

Each Misrepresentation in Lawsuit Is Not a Separate Claim

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A Delaware trial court has granted summary judgment in favor of primary and excess D&O insurers, holding that: (1) each alleged misrepresentation or omission in a lawsuit does not constitute a separate "Claim," (2) where multiple underlying suits share a "sufficient factual nexus," they arise from "Interrelated Wrongful Acts" and constitute a single "Claim," which is deemed first made during the policy period in which the earliest suit was brought, (3) prior notice exclusions barred coverage for suits sharing a "factual nexus" with earlier suits that were noticed to insurers during a previous policy period, (4) prior acts exclusions barred coverage for suits arising out of Wrongful Acts sharing a factual nexus with Wrongful Acts occurring prior to the policy period, (5) prior and pending litigation exclusions barred coverage for suits arising out of the same nexus of facts as suits filed during a prior policy period and (6) it was appropriate to decide the coverage issues based on the allegations in the complaint and the plain and unambiguous terms of the policies. *AT&T Corp. v. Clarendon Am. Ins. Co.*, C.A. No. 04C-11-167 (JRJ) (Del. Super. Apr. 25, 2006).

The insurers issued several primary and excess D&O liability policies to a company in consecutive policy periods. During the first policy period at issue, the company acquired a controlling interest in another company. Prior to and following the acquisition, shareholders of the acquired company filed multiple suits alleging that the company breached its fiduciary duties by controlling the acquired company in a manner that favored the company's interests and harmed the acquired company. The company notified its D&O insurers of these lawsuits during the first policy period.

The acquired company subsequently sought chapter 11 bankruptcy protection. The bankruptcy court dismissed the previously filed shareholder actions, which had been consolidated into one action in a subsequent policy period. The trustee for the acquired company's "bondholders liquidating trust" brought suit during the third policy period at issue, alleging breaches of fiduciary duty arising from the company's acquisition and subsequent control of the acquired company. Shareholders of the acquired company also brought multiple securities class actions against the company after expiration of the initial policy period, which were consolidated into one action. These suits also alleged that the company used its dominance of the acquired company to advance the company's interests at the expense of the acquired company's shareholders.

On the insurers' motions for partial summary judgment, the court concluded that coverage was not available under the policies issued after the initial policy period for the trustee's suit and the consolidated securities class actions (the "Subsequent Actions"). The court first rejected the company's argument that coverage should be spread over several policy periods because each misrepresentation or omission alleged in the underlying complaints constituted a separate "Claim." The court reasoned that this interpretation of "Claim" would render the term "Wrongful Act"—defined as "any actual or alleged act, error omission, misstatement, misleading statement, neglect or breach of duty"—superfluous, and the insuring agreements nonsensical. Based on the "clear and unambiguous language" of the policies, the court determined that the entire civil proceeding constituted the "Claim."

The court next concluded that the Subsequent Actions constituted a single "Claim" along with the suits filed during the first policy period and would be deemed claims "first made" during the first policy period because they involved the same alleged Wrongful Acts and Interrelated Wrongful Acts as those earlier suits. Each of the policies stated, with some variation, that "more than one Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall constitute a single Claim and shall be deemed to have been first made at . . . the time at which the earliest Claim involving the same Wrongful Act or Interrelated Wrongful Acts is first made." Concluding that these provisions were unambiguous, the court found that a comparison of the complaints in the Subsequent Actions and the earlier lawsuits revealed that they arose from a similar "factual nexus" and advanced the same questions of law and fact, making all of the suits a single "Claim" first made during the first policy period. As such, the court held that all of the lawsuits fell outside of the scope of coverage of the subsequently issued policies.

The court likewise held that coverage for the Subsequent Actions was barred under the subsequently issued policies' prior notice exclusions. The exclusions read, with some minor variation, that coverage was not available for any "Claim . . . based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving: (1) any Wrongful Act or any fact, circumstance or situation which has been the subject of any notice given prior to the Policy Period under any other Directors and Officers liability policy or (2) any other Wrongful Act whenever occurring, which, together with a Wrongful Act which has been the subject of such notice, would constitute Interrelated Wrongful Acts." Noting that the exclusions were clear, unambiguous and undeniably broad and encompassed claims "that in any way involve any 'Wrongful Act,' fact, circumstance or situations alleged in the prior litigation," the court found that the two Subsequent Actions arose out of the same Wrongful Act, and that the acts alleged in the Subsequent Actions and earlier litigations constituted "Interrelated Wrongful Acts." The court therefore held that coverage for the Subsequent Actions was barred under the subsequently issued policies because the company had previously notified the insurers of the complaints involving the same "fact, circumstance or situation" during the first policy period.

Similarly, the court held that coverage was barred under the subsequently issued policies' prior acts and prior and pending litigation exclusions. The prior acts exclusions barred coverage for any Wrongful Act or Interrelated Wrongful Act allegedly occurring prior to inception of the relevant policy period. In light of the "common nexus" of facts from which the Subsequent Actions and earlier suits arose, the court concluded that the relevant Wrongful Acts occurred during the first policy period. The prior and pending litigations exclusions

barred coverage for claims arising from any "fact, circumstance, situation, transaction or event" that was the basis for a suit filed prior to the relevant policy period. Again, because the suits filed during the first policy period and the Subsequent Actions involved multiple "shared facts, circumstances and situations," the court held that the exclusions applied to bar coverage under the subsequent policies.

Finally, the court rejected the company's argument that the insurers' coverage obligations must be determined based on the "actual facts" and not on the allegations of the underlying complaints. The court held that the law required it to decide the issues before it based on the allegations in the complaint and the relevant policy provisions. As such, the extrinsic evidence of the alleged "actual facts" offered by the company did not create a genuine issue of material fact precluding summary judgment. The court concluded by noting that the company's theory that the court must essentially adjudicate the underlying lawsuits to determine the applicability of the policy provisions at issue was contrary to case law and the express terms of the policies.