HUNTON ANDREWS KURTH

Lawyer Insights

Key Considerations For D&O Policy Related-Claims Clauses

By Geoffrey Fehling, Lorelie Masters and Sergio Cavazos
Published in Law360 | August 6, 2021


Most directors and officers liability policies contain provisions addressing related or interrelated claims.

These provisions often result in arguments that a single retention or limit applies to loss arising from all claims alleging the same or related wrongful acts, and that, when a claim is made and reported under the policy, any related claim subsequently made against an insured will be deemed to have been first made at the time of the previously reported claim.

But what do "related" or "interrelated" really mean and how is the relatedness concept applied to a particular set of facts? The answer is not as clear as it may seem.

Take the May 3 decision, Stem Inc. v. Scottsdale Insurance Co., where the U.S. District Court for the Northern District of California considered the interrelatedness of multiple claims — a 2010 employment dispute, a claim surrounding a 2013 financing arrangement, a 2017 loan claim and a 2017 shareholder lawsuit — with varying causes of action, occurring in separate years and seeking distinct forms of relief.[1]

The directors and officers, or D&O, policy at issue stated that all claims arising out of interrelated wrongful acts are deemed made at the time when the earliest claim was made, and defined "interrelated wrongful acts" when the alleged wrongful acts "have as a common nexus any fact, circumstance, situation, event, transaction, cause" or series of the same.[2]

The insurer argued that all claims were excluded because they arose out of the 2010 employment dispute, which was first made against the policyholder outside the policy period for the D&O policy at issue.[3] The court concluded that the 2013 financing occurred partly in response to the settlement from the employment dispute.[4] As a result, the financing claim was deemed to have been first made in 2010, before the policy commenced, and was excluded.[5]

The court recognized that the 2017 shareholder lawsuit included general allegations of the defendants' continuing campaign against the plaintiff and other equity holders. It also identified the 2013 financing arrangement.[6]

However, while the lawsuit provided specific connections between the employment dispute and the 2013 financing arrangement, it did not expressly assert or imply a connection between the 2017 loan and the employment dispute.[7] As a result, the court found that the 2017 loan claim was not related and, therefore, was not excluded from coverage.[8]

The court does not explicitly compare the 2017 shareholder allegations with the policy's related-claim provision to explain how certain allegations established a common nexus pursuant to that provision while

others did not. Based on its application of the interrelated-acts exclusion and various other exclusions, the court ultimately held that the insurer was required to cover loss stemming from the 2017 loan claim only.

This article examines the unpredictable nature of interpreting related-claim provisions, like the one above, in claims-made policies. State law variations encompass all kinds of different tests for determining relatedness of claims, creating real uncertainty for policyholders in evaluating the scope of their coverage.

Survey of Recent Cases
A number of courts have recently examined the issue of relatedness and the requirements to determine whether two claims should be treated as the same claim. Most courts reached their determinations by conducting fact-specific inquiries in conjunction with examination of relevant policy language.

In the case of Zurich American Insurance Co. v. UIP Cos., decided Feb. 16 in the U.S. District Court for the District of Columbia, U.S. District Judge Amit Mehta determined on summary judgment that an insurer was not obligated to provide coverage due to the policyholder's failure to provide timely notice of a claim deemed related to a claim in a previous policy period.[9]

The court determined that an email sent during a 2017 D&O policy period concerning the potential buyout of an ownership interest constituted a claim triggering the policy's notice requirements.[10] This preceded three lawsuits filed during the 2018 policy period seeking compensation for the same ownership interest.[11]

The court concluded the three lawsuits were related to the initial claim under the 2017 policy since they all arose from the same wrongful act, and, as such, the insurer properly denied coverage based on the policyholder's failure to provide timely notice of the initial claim.[12]

A 2020 opinion from the U.S. District Court for the Northern District of Illinois, Hanover Insurance Co. v. R.W. Dunteman Co., granted an insurer's motion for judgment on the pleadings based on relatedness, ruling that the insurer had no duty to defend the insureds under a D&O policy based on a failure to provide timely notice of a claim.[13]

The dispute concerned the reduction of a shareholder's ownership interest, which led to the filing of an original complaint during a 2017 policy period and amended complaints during a 2018 policy period.[14] Since the court determined that the insureds failed to provide timely notice of the claim under the 2017 policy, and the subsequent amended complaints were deemed related to the claim under the 2017 policy, the court found that the insurer had no duty to defend the insureds and appropriately denied coverage.[15]

In Alexbay LLC v. QBE Insurance Corp., the U.S. District Court for the District of Connecticut granted summary judgment in 2020 in favor of an insurer that had denied insurance coverage for a lawsuit on the ground that the lawsuit was a related claim that predated the coverage period of the insurance policy.[16]

The court determined that the lawsuit challenged the conveyance of company shares to Alexbay LLC, which was the same "common nexus of facts [or] circumstances" underlying a previous lawsuit in a previous coverage period.[17] Since the two lawsuits were related claims and constituted a single claim originating in a previous coverage period, the insurer was not required to provide coverage.[18]

Although the decisions above favored insurers and barred coverage, policyholders can also benefit from relatedness of claims to pull otherwise uncovered lawsuits into a particular policy or to avoid multiple

large retentions.

The U.S. Court of Appeals for the Tenth Circuit's 2013 ruling in Brecek & Young Advisors Inc. v. Lloyds of London Syndicate 2003 determined that 26 individual claimants' claims in one arbitration constituted interrelated wrongful acts and, thus, should not be subject to $50,000 retentions for each claim.[19]

In reversing the lower court's summary judgment ruling on relatedness, the court concluded that, since all claims "were connected by common facts, circumstances, decisions, and policies," the claims arose from interrelated wrongful acts and should not be subject to individual retentions.[20]

Similarly, in Carolina Casualty Insurance Co. v. Omeros Corp., the U.S. District Court for the Western District of Washington agreed with a policyholder in a 2013 ruling that, even though a claim was made and reported after the conclusion of the applicable policy period, the insurer should still be required to pay since the claim was related to a separate claim that had been made and reported within the policy period.[21]

The court determined that the claims were based on related wrongful acts under the policy language at issue, and that all claims should be deemed a single claim.[22] As a result, the court granted summary judgment for the policyholder and required the insurer "to treat [the] separate claims ... as if they had been made on the date of the earliest claim," which successfully brought the second claim into coverage under the policy.[23]

Variations in State Law
Other than disparate results based on applicable policy language or facts giving rise to a particular claim, what can be gleaned from these related-claim decisions?

One key distinction guiding many related-claim decisions is the varying state law standards interpreting related-claim provisions and their direct impact on applicability of coverage. For example, the burden of proof for proving relatedness, especially when raised by an insurer to limit or bar coverage entirely, varies across states.

Some courts have found that related-claim provisions located in the "conditions" section of a policy, rather than the "exclusions" section, indicates that such provisions were intended to be a condition that the policyholder must meet to trigger coverage under the policy.[24] These kinds of rulings are consistent with the principle that it is the effect of a policy provision rather than its location in the policy that governs and establishes who — between insurer and policyholder — bears the burden of proof on an issue.

However, other courts have disagreed with treating related-claim provisions as conditions precedent for coverage.[25] In Borough of Moosic v. Darwin National Assurance Co., the U.S. Court of Appeals for the Third Circuit in 2014 determined that a related-claim provision operated to limit coverage and, therefore, should be treated as an exclusion even if it was not classified as one in the policy.[26] As a result, the court held that the insurer raising the related-claim defense was relying on an exclusion and carried the burden of proving the exclusion applied.[27]

States also apply different related-claim standards in addressing these common coverage issues, and then use them across lines of coverage to control relatedness, despite differences in relevant policy language.

New York, for example, applies a sufficient factual nexus test to establish that a prior claim is interrelated with a subsequent claim.[28] As stated in Weaver v. Axis Surplus Insurance Co., decided in 2014 by the U.S. District Court for the Eastern District of New York, a sufficient factual nexus is found "where the Claims 'are neither factually nor legally distinct, but instead arise from common facts' and where the 'logically connected facts and circumstances demonstrate a factual nexus' among the Claims."[29]

The Delaware Superior Court in its 2019 decision, Pfizer Inc. v. Arch Insurance Co., explained that courts interpret relatedness or "arising out of" policy language as precluding coverage only where two underlying actions are fundamentally identical.[30]

In contrast, in Axis Surplus Insurance Co. v. Johnson, the U.S. District Court for the Northern District of Oklahoma ruled in 2020 that the question of relatedness turned on whether the relationship between two claims was "so attenuated ... that an objectively reasonable insured could not have expected that they would be treated as a single [related] claim."[31]

As evident by the variation above, state law variations significantly impact interpretation of related-claim provisions.

Takeaways
The decisions above combined with the different standards applied across states demonstrate the unpredictability of relatedness disputes.

Related-claims analysis is highly fact-specific based on the particular policy language, allegations and applicable state law, which can make it challenging to predict outcomes. There are several key points for policyholders to keep in mind in navigating this area of law.

Policy Language
Starting with the policy language itself, one related-claim provision may require that two claims share "a common nexus of facts, circumstances, or Wrongful Acts," like the provision at issue in Alexbay,[32] while another requires a claim that is "in any way related to the same facts, circumstances, situations, transactions, results, damages or events," which was the provision in the Hanover case.[33]

These differences may appear minor but can be outcome determinative. In the second variation above, for example, the court determined the use of the word "any" in the related-claim provision meant that "only a minimal connection" was required to constitute a related claim.[34]

Thus, while a policyholder or insurer may be able to meet a different standard, such as "common nexus of facts or circumstances," different policy wording may result in a much broader application of the related-claim provision.

Choice of Law
The variations in state law noted above also highlight the significance of choice-of-law and choice-of-forum provisions in policies since the applicable state law and a forum's choice-of-law rules can result in courts applying different related-claim standards that materially affect the scope of coverage.

The Delaware case Pfizer Inc. v. Arch Insurance Co.[35] illustrates this point. In Pfizer, the court considered whether two separate lawsuits with different plaintiffs, different alleged wrongful conduct, and different alleged harm were nonetheless related claims under a D&O policy.[36]

The insurer sought application of New York's "sufficient factual nexus" test, as opposed to the more stringent "fundamentally identical" standard applied under Delaware law.[37]

The court determined that application of Delaware law was most consistent with the parties' reasonable expectations and, applying Delaware's standard, concluded the two claims were not fundamentally identical, which negated the insurer's relatedness defense.[38]

Relatedness and Risk Management
Related-claim provisions come into play in many aspects of risk management under D&O, errors and omissions, and other management liability policies. First, policyholders should understand all applicable related-claim provisions when negotiating their policies, as opposed to after a claim arises.

As the U.S. Court of Appeals for the Eleventh Circuit noted in 2018 when enforcing "extremely broad related-claims provisions" in Health First Inc. v. Capitol Specialty Insurance Co., the policyholder is "stuck with the policies it paid for."[39] Understanding the scope of related-claim provisions and how they work in conjunction with policy conditions, exclusions and other provisions can minimize any surprises should a claim arise.

Policyholders must also consider the impact of related-claim provisions to renewals, expirations and runoffs. Related-claim provisions may be implicated in prior notice and similar situations, where insurers use them punitively to limit coverage.

In Emmis Communications Corp. v. Illinois National Insurance Co., a U.S. Court of Appeals for the Seventh Circuit 2018 decision, an insurer denied coverage under a prior notice exclusion based on a notice provided under a previous policy from a separate insurer.[40] The insurer argued that, since the claim filed under the current policy relate" to the previous claim and the current policy required only "any shared factual allegation," it appropriately denied coverage.[41]

The court disagreed and determined the claims were not sufficiently related to make the prior notice exclusion applicable.[42] Thus, policyholders must also consider how previous claim notices can impact arguments that claims are related.

Finally, policyholders should ask what other acts, errors or omissions could relate to a noticed claim, which can be critical in presenting claims in the most advantageous manner to maximize coverage. They should also consider what other policies could apply and what kinds of related-claim provisions appear in those policies since relatedness determinations can negate, or preserve, coverage under a particular policy.

Related-claim provisions are inherently unpredictable, and policyholders must diligently review the factual and legal basis of underlying claims to determine their relatedness. Although related-claim provisions can present coverage challenges for policyholders, careful negotiation of these provisions can mitigate the unpredictable nature of their application and ensure that policyholders receive the coverage they are paying for.

Key Considerations For D&O Policy Related-Claims Clauses
By Geoffrey Fehling, Lorelie Masters and Sergio Cavazos
Law360 | August 6, 2021

Notes

1. Stem, Inc. v. Scottsdale Ins. Co., No. 20-cv-02950-CRB, 2021 WL 1736823, at *6–7 (N.D. Cal. May 3, 2021).

2. Id. at *3.

3. Id. at *9.

4. Id. at *10.

5. Id.

6. Id.

7. Id.

8. Id.

9. Zurich Am. Ins. Co. v. UIP Cos. LLC, No. 19-cv-1818 (APM), 2021 WL 602901, at *9 (D.D.C. Feb. 16, 2021).

10. Id. at *7.

11. Id. at *8.

12. Id. at *9.

13. Hanover Ins. Co. v. R.W. Dunteman Co., 446 F. Supp. 3d 336, 348 (N.D. Ill. 2020).

14. Id. at 340, 342.

15. Id. at 348.

16. Alexbay LLC v. QBE Ins. Corp., 486 F. Supp. 3d 511, 519, 527 (D. Conn. 2020) (alteration in original) (citation omitted).

17. Id. at 526–27.

18. Id.

19. Brecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003, 715 F.3d 1231, 1237–39 (10th

Cir. 2013).

20. Id. at 1239.

21. Carolina Cas. Ins. Co. v. Omeros Corp., No. C12-287RAJ, 2013 WL 5530588, at *3 (W.D. Wash. Mar. 12, 2013).

22. Id.

23. Id.

24. Rsui Indem. Co. v. Attorney's. Title Ins. Fund, Inc., No. 2:13-cv-670-FtM-38CM, 2016 WL 7042960, at *5 (M.D. Fla. June 6, 2016).

25. Borough of Moosic v. Darwin Nat'l Assurance Co., 556 F. App'x 92, 97 (3d Cir. 2014).

26. Id. at 97–98.

27. Id. at 98.

28. Weaver v. Axis Surplus Co., No. 13–CV–7374 (SJF)(ARL), 2014 WL 5500667, at *12 (E.D.N.Y. Oct. 30, 2014), aff'd, 639 F. App'x 764 (2d Cir. 2016).

29. Id. (quoting Quanta Lines Ins. Co. v. Inv'rs Capital Corp., No. 06 Civ. 4624(PKL), 2009 WL 4884096, at *14 (S.D.N.Y. Dec. 17, 2009)).

30. Pfizer Inc. v. Arch Ins. Co., No. N18C-01-310 PRW CCLD, 2019 WL 3306043, at *7 (Del. Super. Ct. July 23, 2019) (citations omitted).

31. Axis Surplus Ins. Co. v. Johnson, No. 06-CV-500 -GKF-PJC, 2008 WL 4525409, at *8 (N.D. Okla. Oct. 3, 2008) (quoting Nat'l Union Ins. Co. of Pittsburgh, Pa. v. Homes & Graven, 23 F. Supp. 2d 1057, 1070 (D. Minn. 1998)).

32. Alexbay LLC, 486 F. Supp. 3d at 526.

33. Hanover Ins. Co., 446 F. Supp. 3d at 340.

34. Id. at 346.

35. 2019 WL 3306043, at *1.

36. Id.

37. Id. at *7.

38. Id. at *8-10.

39. Health First, Inc. v. Capitol Specialty Ins. Corp., 747 F. App'x 744, 751 (11th Cir. 2018).

40. Emmis Commn's. Corp. v. Ill. Nat'l Ins. Co., 323 F. Supp. 3d 1012, 1023 (S.D. Ind. 2018), aff'd, 937 F.3d 836 (7th Cir. 2019).

41. Id. at 1026.

42. Id. at 1029.

Geoffrey B. Fehling *is Counsel in the firm's Insurance Coverage group in the firm's Washington D.C. office. Geoff represents corporate policyholders and their officers and directors in insurance coverage disputes involving directors' and officers' (D&O), errors and omissions (E&O), and other professional liability claims, cybersecurity and data breaches, representations and warranties, employee theft and fidelity claims, government investigations, breach of fiduciary duty, environmental liabilities, and property damage. He can be reached at +1 (202) 955-1944 or gfehling@HuntonAK.com.*

Lorelie S. Masters *is a partner in the firm's Insurance Coverage group in the firm's Washington D.C. office. A nationally recognized insurance coverage litigator, Lorie handles all aspects of complex, commercial litigation and arbitration. She can be reached at +1 (202) 955-1851 or lmasters@HuntonAK.com.*

Contributing to this article was ***Sergio Cavazos****, who was a summer associate at the firm this year and currently serves as chief of staff to Texas House Rep. Eddie Lucio III, D-Brownsville.*