

Delaware Supreme Court Rejects Use of "Fundamentally Identical" Standard in Assessing Relatedness of Multiple Claims

Earlier this week, the Supreme Court of Delaware issued a decision rejecting what is known as the "fundamentally identical" standard in insurance disputes. *First Solar, Inc. v. National Union First Insurance Co. of Pittsburgh, Pa.*, C.A. No. N20C-10-156 (Del. Mar. 16, 2022).

In several earlier decisions, the "fundamentally identical" standard had been previously applied by the Delaware Superior Court to determine if multiple Claims or multiple Wrongful Acts were sufficiently related. In *First Solar*, although the Delaware Supreme Court affirmed the lower court's decision that two lawsuits were related, the Supreme Court held that the lower court erroneously applied the "fundamentally identical" standard. The Supreme Court rejected the use of this "generic" standard, in favor of applying the insurance policy's "relatedness" terms as written.

We expect this decision to have a significant impact on current and future disputes in Delaware that involve interpretation of "Related" Claims and "Related" or "Interrelated" Wrongful Acts language in D&O Policies.

Background

The insurance dispute concerned two securities actions involving First Solar, a renewable energy company. The first was a class action filed in 2012, which had been covered by a 2011-2012 D&O insurance tower. The class action alleged that First Solar violated federal securities laws by misrepresenting that the company had a winning formula for reducing manufacturing costs to make solar power competitive with fossil fuels, among other things. The second lawsuit was an opt-out action filed in 2015 asserting similar allegations in violation of federal securities laws, Arizona statutes, and common law. After settling the class action and exhausting the entire 2011-2012 insurance tower, First Solar then settled the opt-out claim and pursued coverage under the 2014-2015 D&O tower.

The 2014-2015 Primary Policy contained a "Related Claim Exclusion," which would bar coverage for the opt-out action under the 2014-2015 Policy if the opt-out action was "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" the 2012 class action. The lower court held that the opt-out action was excluded after concluding that the two lawsuits were "fundamentally identical."

The Delaware Supreme Court's Decision

On appeal, the Delaware Supreme Court held that the Superior Court's use of the "fundamentally identical" standard to assess the relatedness of the two suits disregarded the plain language of the insurance policy. As the Supreme Court explained, the "fundamentally identical" standard originated with a 2011 decision – *United Westlabs, Inc. v. Greenwich Insurance Co.*, 2011 WL 2623932 (Del. Super. June 13, 2011) – and later cases picked up *United Westlabs'* observation about the claims being "fundamentally identical" and converted it into a standard to assess relatedness. However, the Supreme Court concluded 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 Supreme Court went on to apply the broad relatedness language in the policy and found that the class action and opt-out suit constituted "Related Claims," thereby excluding coverage for the opt-out under the 2014-2015 tower. Some of the factors emphasized by the Court included the overlap of defendants, time periods, overall theories, and relevant statements and evidence. The Court also dismissed what it referred to as "minor differences" between the two actions, instead explaining that both lawsuits focused on First Solar's misrepresentations about the cost of solar power. The Court then noted that both suits alleged federal securities law violations from this wrongful conduct and that both alleged these misrepresentations were made as part of a fraudulent scheme to increase stock prices. The Court also dismissed the differences in the types of damages sought, concluding that the "thrust of the Wrongful Acts" was

the same regardless of how damages were claimed.

Also noteworthy was the Court's reliance on prior statements that the Insured made outside the context of insurance. Specifically, when seeking to litigate the two cases before the same judge, the Insured previously argued the cases contained "nearly identical allegations."

The Supreme Court also denied First Solar's attempt to separate the fraudulent scheme into separate, distinct wrongful acts based on each individual misrepresentation. The Court determined that the Wrongful Act was the fraudulent scheme to inflate stock prices by misrepresenting solar power cost and efficiency and explained that the different misrepresentations were there to support the claims, not different Wrongful Acts.

In view of the foregoing, the Delaware Supreme Court held that the opt-out lawsuit was deemed first made when the original class action was filed in 2012 and was thus excluded from coverage by the 2014-2015 Policy's Related Claim Exclusion.

Potential Impact to Our Clients

The Delaware Supreme Court's decision may significantly impact both current and future insurance disputes regarding policy placement and other "relatedness" issues. In recent years, policyholders have been inclined to commence coverage litigation in Delaware, and Delaware courts have been apt to apply Delaware law to govern D&O policies. For this reason, the previously applied "fundamentally identical" standard has been a concern for insurers since the name of the standard appeared to suggest that Delaware courts would ignore broader "related Claim" language in insurance policies, contrary to the parties' mutual intent. With this new decision, it now appears Delaware court will consider the policy's actual terms rather than a "generic" standard created by the courts, making it more likely for insurers to successfully establish that multiple lawsuits are related. The decision may also make it more difficult for policyholders to rely on micro-differences between two actions that otherwise appear related.

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The experienced Insurance Coverage & Litigation attorneys at Kaufman, Dolowich & Voluck are available to assist with any questions you may have. Please contact Daniel Brody at dbrody@kaufmandolowich.com for further information.

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