

ALERT

## Breach of Contract Dispute Deemed Related to Prior Similar Dispute

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July 7, 2011

The Delaware Superior Court for New Castle County has held that two insurers owed no coverage for a claim arising from the same facts and circumstances as an earlier claim made prior to the inception of the policies. *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2416851 (Del. Super. Ct. June 13, 2011). The court based its conclusion both on the policy language at issue as well as Delaware statutory provisions related to material misrepresentations made during the application process.

The insured business, which provided laboratory services to hospitals, contracted with a financial company for use of a billing system. The parties' relationship subsequently deteriorated, and in January 2007, the business and the financial company filed claims against one another alleging breach of contract (the 2007 Action). These claims were dismissed without prejudice in March 2007. Subsequently, in May 2007, the business obtained a liability policy with an insurer, which was renewed in 2008. The business also secured a separate policy in August 2008 from a second insurer. In its application for both policies, the business answered "no" to a question inquiring as to the business's recent involvement in lawsuits or grievances. In December 2008, the insured business filed suit against the same financial company, and the financial company filed a counterclaim in March 2009. The business tendered the counterclaim to both insurers, and both denied coverage on the grounds that the claim was not first made within their claims-made policies' policy periods. The insured then filed this action against both insurers, seeking a declaration of coverage.

### Practice Areas

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E&amp;O for Lawyers, Accountants and Other Professionals

D&amp;O and Financial Institution Liability

Professional Liability Defense

Insurance

The court held that the first insurer's policy did not provide coverage for the counterclaim. That insurer's policy stated that all acts that "involve the same or related subject . . . or have common facts or circumstances or involve common transactions, events or decisions" constituted a single Wrongful Act "deemed to have been made on . . . the date the first of those Claims is made against any Insured," which the court determined was made in connection with the 2007 Action, prior to the inception of the first carrier's policy period. The court rejected the insured's argument that the 2007 Action and the 2009 counterclaim arose from different conduct. Instead, the court held that the disputes involved the same facts and circumstances because both alleged identical misconduct on the part of the insured business, and thus they were both part of the same Claim, which was first made at the time of the 2007 Action.

The court also held that the counterclaim was not covered under the second insurer's policy. Similar to the first policy, that policy provided that all acts arising from "the same or related or series of related facts, circumstances, situations, transactions or events" were considered Interrelated Wrongful Acts. Further, under the policy, "all Claims arising from Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest time at which the earliest Claim is made or deemed to have been made." The court held that the 2007 Action and the 2009 counterclaim were based on Interrelated Wrongful Acts and thus the counterclaim was deemed a claim first made at the time of the 2007 Action, prior to the inception of the second insurer's policy. In doing so, the court rejected the insured's argument that a claim made during the policy period could not be "pushed backwards and out of the policy" because it related to an earlier claim unless that earlier claim had been reported to the insurer under a prior policy issued by the same carrier, ruling that the policy's plain language contained no such limitation.

Finally, the court addressed the insured business's failure to disclose the 2007 Action in its applications for both policies. The court stated that, pursuant to Section 2711 of Title 18 of the Delaware Code, an insured cannot recover under an insurance policy if the insured makes omissions or misrepresentations that are material to the insurer's acceptance of the risk in connection with the policy's application. The court held that the insured's failure to disclose the 2007 Action was a material omission that constituted additional grounds preventing recovery under both policies.