

Later Filed Suit Did Not Relate Back to Claim Made During Policy Period

November 2008

A federal district, applying Oklahoma law, has held that a lawsuit filed after the expiration of a claims-made directors and officers liability policy did not relate back to an earlier action filed during the policy period such that the second action would implicate coverage under the policy. *Axis Surplus Ins. Co. v. Johnson*, 2008 WL 4525409 (N.D. Okla. Oct. 3, 2008)

The policy at issue afforded specified coverage for claims first made during the policy period of June 17, 2003 to June 17, 2004. The policy included a "single claim provision," stating that "[a]ll Claims arising from the same Wrongful Act and all Interrelated Wrongful Acts shall be deemed one Claim, and such Claim shall be deemed to be first made on the . . . date that . . . any of the Claims is first made against an Insured under this Policy." The policy defined "Interrelated Wrongful Acts" to mean "any and all Wrongful Acts"—*i.e.*, acts, errors, omissions or breaches of duty— "that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally or logically connected facts, circumstances, situations, event, transaction or causes."

The first lawsuit, which was filed during the policy period, involved a group of investors in an airline who had sold their controlling interest in the business to the insured holding company. Plaintiffs alleged that, in connection with the sale, the insured had assumed the airline's debt, including a \$21.8 million loan for two aircraft that had been personally guaranteed by two of the individual plaintiffs. The transaction allegedly required the holding company to assume that personal guarantee, but the insured failed to do so and subsequently defaulted on the loan. After the lender demanded repayment from the individuals, they brought suit against the insured and certain of its directors for breach of contract, breach of fiduciary duty and gross negligence. Timely notice was provided to the insurer, which denied coverage. The action ultimately was dismissed on the merits.

The second lawsuit was filed in 2006 by the trustee of the holding company's bankruptcy estate and named as defendants several of its former directors. The trustee's complaint asserted causes of action for breach of fiduciary duty and gross negligence based on allegations that the directors had mismanaged the business since its inception. The complaint made no mention whatsoever of the plaintiffs in the first lawsuit or the allegations previously asserted by them in that action. Nevertheless, the directors tendered the matter to the

insurer under the policy that had expired two years earlier.

In the coverage litigation that followed, the insurer moved for summary judgment on the ground that the action by the trustee did not constitute a claim first made or deemed first made during the policy period. The court agreed, finding that the action did not "arise from the same Wrongful Acts or Interrelated Wrongful Acts, as defined in the [policy], as those asserted in the [earlier-filed] lawsuit." In this connection, the court first recognized that the policy definition of "Interrelated Wrongful Acts" was "clear and unambiguous." The court also recognized that although the word "related" encompasses both a logical and causal connection, "not . . . every conceivable relationship" will suffice for these purposes. Rather, according to the court, the question is whether the relationship between two claims is "so attenuated or unusual that an objectively reasonable insured could not have expected that they would be treated as a single claim under the policy."

Turning to the two lawsuits at issue, the court noted that the first action was brought by plaintiffs in their capacity as guarantors of the aircraft loan and as creditors of the insured entity. The court further noted that the allegations in that suit focused entirely on the loan and the failure of the insureds to abide by the contractual obligation to relieve plaintiffs of the guarantee. In contrast, the second suit was brought by the bankruptcy trustee on behalf of the insured debtor, and not any creditor, and involved the directors' mishandling of numerous other transactions and business decisions.

According to the court, to accept the insureds' position, it would have had to conclude that "any prior lawsuit with *any* claim against a director that contained the words 'breach of fiduciary duty' or 'gross negligence' would suffice as a basis for relation-back of the Trustee's claim." The court concluded that such an interpretation would run afoul of "the intent of a claims-made policy to limit the liability of the insurer to a finite period of time."