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FLORIDA APPELLATE COURT SAYS CLASS ACTION "RELATES BACK" TO EARLIER-FILED SUIT, THEREBY TRIGGERING CLAIMS-MADE COVERAGE

May 5, 2014 *Michael S. Levine and Anna Lazarus*

On April 9, 2014, Florida's Third District Court of Appeal held, in *Gidney v. Axis Surplus Ins. Co.*, that a class action lawsuit sufficiently related back to an earlier-filed lawsuit brought during the effective period of a mortgage broker's claims-made policy, triggering coverage for the class action lawsuit under the then-expired policy. The court found that the class action was based on facts sufficiently similar to those in the earlier-filed suit to implicate a policy provision that extended coverage to certain subsequent claims where the initial claim was timely filed and covered under the policy.

Background

The policyholder, Berman Mortgage Corporation ("BMC"), arranged privately funded mortgages for commercial properties. BMC was insured by Axis Surplus Insurance Company ("Axis") under a claims-made liability policy that covered, among other things, negligent acts. During the policy period, Robert Revitz filed a complaint alleging that BMC negligently brokered and serviced his mortgages. BMC tendered the Revitz suit to Axis, which afforded coverage for the claim. BMC subsequently was placed into receivership.

Then, after coverage under the Axis policy had lapsed, the receiver of BMC's assets, along with another investor, filed a class action lawsuit alleging that BMC negligently brokered and serviced 41 named projects. BMC tendered the class action to Axis and demanded coverage under the policy. Axis denied coverage and filed a declaratory judgment action seeking a declaration that no coverage was owed for the class claim. Axis moved for summary judgment, which was granted.

BMC appealed and the appellate court reversed.

Analysis and Holding

The claims-made liability policy afforded coverage to BMC for covered claims first made against BMC during the effective policy period. The policy contained a "related claims" provision, which served two general functions: (1) it allowed Axis to confine related wrongful acts to a single policy period and, thereby, a single liability limit, and (2) it allowed BMC to buy a new policy at the end of the policy period, since any additional liabilities attributable to its past acts would relate back to the prior policy. Thus, for coverage to attach to a claim made against BMC after the policy period, the claim must relate back to either a report made by BMC during the policy period, or a claim made by a third party against BMC during the policy period.

The trial court viewed the Revitz suit as a claim implicating a policy provision preserving coverage for claims arising from the policyholder's self-reported wrongful acts, a provision separate from the "related claims" provision. The self-reported wrongful acts provision requires the policyholder to voluntarily disclose information about the scope of any potential liabilities that might arise from the policyholder's prior wrongful acts. The court found that the Revitz suit lacked the level of information required to satisfy the self-reported wrongful acts provision. Consequently, the trial court found that the reporting was not sufficient to preserve coverage for the subsequent class claim.

The appellate court rejected the trial court's application of the self-reported wrongful acts provision. Both the trial and appellate courts agreed that the Revitz claim did not provide sufficient information to trigger coverage of the class claim under that provision. The appellate court concluded, however, that the class action related back to the Revitz claim under the policy's "related claims" provision, which deems all claims that arise from the same "wrongful act" to have been made

on the date the first of the claims is made. The “related claims” provision does not require the policyholder to provide the insurer with the same degree of information as the self-reported wrongful acts provision. The appellate court held that the Revitz and class claims were based on the same course of conduct, i.e., BMC’s allegedly negligent brokering and servicing of mortgages. As the appellate court explained:

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 BMC’s negligence in this regard. ... In terms of BMC’s alleged negligence, the members of the class are investors in the same situation as the investors who made the Reveitz claim. Indeed, while the class members constitute a broader group of plaintiffs, Revitz is within the group. Most of the specific projects listed in the Revitz claim are included in the class claim. Finally, the Revitz claim and the class claim are based on the same course of conduct by BMC, particularly its alleged failure to conduct due diligence, maintain proper accounting, and detect and report prior encumbrances on the properties which provided collateral for the loans.

The appellate court also rejected the insurer’s argument that the class claim cannot relate back to the individual Revitz claim because the damages sought in the class claim are substantially greater than those sought in the Revitz claim. The appellate court found no authority to support such a distinction under the terms of the policy or Florida law.

Implications

Gidney will have broad implications for mass action and class action lawsuits that follow earlier-filed individual claims or actions. Under *Gidney*, it is not necessary that the subsequently filed mass suit arise out of the same identical facts as the earlier claim or suit; it is enough that the subsequent action concern only the same general facts or circumstances. Further, *Gidney* confirms that neither the number of claimants nor the amount of potential damages is dispositive of whether a subsequent action sufficiently relates back to an earlier claim or suit, reiterating the court’s holding that the inquiry focuses on the facts and circumstances underlying the claims.

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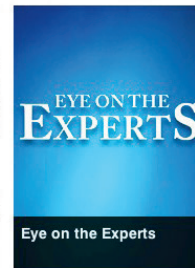
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