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The D&O Diary

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Two Claims Related But Deemed Made During the Later Claim's Policy Period

By Kevin LaCroix on January 22, 2023

It is a standard D&O insurance policy feature that if two claims are "related" within the meaning of the policy then they are "deemed" a single claim first made at the time of the earlier claim. However, in a recent coverage dispute, a Delaware court held, in reliance on policy language the court found to be clear and unambiguous, that two related claims were deemed first made *not* at the time the earlier claim but rather during the policy period of the policy in force at the time the later claim was made. Confused? Read on!

The Underlying Litigation

Seritage Growth Properties (Seritage) was formed in June 2015. Also in June 2015, Seritage, through a series of steps, the last of which was a sale-and-leaseback transaction, acquired 266 properties previously owned by Sears. Two officers of Sears (Lampert and Riecker) became officers of Seritage.

In July 2016, Sears shareholders filed a series of shareholder derivative suits (later consolidated) against Seritage, Lambert, and other Sears directors (the Derivative Action). The complaint in the Derivative Action alleged breaches of fiduciary duty and aiding and abetting breaches of fiduciary duty regarding the Seritage transaction described in the preceding paragraph. In February 2017, the parties to the Derivative Action settled the case.

In October 2018, Sears filed for bankruptcy. In November 2019, unsecured creditors of Sears filed an adversary proceeding in the bankruptcy court (the Adversary Proceeding) against Seritage, Lampert, Rieker, and other individuals and entities. The complaint in the Adversary Proceeding alleged that in connection with the 2015 Seritage transactions, the defendants caused billions of dollars to be siphoned out of Sears.

The Insurance Background and the Coverage Litigation

During the policy period June 8, 2018 to June 9, 2019, Seritage maintained a program of D&O insurance consisting of a layer of primary insurance and three layers of excess insurance. The Adversary Proceeding was submitted to the insurers in the program as claims under their policies.

The primary insurer on the program acknowledged the claim and in fact paid out some defense costs related to the Adversary Proceeding; however, the primary insurer later reevaluated its position, taking the position that the Adversary Proceeding was neither a Securities Claim nor a Non-Securities Claim under its policy, and in addition that the Adversary Proceeding and the prior Derivative Claim were related claims and therefore that the primary insurer did not have coverage for the Adversary Proceeding under its 2018-2019 policy. The primary insurer later settled the claim with the insureds, as did the first layer excess insurer.

Seritage filed an action against the remaining excess insurers seeking a judicial declaration that there was coverage under their policies for the Adversary Proceeding. The parties to the coverage litigation filed cross-motions for summary judgment.

The Relevant Policy Language

The primary policy (to which the excess insurers issued follow form coverage) defines the term "Related Claims" as "All Claims based upon, arising out of or resulting from the same or related, or having a common nexus of, facts, circumstances or Wrongful Acts."

The primary policy provides further that "All Related Claims shall be deemed a single Claim first made during the Policy Period in which the earliest of such Related Claims was either first made or deemed to have been first made." [Readers will want to pay particular attention to the "deemer

clause" in this policy provision, and particularly its use of the term "Policy Period" as the time at which the claims are first made – Policy Period being a defined term in the policy.]

The December 19, 2022, Opinion

In an interesting opinion decided on December 19, 2022, and unsealed on January 3, 2023, Delaware Superior Court Judge **Mary Johnston** granted Seritage's motion for summary judgment and denied the excess insurers' cross-motions for summary judgment. A copy of Judge Johnston's opinion can be found **here**.

In reaching her ultimate conclusion, Judge Johnston made a number of rulings favorable to Seritage that I will not go into depth about here but that are worth noting. First, she concluded that the Adversary Proceeding was a "Securities Claim" within the meaning of the primary policy's definition of that term. Second, she determined that, in the alternative, the Adversary Proceeding was a "Non-Securities Claim" within the meaning of the primary policy. In determining that the Adversary Proceeding was a "Non-Securities Claim," she also determined that Lambert and/or Reichert had acted in their insured capacities (and not, or not entirely, in their capacities as officers of Sears) in connection with the Wrongful Acts alleged in the Adversary Proceeding.

Judge Johnston next turned to the Related Claims issue. The excess insurers argued that the Derivative Action and the Adversary Proceeding were related claims and that therefore the later Adversary Proceeding was first made at the time of the earlier Derivative Action. In considering this issue, Judge Johnston referred to earlier Delaware cases (including the Delaware Supreme Court's opinion in the First Solar case, discussed **here**) to the effect that the claims and evidence in two proceedings "need not be absolutely identical to constitute related claims under the policy language"; it is sufficient for the claims to be related if they are "substantially similar." The court's primary focus should be on the similarity of the facts and "not the parties involved or the types of claims involved."

While the plaintiff cited various purported differences between the Derivative Action and the Adversary Proceeding, Judge Johnston noted that both cases arose out of the Seritage Transaction, that both involved allegations that Lampert, Riecker and others caused Sears to transfer valuable assets away from Sears through the Seritage transaction for their personal benefit and to the detriment of Sears. Judge Johnston also noted that in a related but separate proceeding (involving a different insurance policy with different policy language) a New York court (in what I refer to below as "the separate New York proceeding") had determined that the Derivative Action and the Adversary Proceeding were Related Claims. On that basis, Judge Johnston ruled that the Derivative Action and the Adversary Proceeding constitute "related claims."

Having determined that the two actions were related claims within the meaning of the policy, Judge Johnston then turned to the question of the impact of the primary policy's Treatment of Related Claims provision.

Judge Johnston first noted that unlike the comparable policy provisions in the *First Solar* case and in the separate but related New York proceeding described above, the policy provision in the primary policy at issue here was not "exclusionary" – that is, in her view, and by contrast to those other policies, it did not "operate[] to exclude any claim that relates back to a time before the policy period."

Specifically, Judge Johnston observed that "while the policy language defining a related claim in the instant case operates similarly to the policy language defining a related claim in *First Solar*, the policy language differs with respect to how it treats a claim deemed first made prior to the inception date of the policy." The primary policy here, she said "does not state that a related claim is not covered under the insurance policy, nor does it point to any policy period other than the defined Policy Period (in bold and capitalized)." The primary policy, she noted, defines the term "Policy Period" as being June 8, 2018 to June 8, 2019.

The Treatment of Related Claims provision is not only "not exclusionary," it is "not ambiguous." The provision's reference to the term Policy Period "makes the operation of the Treatment of Related Claims section clear." The policy will, she reckoned, "provide coverage for *future* claims that are related to claims deemed first filed under the policy." The provision, she said, is "prospective, not retrospective."

The use of the defined term Policy Period, she said, "prevents the Adversary Proceeding from relating back to a time period before June 8, 2019." The Treatment of Related Claims provision "permits the Adversary Proceeding to be deemed first made within the 2018-2019 Policy Period." Coverage, she said, cannot be denied on the basis that the Adversary Proceeding and the Derivative Actin are related claims. Summary Judgement on the issue, therefore, is granted in Seritage's favor.

Discussion

I admit that I got totally faked out of position when I read Judge Johnston's conclusion that the two cases were related. I thought to myself at the moment, wow, this is a Delaware case where the insurers are going to win after all. Imagine my surprise when I learned that, even though the two claims are related, there were not deemed first made at the time of the earlier claim, but instead are deemed first made during the policy period of the later of the two claims. (I suspect counsel for the insurers may have had much the same reaction.) Indeed, I had to re-read that section of

the opinion several times before I fully grasped what Judge Johnston was saying. Having now re-read it several time, including reading it very carefully again for purposes of writing this blog post, I now do have a better handle on what is going on here. But I still have to say that for me at least this case had something of a surprise ending.

That said, after several re-readings, I did start to see that there is no doubt that it is the specific language in the Treatment of Related Claims provision that caused the insurers the problems for the insurers here.

The provision indeed *does not*, by contrast to the other Treatment of Related Claims clauses to which Judge Johnston referred in her opinion, include language making it exclusionary. And, as Judge Johnston noted, the deemer clause in Treatment of Related Claims provision in this policy does *not* say the related claims are deemed a single claim first made at the time of the earlier claim, but rather it *does* say, as Judge Johnston noted, that it is deemed first made "during the Policy Period in which the earliest of such Related Claims was either first made or deemed to have been first made in accordance with [the Policy's REPORTING provision]."

So I can see how Judge Johnston got to the point of saying that the claims were deemed first made during the Policy Period of this Policy, because Policy Period is a bolded, capitalized term that in this policy means June 8, 2018 to June 8, 2019.

All I can say is that is not the outcome the insurers intended here. To which I can already hear my policyholder-side colleagues saying: who cares what the insurers say they intended, Judge Johnston said the language in the policy was unambiguous and that the deemer clause – clearly and unambiguously – deemed the two claims to be a single claim first made *during the Policy Period of this policy*. Even if the insurers meant something else, the policyholder side advocates would say, that is not what the policy says.

OK fine, but the insurers are definitely going to appeal this opinion. (To which, I am sure, the policyholder-side advocates will say, fine, bring it on, the policy says what it says. And this is Delaware, after all.) The insurers will argue that Judge Johnston paid insufficient attention to the fact that the Treatment of Related Claims provision doesn't deem the claim as being made "during the Policy Period of THIS POLICY"; rather it says they are deemed a single claim first made "during the Policy Period in which the earliest of such Related Claims was either first made" or deemed to have under the policy's reporting provisions. The phrase "in which the earliest of such Related Claims was … first made" clearly indicates an intent for the deemer date to point to the earlier date — or at least so the insurers will argue.

That said, what all of this means is that there is about to be a mad scramble as all of the insurers now go back and re-read the Treatment of Related Claims provisions in their policies to make sure, number one, that their policies' provisions, by contrast to the policy here, expressly specify that their Treatment of Related Claims provisions are *exclusionary*, and, number two, that the Treatment of Related Claims provisions provide that related claims are deemed a single claim made *at the time of the earlier claim* (without reference to the term "Policy Period"), or some other wording designed to avoid the result here.

I know some of my policyholder side friends will say, OK, that's what the insurers are going to do, what should we, as policyholder side advocates, do? In my view, both policyholders and insurers are better off when (1) policies are clear, and (2) policies work the way everybody expects and intends. Surprise outcomes are not anybody's interest and in fact if everyone can feel confident how policy provisions will be interpreted and applied, over the long run there will be fewer coverage disputes.

There are a number of provisions in D&O insurance policies – indeed in professional liability policies generally – that are designed to keep claims in their proper lanes; that is, to make sure that the claims attach to the proper policies. That is one of the purposes of the Treatment of Related Claims provision; it is one of the provisions intended to keep claims in their proper lanes. And that is the problem with the outcome of this case; the result here may well indeed be due to the specific language in the policy, but the upshot is that the claims have not been kept in their proper lanes. So – to finish the thought I started in the preceding paragraph – everyone is better off if the policy wording is not only clear but works the way everyone expects it to work, to keep claims in their proper lanes.

A few further notes about Judge Johnston's opinion. Although it may get short shrift given Judge Johnston's discussion and analysis of the Treatment of Related Claims provision, her analysis of the analytically prior issue of whether or not the two claims are indeed "related" is also noteworthy and could be significant in other disputes in which the question of whether or not two claims are related.

One final note. I did not discuss here Judge Johnston's separate rulings that the Adversary Proceeding is both a "Securities Claim" and a "Non-Securities Claim" but these sections of her opinion are also interesting and all practitioners will want to make a point to read these portions of her opinion as well.