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## Florida Appellate Court Holds That Class Action Claim Covered Under Policy Even Though Claim Filed Outside Of Policy Period

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**In *Gidney v. Axis Surplus Insurance Company*, No. 3D12-1250 (Fla.3d DCA April 9, 2014), Florida’s Third District Court of Appeal, which hears cases from trial courts located in Miami-Dade and Monroe Counties, reversed summary judgment for an insurance company in regard to coverage for a class action claim.** Instead, the Third District held that the class action claim was covered by a professional liability policy even though the claim was filed after expiration of the policy period. Citing the policy’s “multiple claims provision,” the Third District held that the class action related back to an earlier filed claim, brought before termination of the policy, because the earlier claim was based on similar facts, circumstances and transactions as the class action.

The class action involved allegations relating to alleged misconduct by a defunct mortgage broker, which included improper due diligence, lack of accounting controls and failure to disclose material information relating to mortgaged properties. The mortgage broker arranged for privately funded mortgages for commercial properties. It both brokered the mortgages and then serviced the mortgages for private investors who participated in the loans. The mortgage broker was placed in receivership at the end of 2007.

The insurance company had issued a professional liability policy to the mortgage broker that included coverage for negligent acts, errors or omissions. The coverage period ran from May 2007 until May 2008. During October 2007 one of the mortgage broker’s private investors filed an action that included allegations almost

identical to the class action that was filed in May 2009, a year after the termination of the professional liability policy. The receiver and another private investor filed the class action against the mortgage broker’s principal officers.

The Third District acknowledged that the mortgage broker’s “claims-made” policy only covered claims discovered and brought to the insurance company’s attention during the policy period. The policy, however, also included a “multiple claims provision,” which the Third District found dispositive of the issue on appeal. This provision provided coverage for a claim made after the policy period if the later claim related back to a prior claim brought by a third party against the mortgage broker during the policy period. Under the “multiple claims provision,” all claims arising from the same wrongful act were considered as made on the date when the first claim was made, for purposes of coverage.

The policy, in language cited as “crucial” to the Third District’s decision, provided that “all wrongful acts ‘related by common facts, circumstances, transactions, events and/or decisions . . . will be treated as one Wrongful Act.’” Slip op. at 10. The Third District held that the class action claim related back to the earlier (and indisputably timely for policy coverage purposes) claim because both claims were based on the same misconduct by the mortgage broker, *i.e.*, the negligent brokering and servicing of mortgages. Significantly, the fact that individual class members were involved in separate mortgage transactions did not negate the fact that each claim was based on the mortgage broker’s negligence. The class members and the

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investor who filed the earlier claim were in the same position in regard to the mortgage broker's alleged negligence, and both the class and the individual investor brought claims based upon the same course of allegedly unlawful conduct by the mortgage broker. Thus, the class action claim related back to the earlier individual claim under the "multiple claims provision," and was covered by the professional liability policy issued by the insurance company to the defunct mortgage broker.

In reaching its decision, the Third District rejected the trial court's analysis, which was based upon the policy's "reported wrongful acts provision" because the Third District found that provision inapplicable. Under the "reported wrongful acts provision," coverage applied to subsequent claims outside of the policy period if the mortgage broker notified the insurance company of a wrongful act that it committed during the policy period and provided detailed information regarding potential liability resulting from possible future claims. In the trial court's view, the class action did not relate back to the earlier individual claim because the mortgage broker had not provided the insurance company with a description of potential damages that included the class action claim. A description of potential damages was one of the bits of information that the mortgage broker was obligated to provide under the "reported wrongful acts provision." As a result, in the trial court's view, coverage was not triggered for the later filed class action because the mortgage broker had not complied with the strict information requirements of the "reported wrongful acts provision."

The Third District rejected the trial court's analysis and held that the "multiple claims provision," rather than the "reported wrongful acts provision," controlled resolution of the coverage issue. The goal of advising the insurance company under the "reported wrongful acts provision" was to secure coverage for potential liability flowing from possible future claims. Under those circumstances, the insured was obligated to provide an adequate description of any potential liability to the insurance company to secure coverage under the professional liability policy.

By contrast, the case below involved a prior claim relating to a complaint filed against the mortgage broker by the individual investor. The "multiple claims provision" did not require the same level of detail as the "reported wrongful acts provision." The Third District rejected the insurance company's argument that sought to import the strict information reporting requirements of the "reported wrongful acts provision" into the "multiple claims provision" because it would require the court to rewrite the professional liability policy, which Florida law will not permit. ■

*For more information about any of the topics covered in this issue of the Insurance Law Alert, please contact:*

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