Related Acts Provisions – An Overview

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Related acts provisions come in a variety of forms, such as the following:

Two or more claims arising out of a single act, error or omission or series of related acts, errors or omissions shall be treated as a single claim.

Losses arising out of the same wrongful act by one or more of the directors and/or officers or interrelated wrongful acts by one or more of the directors and/or officers shall be considered a single loss.

“Occurrence” means an act or threatened act of abuse or molestation. . . . A series of related acts of abuse or molestation will be treated as a single “occurrence.”

Related acts, errors or omissions shall be treated as a single claim. All such claims, whenever made, shall be considered first made during the policy period.
or optional reporting period in which the earliest claim arising out of such act, error or omission was first made.

**General Principles**

Understanding related acts provisions and how courts may interpret relatedness or interrelatedness involves grasping (1) the effects of these provisions, (2) general factors that courts consider to evaluate relatedness, (3) how courts focus on the relationship between the facts that lead to a claim rather than on procedural groupings, (4) burdens of proof, and (5) whether or not a court views relatedness as a question of fact or of law.

One important caveat on this subject is that related acts provisions always will contain either the word “related” or “interrelated,” and that where the policy in dispute does not contain either term, then decisions on relatedness will be distinguishable (at best). This issue arises when a party would like two or more similar claims to be deemed to be one and cites to decisions on relatedness despite the policy not actually containing a Related Acts Provision. Such practice is akin to citing to decisions which turned on the enforcement of a particular exclusion which is not contained in the policy in dispute, and the Illinois Court of Appeals properly disposed of such an argument in the context of relatedness by stating that the appellant “want[ed] the instant policies to say that related wrongful acts constitute a single claim, but they simply do not.” *Uhlich Children’s Advantage Network v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 929 N.E.2d 531, 539 (Ill. App. Ct. 2010). In the absence of a Related Acts Provision, otherwise-separate claims may still be deemed to be the same based on some other type of deemer provision (e.g., a
provision stating that all claims arising from the same wrongful act will be deemed to be the same), but decisions on whether claims are “related” or “interrelated” will be of minimal relevance where neither term is given any effect by the policy at issue. In sum, if the policy does not contain either the word “related” or “interrelated,” analysis as to whether the subject claims are related is likely to be irrelevant.


Any attorney grappling with whether multiple claims or occurrences are “related” or “interrelated” under a policy of insurance is most likely dealing with what has been dubbed a “related acts provision.” The purpose of related acts provisions is to require that otherwise-distinct claims be treated as a single claim when they are related. The two most common effects of a related acts provision is that it will alter the number of claims or alter the timing of claims. With regard to the number of claims, this can mean that multiple claims will trigger only a single per-claim limit or per-claim deductible/SIR if they are deemed related. With regard to the timing, a claim first made during the policy period of a claims-made or a claims-made-and-reported policy may be deemed to have been made beforehand and therefore outside of the policy period if related to an earlier reported claim. Conversely, a claim made after the expiration of such a policy may be deemed made within the policy period if related to a claim that was made within the policy period.
General Factors That Determine Relatedness

Even when “relatedness” is not defined in a policy, claims typically will be deemed related when they are either “logically connected” or “causally connected.” E.g., Gregory v. Home Insurance Co., 876 F.2d 602, 606 (7th Cir. 1989). But see Arizona Prop. & Cas. Ins. Guar. Fund v. Helme, 735 P.2d 51 (Ariz. 1987) (rejecting logical connection and finding that relatedness means only a causal connection); Village of Camp Point v. Cont’l Co., 578 N.E.2d 1363 (Ill. Ct. App. 1991) (adopting Helme but called into question by Cont’l Cas. Co. v. Howard Hoffman & Associates, 955 N.E.2d 151, 154 (Ill. Ct. App. 2011)). A causal relationship has been defined as “where one person or thing brings about the other,” and a logical relationship has been defined as “connected by an inevitable or predictable interrelation or sequence of events.” Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803, 811–12 (10th Cir. 2009) (quoting Professional Solutions Ins. Co. v. Mohrlang, No. 07-cv-02481-PAB-KLM, 2009 WL 321706 (D. Colo. Feb.10, 2009)).

While most current policies define the term “related,” those definitions rarely are any less subjective than the above definition. Moreover, courts very rarely distinguish decisions on relatedness based upon differing definitions of “related.” Instead, courts typically have been influenced by the following general factors, none of which are themselves determinative: (1) the identity of claimants, (2) the number of underlying causes, and (3) the number of underlying results.

First, as for the identity of claimants, when the claims are made by the same party or parties, the identity of claimants weighs in favor of relatedness. Estate of Logan v. Northeastern Nat’l Cas. Co., 424 N.W.2d 179, 188–89 (Wis. 1988). If the claims are made by separate

Second, regarding the *number of underlying causes*, when all the claims arise from the same act or acts, this fact weighs in favor of relatedness. *United States v. A.C. Strip*, 868 F.2d 181 (6th Cir. 1989). If they arise from separate acts, this fact weighs against relatedness. *Lexington Ins. Co. v. Lexington Healthcare Grp., Inc.*, --- A.3d ----, 2014 WL 223664 (Conn. 2014). When claims arise from separate acts, they are more likely to be deemed related if they arose from a pattern of similar activity, *Cont’l Cas. Co. v. Wendt*, 205 F.3d 1258, 1264 (11th Cir. 2000), or if they arose from a common omission. *Bryan Bros. Inc. v. Cont’l Cas. Corp.*, 704 F. Supp. 2d 537, 543 (E.D. Va. 2010), *aff’d sub nom.*, 419 F. App’x 422 (4th Cir. 2011), *and aff’d sub nom.*, 660 F.3d 827 (4th Cir. 2011). Further, the *timing of the acts* matters: A significant lapse in time between the causes giving rise to claims weighs against them being deemed a pattern of activity, thereby making it less likely that the resulting claims will be deemed related. *Allmerica Financial Corp. v. Certain Underwriters at Lloyd’s London*, 871 N.E.2d 418, 430 (Mass. 2007).

Third and finally, concerning the *number of underlying results*, when claims arise from the same result, e.g., separate wrongful acts that each contributes to the same ultimate harm, this fact weighs in favor of relatedness. *Flowers v. Camico Mutual Insurance Co.*, No. A134890, 2013 WL 2571271 (Cal. App. June 12, 2013). If they lead to different harms, this fact weighs against relatedness. *Fed. Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546 (5th Cir. 1990).

Similar to the pattern of activity factor, courts have differed regarding the importance of modus operandi in proving relatedness. The prototypical example would be when an insured is
accused of defrauding separate claimants in separate instances using the same basic scheme. Some courts have found that the use of a common modus operandi is a strong factor in finding relatedness. *Am. Commerce Ins. Brokers, Inc. v. Minn. Mut. Fire & Cas. Co.*, 551 N.W.2d 224 (Minn. 1996) (each act of employee of issuing checks to herself formed one series of acts related by common modus operandi; each act by same employee of taking funds received from customers as insurance premiums formed part of a separate series of acts related by different modus operandi). But other courts have found that it is insufficient to overcome the differences in claimants and instances of alleged wrongdoing. *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, 854 A.2d 378 (N.J. 2004) (where car dealer’s finance manager submitted fraudulent applications to lender to induce it to finance car sales to different high risk customers, the transactions were not a series of related acts but were distinct sales to separate purchasers notwithstanding the common modus operandi). A helpful discussion of the issue is set out in in *W.C. and A.N. Miller Development Co. v. Continental Casualty Co.*, No. GJH-14-00425, 2014 WL 5812316 (D. Md. Nov. 7, 2014), in which the U.S. District Court for the District of Maryland reviewed the applicable case law to draw a distinction between claims that were related due to a “common scheme,” from claims that were unrelated by a mere “common motive.”

In arguing that claims are related due to a common modus operandi, parties should be careful to characterize the modus operandi narrowly rather than in an extremely broad fashion. For example, an attorney should avoid alleging that an insured’s modus operandi was to fail to provide the services that constitute the insured’s core business model because under such a theory, virtually any suit against the insured would be related, and a court may be unlikely to

**Relationship of Facts Predominates Over Procedural Grouping**

In determining relatedness, the focus is on the relationship between the facts that give rise to a claim rather than on any procedural grouping that occurs during litigation. In other words, claims should not be deemed related merely because they are brought in the same action or because those actions are later joined or consolidated in some manner. For example, in *Home Insurance Co. of Illinois v. Spectrum Information Technologies, Inc.*, 930 F. Supp. 825 (E.D.N.Y. 1996), the U.S. District Court for the Eastern District of New York rejected arguments for relatedness of claims based on their inclusion in the same suit, stating that

> the concept of “claim” is distinct from that of “suit,” and neither the initial amalgamation of claims in one suit nor the variety of procedural metamorphoses which a suit often undergoes, whether via consolidation or amendment, alters the distinctive nature of individual claims or the consequent loss potentially incurred therefrom.

Accordingly, it is of little consequence whether the claims at issue are brought within the same underlying action. Similarly, it makes little difference whether the claims are pleaded under different causes of action or under the laws of different states. *Gateway Group Advantage, Inc. v. McCarthy*, 300 F. Supp. 2d 236, 243 (D. Mass.2003). Nor does it even matter if they differ by an order of magnitude in the number of claimants or amount of damages sought. *Gidney v. Axis Surplus Ins. Co.*, 140 So.3d 609 (Fla. Ct. App. 2014). The focus remains on the relationship between the underlying facts. Moreover, at least one court held that the related acts need not

Although a procedural grouping should not solely determine an outcome, this does not mean that it should be ignored. Courts have paid attention to whether claims were deemed similar enough to be joined for the purposes of a class action, multidistrict litigation panel, or other procedural grouping that requires similarity among claims. *Park West Galleries, Inc. v. Ill. Nat’l Ins. Co.*, No. 11-15047, 2013 WL 6095482 (E.D. Mich. Nov. 20, 2013). But it is important to understand that in *Park West*, the claims were not deemed to be related because they were grouped together procedurally, but that the court looked at the decision to group them together procedurally as evidence that the claims were related factually. In other words, procedural grouping does not make something related, but it suggests that another court already concluded that they were related factually and grouped them together procedurally based on that factual relatedness.

Another seemingly obvious point is that while claimants should not be able to “manufacture” relatedness simply by alleging that claims are related, courts nonetheless have taken notice when a claimant explicitly alleged that its claims were related to prior claims. *John M O’Quinn P.C. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 4:00-cv-2616, 2014 WL 3543709 (S.D. Tex. July 17, 2014) (one claimant specifically stated in a pleading that it involved same identical legal and factual issues and party defendants and that interrelationship between cases was identical). The opinion of nonparties should not prove dispositive, however, and one
court has held that when one insurer treats the claims as related, even to its detriment, such a decision did not mean that the claims were related in a suit involving another insurer. *Methodist Healthcare v. American Int’l Specialty Lines Ins. Co.*, 310 F. Supp. 2d 976 (W.D. Tenn. 2004).

**Burden of Proof**

Burden of proof should rarely be a decisive factor. It most frequently becomes determinative in disputes where there is no evidence. A creative attorney should be able to draw from the pleadings ample support for an argument for or against relatedness, and so a court should be able to make a determination based on the evidence found in the underlying claims or complaints rather than resorting to which party has the burden of proof. But when the burden of proof does become an issue, as it may when determining which side will proceed first at trial, the issue properly should depend on the policy at issue, as recognized by then Chief Justice Chew of the Texas Eighth Court of Appeals:

Houston Casualty argues the "interrelated acts" provision was not an exclusion, but constituted "other conditions and agreements," and as such, Reeves County and Sheriff Gomez bore the initial burden to establish that a claim was first made during the policy period, and not at an earlier time under the "interrelated acts" provision. We agree with Houston Casualty. This provision was listed apart from the fourteen exclusions as set forth under Section V of the Policy; instead, it was listed under Section VII, entitled "Other Conditions and Agreements." Therefore, it was not an exclusion, and so Reeves County and Sheriff Gomez bore the initial burden to show their claim falls within the scope of coverage provided by the Policy.
Reeves Cnty. v. Houston Cas. Co., 356 S.W.3d 664, 670 (Tex. App. – El Paso 2011). Justice Chew correctly reasoned that a related acts provision should not be treated as an exclusion when it is not written as one, but rather should be treated as a term or a condition.

In contrast to Chief Justice Chew’s analysis, several courts have jumped to the conclusion that related acts provisions are exclusions, particularly when a finding of relatedness would deem a claim to be outside of the policy period. For example, in Gladstone v. Westport Insurance Corp., No. 10-652 (PGS), 2011 WL 5825985 (D. N.J. Nov. 16, 2011), aff’d by 518 Fed. Appx. 107 (3d Cir. 2013), the court, while ultimately finding in favor of the insurer, stated that the insurer had the burden of proving that a related acts provision applied because it acted as an exclusion. The related acts provision at issue stated that all related claims would be deemed a single claim made at the time of the first-made claim. The court held that this related acts provision was exclusionary and thus had to be interpreted against the insurer. Although a finding of relatedness in Gladstone would have resulted in no coverage, this by itself should not be enough to deem a provision exclusionary. If it were enough, all provisions and definitions in a coverage grant also would have to be interpreted as exclusions when a finding contrary to an insured would result in a finding of no coverage. But that is not the case, and instead it is commonly recognized that an insured bears the burden of proof with regard to a coverage grant. Edward J. Zulkey, Litigating Insurance Disputes § 12.06 (6th ed. 2009). Moreover, the error in treating related acts provisions as inherently exclusionary should be evident from the number of insureds who rely on similar provisions to create coverage when none would otherwise exist. E.g., Gidney v. Axis Surplus Ins. Co., 140 So. 3d 609 (Fla. Dist. Ct. 2014). Accordingly, courts should more properly follow Chief Justice Chew’s analysis and treat related acts provisions as
exclusions only when they are written as such and otherwise treat them either as neutral conditions or else as terms of a coverage grant.

**Question of Fact or Question of Law?**

The overwhelming majority of decisions on whether claims are related have been made based on summary judgment motions, thereby implying that relatedness is solely an issue of law. But at least one decision has explicitly stated that relatedness is a mixed question of law and fact: it is a legal question insofar as the word “related” is open to legal construction, but it is factual to the extent that a court must determine whether the claims are as a matter of fact related. *Dormitory Auth. of New York v. Cont’l Cas. Co.*, No. 12 Civ. 281, 2013 WL 840633 (S.D.N.Y. Mar. 5, 2013), *aff’d in relevant part by 756 F.3d 166 (2d Cir. 2014).*

**Claim-Specific Principles**

In addition to the universal principles discussed above, certain trends have emerged among discrete types of claims, which the author has grouped into the categories below solely for the purpose of helping a reader to find cases on relatedness that are factually analogous to those that the reader may be facing. The categorization of these claims has not been recognized by any court, nor has any court refused to apply the holdings or analysis found in one category of claims to a case that might be classified in another. Furthermore, when courts have differed in their treatment of the importance of a particular factor, it could be that the differences can be explained through differences in jurisdiction, or in some cases through a desire to find in favor of
an insured, which could lead to different perspectives on which factors to deem important, depending on the circumstances.

**Legal Malpractice**

The three most important factors to determining relatedness in the context of legal malpractice are (1) the underlying litigation or transactions in which the malpractice took place; (2) the identity and the relationship between the parties; and (3) common modus operandi. With regard to the first factor, in most circumstances, courts will deem claims related when they arise from the same underlying litigation or transaction or when one suit or transaction arises from the previous one. For example, in *Lipton v. Superior Court*, 48 Cal. App. 4th 1599 (1996), the California Court of Appeals held that multiple professional errors made while handling the same claim all were related. However in *Beale v. American National Lawyers Insurance Reciprocal*, 843 A.2d 78 (Md. Ct. App. 2004), an attorney represented five clients in the same matter, each of whom brought a malpractice claim arising from the same mistake in their common suit, and the Maryland Court of Appeals found that the malpractice claims were unrelated due to the separate duty that the attorney owed to each client.

Likewise, claims are more likely to be viewed as related when the claims are brought by the same client. For example, in *Simpson & Creasy, P.C. v. Continental Casualty Co.*, No. CV 409-202, 2012 WL 5389818 (S.D. Ga. Oct. 31, 2012), the U.S. District Court for the Southern District of Georgia held that all claims for malpractice by the same client were related, whether they arose from the sale of the client’s home, sale of stock shares, management of stock shares, sale of a company, acquisition of a company, review of contracts, acquisition of a note, creditor
status, or due to the attorney’s role as a “quasi-legal advisor.” Despite this general rule, in
Admiral Insurance Co. v. Marsh, No. 3:12cv601-JAG, 2013 WL 3270555 (E.D. Va. June 26, 2013), a law firm agreed to provide free legal services to a client for one year in exchange for settling a malpractice claim, and the U.S. District Court for the Eastern District of Virginia found that the malpractice claims arising from the year of free legal services were unrelated to the original malpractice claim.

Lastly, when claims are brought by separate clients, courts have differed on how important they viewed a common modus operandi or a common mistake in multiple representations. For example, in Continental Casualty Co. v. Wendt, 205 F.3d 1258 (11th Cir. 2000), the Eleventh Circuit Court of Appeals held that claims against an attorney for engaging in actions to encourage investment in a company all were related despite leading to different consequences for different individuals, some of whom were clients of the insured. But in Continental Casualty Co. v. Grossman, 648 N.E.2d 175 (Ill. Ct. App.1995), an insured lawyer was sued by multiple clients for malpractice, and the Illinois Court of Appeals held that although all of the clients had alleged that the attorney had participated in a scheme regarding investments in or by the same company, each also could theoretically recover based on alternative allegations that his conduct constituted discrete acts of negligence rather than parts of a unified scheme. Accordingly, the court found that the claims were not related despite the common modus operandi alleged.
Medical Malpractice

The most frequently litigated medical malpractice insurance issue is whether multiple acts of malpractice suffered by the same patient are necessarily related. For example, in Connecticut Indemnity Co. v. Schindler, the New York Supreme Court, Appellate Division found that a dentist’s various failures to diagnose a patient’s cyst on multiple occasions all were related. 828 N.Y.S.2d 146 (N.Y. App. Div. 2006). On the other hand, in Doe v. Illinois State Medical Inter-Insurance Exchange, 599 N.E.2d 983 (Ill. Ct. App. 1992), the Illinois Court of Appeals found that multiple acts of negligence while treating the same patient spread across policy periods were unrelated. In the context of nursing homes, at least one court has been reluctant to deem claims by multiple residents as the result of a single fire as related. Lexington Ins. Co. v. Lexington Healthcare Grp., Inc., 84 A.3d 1167 (Conn. 2014).

Accounting Malpractice

Courts generally have found that claims against accountants for negligent failure to detect fraud on multiple occasions have been related. For example, in Flowers v. Camico Mutual Insurance Co., No. A134890, 2013 WL 2571271 (Cal. App. June 12, 2013), the California Court of Appeals held that in multiple engagements for the plaintiffs, the insured accounting firm had allegedly failed to detect and to guard against an embezzlement scheme, so all such instances were related because they caused the same loss of funds by the client. Courts have made similar findings with regard to deliberate fraud. For example in Tri Core, Inc. v. Northland Insurance Co., 3-01-CV-1431-BD, 2002 WL 31548754 (N.D. Tex. Nov. 12, 2002), the U.S. District Court for the Northern District of Texas held that two claims against a tax and investment consulting
firm for making false representations to induce the purchase of group life insurance policies and retirement plans were related to an earlier-filed claim when all the claims arose from same retirement plans and the plaintiffs in the later claims were named in the earlier claim.

**Wrongful Acts by Insurance Producers**

One of the most important factors used to determine relatedness in claims against insurance producers is whether the claims were made by the same customer. For example, in *Westport Insurance Corp. v. Key West Insurance, Inc.*, 259 F. App’x 298, 299 (11th Cir. 2007), the Eleventh Circuit Court of Appeals held that when the agent of an insurance broker copied and pasted the wrong language into two different policies for the same insured, the resulting claims were related. In contrast, claims by separate customers generally have been deemed not to be related, even when the modus operandi otherwise appeared similar. For example, in *American Auto. Insurance Co. v. Grimes*, No. Civ. A. 5:02-CV-066-C, 2004 WL 246989 (N.D. Tex. Feb. 10, 2004), the U.S. District Court for the Northern District of Texas held that claims by multiple clients that their life and health insurance agent wrongfully convinced them to make early withdrawals to invest in customer-owned, coin-operated telephones were not related because the agent rendered separate services to each client in distinct meetings, owed each a separate duty, and the insured had duty to consider each claimant’s unique circumstances in determining how to advise them regarding their investments.
Dishonest Employee Acts

The most important factor to relatedness in the context of employee dishonesty seems to be the weight that a court gives to modus operandi. Some courts have concluded that all dishonest acts by an employee are related if they share a common modus operandi. For example in *Continental Casualty Co. v. Howard Hoffinan & Associates*, 955 N.E.2d 151, 154 (Ill. App. Ct. 2011), the Illinois Court of Appeals found that all embezzlements by a non-attorney employee of law firm from accounts of different clients all were related by common modus operandi. In contrast, in *Chicago Insurance Co. v. Lappin*, 792 N.E.2d 1018, 782 (Mass. Ct. App. 2003), the Massachusetts Court of Appeals held that an attorney’s negligence in allowing a secretary to perform legal services and steal from clients consisted of multiple, discrete, unrelated breaches occurring over many years resulting in discrete, unrelated losses to numerous individuals.

Courts also have differed when interpreting the importance of a change in modus operandi in the dishonest acts committed by an employee. For example, in *APMC Hotel Management, LLC v. Fiduciary & Deposit Co. of Maryland*, No. 2:09-cv-2100, 2011 WL 5525966 (D. Nev. Nov. 10, 2011), the U.S. District Court for the District of Nevada held that all thefts by the chief financial officer of a hotel were related despite using three different general methods to commit the thefts. In contrast, the Minnesota Supreme Court held in *American Commerce Insurance Brokers, Inc. v. Minnesota Mutual Fire & Casualty Co.*, 551 N.W.2d 224 (Minn. 1996), that each act by an employee of issuing checks to herself formed one series of acts related by a common modus operandi, but that each act by same employee of taking funds received from customers as insurance premiums formed part of a separate series of acts related by different modus operandi.
Employment Discrimination or Harassment Claims

Similar to modus operandi, courts reviewing employment discrimination- or harassment-related insurance claims have found that claims that allege the same type of discrimination typically are related. For example, in *KB Home v. St. Paul Mercury Insurance Co.*, 621 F. Supp. 2d 1271 (S.D. Fla. 2009), the court found that multiple claims for sexual harassment were related when all arose from the same work outing to a strip club, but a racial discrimination claim was unrelated. Similarly, in *Vozzcom, Inc. v. Beazley Insurance Co.*, 666 F. Supp. 2d 1321 (S.D. Fla. 2009), two employees sued over the insured employer’s failure to pay overtime for wages worked in excess of 40 hours a week during the same time period, and their claims were related because their employer had wronged them in the same fashion.

Conclusion

Courts and commenters both have remarked on the perceived lack of consistency between decisions on Related Acts Provisions. However, it does the courts a disservice to dismiss the precedent on this subject as arbitrary or entirely outcome oriented. As this article has attempted to demonstrate, consistent trends can be found between similar fact patterns, which in turn will help to develop into consistent principles in applying these provisions. Accordingly, it is hoped that this article has helped the reader to gain a greater understanding of this developing area of insurance coverage law.

For the more of John Zulkey’s work on Related Acts Provisions, please see “Related and Interrelated Acts Provisions: Determining Whether Your Claims Are Apples and Oranges, or