Post by Pete Dworjanyn

Directors and Officers Insurers Win Summary Judgment on Specific Litigation Exclusion

Directors and Officers policies are typically claims-made policies which attempt to exclude coverage for wrongful acts which occur after the inception of the policy but arise from a nucleus of facts which preceded the inception of the policy. As a result, questions as to whether later acts are "interrelated" with prior acts can be tremendously important. A recent decision by the United States District Court for the Central District of California, *XL Specialty Insurance Co. v. Michael Perry*, June 27, 2012, granted summary judgment to insurers on interrelatedness grounds and provides an interesting discussion of the issue.

The case arose out of the 2008 collapse of IndyMac Bank and bankruptcy of its holding company, Bancorp. The former directors and officers of IndyMac and Bancorp were subsequently sued in several venues for breach of fiduciary duties, security laws and other claims. The opinion grouped these suits as eleven Underlying Actions, the first being known as the Tripp Litigation, a class action securities suit alleging IndyMac violated its own underwriting standards when originating loans.

Two coverage years were implicated: 2007-2008 (Tower 1) and 2008-2009 (Tower 2). Each tower consisted of eight layers of coverage with 10 million dollars per layer. The first four providers in each tower (ABC Insurers) provided coverage for: 1) Side A coverage - losses from claims against Directors and Officers of Bancorp for individual acts; 2) Side B – losses from Bancorp's indemnification of its Directors and Officers, and; 3) Side C – losses sustained by Bancorp as a result of security laws violations. The subsequent four providers in each tower provided Side A coverage only. The ABC policies were similar, as where the A policies, although there were some differences between the two groups.

Interrelated Wrongful Act Limitation

Both the Side ABC and Side-A policies limited their liability so any claim that arose from the same "interrelated wrongful acts" constituted a single claim. Furthermore, the policies noted all such "claims" would be construed as having been made at the time the first claim was made. The Side ABC policies defined interrelated wrongful acts as "wrongful acts which have as a common nexus any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events or transactions." The Side-A policies defined interrelated wrongful acts as "any wrongful act based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related, or series of related, facts, circumstances, situations, transactions, or events."

Prior Notice Exclusion

The Side ABC policies excluded "any payment in connection with a claim based upon arising out of, directly or indirectly resulting from or in consequence of, or in any way involving: 1) any wrongful act or any fact, circumstance or situation which was been the subject of any notice given prior to the policy period . . . ." The Side-A policies excluded coverage for acts "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance or situation, transaction event or wrongful act which, before the inception date of this policy was the subject of notice given under any other [D&O policy].

The Court again rejected the defendants' arguments that the language was ambiguous, noting further that the language described a broad relationship between subsequent claims and claims made during prior policies so that subsequent claims would be excluded under the Tower 2 policies. In this part, the Side ABC policies were equal to the Side A polices and broader than the Side ABC polices' interrelated wrongful acts limitation. The Court held the difference between the interrelated wrongful acts limitation and the prior notice exclusion was subtle. The interrelated wrongful acts limitation states claims that fall within the scope of "interrelated wrongful acts" will be deemed to have been made at the time that the first claim was made. The prior notice exclusion states that the policy does not provide coverage for claims that are broadly related to claims that were noticed during a prior policy period.

Tripp Litigation Exclusion

All of the Tower 2 policies excluded coverage for any claim "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving the following: 1) the [Tripp Litigation]; or 2) any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events or transactions underlying or alleged in the Tripp Litigation., regardless of any legal theory upon which such claim is predicated.

Court's Analysis

The opinion first discussed the three policy limitations. In each instance, the court held the exclusion was unambiguous, and further that the language described a broad relationship between the subsequent claims and the claims made prior to the policy inception date. The court specifically rejected the idea that this broad relationship made the exclusions ambiguous. The court also held that the policy language did not require "alleged wrongs to be temporally identical" for them to constitute interrelated wrongful acts. The opinion then applied its analysis to each of the 10 classes of underlying litigation, holding that all ten Underlying Actions were sufficiently related to the Tripp Litigation to be excluded under at least one clause of the policies.

Note: The decision has been appealed to the 9th Circuit Court of Appeals.

About Pete Dworjanyn

Pete Dworjanyn is a shareholder and chair of Collins & Lacy's Insurance Coverage Practice Group and founding author of the South Carolina Insurance Law Blog. Pete also practices in workers' compensation. Following law school, Pete served as a law clerk for the Honorable Julius H. Baggett, Eleventh Judicial Circuit and as Assistant Solicitor in the Eleventh Circuit Solicitor's Office. Prior to joining Collins & Lacy in 1999, Pete was in private practice, focusing on civil litigation. Pete's reputation has earned him a BV rating by Martindale-Hubbell. He also is one of the Best Lawyers in America, the oldest and most respected peer-review publication in the legal profession.

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