

Louisiana Federal Court Holds Prior and Pending Litigation Exclusion Bars Coverage

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In an unpublished opinion, a Louisiana federal court, applying Louisiana law, has dismissed claims against an insurer, holding that the prior and pending litigation exclusion in the public E&O coverage part of a Premier Public Entity Package Insurance Policy unambiguously barred coverage for allegations arising out of a zoning dispute that was the subject of related litigation filed prior to the policy period. *Global ADR, Inc. v. City of Hammond*, 2004 WL 2694902 (E.D. La. Nov. 23, 2004).

The insurer issued a Premier Public Entity Package Insurance Policy to the city of Hammond, LA. Under the policy, the insurer agreed "to indemnify the Assured for all sums which the Assured is legally liable by reason of a Wrongful Act." The policy defined "Wrongful Act" as "any actual or alleged error or misstatement, omission, act or neglect or breach of duty due to misfeasance, malfeasance, and non-feasance." The policy also contained an exclusion that barred coverage for "any Claim for which an Assured is entitled to indemnity under any policy or policies the term of which has expired prior to the inception date of this policy." Another exclusion precluded coverage for "any Claim arising out of all pending and prior litigation or hearing as well as future Claims arising out of any pending and prior litigation or hearing." Because the policy at issue was a renewal, the pending and prior litigation exclusion "only appl[ied] with respect to a pending and prior litigation or hearing prior to the inception date of the first policy issued and continuously renewed" by the insurer.

The underlying plaintiffs sought to purchase real property with the intent to use it for commercial purposes. However, because the property was in an area that was zoned as "residential," they sought to obtain a "conditional use" exception. The city council passed an ordinance granting the conditional use. The plaintiffs then purchased the property. A group of neighbors then challenged the conditional use ordinance in state court, and the ordinance was stricken on the basis that the city council failed to advertise amendments to the ordinance prior to its passage. Less than a year after the neighbors' suit was concluded, the underlying plaintiffs brought the instant action against the city, its insurers (pursuant to Louisiana's direct action provision), and individual city officials, asserting Fifth Amendment, tort and substantive due process claims pursuant to 42 U.S.C. § 1983. The insurer sought dismissal from the case, arguing that the policy did not provide coverage because (1) the allegations in the complaint did not fall within the policy definition of "Wrongful Act," (2) the "other insurance" exclusion precluded coverage since the insured was entitled to indemnity under another insurer's CGL policy and (3) the prior and pending litigation exclusion barred coverage because the action

was related to the neighbors' prior action, which was filed prior to the policy's inception date.

The court rejected the insurer's argument that the allegations in the underlying complaint did not constitute a "Wrongful Act" within the meaning of the policy. The court held that "plaintiffs have *alleged* errors, misstatements, omissions, neglect and/or breaches of duty in their Complaints" and that plaintiffs "have further alleged that such gross negligence resulted from the City defendants' misfeasance, malfeasance, and/or non-feasance" such that "the plaintiffs' allegations and claims of damages clearly fall into the policy's definition of 'Wrongful Act.'" Similarly, the court rejected the insurer's reliance on the "other insurance" exclusion, noting that there had been no holding that the policyholder was entitled to coverage under any other insurer's policy.

The court held, however, that the prior and pending litigation exclusion barred coverage for the claim. The court reasoned that "it is clear that the instant action against the City of Hammond defendants is a claim . . . and that the claim arose directly from the litigation instituted by [the neighbors] against the City and Global ADR in December of 1999." Because the city first purchased the policy in 2000, under the terms of the exclusion, "the claims of the Global ADR plaintiffs arising from prior litigation instituted in 1999 are excluded from coverage." Moreover, the court held that "[t]he policy language used in the 'prior and pending litigation' exclusion is not ambiguous, and the exclusion is not subject to more than one interpretation."

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