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## Interrelated Acts, Unrelated Case Law

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### I. Introduction

For policyholders with claims-made policies, the issue of “interrelated acts” continues to be an unpredictable minefield in coverage litigation. The issue arises because these policies follow the principle that a single claim will only trigger a single policy. To ensure this result, all future claims that “relate back” to the original claim are deemed to have been made in the same year, the year of the first claim. Often, in determining coverage, the key question becomes whether a subsequently made claim sufficiently relates back to the original claim.

*Unfortunately for both insurers and policyholders, the case law regarding this issue is hopelessly irreconcilable.*

In practical terms, this issue arises in two circumstances: (1) where a policyholder wants a claim to relate back in order to gain coverage in a prior policy as opposed to its current one, or (2) where the insurer disclaims coverage by asserting that a new claim

relates back to an earlier policy. In the former, the policyholder may be motivated to demonstrate interrelatedness because its new policy (if it has one) may already be exhausted, have lower limits, or have already been released. In the latter, the insurer will be motivated to avoid coverage by shifting its obligation to a prior policy. That may result in no coverage for the insured if that prior policy has already been exhausted, or if the insured failed to give notice of the original claim. Case law usually but not always involves an insurer arguing that a claim relates back to a prior policy.

Unfortunately for both insurers and policyholders, the case law regarding this issue is hopelessly irreconcilable. Upon a survey of the law regarding this issue, a Connecticut court lamented, “[i]t is likely impossible to reconcile all of the results . . . in the . . . cases . . . such that each is consistent with a single set of principles.”<sup>1</sup> The unpredictability of the issue stems in part from the fact-intensive analysis that most courts apply in attempting to resolve such disputes.

### II. *Ace* and *Allmerica*: Courts Take Broad View to Find Coverage

Most recently, two courts have taken broad approaches regarding interrelated claims and have found coverage. For example, in *Ace American Ins. Co. v. Ascend One Corp.*,<sup>2</sup> Amerix, a company which assists credit counseling agencies, sought indemnification under a claims-made E&O policy as a result of two consumer protection claims brought against it in two different states. The first claim (hereinafter “Multi-State Claim”) alleged that Amerix engaged in improper marketing and credit counseling practices in several states.<sup>3</sup> The insurer argued that the Multi-State Claim was excluded because of policy

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language disclaiming coverage of prior interrelated acts. The policy stated:

All Claims arising out of the same Wrongful Act and all Interrelated Wrongful Acts of the Insureds shall be deemed to be one Claim, and such Claim shall be deemed to be first made on the date the earliest of such Claims is first made, regardless of whether such date is before or during the Policy Period. All Damages and all Claims Expenses resulting from a single Claim shall be deemed a single Damage and Claim Expense.<sup>4</sup>

The policy further defined Interrelated Acts:

Interrelated Wrongful Acts means all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes.<sup>5</sup>

The insurer claimed that the Multi-State Claim had a common nexus of fact with a 2004 class action, which was brought against Amerix before the policy was in effect.<sup>6</sup> The 2004 class action alleged that the company engaged in “unfair, deceptive and misleading debt management, credit counseling, budget planning and debt collection activities.”<sup>7</sup> The *Ace* court explained that, “In general, courts have found claims to be interrelated when they have a common nexus of facts and arose out of the same occurrence of wrongful acts.”<sup>8</sup> The court found that the two lawsuits were not interrelated because the Multi-State Claim focused on circumstances and events that occurred subsequent to the initiation of the class action.<sup>9</sup> Additionally, the Multi-State Claim focused broadly on the company’s practices rather than focusing on the specific experiences of the class action plaintiffs.<sup>10</sup>

Similarly, a court found that two claims at dispute were not interrelated in *Allmerica Financial Corp. v. Certain Underwriters at Lloyd’s, London*.<sup>11</sup> In that case, Allmerica settled a class action suit which alleged improper practices in the sale of its life insurance policies.<sup>12</sup> Several years earlier, Allmerica defended a suit in Alabama state court which alleged that one of its agents made misrepresentations about the value of an insurance policy and that Allmerica failed to supervise the agent (“Alabama Action”).<sup>13</sup> Allmerica sought indemnification for the class action settlement amount, which the insurer denied in part because of an exclusion which disclaimed coverage for:

[A]ny Wrongful Act or any matter, fact, circumstance, situation, transaction or event which has been the subject of any Claim made against [Allmerica] prior to the Original Effective Date as stated in Item 8. of the Declarations; or

[A]ny other Wrongful Act whenever occurring, which, together with a Wrongful Act which has been the subject of such Claim, would constitute Interrelated Wrongful Acts.<sup>14</sup>

The policy further defined Interrelated Acts to include:

[A]ny Wrongful Acts which are logically or causally connected by reason of any common fact, circumstance, situation, transaction or event.<sup>15</sup>

The insurers argued that the Alabama Action was an Interrelated Wrongful Act and thus did not need to indemnify.<sup>16</sup> The court found that the insurers failed to show that the Alabama Action and the class action were “logically or causally connected.”<sup>17</sup> The Alabama Action involved misrepresentations of a single agent, while the class action alleged that Allmerica perpetrated a scheme of misrepresentations through its agents.<sup>18</sup> While both claims were similar with regards to misrepresentations about the value of the policies sold, the court found that the claims did not involve a common fact, circumstance, situation, transaction or event.<sup>19</sup> “Commonality,” the court noted, “is a more demanding requirement than similarity.”<sup>20</sup> The court also carefully noted that the conduct underlying the claims took place at different times and locations, and involved different policyholders, different sales agents, and separate transactions.<sup>21</sup>

### III. *WFS and Capital Growth: Courts Take Liberal View on Interrelated Acts*

Confusingly, other courts—interpreting claims-made policies with almost identical language to *Ace* and *Allmerica*—have held on similar facts that the disputed claims were interrelated. For example, in *WFS Financial, Inc. v. Progressive Cas. Ins. Co., Inc.*, an automobile financing company sought declaratory judgment affirming its right to indemnity for two claims made under successive claims-made policies, both issued by the same insurance company.<sup>22, 23</sup> The financing company sought indemnity for two separate class action lawsuits which alleged that the company’s practice of permitting independent auto dealers to mark up interest rates based on subjective criteria had a discriminatory effect against minority applicants.<sup>24</sup> Both policies contained liability limitations for Interrelated Wrongful Acts:

Claims based upon or arising out of the same Wrongful Act or Interrelated Wrongful Acts committed by one or more of the Insured Persons shall be considered a single Claim, and only one Retention and Limit of Liability shall be applicable. However, each such single

Claim shall be deemed to be first made on the date the earliest of such Claims was first made, regardless of whether such date is before or during the Policy Period.<sup>25</sup>

The court found interrelatedness despite the fact that the class actions were filed by different groups of plaintiffs, in different forums, under different legal theories.<sup>26</sup> According to the court, the common nexus test was met because both suits involved the company's practice of allowing independent dealers to mark up loans.<sup>27</sup>

Similarly, in *Capital Growth Financial LLC v. Quanta Specialty Lines Ins. Co.*,<sup>28</sup> an investment firm sought indemnity under its claims-made E&O professional liability policy against claims by several investors alleging unsuitably aggressive investments and churning practices related to certain financial advisors. The first claim against the investment firm was brought in arbitration and the insured gave proper notice under the policy.<sup>29</sup> However, ten months after the policy expired, other investors filed their own arbitration claims.<sup>30</sup> Despite the lapse of the policy, the investment firm sought defense and indemnity by asserting that all of the claims related back to the timely-noticed claim.<sup>31</sup> The insurer defended by contending, *inter alia*, that although the improper investments may overlap, they were not identical and that the claimants between the arbitrations were unrelated.<sup>32</sup> The relevant policy language provided that:

All claims based upon or arising out of the same Wrongful Act or Interrelated Wrongful Acts shall be considered a single Claim and each such single Claim shall be deemed to have been made on the earlier of the following:

- A. When the earliest claim arising out of such Wrongful Act or Interrelated Wrongful Acts was first made; or
- B. When notice was provided to the Insurer . . . concerning a Wrongful Act giving rise to such Claim.<sup>33</sup>

The policy defined interrelated wrongful acts as any wrongful acts that are "similar, repeated or continuous" or "connected by reason of any common fact, circumstance, situation, transaction, casualty, events, decision or policy or one or more series of facts, circumstances, situations, transactions, casualties, event[s], decisions or policies."<sup>34</sup> Upon recognizing the confusion in the law on this issue, the Southern District of Florida summarized the factors considered by courts:

[C]ourts analyzing the "relatedness" of claims in situations involving similar policy language consider, among other factors, whether the

parties are the same, whether the claims all arise from the same transactions, whether the "wrongful acts" are contemporaneous, and whether there is a common scheme or plan underlying the acts. This approach does not require exact factual overlap, or even identical causes of action, but rather focuses simply on whether the claims are logically linked by a "sufficient factual nexus."<sup>35</sup>

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The court found that the allegations in the subsequent arbitrations were related in time, place, pattern, and opportunity to the timely-noticed claim, involving allegations of unsuitable, aggressive, and risky investments.<sup>36</sup> Any variations in the types of misrepresentations made to induce the investments, or the unique circumstances of each investor, did not preclude a finding of interrelation as a matter of law.<sup>37</sup> Thus the *Capital Growth* court determined that interrelationship could be found despite the fact that the circumstances underlying the claims involved different claimants at different times.<sup>38</sup>

#### **IV. Unpredictability Prevails in both Recent and Older Case Law**

The recent case law regarding interrelated wrongful acts demonstrates that application of the law produces uneven results. *Ace* and *WFS* are inapposite on similar sets of facts. Both cases involved claims brought by different plaintiffs in different jurisdictions, and both courts applied the "common nexus test," yet each reached a different result. The improper conduct in *Ace* related to a single type of business practice, as was also true in *WFS*. Yet, the *Ace* court drew the line much more sternly, in part, reasoning that the claims were not related because the Multi-State Claim focused on events subsequent to those relating to the class action. If this standard was universally applied, it would be extremely difficult for any party to ever establish an interrelated claim, since subsequent actions often focus on subsequent events relating to a prior practice.

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Litigants in this area may not comfortably rely on similarity of claims as a predictor of the outcome. For example, the "sufficient factual nexus" requirement

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in *Capital Growth* was apparently satisfied by the factual similarity between the claims. However, in *Allmerica*, the court took pains to note that although the claims were similar, they did not share the requisite “commonality.” The discrepancy between the outcomes in *Capital Growth* and *Allmerica* is an exemplar of the uncertainty of the law with regards to interrelated acts in claims-made policies. However, this uncertainty is not just a recent phenomenon. For example:

- In 2006, in *Southridge*,<sup>39</sup> the court held, as in *Allmerica*, that general similarity is not enough to establish interrelatedness. There, the insured was sued in five different actions, all alleging that the insured manipulated stock prices downward. The insurer sought summary judgment on the basis that the five actions related back to an earlier suit which was brought prior to the effective date of any policy at issue. The earlier action alleged that, despite the insureds’ promises otherwise, insureds profited from short selling plaintiffs’ stock. The court determined that although the claimed transgressions were similar, the claims were not interrelated. The two actions had different plaintiffs, different defendants and different details.<sup>40</sup>
- Conversely, in 2003, in *Gateway Group Advantage, Inc. v. McCarthy*, the court found that different actions arising out of the same scheme to promote and market insurance franchises were “related wrongful acts” which had a “common nucleus of fact.”<sup>41</sup> There, the insured was sued by a company which had purchased franchises in two different states in successive years. The company brought two separate actions which alleged that the insured made misrepresentations to induce the purchases of the franchises. Despite the fact that the claims involved different franchises purchased at different times, the court concluded that both actions were related because they arose from the same common

nucleus of fact, particularly since a standard sales pitch was used to induce investors.<sup>42</sup>

- In 2000, in *Continental Cas. Co. v. Wendt*, the court held that actions brought by different plaintiffs alleging damages arising from an attorney’s promotion of notes arose from “the same or related acts.”<sup>43</sup> *Wendt* involved suits brought by investors who detrimentally relied on the insured’s investment advice. The actions were brought under successive policies. Although the alleged harm resulted from different types of acts which harmed different people, the court considered that the promotion of the notes was the act that causally connected the claims and tied them together.<sup>44</sup>

***[I]n coverage disputes, both insurers and policyholders should be aware of the turbulent and unpredictable state of the law whenever interrelatedness becomes an issue in the litigation.***

- However, in 2004, in *Brown v. Nat’l Union Ins. Co. of Pittsburgh, Pa.*, the court found that a number of actions brought against an investment broker regarding potentially fraudulent practices raised a genuine issue as to whether the claims were truly interrelated.<sup>45</sup> At issue was whether the investment broker utilized a single as opposed to various methods to defraud his clients. The court found the record to be undeveloped. However, the court reasoned that the connection, if it existed, could not be overly attenuated and that factors such as time, place, opportunity, pattern and method, or modus operandi must be considered.<sup>46</sup>

The disparate results in the above cases demonstrate that in coverage disputes, both insurers and policyholders should be aware of the turbulent and unpredictable state of the law whenever interrelatedness becomes an issue in the litigation.

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<sup>1</sup> *Southridge Capital Mgmt., LLC v. Twin City Fire Ins. Co.*, No. X04CV020103527S, 2006 Conn. Super. LEXIS 2754, at \*27 (Conn. Super. Ct. Sept. 8, 2006).

<sup>2</sup> 570 F. Supp. 2d 789 (D. Md. 2008).

<sup>3</sup> *Ace*, 570 F. Supp. 2d at 791.

<sup>4</sup> *Ace*, 570 F. Supp. 2d at 793.

<sup>5</sup> *Ace*, 570 F. Supp. 2d at 793.

<sup>6</sup> *Ace*, 570 F. Supp. 2d at 798.

<sup>7</sup> *Ace*, 570 F. Supp. 2d at 799.

<sup>8</sup> *Ace*, 570 F. Supp. 2d at 798.

<sup>9</sup> *Ace*, 570 F. Supp. 2d at 801.

<sup>10</sup> *Ace*, 570 F. Supp. 2d at 801.

<sup>11</sup> 449 Mass. 621, 635–36 (2007).

<sup>12</sup> *Allmerica*, 449 Mass. at 622.

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- <sup>13</sup> *Allmerica*, 449 Mass. at 635.
- <sup>14</sup> *Allmerica*, 449 Mass. at 635 n.21.
- <sup>15</sup> *Allmerica*, 449 Mass. at 635 n.22.
- <sup>16</sup> *Allmerica*, 449 Mass. at 638.
- <sup>17</sup> *Allmerica*, 449 Mass. at 638.
- <sup>18</sup> *Allmerica*, 449 Mass. at 638.
- <sup>19</sup> *Allmerica*, 449 Mass. at 638.
- <sup>20</sup> *Allmerica*, 449 Mass. at 635–36.
- <sup>21</sup> *Allmerica*, 449 Mass. at 636.
- <sup>22</sup> 232 Fed. App'x 624, 625 (9th Cir. 2007).
- <sup>23</sup> *WFS*, 232 Fed. App'x at 625.
- <sup>24</sup> *WFS*, 232 Fed. App'x at 625.
- <sup>25</sup> *WFS*, 232 Fed. App'x at 625.
- <sup>26</sup> *WFS*, 232 Fed. App'x at 625.
- <sup>27</sup> *WFS*, 232 Fed. App'x at 625.
- <sup>28</sup> No. 07-80908-CIV, 2008 U.S. Dist. LEXIS 65814, at \*1 (S.D. Fla. July 30, 2008).
- <sup>29</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*4–5.
- <sup>30</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*5–6.
- <sup>31</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*7.
- <sup>32</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*7–8.
- <sup>33</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*4.
- <sup>34</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*3–4.
- <sup>35</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*11–12.
- <sup>36</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*12–13.
- <sup>37</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*13.
- <sup>38</sup> *Capital Growth*, 2008 U.S. Dist. LEXIS 65814, at \*13–14.
- <sup>39</sup> 2006 Conn. Super. LEXIS 2754, at \*1.
- <sup>40</sup> *Southridge*, 2006 Conn. Super. LEXIS 2754, at \*27–31.
- <sup>41</sup> 300 F. Supp. 2d 236, 245–46 (D. Mass. 2003).
- <sup>42</sup> *Gateway*, 300 F. Supp. 2d at 246–46.
- <sup>43</sup> 205 F.3d 1258, 1264 (11th Cir. 2000).
- <sup>44</sup> *Wendt*, 205 F.3d at 1264.
- <sup>45</sup> Civil No. 02-4724, 2004 U.S. Dist. LEXIS 2224, at \*7 (D. Minn. Feb. 11, 2004).
- <sup>46</sup> *Brown*, 2004 U.S. Dist. LEXIS 2224, at \*5–7.