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Prior Antitrust Action Held Interrelated with Later Securities Suit

By Kevin LaCroix on November 28, 2022

One of the perennial D&O insurance coverage issues has to do with whether a later claim made during the policy period is interrelated with an earlier claim made prior to the policy period, and whether the later claim therefore is deemed under the policy to have been made prior to the policy periods. These issues were front and center in a recent coverage dispute in which the door manufacturer Jeld-Wen argued that earlier antitrust liability actions were not interrelated with the later securities class actions. In an interesting November 18, 2022 opinion by Western District of North Carolina Judge **Max O. Cogburn, Jr.**, applying North Carolina law, held that the antitrust and securities actions were interrelated; that the securities claim was deemed first made prior to the policy period of the excess insurer's policy; and therefore that the settlement of the securities claim was not covered by the policy at issue. A copy of Judge Cogburn's opinion can be found **here**.

Background

Jeld-Wen manufactures and sells interior molded doors. In 2012, Jeld-Wen acquired CraftMaster, one of its competitors. In 2016, one of Jeld-Wen's customers filed a liability action in which the plaintiff alleged that the merger gave Jeld-Wen market power to coordinate the market for interior door sales, in violation of the antitrust laws. In 2018, a jury found in the plaintiff's favor, and Jeld-Wen was order to unwind the CraftMaster merger. The Fourth Circuit later affirmed the district court's order to unwind the merger. During 2018 and 2019, two other, related antitrust actions were brought against Jeld-Wen (the "direct purchaser action" and the "indirect purchaser action"). Settlements of the direct purchaser and the indirect purchaser action were approved by the court in 2021.

In 2020, plaintiff shareholders filed a securities class action against Jeld-Wen and certain of its directors and officers. The complaint alleged that the defendants made misrepresentations to shareholders about the sources of Jeld-Wen's business success. The securities lawsuit, Judge Cogburn was to write in the subsequent coverage action opinion, "was predicated upon Jeld-Wen's antitrust violations."

The complaint in the securities suit alleged that the securities class action arose out of "Defendant's consistent misrepresentations and omissions intended to mislead the investing public by falsely attributing the source of [Jeld-Wen's] financial success to legitimate and lawful pricing strategies," when, in actuality, the complaint alleged, Jeld-Wen "engaged in anticompetitive conduct in violation of federal antitrust laws which was artificially propping up [Jeld-Wen's] laws and was actually the true cause of Jenn-Weld's success." In other words, Judge Cogburn summarized in his subsequent opinion in the coverage action, the securities suit alleged that "Jeld-Wen engaged in unlawful anticompetitive conduct and then lied ab out its unlawful conduct to its shareholders, leading the shareholders to file suit." Jeld-Wen settled the securities suit for $39.5 million.

The Insurance Dispute

Jeld-Wen had two D&O insurance programs in place, one for the policy period 2018-2019 and one for the policy period 2019-2020. Both of the insurance towers consisted of one layer of primary insurance and four layers of excess insurance. The identities and limits of liability of the insurers

were the same in both programs, except that the top layer excess insurer in the 2019-2020 program was different from the top layer excess insurer in the 2018-2019 program.

The new top layer excess insurer in the 2019-2020 program took the position that the securities lawsuit was interrelated with the antitrust lawsuit; that it was therefore deemed under its policy to have been made prior to its policy period; and therefore that it had no coverage under its policy.

Jeld-Wen argued that the antitrust and securities claims involved different plaintiffs, different defendants, different conduct, different time periods, differing resulting injuries, and different remedial schemes, and therefore were not interrelated. Jeld-Wen also argued that the none of the lower level insurers in the insurance program had tried to argue that the securities claim was interrelated, and therefore the top level excess carrier on the 2019-2020 program could not argue that it was interrelated.

The excess insurer filed an action seeking a judicial declaration that because the securities claim was interrelated with the antitrust action, it was deemed under the policy to have been first made prior to the policy period of its policy, and therefor that there was no coverage. The parties filed cross-motions for summary judgement.

The policy defines "interrelated wrongful acts" as acts "that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes."

The November 18, 2022 Opinion

In a November 18, 2022 opinion, Judge Cogburn granted the excess insurer's motion for summary judgment and denied Jeld-Wen's cross-motion for summary judgment.

In granting the excess insurer's motion, Judge Cogburn ruled, first that the policy's definition of "interrelated wrongful acts" is "unambiguous," and further that the facts "create a common nexus sufficient to make the antitrust and securities claims brought against Jeld-Wen interrelated under the policy's broad definition of 'interrelated wrongful acts.'"

The two claims, Judge Cogburn found, involve a "common scheme." In that regard, Judge Cogburn noted that "as evidenced in the securities claim's pleading, it was Jeld-Wen's misrepresentations regarding their antitrust violations which prompted the securities suit." Judge Cogburn noted further that "the two claims share a common cast of characters." The same officers "who engaged in antitrust violations also misrepresented Jeld-Wen's corporate success to its shareholder." Even though, as Judge Cogburn observed, the "conduct in each claim is different," the company "hid the same illicit conduct from both its customers and its shareholder," which served as a factual predicate for both claims."

Based upon the facts, Judge Cogburn said, he concluded that "two claims which allege the same scheme, involving the same actors, who are hiding the same conduct are two claims that comfortably fall within the commonly accepted definition of a factual nexus, rather than on the outskirts of a broad understanding of the concept."

Finally, Judge Cogburn rejected Jeld-Wen's argument that the excess insurer was somehow precluded from arguing that the antitrust and securities claims were interrelated because the lower layer insurers had not raised that argument. Judge Cogburn's analysis of this issue was very practical; he noted because the lower level insurers (unlike the excess insurer in the coverage dispute) were on both insurance towers, they would be on the hook for the securities lawsuit settlement regardless of which tower was held to be the one to which the securities suit applied. The other insurers, Judge Cogburn noted, "have no incentive to argue" that one or the other tower applied, and for those insurers to try to confront the issue "would only be a waste of their time and money."

Discussion

One of the rules for reading court opinions that I learned in law school was to look for clues in the court's description of the dispute for likely direction of the court's ruling. Here, Judge Cogburn gave it away in his description of the underlying securities lawsuit; the first thing Judge Cogburn said by way of characterization of the securities suit was that it "was predicated upon Jeld-Wen's antitrust violations." With that characterization as the starting point for Judge Cogburn's analysis of the insurance issues, it was always going to be an uphill battle trying to convince him that the antitrust and securities suits were not interrelated."

Just the same, the fact is that Jeld-Wen had legitimate and serious ground on which to argue that the two sets of claims were not interrelated. The broad ground on which the parties could argue either that the two sets of claims were or were not interrelated is a reflection of the rudimentary fact, which I have previously considered at length (for example, **here**), that in relation to any two sets of facts, there are always going to be ways in which it could be argued that the two sets are similar or that the two sets are different. In this case, I suspect that many arbiters would conclude that these two sets of claims were sufficiently similar that they fairly could be characterized as "interrelated." That said, any long-time practitioner in the area knows that court decisions on interrelatedness are all over the map; it is very difficult to make generalizations about interrelatedness issues, particularly since the outcomes of the disputes inherently are a reflection of the facts involved.

This situation was represented the unusual circumstance where the outcome of the interrelatedness issue did not determine whether or not the policyholder would or would not be entirely bereft of insurance coverage. Here, regardless of the outcome of Jeld-Wen's dispute with the excess insurer, it was still going to enjoy the benefit of the insurance available from the primary insurer and the underlying excess insurers. I suspect that at some indeterminate level, that helped the excess insurer's arguments succeed.

It is interesting that Judge Cogburn was able to disregard the fact that the excess insurer was taking a position different from the underlying insurers. His consideration of the excess insurer's divergent position was very pragmatic; there were obvious reasons why the underlying insurers were not trying to fight about which of the two insurance towers applied to the insurance settlement. It didn't matter to the underlying insurers, as they were on the hook either way. Judge Cogburn's consideration of this issue does show that an excess insurer is not always bound by the