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Delaware High Court Reshapes Landscape for 'Relatedness' of D&O Insurance Claims, New York Law Journal, authors John FitzSimons, Esq., & Alexander Razi, Esq., June 2, 2022

'First Solar' is a significant decision that puts the focus of the analysis of whether claims are related in its proper place, the actual terms of the insurance contract entered into between the insured and the insurer.

By **John H. FitzSimons and Alexander M. Razi**

The Supreme Court of Delaware recently held in *First Solar v. National Union Fire Ins. Co. of Pittsburgh, Pa., 2022 WL 792158 (Del. March 22, 2022), that the issue of whether two claims are "related" for purposes of insurance coverage must be analyzed under the plain language of the insurance policies at issue, rather than the onerous "fundamentally identical" standard that was understood to be applicable under Delaware law in recent years. First Solar is a significant decision that puts the focus of the analysis of whether claims are related in its proper place, the actual terms of the insurance contract entered into between the insured and the insurer.*

Background

In *United Westlabs v. Greenwich Ins. Co., 2011 WL 2623932 (Del. Super. July 1, 2011), the Delaware Superior Court, in the context of determining when two sets of underlying counterclaims that were filed against an insured by the same counterclaimant in different calendar years should be deemed "first made" for purposes of two "claims made" insurance policies (which generally cover only those claims made or deemed to have been first made during a specified policy period) issued for different policy periods, concluded that the "Wrongful Acts" at issue in both sets of counterclaims were "fundamentally identical." That dicta from United Westlabs was seized upon in several subsequent Delaware Superior Court cases and turned into a standard under which underlying claims could not be related unless they were found to be "fundamentally identical," irrespective of explicit policy terms addressing how claims shall be deemed related.*

Underlying Litigation Against First Solar

The *First Solar case arose out of a dispute concerning insurance coverage for two putative securities class actions brought by stockholders of First Solar, a manufacturer of solar panels. The first case was filed in 2012 and alleged violations of federal securities laws by First Solar and its directors and officers during a putative class period of April 30, 2008 to Feb. 28, 2012 based upon purportedly false and misleading public disclosures, including disclosures concerning First Solar's efforts and ability to reduce manufacturing costs in order to make solar power competitive with fossil fuels (the Smilovits Action).*

The second case was filed in 2015 by First Solar stockholders who opted out of the Smilovits Action and asserted claims for violations of the same federal securities laws at issue in the Smilovits Action, as well as certain Arizona state law claims (the Maverick Action). Plaintiffs in the Maverick Action alleged that during a putative class period of May 2011 to December 2011, First Solar misrepresented how close it was to reaching so-called grid parity—"the point at which solar electricity became cost competitive with conventional methods of producing electricity without government subsidies."

The Maverick Action was filed during the policy period of a tower of "claims made" directors and officers liability (D&O) insurance issued for the 2014-15 policy period. The primary policy in the tower contained a so-called Deemer Provision, pursuant to which all "Related Claims" are deemed to have been "first made" at the time that the earliest such Related Claim was made against the Insured. The Deemer Provision also operates to preclude coverage for Claims deemed first made prior to the inception date of the policy.

The term "Related Claim" was defined in the primary policy to mean "a Claim alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related to those that were … alleged in a Claim made against an Insured."

After the Smilovits Action was settled in 2020, First Solar began to arbitrate a settlement of the Maverick Action and sought coverage under the primary policy and the first excess layer policy in the 2014-15 tower (which generally followed form to the primary policy). First Solar eventually settled the Maverick Action without a coverage commitment from either insurer. The insurers then denied coverage for the Maverick Action, which precipitated First Solar's filing of a lawsuit against both insurers in the Delaware Superior Court.

First Solar Insurance Coverage Litigation

Superior Court Grants Insurers' Motion To Dismiss. The Superior Court, relying on Pfizer v. Arch Insurance, 2019 WL 3306043 (Del. Super. July 23, 2019), and several other similar Superior Court decisions, applied the "fundamentally identical" standard and held that the Maverick Action was a Related Claim to the Smilovits Action. The Superior Court noted the overlapping class periods in the two cases, the fact that the same defendants were named in both cases, and that both cases involved the same allegedly fraudulent scheme—artificially raising stock prices by misrepresenting First Solar's ability to produce solar electricity at costs comparable to the costs of conventional energy production. Accordingly, the Superior Court held that coverage was precluded by the Deemer Provision because the Maverick Action was a Claim deemed first made in 2012 (prior to the policy period of the 2014-15 policies), and the court granted the insurers' motion to dismiss on that basis.

Decision of Supreme Court of Delaware. On appeal to the Supreme Court of Delaware, First Solar argued that the Superior Court incorrectly ruled that the Smilovits Action and the Maverick Action were fundamentally identical. First Solar asserted that the two cases merely shared "thematic similarities," not "fundamental identity," because the Maverick Action focused on grid parity and the company's "Systems Business," while the Smilovits Action focused on "misrepresentations regarding the historical cost of individual solar modules," a temporally and categorically distinct part of the company's business.

The insurers, after prevailing on their motion to dismiss in the Superior Court, unsurprisingly argued that the Maverick Action was fundamentally identical to the Smilovits Action. The insurers asserted that the Maverick Action concerned the same Wrongful Acts and allegedly fraudulent scheme as the Smilovits Action. The insurers further argued that the "fundamentally identical" standard was taken out of context and misapplied by the Superior Court. The insurers asserted that the meaning of "related to" should come from the language of the policies.

The Supreme Court agreed with the insurers that the Superior Court's use of the "fundamentally identical" standard to assess the relatedness of the Smilovits and Maverick Action improperly disregarded the plain language of the policies. The Supreme Court pointedly described the transformation of the "fundamentally identical" dicta from United Westlabs into a standard to assess relatedness as an "error." The court, quoting favorably from a recent Superior Court case, also noted "that neither the Delaware Supreme Court nor any other jurisdiction has adopted 'fundamental identity' as the standard governing all relatedness inquiries, regardless of the contractual language at issue."

The court further noted (quoting from several of its prior decisions) that the scope of coverage under an insurance policy "is prescribed by the language of the policy," and absent "ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning." The court then explicitly held that "[w]hether a claim relates back to an earlier claim is decided by the language of the policy, not a generic 'fundamentally identical' standard."

The court framed the question on appeal based on the language of the Deemer Provision (referred to by the court as the "Related Claim Exclusion")—i.e., whether the Maverick Action "raises Claims that 'aris[e] out of, [are] based upon or attributable to any facts or Wrongful Acts that are the same as or related to'" the Smilovits Action. The court answered affirmatively, noting that both Actions were based on the same alleged misconduct—First Solar's misrepresentations about the cost-per-watt of its solar power—and both Actions alleged violations of the same federal securities laws based on such wrongful conduct.

The court further concluded that the two Actions included different misrepresentations and evidence to support their claims, but "not different Wrongful Acts." The court found the First Solar coverage litigation analogous to United Westlabs, where the Superior Court held that the insured had "engaged in a continuous series of related acts, constituting a single wrongful act as defined by the" policy at issue, even though the two sets of underlying counterclaims spanned different time periods and included different allegations.

The court held that the Maverick Action was properly deemed a Claim first made at the time that Smilovits Action was filed and was, therefore, excluded from coverage under the 2014-15 policies.

First Solar's Impact Going Forward

The Delaware Supreme Court's evisceration of the "fundamentally identical" standard and mandate that the issue of relatedness of claims must be decided by the plain language of the insurance policy at issue make *First Solar a significant decision that will impact many insurance coverage disputes and litigation for years to come. While the issue of whether two or more claims are "related" will no doubt continue to be subjected to a fact-intensive, case-by-case analysis, that analysis in cases in which Delaware law controls (which is common because of the high number of companies incorporated in Delaware) now must be framed in the context of the actual terms of the policy at issue, not a nebulous, generic standard. The court in First Solar refreshingly applied common sense and reached a just result.*

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