wiley

NEWSLETTER

Ninth Circuit Holds Two Class Actions Raising Different Theories Are Related Claims

June 2007

The United States Court of Appeals for the Ninth Circuit, in an unpublished opinion applying California law, has held that the language of a claims-made liability policy precluded coverage for a claim based on facts similar to those underlying a prior claim made before the inception of the claims-made policy at issue. *WFS Fin., Inc. v. Progressive Cas. Ins. Co.*, 2007 WL 1113347 (9th Cir. Apr. 16, 2007).

The insured, an automobile financing company, sought indemnity for two separate class action lawsuits alleging that the insured's practice of allowing automobile dealers to mark up interest rates based on subjective criteria discriminated against minority applicants. The claim arising from the first class action was made during the first policy period and alleged violations of the federal Equal Credit Opportunity Act. The claim arising from the subsequent class action was made during the second policy period and alleged violations of California law.

Both claims-made policies were issued by the same insurer and included the following provision:

Claims based upon or arising out of the same Wrongful Act or Interrelated Wrongful Acts committed by one or more of the Insured Persons shall be considered a single Claim, and only one Retention and Limit of Liability shall be applicable. However, each such single Claim shall be deemed to be first made on the date the earliest of such Claims was first made, regardless of whether such date is before or during the Policy Period.

The limits of the first policy were eventually exhausted in connection with the first class action. After the second class action was filed, the insured sought coverage under the policy then in effect. The insurer denied coverage under the second policy on the grounds that the two lawsuits were related and thus only the first policy could respond to the claim. The financing company subsequently brought an action for breach of contract, declaratory judgment, and breach of the duty of good faith. The district court granted the insurer's motion to dismiss. That opinion is summarized in the April 2005 *Executive Summary*.

The Ninth Circuit affirmed, stating that, "[a]lthough the suits were filed by two different sets of plaintiffs in two different fora under two different legal theories, the common basis for those suits was the [policyholder's] practice of permitting independent dealers to mark up . . . loans." The court continued, "[T]he harms alleged

in the two class action suits are causally related and do not present such an 'attenuated or unusual' relationship that a reasonable insured would not have expected the claims to be treated as a single claim under the policy." In doing so, the court rejected the financing company's argument that the first policy could not "receive" a claim from the subsequent policy period because the policy language specified that "each such single Claim shall be deemed to be first made on the date the earliest of such Claims was first made, regardless of whether such date is *before or during* the Policy Period." Because the second policy contained identical language, the court held, the language expressly contemplated that the second claim could be deemed to have been made during the first policy period.