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ALERT

Applicability of Prior Acts Exclusion Not Established by Class Period But Coverage Otherwise Precluded by Late Notice

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A federal district court in Georgia has held that the applicability of a prior acts exclusion to the settlement of a class action could not be determined as a matter of law based on the fact that the start of the class period predated the trigger date in the exclusion. *DS Waters of America, Inc. v. Twin City Fire Ins. Co.*, 2011 WL 1743716 (N.D. Ga. May 5, 2011). The court did determine, however, that coverage was not available under the insured's claims made professional liability policy a result of the insured's undisputed failure to provide timely notice to the insurer of the action.

The underlying action against the insured—a bottled water company—was filed on February 21, 2008. The complaint defined a class period of February 21, 2004 to February 21, 2008 and alleged that, during this period, the insured falsely represented that one of its products was sponsored, approved, and/or certified by certain organizations. After the insurer denied coverage, the insured settled the class action and brought suit against the insurer.

Ruling on the parties' cross-motions for summary judgment, the district court first addressed the insurer's argument that coverage for the class action was precluded by the policy's prior acts exclusion. This provision barred coverage for any claim "based on, arising from, or in any way related to any Wrongful Act" occurring before November 15, 2004 or "any Interrelated Wrongful Acts thereto." According to the insurer, the exclusion was triggered by the fact that the start of the class period predated November 15, 2004, and the insured was estopped from contending otherwise because it had settled the claim without challenging the class period. The court disagreed, pointing

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out that the insured did not admit liability in the settlement agreement and finding that a genuine dispute existed as to whether the claims settled arose from wrongful acts occurring before November 15, 2004. Accordingly, the court denied the insurer's motion for summary judgment with respect to the applicability of the prior acts exclusion.

Turning to the insurer's second argument, the court held that the insured had breached the policy's notice provision, which required notice "as soon as practicable, but in no event later than sixty (60) days after the General Counsel, Chief Financial Officer or the Human Resource Manager becomes aware that such Claim has been made, and in no event later than sixty (60) days after the termination of the Policy Period." In reaching this holding, the court recognized that the undisputed facts indicated that the insured's Chief Financial Officer and General Counsel had received notice of the class action complaint the day after it was filed, but that notice was not provided to the insurer until October 27, 2008—eight months later and more than 60 days after the policy period ended. The court also rejected the insured's argument that the insurer had waived its late notice defense to coverage by failing to raise the defense in its initial denial letter, which was limited to the prior acts exclusion. In this regard, the court pointed out that the letter advised the insured that in light of the dispositive effect of the exclusion, the insurer was not addressing other provisions that may apply to limit or exclude coverage.