 29, 2010).

The insurers issued D&O policies to a food brokerage company for the November 1, 2002 to November 1, 2003 policy period. The policies barred coverage for Loss in connection with a Claim "alleging, arising out of, based upon or attributable to as of [November 1, 2001], any pending or prior: (1) litigation; or (2) administrative or regulatory proceeding or investigation of which an Insured had notice, or alleging any Wrongful Act which is the same or Related Wrongful Act to that alleged in such pending or prior litigation or administrative or regulatory proceeding or investigation" (the "Prior Litigation Exclusion").

In May 2001, a competitor to the insured company filed for bankruptcy, and in June 2001, the competitor filed a complaint for turnover and injunctive relief against the insured company (the "Turnover Action"). The competitor and the insured company had allegedly executed an interim agreement under which the insured agreed to enter broker agreements with certain of the competitor's clients and to pay for its use of any of the competitor's assets. The competitor moved the bankruptcy court to approve the agreement as memorialized in a term sheet but later withdrew its motion. After the motion was withdrawn, the company allegedly hired many of the competitor's former employees, entered agreements with the competitor's clients and removed files and laptops from the competitor's offices. The parties resolved the Turnover Action informally. In May 2003, the "Creditors' Trust" filed a lawsuit against the insured company (the "Creditors Action"). The complaint in the Creditors Action alleged, among other things, that in the May-June 2001 time period, the company used the competitor's property, including its files and computers; obtained the competitor's trade secrets; and obtained the competitor's retail relationships and contracts.

After the insurers denied coverage for the Creditors Action based on the Prior Litigation Exclusion, the insured initiated the coverage action. The trial court granted summary judgment in favor of the insurers. On appeal, the appellate court first considered whether the trial court erred by determining the applicability of the Prior

Litigation Exclusion based on a comparison of the complaints alone or whether, as the insured argued, extrinsic evidence should have been considered. The court concluded that the issue must be decided on a case-by-case basis, but that if the pleadings are unambiguous, extrinsic evidence need not be considered. The court next rejected the insured's argument that the trial court was required to make a count-by-count comparison of each count in the Turnover Action and Creditors Action to decide whether the Prior Litigation Exclusion applied. The court analyzed the definition of "Claim" to determine if each count constituted a separate "Claim." The policies defined "Claim" as "a written demand for monetary or non-monetary relief" or "a civil . . . proceeding for monetary or non-monetary relief which is commenced by . . . service of a complaint." The court agreed with the insurers that a "Claim" could be one of several things, including an entire lawsuit. The court reasoned that if an entire lawsuit were not a "Claim," the second prong of the definition would not be given effect, contrary to principles of contract interpretation. In so holding, the court rejected the Delaware Supreme Court's ruling in *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104 (Del. 2007).

Finally, the court compared the two complaints and held that the insurers were entitled to deny coverage based on the first prong of the Prior Litigation Exclusion because the Creditors Action "arose out of" the Turnover Action. The court stated that although the Creditors Action contained a number of different counts, "all of the counts asserted against [the insured] center on its efforts to obtain contracts with [the competitor's] clients." The court concluded that the "lack of identical causes of action or damages models is not dispositive of whether the suits are factually related" and noted that the two lawsuits alleged acts that were "part of an overall scheme." As such, the court held that the insurers had properly denied coverage based on the Prior Litigation Exclusion and also decided that it was unnecessary to determine whether the Creditors and Turnover Actions also alleged the same or related wrongful acts.