

Prior Acts and Unfair Competition Exclusions Free Insurer From Covering False Advertising Suits

Allegations of continuing misrepresentations did not negate application of a prior acts exclusion where misrepresentations first appeared on the website of identity theft protection company LifeLock before the retroactive date, according to a New York appellate court. The court also found coverage for the allegations was barred by the unfair trade practices exclusion. *LifeLock, Inc. v. Certain Underwriters at Lloyd's of London, Syndicate Nos. 2623 and 623*, No. 2016-473, Supreme Court of the State of New York, Appellate Division, First Judicial Department.

LifeLock advertised and engaged in the practice of requesting that consumer reporting agencies insert fraud alerts into the credit files of LifeLock's customers. Experian Information Services filed suit against LifeLock in February 2008 asserting that the Fair Credit Reporting Act only allowed actual consumers, rather than corporations such as LifeLock, to place such alerts. The Experian complaint alleged that its claims all arose out of LifeLock's 2005-2008 placement of marketing fraud alerts. Numerous consumer class actions were subsequently filed and later consolidated into a single multidistrict litigation. LifeLock sought \$5 million in coverage from Underwriters to offset \$16.4 million the company claims it spent in attorneys' fees and settlement costs relating to the underlying action.

Underwriters issued a media and privacy insurance policy to LifeLock for the period January 8, 2008 through January 8, 2009. The policy contained an exclusion for claims arising out of (a) related or

continuous acts that first commenced prior to a January 8, 2008, "Retroactive Date" (Exclusion L) or (b) unfair trade practices (Exclusion I). In June 2008, Underwriters denied LifeLock's claim for coverage citing both exclusions. In May 2015, LifeLock filed a breach of contract action against Underwriters.

Underwriters moved to dismiss LifeLock's complaint based upon the pair of exclusions as well as the statute of limitations. LifeLock argued the policy exclusions did not apply since the allegations of misrepresentations and misleading statements appearing on LifeLock's website occurred after 2008, when the policy inception. LifeLock further argued that the class action claims did not allege any specific acts, errors or omissions occurring prior to the policy's 2008 Retroactive Date.

The Trial Court confirmed it was applying established New York law to Underwriters' motion, stating that "a 'but for' test applies to determine the applicability of an 'arising out of' exclusion. In other words, [where] the plaintiff in an underlying action or proceeding alleges the existence of facts clearly falling within such an exclusion, and none of the causes of action that he or she asserts could exist 'but for' the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action." Ruling from the bench in November 2015, the Trial Court granted Underwriters' motion, finding that Exclusion L "certainly applies...because [Experian] mentioned 2005 onward right in the complaint,"

and because “the exclusions are unambiguous and under both [Exclusion] I and [Exclusion] L there is no coverage.”

In December 2016, LifeLock attempted to revive its argument in front of New York’s Appellate Division, arguing that the claims were covered because they remained on the company’s website after the policy took effect. Underwriters countered, arguing the underlying action arose out of LifeLock’s continuous and related 2005-2008 placement of marketing and fraud alerts, thus falling squarely within the policy’s exclusions.

The Appellate Division agreed with Underwriters finding that “in the underlying action...six of the eight causes of action are expressly based on allegations of acts performed before 2008, and the remaining two specifically incorporate these allegations. Thus, the underlying complaint in its entirety falls within exclusion L...It also falls in its entirety within Exclusion I, which excludes coverage for claims arising out of or resulting from unfair trade practices.”

Comment

Policyholders often argue that wrongful acts allegedly occurring after a prior acts or Retroactive Date trigger coverage even if the plaintiff also alleges wrongful conduct pre-dating the Retroactive Date. Here the policy language clearly contemplated excluding such continuous conduct that commenced before the Retroactive Date. We also find this decision significant, in part, because appellate level rulings on the unfair trade practices exclusion are relatively infrequent.

If you have any questions about this Update, please contact the author listed below or the Aronberg Goldgehn attorney with whom you normally consult:

Catherine Connelly Warren
cwarren@agdglaw.com
312.755.3157

Christopher J. Bannon • 312.755.3175 • cbannon@agdglaw.com
Lisa J. Brodsky • 312.755.3177 • lbrodsky@agdglaw.com
Thomas K. Hanekamp • 312.755.3160 • thanekamp@agdglaw.com
Catherine Warren • 312.755.3157 • cwarren@agdglaw.com
Daniel J. Berkowitz • 312.755.3167 • dberkowitz@agdglaw.com
Amber O. LaFevers • 312.755.3170 • alafevers@agdglaw.com
Lindsay P. Lollo • 312.755.3171 • lollo@agdglaw.com
Sara E. Spratt • 312.755.3146 • sspratt@agdglaw.com