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Del. Related Claims Ruling Is Good News for Insurers

WRITTEN BY

Brandon D. Almond | Daniel W. Cohen | Jenna Autry

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On March 16, the Delaware Supreme Court [rejected](#) the “fundamentally identical” standard that Delaware courts had previously used as the test for assessing relatedness-based coverage issues. Instead, Delaware courts will now be required to look to the precise language of the related claims provision at issue.^[1]

In *First Solar Inc. v. National Union First Insurance Co.*, the primary insurer, National Union, issued claims-made policies to the insured, First Solar, for the 2011-2012 and 2014-2015 policy periods.^[2]

The policies contained a provision that excluded coverage for related claims initiated prior to the relevant policy period, defining “related claim” as any claim “alleging, arising out of, based upon, or attributable to any facts or Wrongful Acts that are the same as or related to” an earlier claim against the insured.^[3]

In 2012, First Solar’s shareholders initiated a class action against it, alleging violations of federal securities laws by making false or misleading public disclosures about the company’s ability to produce solar electricity at costs comparable to conventional energy producers — the *Smilovitz* action.^[4] National Union, along with the excess insurers, provided coverage for the *Smilovitz* action and paid its limits.^[5]

In 2015, some of the insured’s shareholders who had opted out of the *Smilovitz* action in 2014 filed a separate class action, the *Maverick* action, claiming violations of the same federal securities laws, but adding state claims for fraud and negligent misrepresentation.^[6]

The insured sought coverage for the *Maverick* action under the 2014-2015 policy.^[7] The primary and excess insurers denied coverage, with the primary insurer asserting the *Maverick* and *Smilovitz* actions were related.^[8]

In 2021, the insured sued the insurers in the Superior Court of Delaware, seeking declaratory relief that the insurers were obligated to provide coverage.^[9]

The insured argued the actions were unrelated because they involved different plaintiffs, claims, conduct and class periods.^[10] The Superior Court of Delaware assessed whether the *Smilovitz* and *Maverick* actions were fundamentally identical such that they would be excluded under the related claims provision.

The court noted the fundamentally identical test required courts to look to the subject of the claims to see if they are the exact same and do not merely share thematic similarities, including by assessing whether the claims share

“common facts, circumstances, transactions, events, and decisions.”[11]

The Superior Court held the actions were fundamentally identical because they alleged violations under the same securities laws, relied on the same disclosures, had an overlap of class periods and were against the same defendants. As a result, the insurers were not required to provide coverage for the *Maverick* action.[12]

Delaware’s fundamentally identical test was a unique approach to assessing relatedness because it permitted courts to analyze relatedness without reliance on the particular policy’s definition of related claims.

The test stems from a 2011 decision, *United Westlabs Inc. v. Greenwich Insurance Co.*, in which the Delaware Superior Court analyzed a particular interrelated claims provision and concluded the alleged wrongful acts were fundamentally identical, though the policy at issue never used such language.[13]

Later Delaware decisions transformed *United Westlab*’s case-specific “fundamentally identical” language into a uniform test to apply to all related claims cases. Initially, the fundamentally identical test seemed to favor policyholders, as seen in the 2019 Superior Court decision *Pfizer Inc. v. Arch Insurance Co.*[14]

In *Pfizer*, the Superior Court relied on the fundamentally identical test, rejecting the insurers’ arguments that two securities class actions levied against Pfizer and its subsidiary were related.

Despite both actions centering on misrepresentations pertaining to the same drug, the *Pfizer* court reasoned that the actions alleged distinct misrepresentations — one pertaining to gastrointestinal risks and the other cardiovascular risks. As a result, the actions were not fundamentally identical.[15]

Consequently, the Superior Court’s 2021 decision in *First Solar* signaled a looser interpretation of the fundamentally identical test. The *Smilovitz* and *Maverick* actions shared some overlapping allegations, but both alleged unique misrepresentations levied by *First Solar* and its directors and officers.

First Solar appealed the decision to the Delaware Supreme Court. Although the Supreme Court ultimately affirmed the decision, it did so with an important caveat — the Superior Court should have never used the fundamentally identical test.

The Supreme Court reasoned that the “fundamentally identical” language first used in *United Westlabs* was never meant to be a test at all.[16] Instead, the court noted there should not be a uniform test applied in related claims cases, because doing so “disregards the plain language of the policy.”[17]

How should Delaware courts decide related claims cases now? On a case-by-case basis, analyzing the precise language of the related claims provision at issue.

In *First Solar*, the Delaware Supreme Court noted the particular provision at issue broadly defined a “related claim” as any claim “alleging, arising out of, based upon, or attributable to any facts or Wrongful Acts that are the same as or related to” an earlier claim against the insured.[18]

Because the *Smilovitz* and *Maverick* actions both centered on *First Solar* allegedly misrepresenting the cost of

solar power to increase stock prices in violation of the same federal securities laws, the claims were related under the policy. The fact that the actions cited violations of different laws, involved different plaintiffs, and sought different damages was inconsequential.[19]

Apart from the policy language, the Supreme Court also pointed to the insured's comments prior to the coverage action. When shareholders initiated the *Maverick* action, First Solar filed a "Motion to Transfer Related Case" to the same judge overseeing the *Smilovitz* action.[20]

In that motion, First Solar described the allegations in the *Smilovitz* and *Maverick* actions as "nearly identical." [21] Although the policy's precise language is the most important factor in the relatedness analysis, insurers should be mindful of how the action is described in precoverage dispute communications.

For insurers, the *First Solar* decision is a welcome reprieve from the once-rigid "fundamentally identical" standard. When policies contain broad related claims provisions, such policy language will govern Delaware courts' analysis.

However, the decision is also a reminder to insurers that related claims provisions must be drafted with precision. Prior to the Supreme Court's March 16 decision, an insurer that crafted a narrow related claims provision was not as tightly bound to the policy's language. Instead, insurers could argue relatedness under the fundamentally identical standard.

Although the shift to relying on the precise language of the policy at issue benefited the insurers in *First Solar*, other insurers with narrower policies may experience difficulty in proving relatedness.

[1] See *First Solar, Inc. v. Nat'l Union First Ins. Co. of Pittsburgh, PA*, No. 217, 2022 WL 792158 (Del. Mar. 16, 2022).

[2] Id. at *1-2.

[3] Id.

[4] Id. at *1.

[5] Id. at *2.

[6] Id. at *1.

[7] Id. at *2-3.

[8] Id.

[9] See *First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. CVN20C10156MMJCCLD, 2021 WL 2563023 (Del. Super. Ct. June 23, 2021).

[10] *Id.* at *5.

[11] *Id.*

[12] *Id.* at *6.

[13] See *United Westlabs, Inc. v. Greenwich Ins. Co.*, No. CIV.A. 09C-12048 MMJ, 2011 WL 2623932 (Del. Super. Ct. June 13, 2011), aff'd, 38 A.3d 1255 (Del. 2012).

[14] *Pfizer Inc. v. Arch Ins. Co.*, No. CVN18C01310PRWCCLD, 2019 WL 3306043 (Del. Super. Ct. July 23, 2019).

[15] *Id.* at *10.

[16] *First Solar, Inc.*, 2022 WL 792158, at *5.

[17] *Id.*

[18] *Id.* at *6.

[19] *Id.*

[20] *Id.* at *9.

[21] *Id.*

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