

# Claim Made After Policy Expired Is Related to Claim Made During the Policy Period

April 2005

A California federal court, applying California law, has granted an insurer's motion to dismiss, finding as a matter of law that the language of the claims-made liability policy at issue applied to render a claim based on facts similar to those underlying a claim made during a prior policy period interrelated to that prior claim and thus not subject to coverage under the later policy. *WFS Fin. Inc. v. Progressive Cas. Ins. Co.*, No. EDCV 04-976 (C.D. Cal. Mar. 30, 2005). In doing so, the court specifically rejected the policyholder's contention that claims made after the expiration of a claims-made policy can never relate back to a prior policy period as a matter of law.

The policyholder was a national automobile finance lender. The insurer issued two consecutive, claims-made casualty policies. During the first policy period, the lender was sued for alleged violations of the Equal Credit Opportunity Act. The purported class alleged that the lender's policies discriminated against African-Americans by allowing dealers to add "a subjective 'markup'" to interest rates. The insurer eventually exhausted its limits in connection with this claim. Another class action was filed against the lender during the second policy period, alleging that the markups discriminated against minorities in violation of California law. In its initial response, the insurer did not reference the relatedness provision in the second policy. Subsequently, the insurer indicated that these two lawsuits are related and therefore, only the first policy potentially was triggered by the second lawsuit.

The second policy provided that "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." The policy further stated 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." The policy defined Interrelated Wrongful Acts as "Wrongful Acts which have as a common nexus any fact, circumstance, situation, transaction or series of related facts, circumstances, situations, events or transactions."

The court first noted that California appellate courts had reached differing conclusions on the issue, citing *Homestead Insurance Co. v. American Empire Surplus Lines Ins. Co.*, 44 Cal. App. 4th 1297 (Cal. Ct. App. 1996), which concluded that claims had to be made within a claims-made policy's policy period to be covered by the policy, and *Friedman Professional Management Co. v. Norcal Mutual Insurance Co.*, 120 Cal.

App. 4th 17 (Cal. Ct. App. 2004), which concluded that claims could relate back to expired policy periods. The court then concluded that, unlike the policy language addressed in *Homestead*, the operative policy language at issue in this case provided that a claim could relate back "regardless of whether [it was first made] before or during the Policy Period." It thus concluded that, in the face of such unambiguous language, the second lawsuit could be treated as a claim first made during the prior policy period, provided it was sufficiently factually related to the first action. In so holding, the court "decline[d] to hold, as a matter of law, that claims made after expiration of a claims made policy—even claims logically and casually related to prior claims made under that policy—can never be ascribed to that policy."

The court then determined that, because the second lawsuit was based on the same markup practice of the lender at issue in the first lawsuit, the two actions were related. In further support of this conclusion, the court cited the fact that the insured had settled both actions in a single global settlement, which "suggest[ed] . . . [that the lender] believed that these cases involved interrelated conduct." Accordingly, because the two lawsuits were related, the court held that the second lawsuit was subject to coverage only under the prior policy, based on the operative policy language, and granted the insurer's motion to dismiss.

For more information, please contact us at 202.719.7130.