

Delaware rulings clarify interpretation of 'related claims' provisions in D&O insurance policies

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For corporations and their management liability insurers, a pair of recent rulings from a Delaware court provide new insight on a recurring theme. Directors' and Officers' (D&O) insurance policies typically include provisions establishing that when one claim alleges a wrongful act that is related to an earlier claim, the two cases will be treated as a single claim deemed to have been first made at the time the earliest of such claims was first made.

Two recent decisions by the Delaware Superior Court seemingly indicate a shift in Delaware's measure of relatedness, which can have important implications for insurers and their policyholders.

"Related claims" provisions can be a minefield for both insureds and insurers, and depending on the context, an insurer may invoke the related claims provision to bar coverage for a claim that is related to a claim of which the insured had notice before the policy period began. An insurer might also relate a claim back to a previous policy period where the policy's limits of liability have already been exhausted. On the other hand, an insured may assert a claim is related to a prior claim to avoid paying multiple retentions or deductibles.

It follows that, depending on which side of the argument one lands on, the standard a court will apply when analyzing relatedness can be a crucial factor. This is especially so since the policy language defining related claims and related wrongful acts is typically very broad, and nebulous, using terms such as "arising out of," "based upon," or "attributable to."

On top of that, different jurisdictions measure relatedness using different standards. For example, courts in Maryland have held that a relatedness analysis should focus on whether there is common "method or modus" or "common scheme," whereas courts in New York and Illinois will generally apply a "common nexus of

facts" or "sufficient factual nexus" standard to a related claim analysis. And further, courts in Delaware have historically applied a "fundamentally identical" standard, a standard many view as an exceedingly high bar to finding relatedness. However, this tide appears to be turning.

Two recent decisions by the Delaware Superior Court — *Sycamore Partners Mgt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631 (Del. Super. Ct. Sept. 10, 2021) and *Options Clearing Corp. v. U.S. Specialty Ins. Co.*, 2021 WL 5577251 (Del. Super. Ct. Nov. 30, 2021) — seemingly indicate a shift in Delaware's measure of relatedness, which can have important implications for insurers and their policyholders.

In *Sycamore Partners*, Delaware Superior Court Judge Abigail LeGrow issued a decision holding that "neither the Delaware Supreme Court nor any other jurisdiction has adopted 'fundamental identity' as the standard governing all relatedness inquiries, regardless of the contractual language at issue. To apply indiscriminately that type of gloss to otherwise unambiguous language arguably could contravene Delaware law requiring this Court to interpret insurance policies according to their plain language..."

In holding that the less stringent 'meaningful linkage' test should be applied, Judge LeGrow reasoned that when interpreting insurance policies, like any contract, "Delaware trial courts have been instructed to analyze contracts using a plain language framework that is based on general interpretative principles."

The policies at issue in *Sycamore Partners* define "Interrelated Acts" as, "Wrongful Acts which are based on, arise out of, directly or indirectly result from, are in consequence of or in any way involve any of the same or related or series of related facts, circumstances, situations, transactions or events."

Judge LeGrow noted that the Supreme Court of Delaware had previously "defined 'arising out of' to mean 'some meaningful linkage,'" and in so doing, "also approved a number of synonyms, including 'originating from,' 'having its origin in,' 'growing out of,' and 'flowing from.'" Extrapolating from "this textual paradigm," and since "the parties exhibited no textual intent otherwise," Judge

LeGrow concluded that “the phrases ‘in consequence of’ and ‘in any way involve’ also must mean, in this context, originating from or sharing a meaningful linkage.”

Judge LeGrow issued a November 2021 decision in Options Clearing Corp. v. U.S. Specialty Ins. Co., rejecting the “fundamentally identical” standard on the grounds that such standard was not “grounded in the policies’ language.”

Despite applying the “meaningful linkage” test, which Judge LeGrow observed “sweeps more broadly than the Insured’s preferred test,” the court nevertheless concluded that the two claims in that case were not interrelated since they “involved different allegations and different Wrongful Acts” against different parties. And the Wrongful Acts alleged in the later-noticed claim did not originate on the theories alleged or the facts challenged by the earlier claim.

Building upon her decision in *Sycamore Partners*, in September 2021, Judge LeGrow issued a November 2021 decision in *Options Clearing Corp. v. U.S. Specialty Ins. Co.*, rejecting the “fundamentally

identical” standard on the grounds that such standard was not “grounded in the policies’ language.”

In *Options Clearing*, U.S. Specialty had denied coverage based on the policy’s “Event Exclusion,” which barred coverage for “a Claim arising out of, based upon or attributable to: ... any Interrelated Wrongful Act,” as well as that insurance policy’s “Prior Notice Exclusion” which barred coverage for a claim “arising out of, based upon or attributable to facts or circumstances alleged” in any claim that had already been reported to earlier insurers.

Applying the same interpretative approach as *Sycamore Partners*, Judge LeGrow concluded that “phrases like ‘based on’ and ‘attributable to’ also most logically mean ‘originating from’ or ‘sharing some meaningful linkage.’” Under this analysis, Judge LeGrow again concluded that no meaningful link existed between the two claims since there were “several key differences [that] refute the Insurers’ argument that a ‘meaningful link’ exists.” For example, each claim had different time periods, alleged violations of different regulations, and involved allegations of different wrongful conduct, and the nature of relief was different.

Judge LeGrow’s rejection of the “fundamentally identical” standard in favor of the “meaningful linkage” standard was grounded in the policy language, language that is typical in many D&O policies, and Delaware law governing contract interpretation. It remains to be seen if other courts in Delaware follow Judge LeGrow’s lead.

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