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Second Circuit Court of Appeals Holds That Insurer Has Duty to Defend in Class Action Lawsuit Because Wrongful Acts Were Not “Related”

BY: Craig Rokuson

In the recent case of *Great Am. Ins. Co v. AIG Specialty Ins. Co.*, the Federal Second Circuit Court of Appeals examined coverage for Houlihan/Lawrence (“Houlihan”), a subsidiary of HomeServices America (“HAS”) which was acquired by Houlihan prior to May 22, 2017.

Houlihan was sued in a class action lawsuit for breach of duties by real estate agents in the sale of real property. AIG contested its duty to defend by arguing that the alleged wrongful acts against Houlihan either occurred prior to Houlihan becoming an insured subsidiary or after Houlihan became an insured subsidiary but were “related acts” that should have been deemed to have occurred prior to Houlihan becoming an insured subsidiary.

The court rejected AIG’s argument, holding that because the court in the underlying class action may conclude that the wrongful acts occurring on May 22, 2017, did not result from a coordinated scheme by Houlihan, but from agents breaching duties in distinct sales, and therefore not “related acts.”

Further, the court found that although there is some similarity in the claims in the underlying class action, the claims allege wrongful acts occurring in different years, featuring different Houlihan representatives, and the plaintiffs allege different injuries. Further, some of the plaintiffs were sellers and some were buyers. The court held that, due to these disparate facts, the acts do not arise out of a common nucleus of acts, and that a closer connection would be needed for the wrongful acts to be related.

The court rejected AIG’s argument that because a class action was certified, the wrongful acts at issue were necessarily related. According to the court, even though there were common questions or laws, or facts in the class action, the claims were nonetheless unrelated for the purposes of AIG’s policy because they do not arise out of the same transaction.

The case illustrates that the determination of relatedness is an art and not a science. The similarities of the claimants, the transactions, the wrongful actors and the injuries/damages must be reviewed. It is a further illustration of New York’s broad duty to defend, in that the mere possibility that the class action court could find that the wrongful acts did not result from a coordinated scheme was enough to trigger AIG’s duty.