

# Prior Litigation Exclusion Bars Coverage for Only Some Opt-Out Claims in Connection with Prior Class Action

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The United States Court of Appeals for the Eleventh Circuit, applying Texas law, has held that a pending litigation exclusion relieved an insurer of its duty to defend against claims of fraudulent misrepresentation, but not against allegations of negligence or vicarious liability. *Am. Gen. Life Ins. Co. v. Franklin Life Ins. Co.*, 2005 WL 1114345 (11th Cir. May 11, 2005).

In 1998, an insurer issued professional liability policies to a company that sold insurance policies that covered amounts "which the insured becomes legally obligated to pay as damages." The policies excluded from coverage "[a]ny claim or suit for damages in any way related to any litigation which commenced prior to the Effective Date . . . ." The policies defined "related claims" as "all claims involving the same wrongful act or wrongful acts which are logically or causally connected by reason of common fact, circumstance, situation, transaction, even or decision." In 1999, several plaintiffs that opted out of a 1998 class action settlement filed individual lawsuits against the insured. Those complaints generally alleged misrepresentation, relying almost exclusively on allegations of fraud at the time of the sale of the policies. At least one complaint, however, asserted a vicarious liability theory. That complaint alleged "that the agents [of the insured] breached their obligation to communicate changed circumstances to the policyholders, which resulted in the policy performing worse than the agents had promised it would." The company demanded a defense from its insurer for the opt-out suits. When the insurer declined, the company filed suit seeking a declaration that the insurer breached its duty to defend and costs for defense and settlement of the opt-out suits. After reviewing the allegations in the class action complaints, the district court held that the pending litigation exclusion relieved the insurer of its duty to defend the misrepresentation claims, but found that a defense was owed with respect to certain opt-out claims that were premised on different legal theories.

The appellate court affirmed the district court opinion in full. First, with respect to the opt-out claims based on misrepresentations, the court noted a disagreement among Texas courts over the use of extrinsic evidence in such instances and the propriety of reviewing previously filed complaints in assessing prior litigation exclusions. However, relying on a Texas appellate court decision (issued after the district court entered its summary judgment order) in which the court reviewed the allegations in the prior litigation in assessing a similar such exclusion, the court observed that "the district court conducted its analysis in the same manner as

the Texas Court of Appeals," which "did not consider it a violation of the eight corners rule to look to the allegations of the prior lawsuits." Accordingly, it determined that opt-out claims based on misrepresentations were not subject to coverage, nor were suits based on "related" fraud, fraudulent concealment and deceit allegations.

The appellate court also agreed with the district court that the pending litigation exclusion did not bar coverage for vicarious liability-based opt-out claims alleging that the insured's agents "breached their obligation to communicate changed circumstances to the policyholders, which resulted in the policy performing worse than the agents had promised it would." Further, it affirmed that alleged acts of concealment, which continued after settlement of the class action litigation, were not "prior" or "pending" claims or suits barred by the exclusion.

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