

ALERT

No Coverage for a Multi-District Class Action Litigation Where All Claims Were First Made or Related Back to Claims First Made Prior to the Policy Period

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December 2, 2013

Applying Michigan law, the United States District Court for the Eastern District of Michigan has held that an art gallery's professional liability insurance policy does not afford coverage for a multi-district class action litigation because some of the claims asserted were first made before the policy period and the remaining claims related back to those uncovered claims. *Park West Galleries, Inc. v. Ill. Nat'l Ins. Co.*, 2013 WL 6095482 (E.D. Mich. Nov. 20, 2013).

The art gallery purchased a miscellaneous professional liability policy for the claims-made-and-reported policy period of October 31, 2008 to October 31, 2009, with a retroactive date of October 31, 2008. Prior to the policy's inception, the art gallery had been named as a defendant in four separate class actions alleging that the gallery acted wrongfully in connection with the sale and appraisal of certain artwork. After the policy incepted, customers filed several additional class actions lawsuits against the gallery based on similar allegations. Ultimately, six of the class actions were consolidated into a multi-district class action litigation. Following a settlement of the multi-district litigation, the art gallery sought defense and indemnity coverage for the six consolidated cases from the carrier.

In the coverage litigation that followed, the court first considered the applicability of an exclusion in the policy for claims "arising out of any wrongful act which occurred prior to the retroactive date." The insurer argued that the exclusion applied because the named plaintiffs in each of the six underlying class actions alleged wrongful

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acts that occurred prior to October 31, 2008. The court rejected this argument, reasoning that putative class members other than the named plaintiffs could have alleged wrongful acts that occurred after the retroactive date, such that the exclusion did not relieve the insurer of its duty to defend.

The court nonetheless held that a number of other terms and conditions in the policy barred coverage for the six consolidated cases. First, the court concluded that two of the consolidated cases were filed prior to the policy's inception date and therefore were not first made within the policy period. Second, the court held that, although the named plaintiffs in the third action did not file suit until after the policy incepted, the same group of plaintiffs had sent pre-inception correspondence to the art gallery stating that 1. they were not able to resell the paintings they had purchased from the gallery "at a good price"; 2. that they wanted to settle the matter "in a fair way"; and 3. that they had retained attorneys and would likely be suing the gallery for damages. Because the court determined that this correspondence constituted a "claim"—defined by the policy as a "demand for money or services, including a suit, arising from your wrongful act"—the court likewise concluded that the third case asserted a claim that was first made outside the policy period.

Finally, the court held that the three remaining cases fell within an exclusion in the policy barring coverage for any claim "first made against you prior to, or pending as of, the first inception date, or relating to the essential facts, circumstances or situation underlying such claim." The court observed that the term "relating to" is generally "interpreted very broadly in this context." Applying this broad definition, the court determined that the three remaining cases involve "similar issues of fact and law" as the other, uncovered cases—as is required for consolidation into a multi-district proceeding. Accordingly, the court held that the related claims exclusion precluded coverage for the final three cases.