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Guest Post: Year in Review: 2023 Key Management and Professional Liability Insurance Coverage Decisions

By Kevin LaCroix on February 5, 2024

In the following guest post, Anne Catapano, VP Financial Lines Claims, Ascot Insurance Company, Christina Errico, VP, Professional Liability Claims Manager, Ascot Insurance Company, Elan Kandel, Member, Bailey Cavalieri LLC, James Talbert, Associate, Bailey Cavalieri LLC and Tyler Hopkins, Associate, Bailey Cavalieri LLC, review the past year's key management and professional liability insurance coverage decisions. I would like to thank the authors for allowing me to publish their article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this site's readers. Please contact me directly if you would like to submit a guest post. Here is the authors' article.

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The past year was marked by several pivotal insurance coverage decisions that cast fresh light on new and longstanding coverage issues facing management and professional liability insurers and their policyholders alike. As 2024 gets underway, we take this opportunity to reflect on some of these significant insurance coverage decisions of 2023.

Disgorgement

It is well known that disgorgement of ill-gotten gains is uninsurable under the law of several states. In 2023, a federal district court in Ohio joined the list of courts finding that disgorgement is uninsurable.

Specifically, in *Huntington Nat'l Bank v. AIG Specialty Ins. Co.*, the policyholder sought coverage under its professional liability policy for an adversary proceeding alleging that the policyholder bank received fraudulent transfers from a third party, a company called Cyberco. The policyholder ultimately settled with the bankruptcy trustee for $32 million.

The policyholder's professional liability insurer denied coverage for the adversary proceeding and the settlement on grounds that "the claim seeks the disgorgement of monies paid by Cyberco to the insured to pay down its loan balance, there can be no coverage under the policy and/or its endorsements," which defined "loss" to exclude "'matters that may be deemed uninsurable under the law pursuant to which [the] policy shall be construed.'"**[i]** In response, the policyholder commenced coverage litigation, contending that "disgorgement payments are insurable under Ohio law."

The District Court for the Southern District of Ohio rejected the policyholder's argument. As a threshold matter, the court recognized that the relief sought in the adversary proceeding was in fact disgorgement because the policyholder did not have the right to accept the payments at issue in the first instance and the Trustee sought the return of those ill-gotten gains. Having established that the Trustee's adversary proceeding was a claim for disgorgement, the district court observed that Ohio courts had not yet addressed whether disgorgement is insurable but predicted that "Ohio courts are unlikely to permit insurance coverage for wrongfully obtained money."**[ii]**

The district court's ruling was appealed to the Sixth Circuit, where it is now fully briefed and awaiting a decision. It remains to be seen whether the district court's reasoning will be embraced at the appellate level. We intend to keep a watchful eye out for Sixth Circuit's decision.

Interrelated Claims

Interrelated claims provisions generally dictate that claims arising from related or interrelated wrongful acts are deemed a single claim first made at the time the earliest such claim was made. Whether two or more claims are "related" or "interrelated" frequently requires a fact-intensive inquiry.

Further, in the private company context, and, particularly in the employment practices liability and homeowners' association/condominium/co-op contexts, for myriad reasons, it is not uncommon to encounter claims made by so-called serial litigants. By way of illustration, in *Steadfast Ins. Co. v. State Parkway Condo. Ass'n*, the First District Appellate Court of Illinois held that a related claim provision barred coverage for a series of "claims" made over the course of six years because the claims arose out of the same pattern of alleged misconduct.**[iii]** There, the underlying plaintiff, an individual unit owner, filed a lawsuit against State Parkway Condominium Association ("SPCA") in

2007 for discrimination and harassment in relation to his hearing impairment. In 2008, SPCA filed a separate lawsuit against the underlying plaintiff for violating certain rules and regulations, and the plaintiff responded by filing a counterclaim alleging discriminatory conduct, harassment, breach of fiduciary duty, and failure to accommodate his disability. The underlying plaintiff and his family members then filed two additional lawsuits against SPCA in 2010 and 2013, respectively, with the last of them settling in 2019. SPCA noticed the underlying plaintiff's lawsuits to its D&O carrier, seeking coverage under several successive policies in effect between 2006 and 2012.

Each policy contained the following "interrelation" provision:

> Losses based upon or arising out of the same Wrongful Act or Related Wrongful Acts of one or more of the Insureds shall be considered a single Loss incurred as a result of a single Claim, which Claim shall be deemed to have been made on the date the first Claim for such Wrongful Act or for one or more such Related Wrongful Acts is made against any of the Insureds[.]**[iv]**

Relying on this provision, the insurer contended that the underlying plaintiff's lawsuits and counterclaim were interrelated, such that coverage would only be implicated under the 2006-2007 policy—the policy in effect when the underlying plaintiff filed his first complaint against SPCA. In the coverage lawsuit that followed, SPCA argued that that each new filing by the underlying plaintiff alleged different, discrete, new conduct and involved different facts, circumstances, and situations. As such, the policyholder argued that coverage was not limited to the 2006-2007 policy, and each successive policy in place when the underlying plaintiffs made separate claims was available to provide coverage.

The court rejected SPCA's contention that each of the underlying plaintiff's lawsuits constituted a separate "claim" arising from distinct "wrongful acts." First, the court observed that the policies defined "related wrongful acts" to mean "wrongful acts that arise out of, are based on, relate to or are in consequence of, the same facts, circumstances or situations." The court found this definition to be unambiguous and held that the underlying plaintiff's lawsuits filed during the 2006-2012 period all arose from "related wrongful acts." Specifically, the court found that "[t]he claims all arose out of SPCA's alleged continuous harassing and discriminatory conduct and retaliation for the [underlying plaintiff's] 2007 [complaint against SPCA]." The court observed that SPCA's own court filings in the underlying lawsuits confirmed as much. In particular, the court pointed to court filings in which SPCA stated that the underlying plaintiff's claims arise out of "continuous discriminatory and retaliatory conduct." Accordingly, the court affirmed the lower court's ruling that the underlying litigation related back to the 2006-07 policy period and therefore did not implicate coverage under SPCA's successive D&O policies.

What Constitutes a "Claim"?

This perennial question commonly arises in the context of coverage disputes, and 2023 saw its fair share of those disputes. In *Brown Goldstein Levy LLP v. Federal Ins. Co.*, the Fourth Circuit Court of Appeals analyzed the definition of "claim" in relation to a search warrant.**[v]** There, the Department of Justice ("DOJ") sent a letter to a partner of the policyholder law firm, notifying the partner that he was the subject of a federal racketeering investigation. Thereafter, the DOJ obtained and executed a search and seizure warrant for the firm's office. The partner and his law firm noticed the search warrant to the law firm's professional liability carrier and requested coverage for fees and costs associated with defending the criminal investigation. The insurer denied coverage on grounds that the search warrant did not constitute a "claim," which was defined to include:

> (a) a written demand or written request for monetary damages or non-monetary relief;
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> (b) a written demand for arbitration;
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> (c) a civil proceeding commenced by the service of a complaint or similar pleading; or
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> (d) a formal civil administrative or civil regulatory proceeding (including a disciplinary or grievance proceeding before a court or bar association) commenced by the filing of a notice of charges or similar document or by the entry of a formal order of investigation or similar document
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> against an Insured for a Wrongful Act, including any appeal therefrom.

In response to the insurer's disclaimer of coverage, the policyholders commenced coverage litigation before the U.S. District Court for the District of Maryland. The district court agreed with the insurer's position, finding that the search warrant did not implicate coverage "because it did not fall within the Policy's definition of a 'Claim,' and even if it did, the costs associated with the search warrant litigation do not constitute 'defense costs' under the Policy."**[vi]** On appeal, the Fourth Circuit affirmed. Specifically, the Fourth Circuit recognized that the search warrant itself was not a "claim" because it was directed to law enforcement rather than the policyholders, and the policyholders were not required to respond to it. Additionally, the Fourth Circuit held that the DOJ's application for a search warrant was not a "claim" either, because the DOJ merely sought authorization to seize the policyholder's files, as opposed to seeking any redress or response from the policyholders.

Another issue related to the definition of a "claim" was analyzed by a federal district court in *Skye Bioscience, Inc. v. PartnerRe Ir. Ins. DAC*. There, the issue in dispute involved whether a demand

letter from a former employee of the policyholder qualified as a "securities claim." **[vii]** The demand letter alleged wrongful termination and retaliation in violation of Section 1514A of the Sarbanes-Oxley Act ("SOX"). The D&O insurer denied coverage on ground that the policy only afforded coverage for entity insureds in relation to a "securities claim," and the demand letter did not qualify as such. "Securities claim" was defined, in relevant part, to mean:

> [A]ny demand or proceeding . . . against any of the Insureds . . . alleging any violation of the Securities Act of 1933, the Securities Exchange Act of 1934, rules or regulations of the Securities and Exchange Commission under either or both Acts, similar securities laws or regulations . . . involving, or relating to the ownership, purchase, sale or distribution of or offer to purchase, sell or distribute any securities of the Company, including any debt or equity securities, whether on the open market or through a public or private offering

In the ensuing coverage litigation, the policyholder argued that "Sarbanes-Oxley Act is a 'securities law,' and, therefore, [the retaliation] claim under Section 1514A of Sarbanes-Oxley qualifies as a Securities Claim under the policy."**[viii]** The insurer responded that the policy's definition of "Securities Claim" is limited to "regulations and statues regulating securities."**[ix]** On the other hand the insurer argued that Section 1514A does not "regulate securities," but rather protects whistleblowers from retaliation.

The court ruled in favor of the policyholder, finding that SOX is expressly referred to as a "securities law" in the Securities Exchange Act of 1934. The court also noted that Section 1514A shares clear similarities to the Securities Exchange Act of 1934. Among other things, both afford protection for whistleblowers who provide information or assist in any investigation regarding a SOX violation. Finally, the court observed that the policy explicitly excludes certain statutory claims from the definition of "Securities Claim," which, in the court's view, implied that the insurer "could have omitted § 1514A from coverage if it wished to limit the Securities Claim definition to particular sections of securities laws."**[x]**

The district court also rejected the insurer's contention that interpreting the definition of "securities claim" to include wrongful termination and retaliation claims under § 1514A would effectively transform the D&O policy into an employment practices liability policy. The court explained that a retaliation under Section 1514A is uniquely tied to securities laws and regulations, and therefore interpreting the term "securities claim" to incorporate retaliation claims under Section 1514A would not "turn the Securities Claim provision into an EPL policy that encompasses all kinds of employment actions."**[xi]**

Conclusion

As in previous years, insurers and policyholders alike should anticipate that the recurrent coverage issues discussed above will continue to generate significant coverage litigation in 2024, and the case law analyzed above may potentially guide the outcomes of such litigation. Accordingly, insurers and policyholders may want to consider examining the case law discussed above when evaluating coverage as well as during the underwriting process.

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[i] *Huntington Nat'l Bank v. AIG Specialty Ins. Co.,* No. 2:20-cv-256, 646 F. Supp. 3d 950, 955 (S.D. Ohio 2022), appeal filed, No. 23-3039 (6th Cir. 2023)

[ii] *Id.*, at 959.

[iii] *Steadfast Ins. Co. v. State Parkway Condo. Ass'n*, 2023 Ill. App. Unpub. LEXIS 952 (Ill. App. Ct. June 21, 2023).

[iv] *Id.*, at *6.

[v] *Brown Goldstein Levy LLP v. Federal Ins. Co.*, 68 F.4th 169 (4th Cir. 2023).

[vi] *Id.*, at 174 (4th Cir. 2023).

[vii] *Skye Bioscience, Inc. v. PartnerRe Ir. Ins. DAC*, 2023 U.S. Dist. LEXIS 108397 (C.D. Cal. June 20, 2023)

[viii] *Id.*, at *7.

[ix] *Id.*, at *14.

[x] *Id.*, at *15.

[xi] *Id.*, at *17-18.