

Class Action Suit Against Insured Mortgage Broker Deemed First Made at Time of Prior Suit Alleging Common Course of Conduct

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The Florida District Court of Appeals has held that a class action lawsuit filed after the expiration of a claims-made policy was deemed made during the policy period because the class action suit and an earlier action filed during the policy period alleged a common course of conduct by the insured. *Gidney v. Axis Surplus Ins. Co.*, 2014 WL 1386168 (Fla. Dist. Ct. App. Apr. 9, 2014). The court held that the alleged wrongful acts were sufficiently related even though the individual class members were involved in different transactions and had unique financial positions.

In October 2007, a private investor filed suit against an insured mortgage broker alleging that it negligently brokered and serviced mortgages by failing to determine the viability of projects, to follow appropriate accounting practices, and to disclose superior encumbrances on properties. In May 2009, another investor filed a putative class action lawsuit against the insured's officers on behalf of "similarly situated investors who had financed mortgages brokered by [the insured]." The class action alleged that the insured "negligently brokered and serviced 41 named projects" by failing to engage in due diligence, to ensure that appropriate accounting standards were in place, and to advise the plaintiffs of superior liens. The broker's insurer sought a declaration that the class action was not covered under the claims-made professional liability policy it issued for the May 2007 to 2008 policy period.

The Florida District Court of Appeals held that the class action and original investor action alleged the "same Wrongful Act" under the policy's "Multiple Claims" provision. The class action was thus deemed to be a claim first made in October 2007, during the policy period. The policy provided that all wrongful acts "related by common facts, circumstances, transactions, events and/or decisions . . . will be treated as one Wrongful Act." According to the court, the class action and the prior action were "based on the same course of conduct by the insured . . . [the insured's] allegedly negligent brokering and servicing of mortgages. The fact that individual class members may have been involved in separate mortgage transactions does not negate the fact that each claim is based on [the insured's] negligence in this regard." The court further noted that the class members were investors "in the same situation" as the plaintiff in the prior action, who was also a member of the putative class. "Acts can be 'related' under the policy's definition of 'Wrongful [A]ct' even if the resulting claims differ in magnitude, such as the amount of damages or number of claimants, so long as the

basis of those claims are 'common facts, circumstances, transactions, events and/or decisions.'"

In reaching its decision, the appellate court rejected the trial court's decision to treat the original action as a notice of wrongful act under the policy's "Reported Wrongful Acts" provision. The trial court had held that because the original claim did not meet the strict notice requirements of this provision, the subsequent class action based on the noticed wrongful act was not covered under the policy. The appellate court held that this was not relevant in light of the "Multiple Claims" provision, "which deals with when and how . . . later-filed claims relate back to a previously-filed claim."