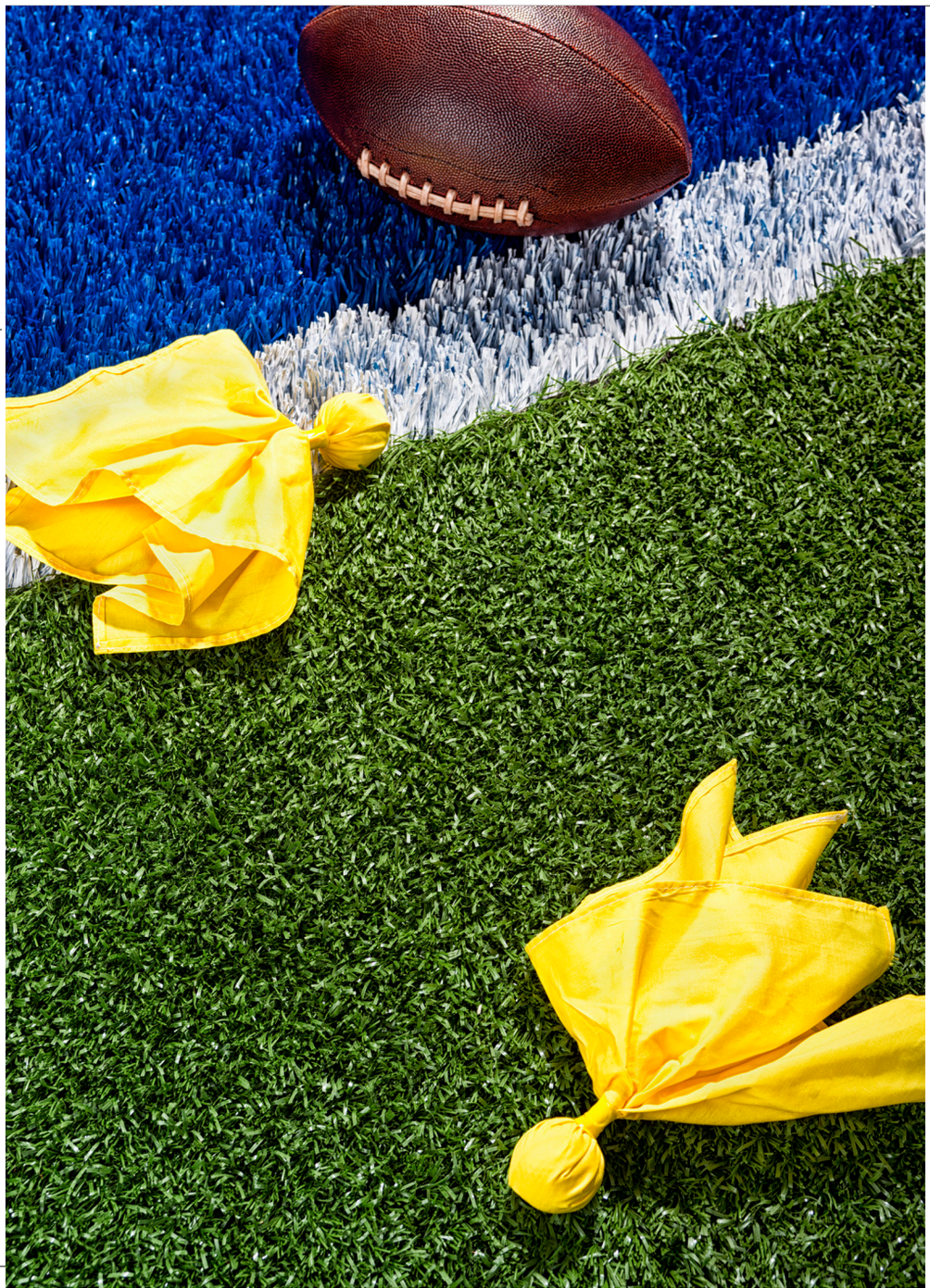
BY CHARLES H. BARR

Two Wrongs Don't Make a Right to Coverage:

'Single Claim' Provisions in Liability Policies



Insurance policy single claim provisions, which combine into one claim multiple claims that are based on interrelated wrongful acts, sometimes benefit insureds but usually operate to their detriment. This article illustrates the operation of a typical single claim provision and suggests strategies for insureds and insurance companies to avoid or preserve their applicability.

When the owner of an enterprise not large enough to self-insure is presented with a liability claim, the first question should be whether the expenses of defending and indemnifying against the claim will be covered by insurance.[1] It is a fact of life that diverse barriers to coverage are embedded in business liability policies. This article addresses one common barrier that too often results in an unpleasant surprise for insureds: the "single claim" provision. A single claim provision in an insurance policy combines into one claim multiple claims that are based on interrelated wrongful acts.

The Wisconsin Court of Appeals recently brushed up against a single claim provision.[2] The underlying facts of the case illustrate the high stakes such a provision can entail. The court's opinion, notwithstanding the fact that it is per curiam, implies strategies for insureds to avoid the effect of a single claim provision, as well as counterstrategies for carriers to preserve and enhance such a provision's effects.

Single Claim Provision in Employment Law Case: A Hypothetical

A hypothetical is useful in discussing ways to avoid or expand the effect of a single claim provision. The following set of facts is adapted from *Braketown USA Inc. v. Markel Insurance Co.*[3] Facts have been changed and factual wrinkles smoothed over to facilitate focus on single claim issues.

Employee's Complaints. An employer has fewer than 100 employees, among them an employee who earned $22.50 per hour and was paid biweekly. The employee filed a labor standards complaint with the Equal Rights Division (ERD) of the Wisconsin Department of Workforce Development, which investigates, adjusts and, along with district attorneys, prosecutes wage claims.[4] The labor standards complaint alleged that 1) payment for two hours of vacation time was omitted from the employee's most recent paycheck; and 2) the amount deducted from that paycheck for deposit in the employee's health savings account (HSA) had not been deposited as of the date of the complaint, which was six days after the date of the paycheck. The amount of wages involved was $179.61.

The employer informed the employee that it would include the vacation pay in the next paycheck and then did so. On the date of the complaint, the employer initiated the HSA deposit, and it was completed the next business day, seven business days after the date of the paycheck withholding for that purpose. The employer took those actions before it was served with the labor standards complaint. Without engaging counsel, the individual in charge of human resources for the employer responded to the complaint by disclosing those actions. The ERD requested a reply from the employee who had filed the labor standards complaint and, when it did not receive one, closed the case.

Six days after the date of the labor standards complaint, but before the employer was served with the complaint, the employer discharged the employee, explaining that the company's economic circumstances required a reduction in staff. The employee filed a retaliation complaint with the ERD, alleging that the discharge was in retaliation for her statement to the employer three days previously that she had filed a wage claim against the employer. The ERD made a finding of probable cause, and the case was assigned to an administrative law judge for hearing. The employee later issued a settlement demand for $625,000.

Employer's Insurance Policy. On the date when the employer was served with the labor standards complaint and the later date when it was served with the retaliation complaint, the employer was insured by an employment practices liability policy that required the employer to report a claim to the carrier by the end of the policy period in which the claim was "made."[5] Because a policy renewal date intervened between those two dates, the claims were made (that is, the employer was served with them) during different policy periods. The terms of the two policies were materially identical. (See sidebar for policy definitions.)

The policies contained a single claim provision under which claims arising from interrelated wrongful acts were deemed to be one claim made on the date the employer was served with the earlier claim.

The coverage grant included indemnity and defense of "wrongful employment claims" – that is, claims "for" wrongful employment practices made and reported during the policy period. The retaliation complaint was such a claim. The employer reported the retaliation complaint to the carrier shortly after the ERD's finding of probable cause and within the policy period in which that complaint was served.

The coverage grant provided only for defense

(not indemnity) of wage and hour claims – that is, claims "for" wage and hour wrongful acts – made and reported during the policy period. The defense was subject to a $25,000 self-insured retention (deductible) per claim. Moreover, work of an employee in defense of a wage and hour claim, such as that engaged in by the individual in charge of human resources, was expressly excluded as a covered defense expense. The employer, which did not consult counsel regarding the labor standards complaint, never analyzed whether that complaint qualified as a "wage and hour claim" and – either because it had no expectation of any payment from the carrier or because it gave the matter no thought – never reported that complaint to the carrier.

The carrier denied coverage of the retaliation complaint on the theory that the wrongful employment practice and the wage and hour wrongful act underlying the labor standards complaint were interrelated wrongful acts, such that there was a single claim made during the first policy period, which the employer failed to report to the carrier during that policy period.

Effects of Single Claim Provisions on Insurance Policy Coverage

Interrelated wrongful acts can, as in the hypothetical, form the basis of claims that, if timely reported, are within the coverage grant. A policy that contains a single claim provision prescribes that the date the earliest of those claims is made against the insured is considered the date the single claim is made.

In some situations, a single claim provision can increase coverage by applying only one self-insured retention (SIR) to a claim, whereas multiple SIRs would apply if the claims were not aggregated.[6] That effect may be important in a specialty policy insuring against high-magnitude risks – for example, environmental damage claims. If the per-claim coverage limit in such a policy is high relative to policies that cover smaller claims, the same is likely to be true of the SIR. In that context, the insured has a substantial interest in avoiding multiple SIRs and the carrier, which has the opposing interest, may find itself arguing against application of its own single claim provision.

More often, however, a single claim provision works against the insured. It can do so by applying a single per-claim coverage limit to what otherwise would be multiple claims. Of greater effect, it can foreclose coverage altogether if the insured does not report the earliest claim to the carrier timely or at all. Common reasons for not reporting are the insured's realization at the outset that 1) the claim is a nonstarter or 2) indemnity and defense costs are unlikely to exceed the SIR.

The danger of forfeiting coverage of a consequential claim due to failure to report an inconsequential one has increased over the past 60 years or so as carriers have increasingly issued claims-made-and-reported liability policies like that in the hypothetical, under which the coverage grant is strictly limited to claims made against the insured and reported to the carrier within the policy period.[7] The Wisconsin Supreme Court has held that the notice-prejudice statute, which preserves coverage of a claim not timely reported to the carrier if the carrier is not prejudiced, does not apply to a claims-made-and-reported policy.[8] That holding represents the weight of authority nationwide.[9]

Strategies and Counterstrategies When Policies Contain Single Claim Provisions

An insured's most obvious strategy to avoid the effect of a single claim provision is to report to the carrier as a claim any event that may turn out to be interrelated with any conceivable future claim, even if the purported claim is trivial in amount or there is not even a remote prospect of any payment from the carrier. But many insureds fail to exercise such foresight. Even if they are on guard, they lack perfect predictive power. Moreover, an insured might perceive disadvantages to reporting every claim, such as inducing the carrier to raise the premium or to decide not to renew the policy.

Are There Two Wrongful Acts? For an insured caught in the single claim trap, the first inquiry should be whether the first "claim" is in fact a claim – that is, whether it is based on a wrongful act. The fact that the carrier says so does not make it so. That is the basis on which the *Braketown* court ruled for the employer on the coverage issue: The labor standards complaint did not allege a wage and hour claim, and accordingly there was no wrongful act with which the wrongful employment practice underlying the retaliation complaint could interrelate.[10]

The *Braketown* court "pars[ed] out the potentially applicable" laws – the FLSA and any other law concerning wage and hour practices:

"The Labor Standards Complaint fails to allege a violation of the FLSA because the FLSA concerns minimum wages, maximum pay, and overtime wages. Neither [the employee's] pay for two hours of vacation time, nor the deposit to her HSA concern either payment of minimum wages, maximum pay, or overtime wages. Turning to the potentially applicable Wisconsin law, [Wis. Stat. section] 109.03 requires payment within thirty-one days to employees. By responding immediately, Braketown complied with this requirement under Wisconsin law. The last potentially

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applicable law, the Employee Retirement Income Security Act (ERISA), requires that an employer with fewer than 100 employees deposit deductions within seven business days. Braketown again complied with this requirement."[11]

The court held that because there was no other potentially applicable wage law, no wrongful act was alleged.

The carrier argued that this reasoning contravened the four-corners rule, which would have required the carrier, when determining whether it had a duty to defend against the labor standards complaint, to assume the truth of the complaint's allegations no matter how implausible or demonstrably false. But this argument conflates an insurer's duty to defend against a covered claim regardless of its merits and the issue of whether a complaint or other form of demand alleges a wrongful act so as to constitute a covered claim.

Both the four-corners rule and analysis of whether a complaint "[f]ail[s] to state a claim upon which relief can be granted"[12] require assuming that the complaint's allegations are true. However, when a complaint fails to state a covered claim – that is, fails to allege a wrongful act even if the allegations are true – the insurer does *not* have a duty to defend. The

Policy Definitions

Wrongful Employment Practice: An actual or alleged wrongful termination in retaliation for asserting a legal right.

Wage and Hour Wrongful Act: An actual or alleged violation of the Fair Labor Standards Act (FLSA) or other law concerning wage and hour practices, including timely payment of wages.

Wrongful Acts: Includes both wrongful employment practices and wage and hour wrongful acts.

Interrelated Wrongful Acts: 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.

Related Claims: "[A]ll Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same *or related* facts, circumstances, situations, transactions, or events or the same *or related* series of facts, circumstances, situations, transactions, or events whether related logically, causally, or in any other way."[25] **WL**

supreme court has held "the substance of the four-corners rule to be" that "[w]hen a complaint alleges facts that, if proven, would constitute a covered claim, the insurer must appoint defense counsel for its insured without looking beyond the complaint's four corners."[13] Conversely, when the facts alleged, if proved, would not constitute a wrongful act that is necessary to the existence of a covered claim, the insurer has no such duty.

Carriers' Options. If the factual allegations of a complaint or other form of demand are defective but investigation nonetheless suggests the existence of an underlying wrongful act, then the insurer has a colorable argument that the demand is "for" a wrongful act – an actual, not merely an alleged, violation of law. In that situation, the single claim provision springs to life, whether or not the complaint is timely reported to the carrier. But that argument is unavailable to the carrier in the hypothetical; the insured employer obviously violated no wage law.

A carrier can prevent escapes from the single claim provision by expanding the definition of an "alleged" wrongful act. The allegations of the labor standards complaint would fall within the definition of a wage and hour wrongful act if the following sentence were added to that definition:

"The allegations of a complaint filed with an administrative agency authorized to enforce or investigate violations of any such law, or of a written demand indicating an intention to make such a filing, shall be deemed to allege a wage and hour wrongful act regardless of the contents of that complaint or demand."

To capture analogous civil actions and the demands that precede them, the carrier could add another sentence:

"The allegations of a complaint filed in a court, or of a written demand indicating an intention to make such a filing, shall be deemed to allege a wage and hour wrongful act if the complaint seeks, in whole or in part, a remedy provided by any such law, regardless of the other contents of that complaint or demand."

Then the definition would encompass not only actual and properly alleged violations of wage laws but also a demand that makes or relates to no such allegation – for example, an incoherent statement or, as in the hypothetical, an employee's criticism of the timing of a small amount of wage payments that seemingly violated no law. The price of that solution is expansion of the coverage grant to include an instance in which the third party's apparent intent is to make a covered claim or, put differently, a demand that "feels like" a covered claim.

As a practical matter, however, the insurer may choose to defend those claims even without the expanded definition of a wrongful act, which may explain why the *Braketown* insurer equated its duty to defend under the four-corners rule with the issue of whether the claim a third party apparently intended to allege was covered.

Are the Wrongful Acts Interrelated? If the earlier claim alleges a wrongful act or, arguably, if an actual wrongful act underlies that claim, the insured must turn to the policy term – most commonly "interrelated wrongful acts" – that specifies the relationship between wrongful acts necessary to activate the single claim provision. The policy definition in the hypothetical is the functional equivalent of the most common definition of that term.[14] Analyzing whether this definition of relationship applies to two wrongful acts requires a deeper dive than merely asking whether the wrongful acts are related in some fashion.

The key term is "common nexus." A nexus is a connection, and it must be something the wrongful acts have in common. Wrongful acts must have in common a "fact"; circumstances, situations, events, transactions, and causes are all comprised of facts.

Braketown did not address this issue because it held that the labor standards complaint failed to allege a wrongful act.[15] Courts that have analyzed the relationship between wrongful acts under the same definition used in the hypothetical have searched for facts that the wrongful acts had in common. When wrongful acts had facts in common, those courts held them to be interrelated wrongful acts. When wrongful acts had no facts in common, they were held not to be interrelated and therefore not to form the basis of a single claim.[16]

The common nexus must be between the wrongful acts themselves, not between the claims based on those wrongful acts.[17] Thus, "window dressing" in the complaints, such as the fact that the employee worked for the insured at the times of both wrongful acts, is not a common nexus; such employment was not wrongful conduct. Rather, the nexus must be between the "operative facts" of each wrongful act.[18]

A simple example of interrelated wrongful acts is demoting an employee in retaliation for attempting to enforce a legal right and later terminating that employee for the same reason. The common nexus between the wrongful acts is that the employer's action in each case has the same cause or, put differently, that the employer acts with the same retaliatory motivation in each case. If the employee makes a claim based on the demotion and a later claim based on the termination, they would be considered together as a single claim made on the date the employer was served with the first claim.

But in the hypothetical, no common nexus exists between the purported wage and hour wrongful act described in the labor standards complaint and the wrongful employment practice described in the retaliation complaint. None of the facts of the wrongful act – what the employer allegedly did wrong – in the retaliation complaint is the same as any of the facts of the wrongful act in the labor standards complaint. The alleged wrongful conduct in the retaliatory discharge claim is entirely distinct from the alleged wrongful conduct in the wage claim.

A less common term in liabilities policies is "related claims." (See sidebar for definition.) One court that found related claims to exist distinguished cases that were "inapposite because they involved markedly different relatedness provisions."[19] Among those provisions was the definition of interrelated wrongful acts in the hypothetical, which the court characterized as a "*narrower* 'interrelated wrongful employment practices' definition."[20]

The crucial difference between the two definitions is the required factual connection. Under the interrelated wrongful acts definition, the factual connection between two wrongful acts must be a common nexus – that is, facts (or a series of related facts) they have in common – while under the related claims definition the facts (or series of facts) of one wrongful act need only be related to the facts (or series of facts) of another.[21]

The difference in breadth is immense, as shown by a Wisconsin case that addressed the functional equivalent of the related claims definition.[22] In concluding that the claims in that case were related claims, the court followed the Seventh Circuit's reasoning that "the common understanding of the word 'related' covers a very broad range of connections, both causal and logical."[23] The only constraints on that breadth are that the relationship be "obvious and direct" and "not so tenuous as to mislead a reasonable insured."[24]

Under the definition in the hypothetical, wrongful acts can be interrelated via a series of related facts, but the wrongful acts must have that series of facts in common. In contrast, under the related claims definition, the claims need not have any facts in common.

The wrongful acts in the hypothetical meet the broad definition of related claims because they are links in a linear causal chain: the employer's wage and hour wrongful act caused the employee to file the labor standards complaint, and when she told the employer she had done so, that caused the employer to discharge her. A strategy for this insurer and others, therefore, is to write the broader relatedness definition into its policies. It can do so without expanding coverage.

Conclusion

A single claim provision can trap an insured. Escape routes might exist: The earliest claim might not allege a wrongful act, or the multiple wrongful acts might not meet the policy's relatedness definition. To find these escape routes, the insured must closely scrutinize the facts of the purported wrongful act in the earliest claim and the relatedness definition the policy applies to wrongful acts.

On the other hand, a carrier may arguably enforce a single claim provision even when the first claim is defectively pleaded if a wrongful act nonetheless underlies the earliest demand, and the carrier can draft its policies to expand the wrongful act and relatedness definitions. **WL**

ENDNOTES

[1]The projected market size (gross written premium) of the general liability insurance market in the United States is expected to reach $179.7 billion in 2024. https://www.statista.com/outlook/fmo/insurances/non-life-insurances/general-liability-insurance/united-states (last visited Aug. 28, 2024).

[2]*Braketown USA Inc. v. Markel Ins. Co.*, No. 2021AP1591, ¶¶ 11-13, 2023 WL 5543863 (Wis. Ct. App. Aug. 29, 2023) (unpublished) (review denied).

[3]*See id.* ¶¶ 2-5.

[4]*See* Wis. Stat. § 109.09(1).

[5]*See Braketown,* 2023 WL 5543863, ¶¶ 11-13.

[6]*See* Dale Joseph Gilsinger, *Construction and Application of 'Interrelated Wrongful Acts' in Liability Insurance Policies*, 13 A.L.R.7th Art. 7, § 3, at 4 (2016).

[7]*See Anderson v. Aul*, 2015 WI 19, ¶¶ 26, 30, 361 Wis. 2d 63, 862 N.W.2d 304.

[8]*Id.* ¶¶ 84, 98; *see* Wis. Stat. § 632.26(2).

[9]*See Anderson*, 2015 WI 19, ¶ 86 & n.79, 361 Wis. 2d 63 (collecting cases). *But see Sherwood Brands Inc. v. Great Am. Ins. Co.*, 13 A.3d 1268, 1288 (Md. 2011) (reaching opposite conclusion under Maryland notice-prejudice statute). *See also Grigg v. Aarrowcast Inc.*, 2018 WI App 17, ¶ 65 n.20, 380 Wis. 2d 464, 909 N.W.2d 183 (Wisconsin notice-prejudice statute applies to pure claims-made policy, which requires that claim be made but not that it be reported to carrier during policy period).

[10]*See Braketown,* 2023 WL 5543863, ¶¶ 16-21.

[11]*Id.* ¶ 18 (citations omitted).

[12]Wis. Stat. § 802.06(2)6.

[13]*Estate of Sustache v. American Fam. Mut. Ins. Co.*, 2008 WI 87, ¶ 27, 311 Wis. 2d 548, 751 N.W.2d 845.

[14]*See* Gilsinger, *supra* note 6, § 2, at 3 ("Wrongful Acts which have as a common nexus any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events, or transactions" – same definition as in hypothetical except for omission of "cause" and "series of ... causes").

[15]*See Braketown,* 2023 WL 5543863, ¶ 16 (citing *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground")).

[16]*See Fiserv Sols. Inc. v. Endurance Am. Specialty Ins. Co.*, No. 11-C-0603, 2016 WL 8674661, at *21 (E.D. Wis. Sept. 30, 2016) (unpublished) (in program under which Fiserv provided variety of loan-closing services to lenders and title insurers, Fiserv's issuance of certain certificates without complying with title insurer's instructions and failure to assist title insurer in defense of claim were "different actions" than attaching legal descriptions and processing home equity mortgages for lender, and therefore title insurer's and lender's claims making those allegations did not allege interrelated wrongful acts; but other claims of title insurer and lender, which both alleged Fiserv's failure to timely submit lender's claims to title insurer, did allege interrelated wrongful acts); *KB Home v. St. Paul Mercury Ins. Co.*, 621 F. Supp. 2d 1271, 176 (S.D. Fla. 2008) (in claims by four employees for sexual harassment based on hostile work environment, claims of two employees "share[d] facts" with that of third and therefore those three were interrelated, but insurer "failed to provide any 'fact, circumstance, situation, event, transaction' shared between" claims of third and fourth employees), *aff'd*, 339 Fed. Appx. 910 (11th Cir. 2009).

[17]*See Fiserv*, 2016 WL 8674661, at *20 ("the Interrelated Wrongful Acts definition does not include just 'any' fact in common between the claims or lawsuits, but instead refers to wrongful acts that are the same or have a substantial common nexus or connection").

[18]*See Emmis Communications Corp. v. Illinois Nat'l Ins. Co.*, 323 F. Supp. 3d 1012, 1027 (S.D. Ind. 2018), *rev'd and remanded*, 929 F.3d 441 (7th Cir. 2019), *rehearing granted, opinion withdrawn, and district court judgment aff'd*, 937 F.3d 836, 836-37 (7th Cir. 2019) (adopting district court's opinion).

[19]*Allied World Surplus Lines Ins. Co. v. Day Surgery Ltd. Liab. Co.*, 451 F. Supp. 3d 577, 586 (S.D. W. Va. 2020) (emphasis added).

[20]*Id.* (emphasis added) (citing *KB Home*, 621 F. Supp. 2d at 1272, 1277).

[21]*American Med. Sec. Inc. v. Executive Risk Specialty Ins. Co.*, 393 F. Supp. 2d 693, 705 (E.D. Wis. 2005) ("Related Claims are those involving not only the 'same' facts, circumstances, situations, transactions, events, or Wrongful Acts but also facts, circumstances, situations, events, or Wrongful Acts 'related ... logically, causally, or in any other way.'")

[22]*Id.* (same definition as in *Allied* except for immaterial addition of "for Wrongful Acts" after "Claims").

[23]*Id.* at 707 (quoting *Gregory v. Home Ins. Co.*, 876 F.2d 602, 606 (7th Cir. 1989)).

[24]*Id.*

[25]*Allied World Surplus Lines Ins. Co.*, 451 F. Supp. 3d at 584.

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