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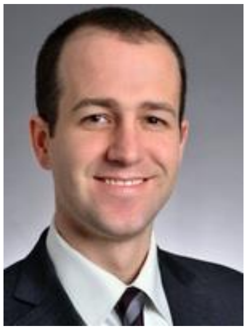
How 9th Circ. Approaches 'Related Claims' Insurance Disputes

By **Nicholas Maxwell and Diana Gliedman** (March 13, 2019, 4:02 PM EDT)



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Errors and omissions professional liability insurance exists to protect lawyers and other professional service providers from the substantial cost of defending against malpractice claims. However, E&O policies often contain various provisions designed to limit coverage based on the substance, timing or surrounding circumstances of the claim(s) in question.

Two insurance coverage disputes over errors and omissions professional liability claims recently decided in the Ninth Circuit hinged on the often problematic “related claims” or “related acts” provisions found in most E&O policies. Insurance companies include these wordy provisions in order to argue that multiple claims bearing some relationship to one another can be consolidated under one policy year with one limit of liability.

While related claims language theoretically protects insurance companies against an unlimited number of claims based on a single wrongful act, a reasonable objective, insurance companies may use the language to conflate multiple claims with very little in common.

In a case decided by the Ninth Circuit in late 2018, Liberty Insurance Underwriters Inc. v. Davies Lemmis Raphaely Law Corp., the court's interpretation of the related claims provision determined the extent of policy liability limits. In the more recent case, Attorneys Insurance Mutual Risk Retention Group Inc. v. Liberty Surplus Insurance Corp., decided just last month, the related claims provision was dispositive — though in a fact-specific and paradoxical way — with regard to when coverage was triggered and so whether coverage existed at all.

One Scheme, Seven Suits

In Liberty Insurance Underwriters Inc. v. Davies Lemmis Raphaely Law Corp., the U.S. Court of Appeals for the Ninth Circuit ruled in December 2017 in a dispute over Liberty's assertion of its related claims provision to encompass seven different lawsuits against its law firm policyholder. DLR represented a property owner soliciting investments in the ownership of various properties.

Multiple investors would later allege that DLR helped the owner close sales by telling investors that the owner would pay any sales commissions, when in fact sales commissions were baked into the sale price. Seven different investors filed suits arising from the sale of at least 15 different properties over a six-year span.

The Ninth Circuit considered whether the seven lawsuits were “claims, alleging, based upon, arising out of or attributable to the same or related wrongful acts.” Naturally, DLR emphasized the various differences in its briefing. The appellate panel nonetheless agreed with Liberty and the district court that despite all of the differences between the lawsuits, they were “logically related to each other by the ‘common purpose or plan’ — a scheme to incentivize investments by signifying that sellers would pay commissions, while hiding the fact that the price of the investment included the commissions.”

This “common plan,” the court explained, overrode the many differences between the lawsuits, limiting the policyholder to one limit of liability for all seven.

Late Notice Negated: A Related Claims Boomerang

A bit more than one year later, Attorneys Insurance Mutual Risk Retention Group Inc. v. Liberty Surplus Insurance Corp. presented the Ninth Circuit with another dispute over the “related claims” provision in a Liberty E&O policy. This one arose out of two lawsuits filed against the law firm policyholder by the same clients, one during the 2009-2010 policy year and the other during the 2010-2011 policy year.

The clients sued in probate court during the 2009-2010 policy year for equitable relief arising from the attorney’s alleged attempt to defraud a family of its fortune under the guise of providing estate planning services. For unstated reasons, the policyholder did not give Liberty Surplus notice of the probate case.

During the subsequent 2010-2011 policy year, the clients sued the attorney again, this time in civil court, for torts including legal malpractice. After receiving notice of the civil case and learning of the earlier probate case, Liberty determined that the probate and civil cases were “claims alleging, based upon, arising out of or attributable to the same or related acts, errors or omissions” and therefore must be treated as one claim under the 2009-2010 policy year.

Since the probate case came first and the policyholder had not given timely notice, Liberty declined coverage for both cases under policy language very similar to the language in the Davies Lemmis Raphaely case.

Interestingly, and for reasons unclear from the briefing, the parties agreed that the probate and civil cases were sufficiently related for purposes of the related claims provision. The plaintiff instead emphasized another prong of the related claims provision: “All such Claims, whenever made, shall be considered first made during the Policy Period … in which the earliest Claim … was first made.”

This second prong of the related claims provision at first seems noncontroversial, since the plaintiff already admitted that the threshold relatedness requirement was met. However, the plaintiff then pursued an entirely separate argument based on the fact that "Policy Period" was defined to refer exclusively to the 2010-2011 policy, not prior Liberty policy periods.

Therefore, the Ninth Circuit held in a Feb. 15, 2019, decision that the related claims provision was only triggered if the "earliest Claim" was a claim made during the 2010-2011 policy. In this instance, the only candidate was the civil case, for which the policyholder had given timely notice. Accordingly, despite the plaintiff admitting the two claims were sufficiently related, the court still required Liberty to contribute to the defense of the civil case.

Related Claims Disputes: Endemic to Claims-Made Policies

The two cases discussed above demonstrate that courts construing "related claims" provisions tend to favor close analysis of facts and policy language over the application of broad standards or tests. The recent AIMRRG decision in particular suggests that courts are always prepared to consider atypical policy language arguments in order to resolve challenging and fact-specific "related claims" disputes.

And though Davies Lemmis Raphaely and AIMRRG both arise from legal malpractice claims, the same issues are equally likely to confront architects, engineers, accountants and any other industry whose members carry E&O insurance. Policyholders should also be aware of such provisions in other types of claims-made insurance including directors and officers and employment practices liability policies.

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