Another Court Applies New York's "Sufficient Factual Nexus" Test to Related Claims

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Insurance Coverage and Bad Faith Alert
4.27.18

Claims-made insurance policies typically contain provisions providing that all "related claims" be treated as a single "claim," deemed first made at the time the earliest of such claims was made. The related claims issue is important because it can determine whether "claims" trigger multiple policy years, or instead, whether those "claims" only trigger a single policy year. For insurers participating on multiple years, the stakes are high.

In *Cushman & Wakefield, Inc. v. Illinois National Insurance Company*, 2018 US District LEXIS 67523 (N.D. Ill. April 20, 2018), the United States District Court for the Northern District of Illinois, applying New York law, was tasked with interpreting the following related claims language in a Real Estate Professional Liability Policy: "a series of continuous, repeated or interrelated wrongful acts shall be considered as one wrongful act." The court broadly applied the "related claims" language and confirmed that, under New York law, "claims" will be deemed related so long as they share a "sufficient factual nexus."

Background

From 2004 to 2007, certain Credit Suisse entities retained various Cushman subsidiaries to perform real estate appraisals in connection with loans made to developers of large, master-planned residential communities (MPCs). *Cushman & Wakefield* at 11. In preparing the appraisals, Cushman used a Total Net Value (TNV) methodology. Between 2008 and 2010, several of the loans went into default and lawsuits surrounding the use of the TNV appraisal method were brought against Cushman and others. *Id.* According to the court, "not only did the underlying actions against Cushman involve overlapping properties, but all underlying claims also alleged that Credit Suisse and Cushman conspired to intentionally overvalue the MPCs so Credit Suisse could generate fees and that the TNV appraisals were inherently misleading." *Id.* at 13. The "underlying claims" included: (1) the Gibson Action, (2) the Highland Demand, (3) the Blixseth Action and (4) the Rhodes Action.

Cushman provided notice of the Gibson Action to its first-level excess insurer during the 2009-2010 policy period. *Id.* at 14. The first level excess insurer accepted the Gibson Action as a Claim under the 2009-2010 year (the first-level excess insurer also participated on Cushman's insurance program for the 2009-2013 years). After the 2009-2010 policy expired, Cushman provided notice of the Highland Demand, and initially requested that the first-level excess insurer treat the Highland Demand as a "continuation" of the Gibson Action because it "is directly related to [Gibson]." *Id.* at 15. However, it appears that Cushman later changed its position, and argued that the Highland Demand should trigger coverage under the 2010-2011 policy year. *Id.* at 15-16. Also after 2009-2010 policy expiration, Cushman provided the first-level excess insurer with notice of the Blixseth Action and advised that it "is related to the Gibson/Credit Suisse claim filed in the 2009-2010 year." *Id.* at 17. Finally, on April 1, 2013, Cushman provided notice of the Rhodes Action under the 2012-2013 policy. *Id.* at 20. While the first-level excess insurer initially accepted the Rhodes Action under the 2012-2013 year, "upon further review," the insurer later determined that the Rhodes Action was related to the Gibson Action, and should be treated under the 2009-2010 year. *Id.*

The insurers raised several coverage arguments, including the applicability of an "Investment Advisor Exclusion" and a "Prior Knowledge Exclusion." The court rejected these arguments. However, the first-level excess insurer separately argued that the Highland Demand, the Blixseth Action and the Rhodes Action were all related to the Gibson Action, such that coverage for all the underlying

claims should be triggered only under the 2009-2010 year, and not any later policy years (in addition to Cushman, two higher-level excess insurers argued that the underlying claims triggered ***different*** policy years).

The Court's Decision on Related Claims

The "related claims" language provided that:

> If additional Claims are subsequently made which arise ou[t] of the same Wrongful Act as Claims already made and reported to the Company, all such Claims, whenever made, shall be considered first made when the earliest Claim arising out of such Wrongful Act was made and all such Claims shall be subject to one such Limit of Liability.
>
> For purposes of the Limits of Liability, a series of continuous, repeated or *interrelated Wrongful Acts shall be considered as one Wrongful Act.*
>
> If during the Policy Period (i) written notice of a Claim has been given to the Insurer or (ii) written notice of circumstances that may reasonably be expected to give rise to a Claim has been given to the Insurer, then any Claim that is subsequently made against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim or circumstances of which such notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim or circumstances of which such notice has been given, shall be considered made at the time such Claim or circumstances has been given to the Insurer.

First, the court rejected the argument that the terms "related" and "interrelated" were ambiguous simply because they were undefined in the policy. *Id.* at 43. The court noted that the terms "related" and "interrelated" were not "open to differing but reasonable interpretations." *Id.* Because the relevant terms were not defined in the policy, the court used the "sufficient factual test" under New York law. *Id.* at 45. The court cited various New York cases applying the "sufficient factual nexus test," which hold that "a sufficient factual nexus exists where the claims are neither factually nor legally distinct, but instead arise from common facts" and where "logically connected facts and circumstances demonstrate a factual nexus among the claims." *Quanta Lines Insurance Co. v. Investors Capital Corp.*, 2009 US District LEXIS 117689 at *14 (S.D.N.Y. Dec. 17, 2009) *quoting Seneca Insurance Co.v. Kemper Insurance Co.*, 2004 US District LEXIS 9159 at *8-9 (S.D.N.Y. May 21, 2004). Applying this test, the court noted that:

> [T]he Underlying Claims at issue contain overlapping factual allegations and arise from strikingly similar circumstances. They involve the same alleged course of conduct, during the same time period, and involve many of the same MPCs. Specifically, plaintiffs in the Underlying Claims each allege they were harmed in connection with appraisals done using the Total Net Value methodology, which were misleading and artificially inflated the value of high-end properties, to the benefit of Credit Suisse and Cushman. This is much more than a tenuous factual overlap. *Id.* at 46-47.

The court noted that "although differently situated, plaintiffs in the underlying claims appear to be various players affected by the alleged scheme – property owners in MPCs, an owner and manager of an MPC, an MPC developer and a hedge fund that owned MPC debt." *Id.* at 47. The court also noted that the plaintiffs in the original Gibson Action "recognized these players, alleging that not only property owners but developers and others were affected by the alleged scheme." *Id.* at 48. The court further observed the overall nature of the alleged "scheme" and that "many of the same properties and appraisals were at issue in the underlying claims." *Id.* Therefore, the court held that the underlying claims were related, and triggered the 2009-2010 policy year only.

The related claims issue is always difficult. At least under New York law, there appears to be some growing consistency under the "sufficient factual nexus" test. Here, according to the court, the plaintiffs in the original Gibson Action made broad, sweeping allegations that "not only property owners but developers and others were affected by the alleged scheme." This is significant because the court

was able to "relate back" the subsequently-filed actions based on these initially broad allegations. While there may never be a clear test for related claims, this decision underscores the fact that under New York law, claims may share a "sufficient factual nexus" when they "involve the same alleged course of conduct, during the same time period and involve many of the same" properties or transactions.

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