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Florida District Court Finds That "Unrelated" Design Errors Sufficient to Trigger "Related Claims" Provision in Architects & Engineers Policy

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Most professional liability polices include some form of a "related claims" provision that generally provides where two or more claims or wrongful acts are causally or logically related, they will be deemed to constitute a single claim. Importantly, these provisions typically provide that those "claims" are then deemed to have been "first made" at the time the first claim or act was committed for purposes of the policy's claims-made and reporting requirements. Understandably, these provisions provide insurers and insureds with some clarity over the number and timing of claims that could involve multiple errors or omissions, and potentially aggregate all related claims or acts into a single policy period. While reasonable in principle, application of such provisions, especially involving large scale design and construction projects, is not always so easy.

Nova Southeastern University, Inc. v. Continental Cas. Co., 18-cv-61842 (S.D. Fla. Dec. 27, 2019), involved such an insurance coverage dispute with a design project gone wrong. DeRose Design Consultants, Inc. ("DeRose") was hired as a structural engineer to design "ice tanks" to store and chill water for an energy efficient air conditioning facility constructed on the campus of Nova Southeastern University ("NSU"). An early water test on one of the tanks determined the walls of the ice tank deflected, leaked, and cracked when the tank was filled with water. DeRose later discovered that the problems with the ice tank were caused by a structural design error.

The first errors were discovered in early 2009, and reported under DeRose's professional liability policy with Evanston. DeRose then created a remedial design to repair the tanks, which involved strengthening repairs. Additional leaking and an early indication of corrosion involving the Remedial Design arose as early as October 25, 2009. Several field investigation reports were prepared in 2011 and 2012 confirming these issues with the Remedial Design. A third report in February 2012, however, identified a new error involving the concrete slab under the ice tanks also designed by DeRose. The third report concluded that the concreate slab was overstressed and could not handle the loads of the ice tanks. The report also concluded, however, that the design defects in the concrete slab were "unrelated" to the original design defect of the ice tank walls or Remedial Design.

NSU filed suit against DeRose in Florida state court in December 2012 asserting a single cause of action for professional negligence, which referred to all three design errors with the project. Five years later a consent judgment was entered in favor of NSU and against DeRose in the amount of $10,500,000. While Evanston defended DeRose in the litigation, DeRose also tendered the third field report and Underlying Action to Continental, who issued an Architects/Engineers Program Policy for the policy periods January 11, 2012 to January 11, 2013, and January 11, 2013, to January 11, 2014.

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While the third report and Underlying Action were first filed and reported to Continental during the first policy period, Continental denied coverage. In the subsequent coverage action NSU (who received an assignment of DeRose's rights under the Continental Policies) acknowledged that DeRose made three separate and distinct errors related to the Project, but argued that the third error in particular – the concrete slab claim – was covered. NSU argued that the slab claim was discovered and reported during Continental's coverage period, and therefore, it was "separate and distinct" from the other errors in the Project.

The District Court held that while DeRose may have made three distinct errors, the errors were all part of a single "claim," as there was only one "demand for money or services" against DeRose, namely, the Underlying Action filed in 2012. Moreover, even if each discrete error committed by DeRose were considered a separate "claim," the court reasoned that they constituted "related claims" under Continental's policies. Specifically, the Continental Policies provided that "[a]ll related claims shall be considered a single claim first made and reported to us within the policy year in which the earliest of the related claims was first made and reported to us." The term "related claim" was defined in relevant part as "multiple wrongful acts that are logically or causally connected by any common fact, situation, transaction, advice, or decision…."

NSU argued that the slab claim was not a "related claim" to the original ice tank design or Remedial Design based upon its expert's unrebutted opinion that those errors were "unrelated." However, while the unrebutted report might establish that the defect in the slab was not "*causally* connected" to the defects in the ice tank and Remedial Design, it did not preclude finding that the errors were "*logically* connected," as provided for in the "related claims" language of the policies. According to the District Court, the relevant inquiry is whether there are any common facts or circumstances between the claims—not whether there are any differences. Further, Florida courts have held that for claims or acts to be "logically connected," all that is required is some "factual nexus." *See e.g., Vozzcom, Inc. v. Great Am. Ins. Co. of N.Y.*, 666 F. Supp. 2d 1332 (S.D. Fla. 2009) (recognizing the "extremely broad" nature of the language at issue under the policy and explaining that analyzing the "relatedness" of claims under such language "does not require exact factual overlap, or even identical legal causes of action, but rather focuses simply on whether the claims are logically linked by a sufficient factual nexus.").

Given this analysis, the District Court concluded that to the extent NSU's claims against DeRose constituted three different "claims," those claims are "related claims" and must therefore be treated as a single "claim" under the Continental Policies. The court reasoned that DeRose was responsible for the design flaws in the ice tank, the Remedial Design, and the concrete slab, and that the ice tanks and concrete slab were designed and constructed by the same firm as part of the same project. According to the District Court, "[o]ne would not exist without the other," and thus, a sufficient factual nexus existed to conclude that the errors are "logically connected" and part of the same course of conduct, even if the errors were not "causally connected."

Finally, having held that the Underlying Action was the "claim" at issue, undisputedly filed in December 2012 and within the first Continental Policy period, the court ruled that "Prior Knowledge" and "Prior Notice" Conditions separately barred coverage. According to the District Court, DeRose knew (or should have known) that a "wrongful act" may have become the basis of a claim as far back as January 2009 when it initially reported the original tank design issues to Evanston (for this reason, the "Prior Notice" Condition also barred coverage). Although the court acknowledged that there was no reason to know of the slab issues until after the third report in 2012, the Underlying Action clearly sought to recover for those "wrongful acts" related to the initial and Remedial Designs, in addition to the slab issues. As the three issues made up the same "claim," and DeRose had knowledge of certain issues that made up the claim as far back as January 2009, the District Court found that the "Prior Knowledge" Exclusion barred coverage.

Not all "related claims" provisions are so broad to include claims both causally and logically connected as provided in the Continental Policies here. Likewise, courts' interpretation of similar provisions is far from consistent and varies by jurisdiction. While the fact that multiple errors by an insured arose on the same project does not (or should not) necessarily require a conclusion that all errors are "related," the *Nova* court found the fact that all errors were related to the overall design and construction of the ice tanks by the same firm was a sufficient factual nexus to trigger the "related claims" provision in the Continental Policies.

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