

ALL IS NOT LOST FOR CLAIMS MADE OUTSIDE POLICY PERIOD

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Most businesses are aware that their claims-made insurance policies – like directors and officers policies, management liability policies and professional liability policies – generally provide coverage for claims made during the policy period (or, if purchased, an extended period of reporting). It would be unwise, however, to simply assume that any claim made outside a policy period is untimely and not covered. That is because claims-made policies also often contain “related claim” provisions, which deem a claim to have been made during a prior policy period if it is sufficiently related to another, prior claim. A recent case illustrates the potential breadth of these related claim provisions. A mortgage company had a professional liability policy with a policy period of May 10, 2007, to May 10, 2008. In October 2007, an investor filed a lawsuit against the company alleging that the company negligently brokered and serviced mortgages by various actions, including (1) failing to perform proper due diligence; (2) using negligent accounting practices; and (3) negligently failing to full and accurately disclose certain information. The 2007 lawsuit identified eleven specific mortgages for which the company was allegedly negligent. In May 2009, after the 2007-2008 policy period, a class action lawsuit was filed against the mortgage company alleging that it negligently brokered and serviced mortgages for forty-one named projects by (1) neglecting to engage in fundamental due diligence; (2) neglecting to ensure minimum accounting safeguards are in place; and (3) neglecting to advise lenders of superior liens. The insurance company denied coverage under the 2007-2008 policy because this lawsuit was not filed during the policy period. The Florida Court of Appeals held that the 2009 class action was covered by the 2007-2008 policy because it was related to the 2007 lawsuit. The court relied on a related claim provision in the 2007-2008 policy, which stated that

“[a]ll claims arising from the same Wrongful Act will be deemed to have been made at the earlier of ... [t]he date the first of those Claims is made against any Insured....”

Although the parties and mortgages were different, the court held that the

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2007 lawsuit and the 2009 lawsuit were related claims within the meaning of the 2007-2008 policy because they were

“based on the same course of conduct by the insured, in this case [the insured’s] allegedly negligent brokering and servicing of mortgages.”

Whether two claims are sufficiently related to constitute a single claim depends on the facts and the policy language in any particular situation. Also, whether a related claim provision helps or hurts a policyholder will depend on a number of factors, such as the available limits of the earlier policy period, whether there is potentially coverage for the claim under the current policy period, the retentions or deductibles of the policy periods in question, and other factors. However, a business should not simply assume that a claim made after a policy expires is not covered by a claims made policy, particularly where that claim alleges a course of conduct or similar allegations that may relate to other claims made against the business during the prior policy period.