Professional Liability Defense QUARTERLY

"Timing and Deemers and Gaps – Oh My!"
Claims-Made Relatedness Issues Under D&O and E&O Policies

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"Timing is everything", and this is particularly true with regard to "claims-made" insurance policies. By and large, the prevailing forms of domestic Directors and Officers, Management Liability, and Errors and Omissions professional liability policies are all "claims-made" policies.

"Claims-made" policies apply only to claims made against an insured during the policy period, or if so agreed, within a short time thereafter. "Claims made and reported" insurance policies similarly restrict the insured's coverage to claims made during the policy period, and they also contain additional reporting provisions to ensure that claims are timely brought to the insurer's attention within the policy period or within a short time thereafter. The insurers' underwriting functions can be performed with greater certainty, and the extent of the insured risks becomes more accurately predictable to both the insurers and their insureds, if these policies' time-limiting clauses are enforced as written, consistent with the insurance policy's agreements and premiums paid.

When claims made against an insured are defined as "related" or "interrelated", or are "deemed" to take place at the time of a single claim, a well-drafted policy provision may define the one "claims-made date" for multiple claims made at different times, and thereby bring greater certainty to insurers and insureds regarding what policy responds and what policy limits may be available. On the other hand, these clauses when applied can cause harsh results for insureds, as where a claim is deemed made prior to the inception of coverage and not covered; or they can cause harsh results for insurers, as where a claim made after its policy period's expiration is deemed made during the policy period and thereby covered.

The financial implications of these multiple-claims clauses, which are generally regarded as enforceable by most courts, can be considerable: Multiple losses may be deemed to constitute one claim, or several claims. The Insurer's liability may be capped by a single "per claim" limit, or by a separate limit for each claim. Or, based on the same or similar relatedness policy language and/or applicable jurisprudence, the Insured may have to pay one or multiple deductibles/SIRs. And the Insured's financial concerns regarding a covered claim may be amplified if that claim is deemed to be in a policy year with reduced or exhausted policy limits.

Location and Text of Commonly Encountered Multiple-Claim Provisions

"Location is everything" in many contexts too, so it is always useful to know **where** to expect that multiple-claim clauses will most commonly be located within professional liability insurance policies. And, to note that when it comes to the enforcement of insurance policies' limitations on their extent of coverage, the location of a clause can be as important as its language.

First, the **Insuring Agreement** of professional liability policies may conclude, after specifically stating the scope of the coverage afforded for payments on behalf of an Insured, that "All 'professional liability claims' by the same person that arise out of the same 'professional incident' or 'related professional incidents' will be considered to have been made

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at the time the first of those [claims or incidents] have been reported to [the insurer]". Also, if the scope of coverage is subject to Retroactive Date provisions, those provisions can confirm the parties' understanding that a covered underlying *incident* can take place after a Retroactive Date that is earlier than the policy period, but a covered *claim* must be first made *during* the policy period.

Definitions of the Policy will almost always spell out the meaning of key clauses such as "related claims", or "interrelated wrongful acts", particularly in the current era of standardized forms, or insurers' specially-"manuscripted" forms, that have already gone through several updates. Prior to such specific definitions of "related" or "interrelated" claims or wrongful acts, courts' rulings on their meanings were based on judicially-created definitions, which potentially created inconsistencies depending on each fact situation presented. *See, e.g., Arizona Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451 (Ariz. 1987). Some courts even held that "interrelated" required closer relationships than "related" claims, but such a judicially-created rule all but disappears when a policy specifically defines the term "interrelated" with the same terms that commonly appear in definitions of "related". *See, e.g., W.C. & A.N. Miller Development Co. v. Continental Cas. Co.*, 814 F.3d 171 (4th Cir. 2016).

As one definition example, a streamlined "Related Claims" definition states: "Related Claims means all Claims based upon, arising out of or resulting from the same or related, or having a common nexus of, facts or circumstances." Other modern definitions of "Related" state they are based on logical or causal connection, and such definitions have been interpreted in cases across the country, for example: "'professional incidents' that are logically or causally connected to each other by any common fact, circumstance, situation, transaction, event, advice or decision." Definition-language variations can be as simple as nine words ("Interrelated Wrongful Acts means all causally connected Wrongful Acts"), or they can be as intricate as "Interrelated Wrongful Acts means all Wrongful Acts that have as a common nexus any fact circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes."

Limit of Liability may identify the policy limits and/or deductible amounts that shall not be exceeded in the event of claims by multiple parties or multiple insureds claiming coverage. Such clauses may then further state a single-claim provision such as: "Two or more claims arising out of a single act, error or omission or a series of related acts, errors or omissions shall be treated as a single claim." Alternatively, the provision may simply refer generally to "related" provisions that are defined elsewhere in the policy: "The limit of liability stated for 'each claim' is the maximum we will pay for all claims and claim expenses arising out of, or in connection with, the same or related wrongful acts."

Exclusions can be structured to carve out particular matters, including "Wrongful Acts" that date from before the policy period, or written notices given to a prior insurer, from claims that would otherwise come within the scope of the liability coverage. If an exclusion is contemplated of "prior litigation" generally, or related to one specifically-identified prior lawsuit, the policy's exclusion(s) may be crafted accordingly.

Conditions, which are often phrased to be required "conditions precedent" to coverage under the policy, or that may be treated as such preconditions under applicable case authorities. Although not required, insurers may choose to signal that the objective application of this condition may lead to coverage or may lead to no coverage, by stating that a single date shall apply to multiple claims "regardless of whether such date is before or during the Policy Period".

Notice conditions may clearly indicate by their title, for example "Notice of Claims *and Multiple Claims*" that they contain a "deemer" clause to address multiple claim situations, such as this sample provision: "Claims based upon or arising out of the same act, error or omission or related acts, errors or omissions shall be deemed to be a single claim, . . .

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and all such claims shall be deemed to be first made as of the date that the earliest of such claims was first made." Other titles, such as "Reporting and Notice" provide few clues that among a dozen or so paragraphs, one provision lurking therein might state that "any Claim subsequently arising…shall be deemed to have been first made" during the policy period of the first written notice.

Better still, the subject matter is clear of clauses contained in a professional liability policy's well identified, **Separately-Titled Sections or Endorsements**, for example "Treatment of Related Claims" or "When a Claim is Deemed First Made." Under such clear titles, it is easier to anticipate that a deemer provision such as this one will appear: "Related acts, errors or omissions shall be treated as a single claim. All such claims, whenever made, shall be considered first made during the policy period or optional reporting period in which the earliest claim arising out of such act, error or omission was first made, and shall be subject to the same Limit of Liability."

However, such separate provisions may still be called into question, sometimes in light of other provisions contained in the same policy. Surrounding such clear statements of a related-claims or "deemer" clause, there may be apparently conflicting definitions elsewhere in the same policy form, or in individual coverage parts or endorsements. Those other provisions could explicitly control in the event of a conflict (where the policy so provides), or if they appear in clauses more specifically tailored to the liability-causing issues, they could be implicitly regarded as the controlling clauses.

Recent Case Law On Claims-Made Relatedness Issues

New cases are regularly issued across the country to interpret and apply the single-claim clauses and "deemer" clauses that appear in professional liability policies. As in many areas of insurance coverage law, opinions from influential jurisdictions such as California and Florida have helped to guide the other courts' approaches.

California Supreme Court standards adopted in 1993, stating that "the term 'related' . . . encompasses both logical and causal connections," remain applicable today. *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal.4th 854, 873, 21 Cal.Rptr.2d 691, 855 P.2d 1263 (1993). Even though the policy language at issue contained only the term "related", and not a specific Definition with "logically or causally connected" language as quoted above, the *Bay Cities* holding used both of these two terms to provide two avenues for a sufficient connection—either a causal connection (e.g., one incident causing the other) or a logical connection. Its cautionary language about logical connection still applies today too, whereby *Bay Cities* concluded by stating that not "every conceivable logical relationship" would satisfy the "related" requirement between claims, for example if the relationship is so "attenuated or unusual that an objectively reasonable insured could not have expected they would be treated as a single claim" under the policy. More recently, in *Liberty Ins. Underwriters, Inc. v. Davies Lemmis Raphaely Law Corp.*, 162 F.Supp.3d 1068 (C.D. Cal. 2016), both of the relatedness connections were held to be sufficient. Seven pending civil lawsuits alleging the insured participated in a fraudulent investment scheme were logically and causally related, consistent with the *Bay Cities* standard, and therefore they constituted a single claim subject to a single per-claim limit of liability.

In Florida, a recent case *Am. Cas. Co. v. Belcher*, 2017 WL 372094 (S.D. Fla. Jan. 26, 2017) *aff'd* 709 Fed. Appx. 606 (11th Cir. 2017), held the definition of "related acts, errors or omissions", which applied to conduct "logically or causally connected by any common fact…", would apply to claims that shared "at least one common fact." *Belcher* relied on two earlier opinions that centered their Florida law analyses on (1) a limit of liability provision's undefined term "related", *Continental Casualty Company v. Wendt*, 205 F. 3d 1258 (11th Cir. 2000); and (2) exclusions for prior

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litigation and prior notice, *Vozzcom, Inc. v. Great Am. Ins. Co.*, 666 F.Supp.2d 1332, 1340 (S.D. Fla. 2009), *aff'd* 374 Fed. Appx. 906 (11th Cir. 2010) (holding three different employees' wage and hour lawsuits against the same employer arose from related wrongful acts). *Belcher* further explained that pointing to any differences in the claims would not defeat relatedness, where the applicable definition required that it "instead must focus on the similarities … by way of a logical or causal connection 'by any common fact' . . ." *Belcher*, 2017 WL 372094 at *10.

Last year, a Texas federal court, presented with a similar definition based on "logically or causally connected" wrongful acts, held that three class action lawsuits alleging an insured corporation misrepresented its financial condition were "related". *Nobilis Health Corp. v. Great Am. Ins. Co.*, 2018 WL 4810840 (S.D. Tex. Oct. 4, 2018).

"Nexus" is a term commonly utilized in "related" definitions to describe connected facts, but it is almost never defined by the policy. New York courts have repeatedly considered whether to apply the so-called "factual nexus" test to determine that claims are the same or substantially similar. A 2018 New York opinion summarized its "factual nexus" rule as follows: "…where those 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 between the claims." *Colony Ins. Co. v. AIG Specialty Ins. Co.*, 2018 WL 1478045, *11-12 (March 26, 2018) (*quoting Quanta Lines Ins. Co. v. Inv'rs Capital Corp.*, 2009 WL 4884096 (S.D.N.Y. Dec. 17, 2009)). It held that there was no coverage, because an earlier claim before the policy period foreshadowed a claim "based on the same nexus of facts" during the applicable policy period.

In these influential jurisdictions, and in similar cases across the country, many courts have continued to hold that even extremely broad "related" definitions in claims-made policies are unambiguous and enforceable. Nevertheless, some courts struggle with the various factual questions presented, including whether and when there is actually a demand that qualifies as a "claim", and whether there is sufficient overlap of conduct and/or injury for a multiple-claim provision to apply. Where such uncertainties continue to arise, insurers may then attempt to tailor their policy language to define (or redefine) "related" and "interrelated" claims in a way that adapts to these courts' inconsistent interpretations.

Unambiguous Related-Claims Provisions are Important to Claims-Made Coverage

In theory, most courts agree that the parties to an insurance policy are free to govern the bounds (and expansions) of their contractual relationships as the contract states. However, their "freedom of contract" credo may strain against reality, when they are presented with an insured claimant whose claim ends up underinsured or uninsured because it is "deemed" made during a policy period when the insured purchased lower limits of liability. Faced with such tension, some courts have issued result-driven rulings that appear geared to avoid any insured, in all but the most obviously intentional "failure to purchase adequate insurance" situations, being left unprotected by an insurance coverage "gap". Other courts have demonstrated an objective application of unambiguous policy language to the facts presented, in a manner that enforces an essential purpose of claims-made coverage, to assess risks based on discrete contracted time periods. Arguably, the parties' rights to define their scope of risk by multiple-claim clauses are rights just as central to claims-made policies as the insurer's right to receive timely reporting.

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