

**ALERT**

# Insurer May Decline Coverage Where Claim Arises Out of Facts Alleged in a Prior Civil Proceeding

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The United States District Court for the Eastern District of Washington has held that an insurer may decline coverage under a policy's "prior and pending litigation" exclusion when a claim arises out of a "fact, circumstance, situation, transaction, event or wrongful employment practice...underlying or alleged in any prior and/or pending civil proceeding." *Wendel v. Travelers Cas. and Sur. Co. of Am.*, 2011 WL 864863 (E.D. Wash. March 10, 2011). The court also found that an insurer may rely on undisputed evidence outside the complaint to deny a defense to the insured when the extrinsic evidence does not bear upon the allegations' truth or scope, but rather, concerns only a discrete, independent coverage issue.

In 2005, the insured purchased an Employment Practices Liability (EPL) policy from the defendant insurer to protect his business from employment-related claims. The policy was extended when the insurer issued a 2007-2008 renewal EPL policy. In 2007, the widower and personal representative of a deceased former employee of the insured filed suit alleging that the insured had pressured the decedent to engage in an improper and manipulative sexual relationship while she was employed by the insured, ultimately resulting in the decedent's termination from employment and suicide. Prior to the first policy's inception, another former employee had sued the insured alleging that she was distressed by the sexual affair between the insured and the decedent and further alleged facts regarding the decedent's firing and suicide. The insurer denied coverage for the widower's suit based upon the policy's "prior and pending litigation" exclusion.

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The court found that the insured's claim fit squarely within the scope of the prior and pending litigation exclusion, which provides in relevant part:

This insurance shall not apply to, and the Company shall have no duty to defend or pay Defense Expenses for, any Claim...for, based upon, or arising directly or indirectly out of any fact, circumstance, situation, transaction, event or Wrongful Employment Practice...underlying or alleged in any prior and/or pending civil, criminal, administrative or regulatory proceeding as of the applicable Prior and Pending Proceeding Date in...the Declaration[.]

The court found that coverage for the widower's suit was excluded because the facts surrounding the affair with the decedent and her death were alleged in the former employee's lawsuit before the "prior and pending" date of the policy.

The court further found, notwithstanding a lack of Washington law on the subject, that an insurer may rely on undisputed evidence outside the complaint to avoid its duty to defend when the extrinsic evidence bears not upon the allegations' truth or scope but concerns only a discrete, independent coverage issue.