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D&O Policy 'Related Claims' Ruling Highlights Importance Of How Your Policy Is Written

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Will a new Delaware Supreme Court ruling regarding directors and officers liability insurance make it more difficult for your company to get future claims covered? A recent ruling by the Delaware Supreme Court interpreting a related claims provision in a D&O policy refused to endorse a bright-line test that would enable policyholders to better understand when multiple claims made in different policy periods may be deemed a single claim made in one policy period.

A bright-line test would provide some needed consistency to applying related claims provisions. In the absence of such a test, insurance companies generally take whatever position will minimize their payouts. When treating two claims as one would narrow coverage to the limits of a single policy, insurance companies broadly interpret what makes claims related. However, when the applicable self-insured retention is larger than the value of any of single claim, the insurance company will narrowly interpret these same provisions in the hopes that multiple claims will result in multiple retentions – placing any possibility of coverage out of reach.

The Delaware case at issue is *First Solar v. National Union First Insurance Co.*, which was decided on March 16, 2022. It arose out of a coverage dispute in which the insurance company denied coverage of a new securities lawsuit against the insured. The insurance company asserted that the new claim was related to an earlier class action lawsuit and applied a related

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claims provision to the new claim. The related claims provision in the policy aggregated all claims "alleging, arising out of, based upon or attributable to" the "same or related" wrongful acts. Because the limits of the policy in effect when the prior lawsuit had been exhausted by the payment of defense and settlement costs in the class action, the insurance company's position effectively left no remaining coverage for the newer securities lawsuit.

In the resulting coverage litigation, the trial court addressed this dispute by applying what it called the "fundamentally identical" standard to the related claims provision. Under this standard, claims are related if the "subject" of the claims is "the exact same" – it was not enough for the claims to share "thematic similarities." The trial court granted the insurance company's motion to dismiss on grounds that the claims were related because both lawsuits alleged "the same fraudulent scheme – artificially raising stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production."

On appeal, the Delaware Supreme Court affirmed the trial court's ruling, but rejected its reasoning. It observed "[w]hether a claim relates back to an earlier claim is decided by the language of the policy, not a generic 'fundamentally identical' standard." Using the "same or related" wrongful acts language in the policy's related claims provision, the appellate court concluded that the lawsuits were related because the "thrust of the Wrongful Acts alleged in the two Actions is the same" even if there were minor differences in the specific allegations or the damages sought.

What does this mean for D&O policyholders?

First, the *First Solar* case highlights the fact that, in the end, insurance policies are contracts, where the rules of contract interpretation are applied to the particular words of the contract as sold to the policyholder. Following that logic, the court reasoned that the issue as to whether two claims are deemed related might depend on the precise wording of the related claims provision: For example, does the provision require a thematic or merely a causal relationship?

Second, a best practice is to consider the impact of this decision when buying a D&O policy. Are there scenarios in which the company would prefer to separate old claims and new claims as clearly as possible? Or vice versa? A best practice would be to evaluate the terms and conditions in new policies, along with other factors that might have an effect on how a related claims provision could impact the policyholder.

Third, whether in the market for a new D&O policy or involved in a coverage dispute over an existing policy, policyholders are well-served to consider the arguments that an insurance company might assert to try to limit or eliminate coverage. It is always a best practice to be better prepared to explore solutions that maximize coverage options and respond to insurance company efforts to wriggle out of coverage.