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NEWSLETTER

Eighth Circuit Affirms Actions Are Related Claims; Coverage Precluded

June 2005

The United States Court of Appeals for the Eighth Circuit, applying North Carolina law, has affirmed the district court's grant of summary judgment for an insurer, holding that two lawsuits filed against an entity were related and constituted a claim first made during the period of a policy that did not provide entity coverage, precluding the coverage sought by the policyholder. *Highwoods Properties, Inc. v. Exec. Risk Indem. Inc.*, 407 F.3d 917 (8th Cir. 2005).

The insurer issued two claims-made D&O policies to the policyholder. The first policy, issued for the policy period June 30, 1996, to June 30, 1998, provided coverage only for the directors and officers of the company and did not include entity coverage. The second policy, issued for the policy period June 30, 1998, to June 30, 2001, provided entity coverage for securities claims in addition to coverage for the company's directors and officers. The policy incepting in 1998 policy stated that "[a] Claim is first made when it is commenced by the filing of a complaint, notice of charges, formal investigative order or similar document, or by the return of an indictment, against an Insured Person." The 1998 policy further provided that "[a]ll Related Claims will be treated as a single Claim made when the earliest of such Related Claims was first made, or when the earliest of such Related Claims is treated as having been made" and defined "related claims" as "all Claims for Wrongful Acts based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events."

The company arranged a merger with another company to be concluded in mid-1998. In January 1998, during the first policy period, a shareholder of the second company filed suit against that company, its directors and officers and the policyholder company, seeking to enjoin the merger and alleging breach of fiduciary duties. The policyholder notified the insurer of the lawsuit and the insurer denied coverage on the grounds that the suit was only brought against the company entity and that the 1996 policy did not provide entity coverage. The underlying action was subsequently dismissed as to the policyholder entity on the grounds that the company owed no fiduciary duties to shareholders of the second company. A second action was then filed by a different plaintiff against the same defendants, alleging misrepresentations in the prospectus and SEC registration statement that were disseminated in connection with the merger.

The company tendered the second action to the insurer, seeking coverage under the 1998 policy. The insurer denied coverage, asserting that the second suit was related to the first suit and constituted a claim under the 1996 policy that was barred due to the lack of entity coverage under that policy. The company filed the instant action seeking coverage and the insurer successfully moved for summary judgment.

On appeal, the court considered whether the first lawsuit constituted a claim under the 1998 policy. The company argued that it was unfair for the insurer to deny that the first lawsuit was a claim under the 1996 policy and to then later assert that it was a claim under the 1998 policy and deny coverage under the 1996 policy's terms. The court of appeals rejected this argument, noting that it was "interpreting and applying only the 1998 policy, which was neither an extension of nor included all of the same terms as the 1996 policy." Applying this approach, the court concluded that the first action constituted a claim within the meaning of that term in the 1998 policy.

The court next considered the effect of the "related claims" language in the 1998 policy. The court first rejected the company's contention that the court's prior decision in *McCuen v. American Casualty Co.*, 946 F.2d 1401 (8th Cir.1991), necessitated a finding that the policy language at issue in this case was ambiguous. Instead, the court adopted the contextualized approach of the Seventh Circuit in *Gregory v. Home Insurance Co.*, 876 F.2d 602 (7th Cir.1989), in which the Seventh Circuit held "that the meaning of 'related' covers a very broad range of connections, both causal and logical" but that "the facts of the case 'comfortably fit within' the term's natural scope." Applying the reasoning of *Gregory and Continental Casualty Co. v. Wendt*, 205 F.3d 1258 (11th Cir. 2000) (per curiam), the court stated that "[w]e will not automatically conclude that such broad terms are necessarily ambiguous and will not always construe them in favor of the insured" and further stated that "[t]he meaning of the terms 'related' and 'series' do have common meanings sufficiently clear to be applied."

Turning to the facts of the case, the court concluded that the two suits at issue here "are related claims, falling within the natural scope of the related claims provision." The court reasoned that the "facts indicate that the two cases meet the definition of 'related' because the circumstances have an established connection or resemblance, and they both involve communications to shareholders in relation to the merger that are allegedly incomplete and deceptive." The court also noted that "[t]he term 'series' also reasonably applies in this context because the alleged deceptive and harmful actions occurred through the promulgation of several related documents issued in temporal succession, building on one another and resulting in the accomplishment of the merger." Based on these findings, the court ultimately concluded that "[b]y operation of the policy, the claims therefore constitute a single claim that was made outside the policy period of the 1998 policy. Because entity coverage was not included in the 1996 policy, and because a logical and reasonable application of the 1998 policy language operates to preclude coverage for [the second action], summary judgment was appropriate for [the insurer]."

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