Too Much Risk: The Impact of Class Action Lawsuits on Claims Made Insurance Policies

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Too Much Risk:
The Impact of Class Action Lawsuits on
Claims Made Insurance Policies

H & R Block, Inc. v.
American International Specialty Lines Insurance Co. ¹

I. INTRODUCTION

Class action lawsuits arise in a variety of contexts. While no firm data exists on the total number of class actions filed nationally per year or the types of class actions filed,² the breadth of activity that may give rise to a class action lawsuit means that most major American corporations face the prospect of a class action lawsuit. Some of the most commonly asserted types of class action lawsuits are consumer, securities, employment, environmental and products liability class actions.³ These types of claims are typically insured against by major American corporations. For the indefinite future, a certain class of consumer and securities class action lawsuits are likely to be increasingly filed: suits against financial service companies for misrepresentation, negligence, or breach of fiduciary duty.

In the fourth quarter of 2008, in the wake of the credit market collapse and the ensuing economic recession, class action claims against financial service companies rose sharply.⁴ These class action lawsuits are likely to continue to be filed given the length of time it typically takes class action lawsuits arising from a national practice of a company or companies to be filed on behalf of all potential claimants nationwide⁵ and in light of the current national culture, which, similar to the culture during the Great Depression, views those who work for financial service companies as villains.⁶ Be-

¹ (H & R Block II) 546 F.3d 937 (8th Cir. 2009).
⁵ See, e.g., H & R Block II, 546 F.3d at 939-40 (discussing prior class action suits filed against H & R Block, Inc., including one Texas suit that was certified as a class over six years after it was filed).
cause these suits involve claims of wrongdoing, the financial companies against whom they are brought will invoke their liability insurance policies for coverage.

During the 1990s, H & R Block, Inc., a financial tax preparer and Kansas City’s largest corporation, already faced the types of claims many financial service companies are now facing or are likely to face in the near future. The suits against H & R Block engulfed the company in a dispute with its insurance providers, who provided H & R Block with a “claims made” insurance policy. A “claims made” insurance policy is a commonly issued insurance policy that “insures against claims that are made during the policy period notwithstanding when the occurrence occurred and the harm resulting from the occurrence may have happened.” Claims made insurance policies are structured in a variety of ways. H & R Block’s insurance policies contained a general provision limiting coverage to claims made when the policy was in effect for acts occurring during the policy period. The policy extended coverage in a specific “[p]rior [a]cts” provision to acts that occurred prior to the enactment of the policy as long as the insured did not have knowledge of the wrongful acts or should have reasonably foreseen that a future claim would be brought against the company.

The dispute between H & R Block and its excess policy insurers presented the United States Court of Appeals for the Eighth Circuit with an issue of national first impression: does the existence of a series of class action lawsuits prior to the enactment of a claims made insurance policy make it reasonably foreseeable that similar future claims will be filed? The Eighth Circuit’s ultimate decision in H & R Block, Inc. v. American International Specialty Lines Insurance Co. will impact insurance coverage of major corporations nationally, in both the narrow context of the upcoming wave of lawsuits against financial service companies and the broader context of any class action lawsuit that invokes liability insurance, such as consumer, securities employment, environmental, and products liability class action lawsuits. This

com/time/specials/packages/article/0,28804,1877351_1878509_1878508,00.html (last visited Feb. 12, 2009).
7. See H & R Block II, 546 F.3d at 938-40.
9. H & R Block II, 546 F.3d at 939.
10. ERIC M. HOLMES & MARK S. RHODES, HOLMES’ APPLEMAN ON INSURANCE § 111.2 (2d ed. 1996).
11. Id.
13. H & R Block II, 546 F.3d at 939. See also H & R Block I, 2006 WL 763177, at *1.
14. H & R Block II, 546 F.3d at 938.
Note argues that the United States Court of Appeals for the Eighth Circuit correctly concluded that knowledge of prior class action lawsuits bars coverage under a claims made insurance policy.

II. FACTS AND HOLDING

In the late 1980s, the Internal Revenue Service developed and encouraged the online filing of federal income tax returns. Responding to this innovation, the national tax preparer service H & R Block facilitated online income tax filings for its customers. Those H & R Block customers who filed their tax returns online were offered an additional service—an immediate refund by H & R Block. These refunds were actually “short-term loans... funded by third party banks,” which were later repaid by the actual government refund proceeds. Short-term loans of this type are known as “Refund Anticipation Loan[s] (RALs).” From 1993 to 1996, H & R Block processed more than 15,000,000 RALs.

In August 1992, H & R Block added additional professional liability insurance coverage to its primary insurance policy. This excess claims made coverage was provided by Evanston Insurance Company (Evanston Insurance) and was renewed annually through August 1998. The excess policy insured prior acts that were wrongfully committed before the enactment of the policy but that were first filed against H & R Block during the insured period. Not covered by the excess insurance were wrongful acts of which H & R Block knew or could reasonably foresee prior to the start of coverage.

In 1996, four years after H & R Block first purchased excess claims made insurance coverage, it purchased additional excess coverage from two other insurance providers, American International Specialty Lines Insurance Company (American International) and Lexington Insurance Company (Lexington Insurance). American International’s insurance policy covered the period of

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 939. See also H & R Block, Inc. v. Evanston Ins. Co. (H & R Block I), No. 03-0904-CV-W-ODS, 2006 WL 763177, at *2 (W.D. Mo. 2006).
22. *H & R Block II*, 546 F.3d at 939. See also *H & R Block I*, 2006 WL 763177, at *2.
May 1996 to August 1998.\textsuperscript{26} Lexington Insurance's policy covered a shorter period from May 1996 to August 1997.\textsuperscript{27}

In 1990, shortly after H & R Block initially offered its online filing and instant refund service – and prior to the purchase of its excess insurance coverage from Evanston Insurance, American International, and Lexington Insurance – a group of plaintiffs filed the first of what became a wave of class action lawsuits, "asserting a variety of statutory and common law damages claims"\textsuperscript{28} centering on the legal concept of misrepresentation.\textsuperscript{29} In 1992, after H & R Block purchased its excess coverage from Evanston Insurance, but before it had purchased excess coverage from American International and Lexington Insurance, the second suit seeking class action status was filed.\textsuperscript{30} By May 1996, when H & R Block purchased its additional prior act coverage from American International and Lexington Insurance, eleven suits seeking class action status had been filed against the company nationwide in various federal and state courts.\textsuperscript{31} At that time, none of the actions had been certified as a class, two of the cases had been dismissed with prejudice, two cases had been settled, and the other seven cases were pending.\textsuperscript{32} H & R Block disclosed all of these suits to American International and Lexington Insurance prior to the purchase of its coverage.\textsuperscript{33}

After H & R Block purchased excess coverage from American International and Lexington Insurance, and while its coverage from Evanston Insurance was still active, eleven more suits were filed from May 1996 to August 1998.\textsuperscript{34} The most costly of these additional eleven suits was a Texas state-
wide class action that was settled in 2002, six years from the date it was filed. The settlement provided the plaintiff customers discount coupons for future H & R Block services and, more significantly, for $49,900,000 in attorneys’ fees. “Other class action[s] . . . filed during the . . . period settled for $19.5 million, $881,000, $550,000, $265,000, $22,700 and $250.”

H & R Block sought defense and indemnification from Evanston Insurance, American International, and Lexington Insurance for these cases under its excess coverage policies. The three insurers refused to indemnify H & R Block on multiple grounds. In response, H & R Block brought a diversity action against all three insurers in the United States District Court for the Western District of Missouri, in the jurisdiction where H & R Block is headquartered, “seeking a declaratory judgment that the insurers must defend and indemnify [H & R] Block up to the excess policies’ limits for RAL suits filed during the applicable policy periods.”

In an interlocutory order, the district court indicated that Evanston Insurance was obligated to provide coverage. Evanston Insurance’s policy was enacted earlier than American International’s and Lexington Insurance’s policies, and only one class action suit, brought in 1990, had been filed prior to the enactment of coverage. The district court reasoned that the 1990 class action dispute was factually distinguishable from the later suits because the 1990 class action charged that the interest rate on the RAL was miscalculated, which was a technical mistake, and not that the interest rate was misrepresented. Thus, the later suits were not reasonably foreseeable. The court further determined that, even if the 1990 case were factually similar to the subsequent cases, one class action lawsuit was not enough to make a future claim reasonably foreseeable because a single lawsuit only highlighted a local, as opposed to national, issue.

On a later motion for summary judgment filed by American International and Lexington Insurance, the district court ruled that the insurers were not liable to provide coverage. The court reasoned that H & R Block could

35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
41. H & R Block II, 546 F.3d at 940.
42. Id.
43. Id. at 939. See also H & R Block, Inc. v. Evanston Ins. Co. (H & R Block I), No. 03-0904-CV-W-ODS, 2006 WL 763177, at *4 (W.D. Mo. Mar. 24, 2006).
45. Id.
46. Id.
47. H & R Block II, 546 F.3d at 940.
reasonably foresee that a claim would be brought for charging excessive interest rates, given the prior series of class action lawsuits brought against it for charging excessive interest rates; therefore, the excess insurance coverage provided by American International and Lexington Insurance did not apply.\(^48\) H & R Block appealed the ruling to the United States Court of Appeals for the Eighth Circuit.\(^49\) The Eighth Circuit upheld the district court’s ruling that American International and Lexington Insurance were not obligated under their prior act coverage.\(^50\) The Eighth Circuit held that, since class action lawsuits arising from a national practice of H & R Block were filed prior to the enactment of the two insurance policies, it was reasonably foreseeable prior to the enactment of the insurance policies that future class action lawsuits would be brought against the company for the same practice.\(^51\) Thus, the two insurance companies did not have to indemnify H & R Block for the losses it suffered from the series of class action lawsuits because the insurance policies barred coverage for acts that were reasonably foreseeable prior to the enactment of the policies.\(^52\)

III. LEGAL BACKGROUND

The issue of whether a series of class action suits makes a future suit foreseeable was one of national first impression in *H & R Block, Inc. v. American International Specialty Lines Insurance Co.*\(^53\) However, while there is no legal precedent directly on point, there is legal precedent relevant to the issue from Missouri and other states.

A. Relevant Non-Missouri Precedent

The most relevant precedent on the issue is from states other than Missouri. One such case is a recent Massachusetts Supreme Judicial Court case, *Allmerica Financial Corp. v. Certain Underwriters of Lloyd’s, London.*\(^54\) Allmerica Financial Corporation (Allmerica), a national life insurance service provider, was sued by multiple parties for misrepresentation.\(^55\) In that case, prior to the enactment of Allmerica’s claims made insurance policy, a suit was brought against the company for the misrepresentations made by a company sales representative, specifically for the use of a “vanishing premium.”\(^56\)

\(^48\) *Id.*
\(^49\) *Id.*
\(^50\) *Id.* at 943.
\(^51\) *Id.* at 942-43.
\(^52\) *Id.* at 943.
\(^53\) *Id.* at 938.
\(^54\) 871 N.E.2d 418 (Mass. 2007).
\(^55\) *Id.* at 421-22, 430.
\(^56\) *Id.* at 422. A vanishing premium occurs when one induces a customer to use cash value remaining in an insurance policy to systematically buy further unnecessary
The claim asserted that the company was negligent in its supervision of the agent.  
When Allmerica purchased its claims coverage, it disclosed the lawsuit to its insurance provider, along with other cases filed against Allmerica involving the use of vanishing premiums by company agents and litigation over vanishing premiums filed against other companies in the industry.  
After the enactment of Allmerica’s insurance policy, a class action lawsuit was filed against Allmerica for the use of vanishing premiums by some of its agents.  
Allmerica’s excess liability insurance provider denied coverage, claiming that a prior 1992 suit concerning vanishing premiums barred coverage because the insurance agreement’s provision excluded coverage for suits that were indirectly related to suits filed before the enactment of the insurance agreement.  
Subsequently, Allmerica initiated suit against the provider for a declaration of coverage and a judgment for breach of contract.  
While the terms of the insurance agreement at issue were not the same as in H & R Block, the issues in the case were similar, due to the common law doctrine of “known loss.”  
In Missouri, the doctrine of known loss is also known as the “‘loss in progress’ doctrine.”  
Under the common law doctrine of known loss, an insurance policy does not cover a loss where the insured, prior to the enactment of the policy, knew a “substantial probability” existed that the loss would occur.  
The basis for the doctrine is that “insurance is [meant] to protect against fortuitous events and not against known certainties.”  
The court noted, however, that “[w]hile most sophisticated insureds will have some idea of the sorts of claims they may face, that is not the same as knowing of the existence or merits of a particular claim.”  
The court was articulating the principle that, while insurance does not provide coverage for claims that are known prior to the enactment of an insurance policy, insurance does provide coverage for claims where the insured merely knew of the possibility of suit. Given this principle, an inherent issue in a dispute of this kind is the determination of when “reasonable forseeability” is created. That is, at what point does an insured move from the awareness of a mere possibil-

policies on a representation that the purchase is an investment that will itself have a certain monetary value.  
57. Id. at 429-30.  
58. Id. at 431.  
59. Id. at 422.  
60. Id. at 429, 430 & n.21.  
61. Id. at 424.  
62. Id. at 429-32.  
See also 7 Lee E. Russ & Thomas F. Segalla, Couch on Insurance § 102:9 (3d ed. 2009).  
64. Allmerica Financial Corp., 871 N.E.2d at 430.  
66. Id. at 431.
ity of litigation to some degree of certainty that a claim will be brought? The Massachusetts Supreme Judicial Court determined that, given the prior lawsuit’s limited allegations, Allmerica did not have sufficient knowledge that a future claim would be brought for misrepresentations on a national basis, and, therefore, the known loss doctrine did not bar coverage of the claim.67

Unlike in H & R Block, the initial claim in Allmerica was a single lawsuit for the actions of a single employee and was not a series of class action lawsuits based on a nationwide practice of the company.68 As such, in Allmerica it was less foreseeable that a future claim would be brought, because the prior allegations were limited to a single lawsuit, and the lawsuit itself was limited to a narrow local context.69 Therefore, while Allmerica raised issues similar to the instant case, it did not raise the distinct issue of the effect of a series of prior class action lawsuits based on the same national practice of a company.

Another factually similar case, from Minnesota, is Redeemer Covenant Church of Brooklyn Park v. Church Mutual Insurance Co.70 As in H & R Block, multiple parties sued Redeemer Covenant Church of Brooklyn Park for the same practice.71 Unlike in H & R Block, the organization was not a national organization but was a local church.72 A former pastor at the church had sexually abused a number of young parishioners over three decades.73 In 1989, the church was sued by seven victims of the pastor’s sexual abuse.74 The victims claimed the church was negligent in its retention and supervision of the pastor.75 In this context, the church’s practice was its retention and lack of supervision of the pastor. In 1991, after the annual renewal of the church’s claims made insurance policy, eight more victims filed suits against the church, each making similar accusations of sexual assault and asserting the same claim of negligence.76 The insurance provider denied coverage of the 1991 claims on the basis that the claims were reasonably foreseeable.77 The Minnesota Court of Appeals disagreed.78 The court reasoned that, although the church knew of the pastor’s history of sexual abuse when it purchased the 1991 insurance policy, “[n]o claims had been filed for fifteen months, and none of the [later] claimants had indicated any intent to file a

67. Id. at 431-32.
68. Id. at 629-31.
69. See id. at 429-30.
70. 567 N.W.2d 71 (Minn. Ct. App. 1997).
71. Id. at 74.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id. at 78.
78. Id. at 78-79.
claim." The court cited cases from other jurisdictions supporting the proposition "that 'knowledge of circumstances that might result in a claim' . . . mean[s] more than speculation." As such, the court implicitly held that, while the church was aware of the possibility of future suits, future suits were not reasonably foreseeable because the church was not aware of specific claims from context or from specific individuals.

B. Relevant Missouri Precedent

There are three relevant cases from Missouri addressing the concept of reasonable foreseeability under claims made insurance policies. The cases adhere to the principle articulated by Allmerica and followed by Redeemer Covenant Church of Brooklyn Park that, while insurance does not provide coverage for claims that are known prior to the enactment of an insurance policy, insurance does provide coverage for claims where the insured merely knew of the possibility of suit. However, unlike the previous cases, the three Missouri cases do not deal with multiple claims asserted over a period of time arising from the same practice but rather with a single claim.

For these cases, the insured was not made aware of the possibility of suit from prior lawsuits but was made aware of the possibility of suit by communications with the aggrieved party or a third party. As such, although relevant to the principles of foreseeability, the nature of the notice to the insured in these cases is fundamentally different.

In two of the three Missouri cases, the insured knew of a specific individual who had been wronged and knew of specific claims the individual threatened to bring against it. In one of those two cases, Wittner, Poger, Rosenblum & Spewak, P.C. v. Bar Plan Mutual Insurance Co., the issue was whether multiple communications by a legal client indicating she believed the law firm who represented her might have committed legal malpractice and

79. Id. at 78.


81. Id. at 78.


83. Wittner, Poger, Rosenblum & Spewak, P.C., 969 S.W.2d at 750-52; City of Brentwood, 397 F. Supp. 2d at 1145; Fremont Indem. Co., 701 S.W.2d at 739.

84. Wittner, Poger, Rosenblum & Spewak, P.C., 969 S.W.2d at 749-51.
threatening the possibility of a suit made it reasonably foreseeable that the client would bring a future claim for malpractice. The malpractice claim arose after a default judgment entered against the client in a divorce action. Following the entry of the default judgment, the client sent her attorney two letters indicating that she believed he had been professionally negligent. The first letter mentioned the negligence of the attorney four times, with the key concluding phrase being "'Your negligence, not only hurt me financially, but this is the biggest insult I have ever got.'" The second letter specifically indicated the possibility of suit, stating, "'[W]hen I asked you if that is not going to work, what then? You said that I would have to file a suit against you. I knew then and I know now that this is a very strong possibility.'" The Supreme Court of Missouri ruled that the malpractice claim was reasonably foreseeable because the insured was aware of the possibility of suit and was specifically threatened with a lawsuit prior to the enactment of its claims made insurance policy. As such, the law firm did not have a right to be indemnified by its insurance policy.

In a similar case, City of Brentwood v. Northland Insurance Co., the issue was whether notification of charges filed with government commissions makes a future suit reasonably foreseeable. In City of Brentwood, a city employee, after being denied a raise, filed charges of employment discrimination with the Missouri Human Rights Commission and the Equal Employment Opportunity Commission. The City of Brentwood was notified of the charges filed with both commissions. The notification from both commissions was provided prior to the enactment of the city's two claims made insurance policies in question. After the enactment of the two claims made insurance policies, the Missouri Human Rights Commission found no probable cause for the charge, and the Equal Employment Opportunity Commission issued a right to sue letter. The employee subsequently filed suit against the city. The United States District Court for the Eastern District of Missouri ruled that the filing of charges with the Human Rights Commission and the Equal Employment Opportunity Commission indicated that a party

85. Id. at 753.
86. Id. at 749.
87. Id. at 750-51.
88. Id. at 750.
89. Id. at 751.
90. Id. at 753.
91. Id.
93. Id. at 1145.
94. Id.
95. Id.
96. Id.
97. Id.
intended to file suit and that a future claim was reasonably foreseeable. As was the case in *Wittner, Poger, Rosenblum & Spewak, P.C.*, the insured was aware of the open possibility of suit and was specifically threatened with the filing of a suit prior to the enactment of its insurance policy, and, as such, the city did not have a right to be indemnified by its insurance policy.

In contrast, in *Fremont Indemnity Co. v. Lawton-Byrne-Bruner Insurance Agency Co.* the insured only knew of a specific entity that had been wronged and not of specific claims the entity threatened to bring. In that case, the Missouri Court of Appeals for the Eastern District held that it was not reasonably foreseeable that a future claim would be filed. In *Fremont Indemnity Co.*, a St. Louis hospital believed its insurance provider had been overcharging the hospital on its insurance policy for a number of years and sent a letter to the Missouri Division of Insurance asking if there had been an overcharge and, if so, what legal recourse might be available. The Missouri Division of Insurance forwarded this letter to the insurance provider, which provided a reply. The insurance provider was later told by the Division of Insurance that its answer was satisfactory. The insurance provider continued to do business with the hospital and was never informed by the hospital that it had consulted an attorney. Five months after the hospital had been informed that its response was satisfactory, the hospital filed a claim against the provider. The Missouri Court of Appeals ruled that the claim was not reasonably foreseeable for a number of reasons: the provider had been told its answer was satisfactory from the Missouri Division of Insurance, the hospital provided it no reason to think otherwise, and five months had passed since the issue had been raised. Therefore, the hospital was covered by its insurance policy.

IV. The Instant Decision

In *H & R Block, Inc. v. American International Specialty Lines Insurance Co.*, the United States Court of Appeals for the Eighth Circuit addressed an issue of national first impression: whether class action lawsuits brought prior to the enactment of claims made insurance policies make future class action suits foreseeable and therefore bar insurance coverage for similar class

98. *Id.* at 1147-48.
99. *Id.*
100. 701 S.W.2d 737, 743 (Mo. App. E.D. 1985).
101. *Id.* at 743.
102. *Id.* at 738-39.
103. *Id.* at 739.
104. *Id.*
105. *Id.* at 743.
106. *Id.* at 742-43.
107. *Id.*
action lawsuits. H & R Block argued coverage could be barred for foreseeable wrongful acts only if the insured knew of a specific claimant and a specific wrongful act. American International and Lexington, two of H & R Block’s excess coverage insurers, argued that the class actions prior to the enactment of the insurance policies alleged the same facts and legal theories as the later suits and that, therefore, H & R Block knew and could reasonably foresee that future suits would be brought against the company. In addressing this issue, the Eighth Circuit first noted the case law in Missouri, the controlling jurisdiction, and briefly summarized three key cases: Wittner, Poger, Rosenblum & Spewak, P.C.; City of Brentwood, and Fremont Indemnity Co. All three of these cases dealt with the issue of foreseeability in the context of claims made insurance policies, but, as the Eighth Circuit noted, unlike in the case before the court, in these cases the insured knew of specific individuals who considered themselves wronged. Thus, the Eighth Circuit did not apply the analysis of these previous Missouri cases to the present issue before the court.

Instead, the court started the foundation of its analysis with a fundamental principle of insurance law: “the very purpose of insurance is to protect against the risk of an unknown, but not unexpected loss.” In other words, insurance protects the insured if the insured did not know that a specific claim would be brought. The insured is still covered if the insured anticipated that a general or specific claim was likely to be brought as long as the insured did not know that a specific claim would be brought. The court drew this principle from two non-Missouri cases – Allmerica Financial Corp. and Redeemer Covenant Church of Brooklyn Park. The Eighth Circuit then noted the

108. 546 F.3d 937, 938 (8th Cir. 2008).
109. Id. at 940-41.
110. Id. at 941.
111. Id. at 938.
113. H & R Block II, 546 F.3d at 938.
114. Id. at 942.
115. Id.
116. Id. at 941. Although the court of appeals cited to both Redeemer Covenant Church of Brooklyn Park and Allmerica Financial Corp., only Allmerica Financial Corp. specifically articulates the fundamental principle of insurance law quoted. Allmerica Financial Corp. v. Certain Underwriters of Lloyd’s, London, 871 N.E.2d 418, 430-31 (Mass. 2007). Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co., 567 N.W.2d 71, 78-79 (Minn. Ct. App. 1997). The court of appeals most likely used this structure to acknowledge the primary case relied upon by H & R Block but avoid criticizing a state court decision directly or harmonizing the case with its ruling. H & R Block II, 546 F.3d at 941.
need to apply the fundamental purpose of insurance to the unique and difficult context of a class action lawsuit. 117 The court rejected H & R Block’s contention that class action lawsuits are just a series of individual claims “for specific wrongful act[s],” stating that “this ignores the realities of the modern consumer class action.” 118 To be certified as a class, “‘there [must be] questions of law or fact common to the class’ that ‘predominate over any questions affecting only individual members.’” 119 The court then concluded, without further elaboration, that, when a product or service is sold nationally, claims are based on uniform aspects of a program, and those claims rely on a cause of action available in most jurisdictions, it is reasonably foreseeable that other consumers will assert claims for the same wrongful act or acts. 120

The Eighth Circuit implicitly concluded that, because H & R Block’s RAL program was a service sold nationally, the class action claims before and after the enactment of the insurance policy centered on the high rates of interest charged on the loans and that, because the causes of action asserted in the claims were causes of action available in most jurisdictions, H & R Block could reasonably foresee that future claims would be brought against the company. 121 As a result, H & R Block’s claims made insurance policy did not provide coverage for the wrongful acts, and, as such, American International and Lexington Insurance did not have to indemnify H & R Block for the losses it suffered from the series of class action lawsuits between May 1996 and August 1998 concerning misrepresentations it made about its immediate tax refund service. 122

V. COMMENT

A. Expanded Reasoning: The Concept of Risk

The United States Court of Appeals for the Eighth Circuit, in H & R Block, Inc. v. American International Specialty Lines Insurance Co., engaged in precise line drawing to determine when an insurance claim becomes so foreseeable that it should be barred from insurance coverage. 123 The face of the opinion in H & R Block seems simple: if similar class actions are filed across the country, it is foreseeable that other class actions will be filed and that insurance coverage should be barred. 124 However, this seeming simplicity is deceptive. The issue is more complex because of the nature of modern

117. H & R Block II, 546 F.3d at 941.
118. Id.
119. Id. (quoting FED. R. CIV. P. 23(a)(2), (b)(3)).
120. Id.
121. Id. at 942-43.
122. Id. at 943.
123. Id. at 940-42.
124. Id. at 942.
insurance and the nature of insuring major national corporations, an issue largely unaddressed by the Eighth Circuit.

When an insurer provides coverage for a large national corporation, it is almost guaranteed that certain claims will be filed against the corporation. For example, when an insurance company provides liability coverage to H & R Block for its financial investment services, it is almost guaranteed that a suit will be filed against the company, alleging that one of its representatives lied to a client about certain investments. Likewise, when an insurance company provides liability coverage to Ford Motor Company or to a major national medical device producer for products liability, it is almost guaranteed that a products liability claim will be filed against those corporations at some point during the insurance period. As a company increases in size or begins providing either more complex services or a more diverse product line, it becomes increasingly more foreseeable that certain lawsuits will be brought against the company.

The Eighth Circuit alluded to the issue of sophisticated parties knowing with high certainty that certain claims will be asserted when it cited Allmerica in its opinion. The court, following the reasoning of Allmerica, noted that if H & R Block were sued by a client for negligently preparing his or her tax return, then H & R Block would still qualify for claims made insurance coverage even though it had been sued by other clients for the same type of negligence. The text of the opinion in Allmerica more specifically noted that "most sophisticated [parties with insurance] will have some idea of the sort of claims they may face." Although the court in Allmerica seemed to indicate that only the insured will know that there is a high probability that certain claims might be brought, in actuality both sophisticated insured parties and sophisticated insurers will know that certain claims are likely to be brought against the insured. Both parties have this knowledge because of their status as major national corporations with extensive resources and as repeat players in the industry. Major national insurance providers have an equivalent level of knowledge about the industry they insure, and it is a mischaracterization to present only the insured party as having knowledge of the claims that might be brought against them.

When the Allmerica court approached the issue of sophisticated parties having knowledge of claims that are likely to be brought, the court drew a precise line with regards to foreseeability. The court held that, while a sophisticated insured party may know the claims against it, "[this] is not the same as knowing of the existence or merits of a particular claim." The line

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125. The author was unable to secure a risk analysis preformed by an insurer providing coverage for a major national corporation.
126. H & R Block II, 546 F.3d at 941.
127. Id.
129. Id.
drawn by the *Allmerica* court holds consistent with the Missouri precedent referenced by the Eighth Circuit. In *Wittner, Poger, Rosenblum & Spewak, P.C.* and *City of Brentwood*, the insureds knew of specific individuals with specific claims, and, as a result, insurance coverage was barred.\(^{130}\) In contrast, coverage in *Fremont Indemnity Co.* was not barred when the insured knew of the specific individual but did not know of the specific potential claim.\(^{131}\) If the Eighth Circuit had applied the line drawn by *Allmerica*, a standard it noted with approval, to *H & R Block*, the insurance claim of H & R Block most likely would not have been be barred.\(^{132}\)

H & R Block did not have knowledge of specific individuals who intended to file a claim or the precise circumstances that would lead those individuals to bring a claim.\(^{133}\) H & R Block merely had a general idea of how claims would arise and of the high probability that future claims would be brought against the company.\(^{134}\) The Eighth Circuit, in the context of class actions, created an exception to the *Allmerica* principle that insurance coverage applies when the insured knows of the likely possibility of a future claim but does not know the identity of a likely future claimant. But does this exception make sense when insurance providers are already providing coverage to national corporations, knowing with near certainty that certain claims will be brought against the company? Is the nature of the claims that different? Does it make a difference that the claimants bring their claims collectively as opposed to jointly?

The general answer to these questions is yes. The nature of a series of class action lawsuits based on the same national practice of a company is different from the types of claims that arise merely from a corporation being large or offering either complex services or diverse products. In examining this question, focusing solely on the concept of foreseeability in insurance is misleading. It is important to take a step back and consider what the principle consideration of the parties is.

An insurance agreement is fundamentally a contract for the allocation of risk.\(^{135}\) As *Holmes’ Appleman on Insurance* states, “[R]isk is the Mother Mold of insurance.”\(^{136}\) Foreseeability is one aspect of the risk, but another


\(^{132}\) *H & R Block II*, 546 F.3d at 941.

\(^{133}\) *Id.* at 940-41.

\(^{134}\) *Id.*

\(^{135}\) See *HOLMES & RHODES, supra* note 10, at § 1.2 (2d ed. 1996) (“[I]nsurance is generally understood as risk sharing through consensual arrangements which transfer and distribute risks among consenting parties.”).

\(^{136}\) *Id.*
aspect of risk is the magnitude of loss. When an individual brings a suit against H & R Block for the misrepresentations of an agent, it is as foreseeable as when a class action is filed against H & R Block after a series of similar class actions were filed in other parts of the country. The insured and the insurer know with an extremely high probability that both will be filed. However, the two scenarios differ in their magnitude of potential loss. A series of class actions across the country based upon a nationwide policy of a corporation represents a huge financial risk, while a series of unconnected claims represents a much smaller financial risk, although both are foreseeable.

The concept of risk was alluded to by the Eighth Circuit when it discussed whether H & R Block’s insurance coverage was illusory. The court noted that a claims made insurance policy providing no prior act coverage would be valid, or in other words not illusory, if the insurance premium was correspondingly small. This contention by the court emphasizes not the foreseeability of a future claim but the magnitude of loss from a future claim.

In H & R Block, it would be unreasonable to infer that the insurance company intended to assume the level of risk associated with a likely nationwide series of class action lawsuits because the potential financial liability would be extreme. It was probably the intent of the insurance company to assume the level of risk associated with likely prior wrongs that arise as a function of a company’s size or sophistication and not claims that arise from a national wrongful practice likely resulting in multiple class action lawsuits. This intuitive assessment of what the parties most likely bargained for in their agreement is probably what led the Eighth Circuit to determine that the insurance agreement did not cover the series of class action lawsuits, but that the insurance agreement would provide coverage for individual acts that were foreseeable.

The United States Court of Appeals for the Eighth Circuit most likely narrowed its legal reasoning to the concept of foreseeability to provide a clear holding by avoiding more ambiguous issues of contract interpretation. Analyzing insurance agreements according to the intent of the parties may be difficult because there might not have been a true “meeting of the minds.” Even sophisticated parties may avoid specifying what scenarios are not covered by an agreement to avoid a morass of potentially difficult issues that could threaten to deny one party a lucrative contract and the other party insurance coverage. Instead, each party’s intent may have been to construe the ambiguous contract in its favor, with the insured intending to get as much coverage as possible, whatever the language in the agreement, and the insurer intending to provide as little coverage as possible, despite the language. In

137. Id. at § 1.3 (“Risk sharing connotes not only a transfer of risk (risk-shifting) to others but a distribution (sharing) of the risk among others.”).
138. See H & R Block II, 546 F.3d at 942.
139. Id.
140. Id.
such a situation, courts must either unrealistically assume a "meeting of the minds" or fill in the gaps of the agreement with principles and doctrines such as the known loss doctrine mentioned in Allmerica, establishing a presumed intent of the parties. The detached and abstract nature of either analysis may have led the Eighth Circuit to frame its decision not in the context of what was bargained for by the parties, but instead in the language of foreseeability, thus providing a clear holding.

It should be noted that, under the Eighth Circuit’s general framework for assessing whether a claims made insurance agreement covers class action lawsuits, a company could still bargain to acquire coverage for class action lawsuits after a series of class action lawsuits had been filed. A company would merely have to use a different contract form provision barring coverage for wrongful foreseeable acts than the typical claims made insurance policy, such as the typical provision in H & R Block. A company could specifically bargain for its insurance agreement to provide coverage for future class action lawsuits filed against the company representing the same core of facts as previous class action lawsuits filed against the company.

B. The Lower Court’s Decision: Highlighting Future Application Difficulties

While the factual circumstances before the Eighth Circuit in H & R Block appear to be fairly simple, the United States District Court for the Western District of Missouri’s decision in H & R Block on the issue of whether Evanston Insurance had to provide coverage indicates the factual complexity lower courts may confront when addressing whether class action suits should be covered by claims made insurance. Evanston Insurance’s policy with H & R Block began before the policies of American International and Lexington Insurance. Unlike American International and Lexington Insurance, whose policies were enacted after there had been a series of class actions, Evanston Insurance’s policy was enacted after there had been only one class action lawsuit. The court determined that, while the initial suit and the suits following the enactment of Evanston’s policy each dealt with the RAL program, the allegations in the initial suit were of a different nature. The causes of action in the initial suit were for miscalculation of the APR rate on the loans and for the timeliness of the processing of the loans, while the causes of action in the later suits were for fraudulent misrepresentations, fraudulent omissions, breach of fiduciary duty, and violations of the Truth in

142. See H & R Block II, 546 F.3d. at 942.
144. Id. at *4.
145. Id.
Lending Act. The district court further noted that, even if the claims were the same, a single class action lawsuit was not sufficient to make a second suit reasonably foreseeable.

The nature of the claims filed in the initial class action and the later class action suits were fundamentally different. Although the initial and later suits both dealt with the issue of the interest charged by the RAL loans, the initial suit challenged whether H & R Block complied with its obligations under the agreement and did not challenge the agreement itself. The later suits for fraudulent misrepresentation, breach of fiduciary duty, and violation of the Truth in Lending Act challenged the legitimacy of the agreement. In the instant case, the lower court correctly concluded the nature of the suits was different; however, the decision highlights how lower courts have an avenue to force insurance companies to provide coverage by factually distinguishing claims. This will particularly be true when a series of class action lawsuits first begins and plaintiffs have a variety of causes of action from which to choose and there is not a successful cookie-cutter template to copy from other states. As these issues arise in the future, courts may be forced to engage in intensive factual analysis to determine whether separate class actions are essentially the same lawsuit or are fundamentally different. Such an analysis provides courts with an avenue to apply the law on its face but reach different outcomes by hyper-analyzing the facts and forcing insurance companies to provide coverage for what is essentially the same lawsuit.

The lower court in *H & R Block* also addressed a more difficult issue than the Eighth Circuit and one certain to arise in the future: does the filing of a single class action lawsuit before the enactment of an insurance policy bar future claims for similar class actions? The United States District Court for the Western District of Missouri said no. While this was true in the present case because the factual nature of the suits was different, it is not inherently true. What is central to the assessment of whether a single lawsuit can put an insured on notice of future claims is the nature of the claim asserted. If it is clear that a claim derives from a national policy or a practice used widely throughout the country, an insured will be on reasonable notice that future suits are likely to be brought against the company. If the claim meets these criteria and is legitimate or successful, the insured is on notice that future similar suits are almost certain against the company.

For example, if Bank of America were to use a software program that changes the order of when deposits and withdrawals are credited for custom-

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146. *Id.* at *2*-4.
147. *Id.* at *4*.
148. *Id*.
149. *Id.* at *2*.
150. *Id.* at *4*.
151. *Id*.
152. *Id.* ("[T]he fact that a single lawsuit has been filed is insufficient to put a party on notice that a second lawsuit will be filed.").
ers who have overdrawn their accounts, resulting in higher overdraft fees, a single lawsuit for fraudulent misrepresentation would put Bank of America on notice about future claims. The notion that a single class action lawsuit is inherently not enough to put a company on notice that future claims may be brought is simply incorrect and should not be adopted as a rule of law. In terms of the concept of risk, insurance companies do not intend to assume the risk of covering class action lawsuits when a company has notice that a national policy or widely used national practice would lead to future suits. When courts confront this issue they will be forced to engage in a factual analysis of the nature of the suit initially brought in terms of whether it implicates what is essentially a national policy and whether the claim is of sufficient validity to put the insured on notice that future claims might be brought against the company.

VI. CONCLUSION

The United States Court of Appeals for the Eighth Circuit’s decision on a question of first impression in *H & R Block, Inc. v. American International Specialty Lines Insurance Co.* significantly impacts the provision of insurance for major corporations because the decision establishes that the standard claims made insurance policy does not cover class action lawsuits when similar suits were filed prior to the enactment of the insurance policy. The Eighth Circuit reached the correct conclusion in *H & R Block, Inc.*, utilizing the concept of foreseeability. However, the Eighth Circuit’s decision is better understood according to the broader concept of risk. 153

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153. See 546 F.3d 937, 941-42 (8th Cir. 2008).