

Prior Litigation Exclusion Applies to All Insureds Despite Lack of Knowledge

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A Pennsylvania superior court has held that a prior and pending litigation exclusion applies to all insureds regardless of whether they had actual knowledge of the prior litigation. *Universal Teleservices Arizona, LLC v. Zurich Am. Ins. Co.*, 2005 WL 1503637 (Pa. Super. Ct. June 27, 2005).

In November 2001, the insured obtained a D&O policy for the November 27, 2001, to November 27, 2002, policy period, which covered two corporations, a husband (who served as a board member and/or officer of both entities) and his wife. The policy contained an exclusion for loss on account of any claim "based upon, arising out of, attributable to, or in any way directly or indirectly related to any demand, suit or proceeding pending or order, decree or judgment entered against any Company or any Insured Person on or prior to" September 28, 2000.

The husband and wife sought coverage from the insurer for a lawsuit filed against the husband, wife and insured company in March 2001. The suit sought to enforce a \$21 million judgment entered against the husband in July 2000. The court characterized the facts as: "the novel theory of one person borrowing money, not repaying it, losing judgment at trial regarding the borrowed money, transferring the borrowed assets into joint assets (including new corporate entities), stonewalling on satisfying the judgment, waiting for a lawsuit to be filed seeking to enforce the judgment, and then buying insurance after the enforcement action has been filed in an attempt to avoid any personal or corporate responsibility in satisfying the judgment."

The appellate court held that the insurer properly denied coverage based on the prior and pending litigation exclusion. The insureds argued that the exclusion did not apply for two reasons. First, they asserted that the severability provision "prevents any fact pertaining to or knowledge possessed by [the husband] from being applied to [his wife]." Second, they claimed that the initial suit "was not filed against [the husband] in his capacity as a director or officer of the insured corporate entities."

The insureds based their first argument on the severability clause providing that "[n]o, fact pertaining to or knowledge possessed by any Insured Person shall be imputed to any other Insured Person." The court observed that such a narrow interpretation "ignores the clear and unambiguous" policy language, which barred coverage for any claim:

Based upon, arising out of, attributable to, or in any way directly or indirectly related to any demand, suit or proceeding pending or order, decree or judgment entered against Company or any Insured Person on or prior to [September 28, 2000] or the same or substantially the same fact, circumstance or situation underlying or alleged therein.

Because judgment was entered against the husband in July 2000 (*i.e.*, before the policy's September 2000 exclusion date) and the husband was "indisputably an insured," the court concluded that both "the plain language of the exclusion and the common sense interpretation of the exclusion make it applicable to the facts at hand."

The court also rejected the argument that the original judgment had not been rendered against the husband in an insured capacity. The court noted that "nothing in the language of the exclusion" suggests "that it applies only when the prior or pending action involves the insured in his or her capacity in the current employ. The interpretation proposed by [the insureds] makes no sense."

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