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NEWSLETTER

Federal District Court Holds Prior Acts Exclusion Inapplicable; Invokes Related Claims Exclusion

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A federal district court, applying Florida law, has held that insurer could not deny coverage based on the prior acts exclusion in its policy. *Pro Net Global Ass'n v. U.S. Liab. Ins. Co.*, No. 3:02-CV-369-J-32TEM (M.D. Fla. June 4, 2003). The court also held that a second insurer properly denied coverage for two lawsuits involving "the same or substantially the same facts, circumstances, and situations" as a third lawsuit initiated prior to the inception of coverage.

Two insurers had issued consecutive claims-made policies to a company. The underlying litigation involved three lawsuits filed against the policyholder company by distributors of Amway promotional materials who alleged that the company engaged in various schemes to disrupt the chain of distribution and sponsorship with Amway's business. The same lawyer filed each of the lawsuits, and each complaint contained similar factual allegations and overlapping causes of action. The first lawsuit was filed during the first insurer's policy period. The later two lawsuits were filed during the second insurer's policy period. Coverage litigation ensued involving the company and two of its insurers.

The first insurer had issued a policy containing an exclusion for "any Claim based upon or arising out of any Wrongful Act or circumstance likely to give rise to a Claim of which any insured had knowledge, or otherwise had a reasonable basis to anticipate might result in a Claim, prior to the [beginning of the coverage period]." The policy defined "Claim" to include "any written notice received by any Insured that any person or entity intends to hold such Insured responsible for a Wrongful Act." Although the first suit was filed during the first insurer's policy period, the insurer sought to deny coverage by pointing to two facts that it asserted provided notice to the company of potential litigation prior to the inception of coverage and therefore barred coverage. First, the underlying complaint alleged that the company's standard membership agreements contained arbitration clauses, which the insurer contended was done to prevent potential litigation and indicated that the company anticipated litigation. Second, the insurer pointed to a lawsuit involving some of the company's principals that preceded the formation of the company and that was voluntarily dismissed by the person initiating the lawsuit who later became a member of the company, which the insurer also argued gave the company reason to anticipate litigation. The court rejected the insurer's arguments that these two facts constituted knowledge of a potential claim. The court reasoned that neither fact presented "a conclusive basis

upon which to find" that any of the company's principals had "knowledge, or otherwise had a reasonable basis to anticipate" the three lawsuits that were filed.

The second insurer provided coverage after the first lawsuit had been filed, but prior to initiation of the later two lawsuits. The policy excluded coverage for claims "based upon, arising out of, or attributable to any demand, suit or proceeding pending, or order, decree or judgment entered against the Company or any Insured Person on or prior to the [institution of the policy], or the same or substantially the same fact, circumstances or situation underlying or alleged therein." The policy also excluded claims "based upon, arising out of, or attributable to any fact, circumstance or situation which has been the subject of any written notice given under any policy of which this policy is a renewal or replacement." The court held that "[b]ased upon the allegations in the three underlying lawsuits and the unambiguous pending claim exclusion in the [insurer's] policy, it seems plain" that the insurer owed no coverage.

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