

## CORPORATE INSURANCE LAW

## Expert Analysis

# Delaware Courts Take Narrower View of Related Claims Than NY Courts

**D**irectors' and officers' (D&O) liability insurance policies typically contain clauses providing that related claims or claims arising out of interrelated wrongful acts will be treated as a single claim deemed to have been first made when the first of the related claims was asserted against the insured. The policy language defining related claims and interrelated wrongful acts is typically very broad and courts have wrestled with how to interpret these provisions to determine whether one or more claims are, in fact, related claims. In many cases, whether there is coverage or not will hinge on this very issue.

In a 2014 column, we reviewed New York case law construing related claims language in D&O policies, finding that the outcome of the cases was very much dependent on the facts. We also found that New York courts tend to broadly interpret the relevant policy language, generally holding that claims are



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related whenever there is a sufficient factual nexus between two or more claims. "Related Claims Are in the Eye of the Beholder," NYLJ, Vol. 252-No. 9 (July 15, 2014).

While New York courts appear to interpret these clauses broadly, recent Delaware case law suggests that Delaware courts will construe the clauses more narrowly. For example, in *Pfizer v. Arch Insurance Co.*, the court held that, under Delaware law, coverage for one or more claims will be precluded based on related claims clauses only where the underlying actions are "fundamentally identical." *Pfizer v. Arch Insurance Co.*, 2019 WL 3306043, No. 18C-01-310 (Del. Super Ct.) (July 23, 2019).

In the context of related claims disputes, insureds and insurers can find themselves on either side of the argument. For example, an insurer

may seek to avoid providing coverage for a new claim by contending that the claim is related to a prior claim such that the new claim is deemed made during a prior policy year when a different insurer was on the risk or where the limits of the applicable policy have already been exhausted. While the insured would likely contest this argument in that context, an insured may, in other circumstances, seek to argue that a new claim relates back to a prior

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claim in order to access remaining limits on a prior policy or to avoid a specific exclusion in a current policy where the prior policy does not contain the same exclusion.

Due to the broad policy language and the lack of consistent court rulings, disputes over

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related claims language are not uncommon. The recent *Pfizer* decision suggests that whether Delaware or New York law applies to an insurance dispute may be very significant where the dispute relates to whether coverage is precluded by related claims clauses.

### 'Pfizer'

The *Pfizer* case concerned an underlying class action filed by plaintiff Morabito on behalf of those shareholders who purchased Pfizer's common stock during the period from October 31, 2000 to October 19, 2005. With contributions from most of its insurance tower, Pfizer settled the class action for \$486 million on behalf of itself and the individual defendants. Two of Pfizer's excess insurers refused to contribute to the settlement or the \$82 million in defense costs incurred by Pfizer on the grounds that the *Morabito* action was barred from coverage by the Related Wrongful Acts Exclusion and/or the Specific Litigation Exclusion. Pfizer filed suit against the two insurers, Arch Insurance Company and U.S. Specialty Insurance Company. *Pfizer*, 2019 WL at 3306043.

The issue in dispute in *Pfizer* was whether the wrongful acts alleged in the *Morabito* action were related to the wrongful acts alleged in a prior securities class action, the *Garber* action, such that the Related Wrongful Acts Exclusion or Specific Litigation Exclusion barred coverage. The

Specific Litigation Exclusion in the Arch policy barred coverage for claims arising out of the *Garber* action or "any Wrongful Act alleged in such litigation or proceeding, or any other Wrongful Act whenever occurring, which, together with any Wrongful Act alleged in such litigation or proceeding, constitute Interrelated Wrongful Acts." Id. The Arch policy defined Interrelated Wrongful Acts as "Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transaction or causes." Id. at \*2.

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The Related Wrongful Acts Exclusion barred coverage for loss incurred in connection with claims "alleging, arising out of, based upon or attributable to the facts alleged, or to the same or related Wrongful Acts alleged or contained in any Claim which has been reported, or any circumstances of which notice has been given, under any policy of which this policy is a renewal or replace-

ment or which it may succeed in time." Id. at \*2.

### Choice of Law

The Delaware Superior court first performed a choice of law analysis in which it examined the approach of New York and Delaware courts with respect to the interpretation of related and interrelated claims provisions. The court explained that, under New York law, a prior claim is considered interrelated with a subsequent claim where the two claims share a "sufficient factual nexus." To demonstrate a "sufficient factual nexus", the claims "need not involve precisely the same parties, legal theories, wrongful acts, or requested relief." Rather, a "sufficient factual nexus exists where the claims are neither factually or legally distinct, but instead arise from common facts and where the logically connected facts and circumstances demonstrate a factual nexus among the claims." Id. at 7 (citing *Weaver v. Axis Surplus Co.*, 2014 WL 5500667, at \*12 (E.D.N.Y. Oct. 30, 2014), aff'd, 639 Fed. Appx. 764 (2d Cir. 2016)).

In contrast, the court pointed out that Delaware courts construe related claims clauses more strictly and only interpret such clauses to preclude coverage where the two claims are "fundamentally identical." Id. at 7 (citing *Med. Depot v. RSUI Indem. Co.*, 2016 WL 5539879, at \*14 (Del. Super. Ct. Sept. 29, 2016); *United Westlabs*, 2011 WL 2623932, at \*11-12 (Del.

Super Ct. June 13, 2011), aff'd., 38 A.3d 1255 (Del. 2012)).

The court then applied the most significant relationship test to determine which state's law applied and concluded that Delaware law was applicable. Notably, the court's choice of law determination was influenced in part by the fact that the policies provided that Delaware law would govern alternative dispute resolution procedures under the policies and by Delaware precedent holding that "when the risk is the directors' and officers' honesty and fidelity to the corporation, and the choice of law is between the headquarters or the state of incorporation, the state of incorporation has the most significant relationship." *Id.* at 8; *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, at \*4-6 (Del. Super. Ct. Nov. 5, 2010).

### Related Claims Analysis

Turning to the decisive issue of whether the *Morabito* and *Garber* actions were sufficiently related to trigger the applicable exclusions, the court found that, although the two claims were both class action lawsuits against Pfizer alleging securities violations, they did not address the "same subject" and therefore were not related enough to trigger the exclusions under Delaware's "fundamentally identical" standard. *Id.* at 10.

In fact, despite the court's ruling, on the surface the two actions did share some similarities in that both were securities class

actions which in part alleged misrepresentations concerning the drug Celebrex. The *Garber* action was brought by the shareholders of Pharmacia Corporation (acquired by Pfizer in 2003) and alleged fraudulent and misleading statements made by Pharmacia and co-marketer Pfizer regarding the health risks of Celebrex, which allegedly led to loss when the truth was revealed on June 1, 2002. The *Morabito* action was brought by shareholders of Pfizer and alleged that Pfizer and some of its executives made false representations and omissions regarding the health risks of Celebrex as well as another drug known as Bextra.

Looking deeper, the court noted that the *Garber* action focused on alleged misrepresentations concerning the results of a class study and, in particular, the upper gastrointestinal impacts of Celebrex. In contrast, while the *Morabito* pleadings mentioned the same class study (as one item on a list of material information to which the defendants had access), the alleged misrepresentations at issue concerned cardiovascular safety. The court concluded that "[t]he wrongs alleged in the *Garber* and *Morabito* Actions involved entirely distinct misrepresentations of very different health risks associated with Celebrex." *Id.* at 10. Consequently, the court granted Pfizer's motion for partial summary judgment, holding that the claims were not sufficiently related to trigger the Specific Litigation Exclusion.

### Looking Forward

While the court's ruling in *Pfizer* was based on a detailed analysis of the underlying claims, the application of the Delaware "fundamentally identical" standard undoubtedly made it easier for the court to reach its conclusion. While we can continue to expect rulings on related claims disputes to vary based on the facts presented, the distinction between Delaware's standard and New York's "sufficient factual nexus" standard could very well be determinative of some disputes. Consequently, counsel should carefully consider choice of law issues when addressing related claims disputes going forward.

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